BRB Nos. 90-2004
and 89-3165

ESTHER KRAUSE (Widow of HERBERT KRAUSE) Claimant-Respondent v. BETHLEHEM STEEL CORPORATION CORPORATION Self-Insured Employer-Petitioner	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits of R. S. Heyer, Administrative Law Judge, and the Attorney Fee Award of John Sharp, District Director, United States Department of Labor.

Victoria Edises (Kazan & McClain), Oakland, California, for claimant.

Bill Parrish, San Francisco, California, for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (88-LHC-3232) of Administrative Law Judge R. H. Heyer and of the attorney fee award of District Director John Sharp on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33

U.S.C. §921(b)(3).

While working for employer as a sheet metal worker, decedent was exposed to asbestos, and developed work-related mesothelioma which resulted in his death on February 21, 1987. Decedent filed a claim for compensation on August 21, 1986, and claimant filed a claim for death benefits on April 1, 1987. Employer paid decedent permanent partial disability compensation from January 7, 1987 through February 25, 1987, and paid claimant death benefits from May 15, 1987 through June 24, 1987. The administrative law judge found that decedent and claimant entered into a settlement on February 2, 1987 with Asbestos Claims Facility for $300,000 based on correspondence dated February 10, 1987 from employer's counsel to claimant's counsel at the time, Mark Wasacz, stating that the case "was settled" with Asbestos Claims Facility on February 2, 1987.[1] The administrative law judge, in addition, found that decedent and claimant entered into settlements with Garlock Corporation, Uniroyal, and Nicolet Corporation prior to his death but these settlements did not need to be considered separately from the Asbestos Claims Facility settlement because they introduced no additional considerations and, in any event, one settlement suffices under Section 33(g)(1), 33 U.S.C. §933(g)(1).

[1]In that letter, Mr. Wasacz also states that "As agreed between our offices, you will generate the closing documents. Upon completion of the necessary signatures and notaries, please forward an original Compromise and Release and Request for Dismissal to our office... Upon receipt of the properly executed documents, we will forward the settlement draft to your office." CX 21, p. 182.

The administrative law judge found that decedent's claim was barred by Section 33(g)(1) because decedent had settled for an amount greater than he was entitled to receive under the Act but was not barred by Section 33(g)(2), 33 U.S.C. §933(g)(2), because employer received adequate notice of the third party settlements on February 19, 1987.

The administrative law judge found that claimant entered into additional settlements with Raymark, W.R. Grace, Babcock and Wilcox and apparently Combustion Engineering, after decedent's death but prior to April 1987, the date she filed her death benefits claim, yielding a net third party recovery of $212,156.23 after reduction of attorney's fees and costs. Claimant also received a net recovery of $29,750 in a California state workers' compensation settlement. With regard to the death benefit claim, the administrative law judge further determined that although claimant did not obtain employer's prior written approval before entering into the third party settlements, her right to benefits under the Act was not barred by Section 33(g)(1) as she did not become a person entitled to compensation until May 15, 1987, when employer initiated payment of death benefits after the settlements had been completed. The administrative law judge further determined that claimant's right to compensation was not barred pursuant to Section 33(g)(2) because employer received adequate notice of the settlements on February 19, 1987,[2] although the full

[2]In the February 19, 1987, letter addressed to employer's counsel, claimant's counsel, Gabriel Beccar-Varela, specifically

details of the settlement agreements were not provided until June 1987. An "Addendum" was attached to each settlement which stated that 75 percent of the settlement proceeds are to go to decedent, 10 percent to claimant, and 15 percent to their three adult children. Although the administrative law judge accepted the addendum apportionment statements as generally credible, he modified the amount to be distributed to claimant to 15 percent, and the amount to the children to 10 percent, finding it more plausible that the settlement values would equate the children with the widow in the aggregate rather than individually. The administrative law judge concluded that although claimant was theoretically entitled to decedent's disability compensation and medical care pursuant to 33 U.S.C. §§907, 908, the 75 percent offset under Section 33(f), 33 U.S.C. §933(f), of decedent's interest in the net third party recovery and the offset for his disability and medical benefit interest in the state settlement under Section 33(f) exceeded and extinguished those entitlements. The administrative law judge, however, awarded claimant death benefits pursuant to Section 9, 33 U.S.C. §909, subject to a Section 33(f) offset for her 15 percent interest in the net third party recovery and a Section 3(e) offset for her $29,750 interest in the state compensation claim settlement.[3]

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states that he will distribute the third party settlement without employer's approval, noting that claimant's claim had not accrued and that she is not a person entitled to compensation. EX 8. He also requested that employer stop making payments.

[3]In a Supplemental Decision and Order Awarding Attorney Fee,

On appeal (BRB No. 89-3165), employer argues that claimant's right to benefits was barred pursuant to Sections 33(g)(1) and 33(g)(2) and that the administrative law judge erred in limiting the Section 33(f) credit to 15 percent of the net third party recovery absent credible evidence of apportionment. Employer also appeals (BRB No. 90-2004) the district director's award of attorney's fee. Claimant responds, urging affirmance. The two claims were consolidated on appeal.[4]

SECTION 33(g)

Section 33(g)(1) and (g)(2) provide in pertinent part:

> (g)(1) If the person entitled to compen-sation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less that the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under sub-section (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to

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the administrative law judge awarded $7,381.75 in attorney's fee and $178.50 in costs.

[4]The administrative law judge's finding regarding decedent's right to compensation is not challenged on appeal.

compensation (or the person' representative).

2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

Section 933(g)(Supp. V 1987).

