

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM CHARLESTON COUNTY  
COURT OF COMMON PLEAS

Markley Dennis, Jr., Circuit Court Judge  
Case No. 2014-CP-10-2954

---

**RECEIVED**  
MAR 21 2016  
SC Court of Appeals

Appellate Case No. 2015-001930

DARRELL EDWARDS, ..... Appellant,

v.

E. PAUL GIBSON, REISEN LAW FIRM, E. PAUL GIBSON PC, and JOHN DOES 1-5,  
..... Respondents.

---

RESPONDENTS' PETITION TO SUPPLEMENT  
THE RECORD ON APPEAL

---

Carl E. Pierce, II  
Joseph C. Wilson, IV  
Pierce, Hems, Sloan, & Wilson, LLC  
P.O. Box 22437  
Charleston, SC 29413  
(843) 722-7733  
Attorneys for Respondents

Other Counsel of Record:

Chauntel Demetrius Bland  
463 Regency Park Dr.  
Columbia, SC 29210  
(803) 319-6262  
Attorney for Appellant

Respondents/Defendants E. Paul Gibson, Reisen Law Firm, and E. Paul Gibson PC hereby petition the Court to supplement the Record on Appeal with the attached Order on Motion for Reconsideration from the Benefits Review Board of the U.S. Department of Labor dated March 10, 2016.

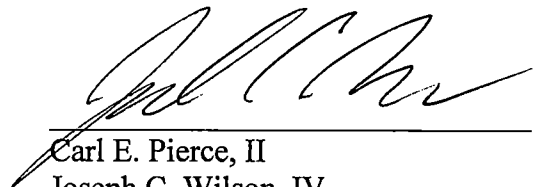
As set out in Appellant's Reply Brief, Respondents' Petition to Strike, and Respondents' proposed Sur-Reply Brief, the Benefits Review Board has appellate jurisdiction over a related proceeding under the Longshore and Harbor Workers' Compensation Act (the "Longshore Act"), 33 U.S.C. §§ 902, 903. Appellant claims that he lost his right to proceed under the Longshore Act due to the actions of Respondents. Respondents contend, and the lower court agreed, that Appellant lost his rights under the Longshore Act when he failed to give his employer notice of a third party tort settlement, as required by Section 33(g) of the Longshore Act, 33 U.S.C. § 933(g).

In its original BRB Order, quoted by Appellant in his Reply Brief, the Benefits Review Board partially reversed and remanded an order by the Department of Labor Administrative Law Judge that dismissed the claim for failure to comply with Section 33(g). The Administrative Law Judge's underlying order was relied upon by the lower court in granting summary judgment to Respondents in this matter.

The attached Order on Motion for Reconsideration alters the original BRB Order that Appellant first referenced in his Reply Brief. The Order on Motion for Reconsideration explicitly reverses its finding that Appellant Edwards complied with Section 33(g)(2), and remands the matter to the Administrative Law Judge for a determination of whether Appellant Edwards complied with any part of Section 33(g), which requires Appellant to give notice of third party settlements to his employer.

The most notable thing about the Order on Motion for Reconsideration and its modification of the original BRB Order is that it withdrew the very language that Appellant quoted and relied upon in his Reply Brief. Reply Brief, Pages 3-4. In summary, the Benefits Review Board has now confirmed that Appellant did not comply with Section 33(g)(1) (which likely governs in this matter), and may or may not have complied with Section 33(g)(2). As explained in the Sur-Reply Brief, these holdings do not impact the validity of the lower court's grant of summary judgment to Respondents.

Respectfully submitted,



Carl E. Pierce, II  
Joseph C. Wilson, IV  
Pierce, Hems, Sloan, & Wilson, LLC  
P.O. Box 22437  
Charleston, SC 29413  
(843) 722-7733

Attorneys for Respondents

3/15, 2016  
Charleston, South Carolina



BRB No. 15-0112

DARRELL EDWARDS  
Claimant-Petitioner

v.

MARINE REPAIR SERVICES,  
INCORPORATED

and

SIGNAL MUTUAL INDEMNITY  
ASSOCIATION, LIMITED

Employer/Carrier-  
Respondents

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT  
OF LABOR

Respondent

**PUBLISHED**

DATE ISSUED: MAR 10 2016

ORDER on MOTION for  
RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's decision in this case, *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to deny the motion. Claimant has not responded to employer's motion. Upon review of employer's contentions, we grant employer's motion for reconsideration and the alternative relief requested by employer. Accordingly, the Board's Decision and Order is modified as set forth below.

In its decision, the Board held that claimant had complied with the notice provision of Section 33(g)(2), 33 U.S.C. §933(g)(2), such that claimant's right to benefits under the Act would not be barred if Section 33(g)(1), 33 U.S.C. §933(g)(1), is not applicable. The belief that there was no dispute as to whether claimant had notified employer of his third-party settlement within months of its execution was based upon a statement in claimant's response to employer's motion for summary decision, in conjunction with the undisputed fact that employer filed a motion for summary decision

because claimant had executed a third-party settlement. As claimant undisputedly had not complied with the prior written approval provision of Section 33(g)(1), and there appeared to be no dispute regarding his compliance with the notice requirement, the Board remanded the case for the administrative law judge to address which subsection of Section 33(g) applies.<sup>1</sup> *Edwards*, 49 BRBS at 74-75.

Employer has clarified in its motion for reconsideration that it did not concede to the assertion in claimant's response brief. Therefore, the matter is clearly one in dispute and must be resolved by the administrative law judge. Consequently, we vacate the Board's conclusion that claimant complied with the notice provision in Section 33(g)(2). We modify the remand order of our original decision to include the instruction that the administrative law judge must fully discuss and determine whether the Section 33(g)(2) notice provision has been satisfied, based on all the relevant facts, such that, if claimant's third-party settlement was for an amount greater than or equal to his compensation entitlement under the Act, the administrative law judge would be able to state whether the Section 33(g)(2) bar applies.<sup>2</sup> See *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988); *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001); *Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186 (1993) (decision on recon.), *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J., concurring); *Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989), *rev'd on other*

---

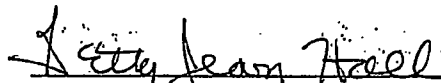
<sup>1</sup> Specifically, the Board stated that the administrative law judge must make a comparison between claimant's gross third-party settlement and his lifetime compensation entitlement under the Act, excluding medical benefits. *Edwards*, 49 BRBS at 74-75; *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). The Board noted that it is employer's burden to establish the applicability of the Section 33(g) defense. *Edwards*, 49 BRBS at 75 n.9; see also *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

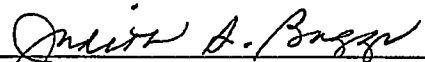
<sup>2</sup> However, we reject employer's assertion that the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), overrules *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), as it pertains to the timing of the Section 33(g)(2) notice. While the Supreme Court addressed the situations which would require a claimant to give an employer notice of a third-party resolution, as opposed to obtaining the employer's prior written approval, *Cowart* did not address the timing of that notification. *Cowart*, 505 U.S. at 481-483, 26 BRBS at 52-53(CRT).

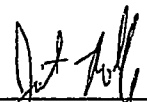
*grounds sub nom. Todd Pacific Shipyards Corp. v. Director, OWCP, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990); Fisher v. Todd Shipyards Corp., 21 BRBS 323 (1988). Lewis v. Norfolk Shipbuilding & Dry Dock Co., 20 BRBS 126 (1987) (Brown, J., concurring).*

Accordingly, employer's motion for reconsideration and the alternate relief it requests are granted, and the Board's initial decision in this case is modified as stated herein. 20 C.F.R. §802.409. In all other respects, the Board's decision is affirmed, and the case is remanded for further proceedings consistent with the Board's decisions.

SO ORDERED.

  
BETTY JEAN HALL, Chief  
Administrative Appeals Judge

  
JUDITH S. BOGGS  
Administrative Appeals Judge

  
JONATHAN ROLFE  
Administrative Appeals Judge