On appeal, employer contends that the administrative law judge erred in determining that all the settlements were obtained on February 2, 1987 prior to decedent's death. Employer contends that the parties merely entered tentative agreements on February 2, 1987, which were later confirmed in writing after decedent's death when claimant signed them. Employer contends that inasmuch as no meeting of the minds occurred until the settlements were actually signed after decedent's death, the administrative law judge erred in finding that claimant was not a person entitled to compensation at the time of the settlements, and that accordingly her death benefit claim was barred pursuant to 33(g)(1). In the alternative, employer contends that the administrative law judge erred in concluding that adequate notice had been provided under Section 33(g)(2) on February 19, 1987, arguing that sufficient notice was not actually provided until June 2, 1987.

Initially, we note that contrary to employer's assertions, the administrative law judge did not find that all of the

settlements occurred on February 2, 1987. Rather, the administrative law judge determined that some of the settlements occurred at that time but that others occurred after decedent died, but prior to the filing of claimant's April 1, 1987 death benefits claim. The administrative law judge further determined that in any event, all of the settlements had been executed prior to May 15, 1987, when employer initiated payment of compensation benefits thereby rendering claimant a person entitled to compensation. Employer correctly asserts, however, that none of the settlements were actually executed until after decedent's death inasmuch as all of the settlement agreements were signed between March 4, 1987 and May 13, 1987.

In order to preserve his right to compensation, a claimant must obtain written approval of a third-party settlement if at the time of settlement, the claimant is "entitled to compensation." 33 U.S.C. §933(g)(1). In determining that claimant became a person entitled to compensation on May 15, 1987, when employer had initiated payments to claimant, the administrative law judge applied the law in effect at the time which was that a "person entitled to compensation" must either be receiving compensation from employer or entitled to receive it pursuant to an adjudication under the Act. See e.g., Dorsey v. Cooper Stevedoring Co., 18 BRBS 25 (1986), appeal dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP, 826 F.2d 1011 (11th Cir. 1987). The Supreme Court has since held that a claimant becomes a

person entitled to compensation within the meaning of Section 33(g)(1) at the moment his right to recovery under the Act vests. Estate of Cowart v. Nicklos Drilling Co., U.S. , 112 S.Ct. 2509 (1992) aff'g Nicklos Drilling Co. v. Cowart, 927 F.2d 828, 24 BRBS 93 (CRT)(5th Cir. 1991), (en banc) aff'g on reh'g. 907 F.2d 1552, 24 BRBS 1 (CRT)(5th Cir. 1990), rev'g 23 BRBS 42 (1982). The Court held that a person is "entitled to benefits" regardless of whether the right has been acknowledged or adjudicated. Cowart, supra. Thus, under Cowart, claimant became a person "entitled to compensation" at the time of decedent's death. Because, however, under pre-Cowart law, claimant was not a person "entitled to compensation" at the time she entered into the settlements and therefore had no duty to seek employer's written approval prior to entering into them, and the parties never briefed or presented evidence on the issue, the case must be remanded for the administrative law judge to reconsider the applicability of Section 33(g)(1) in light of Cowart, supra. Moreover, because it is not clear which evidence the administrative law judge relied on in determining whether claimant settled for an amount greater than employer's liability under the Act, on remand, the administrative law judge should indicate which evidence he relied on in making this determination.

SECTION 33(g)(2)

If on remand the Court determines that Section 33(g)(1) does not bar claimant's claim, the administrative law judge must

determine whether claimant falls within the Section 33(g)(2) notification exception. In Cowart, the Court indicated that an employee is required to provide notification to his employer but is not required to obtain prior written approval pursuant to Section 33(g)(2) in two instances: (1) Where the employee obtains a judgment, rather than a settlement against a third party and; (2) Where the employee settles for an amount greater than or equal to the employer's total liability. Cowart, supra.

The administrative law judge determined that the February 19, 1987 letter, from Mr. Gabriel Beccar-Varela to employer stating that it would not seek employer's approval for distribution of the third party settlement and informing employer to discontinue payments provided adequate notice.[5] The administrative law judge found, however, that it was not essential that the February 19, 1987, letter comply with all the requirements of 20 C.F.R. §702.811 such as those requiring that notice be given to the deputy commissioner and that certain details about the settlements be provided on the rationale that, to the extent these

[5]The administrative law judge found the February 19, 1987, letter met the requirements of Section 33(g)(2) in that it was sufficient to prevent employer from unwittingly paying compensation under the Act beyond what it owed because the letter informed employer of "the fact of a major settlement" and claimant advised employer, for that reason, not to make further payments. Decision and Order at 11.

The administrative law judge noted that employer nonetheless continued making payments not because it was unwittingly led to do so but because it "deliberately chose to do so as to try to manipulate the posture of the case to take advantage of its unreasonable interpretation of the law." Id.

requirements exceeded those contained in Section 33(g)(2), the regulation was invalid.[6]

On appeal, employer contends that Section 33(g)(2) bars claimant's recovery because the administrative law judge erred in finding that the February 19, 1987, letter constituted adequate notice. Employer contends, apparently as it did below, that the February 19, 1987, letter does not comply with 20 C.F.R. §702.281 in that there is no evidence that the deputy commissioner was notified and the letter did not specify the terms, conditions or amounts of the settlements nor with whom the settlements had been

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[6]Section 20 C.F.R. §702.281(a) provides in pertinent part:

> Every person claiming benefits under this Act (or the representative) shall promptly notify the employer and the district director when:
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> 1) A claim is made that someone other than the employer or person or persons in its employ, is liable in damages to the claimant because of the injury or death and identify such party by name and address.
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> 2) Legal action is instituted by the claimant ... against some person or party other than the employer...on the ground that such other person is liable in damages to the claimant on account of the compensable injury and/or death; specify the amount of damages claimant and identify the person or party by name and address.
>
> 3) Any settlement, compromise or any adjudication of such claim has been effected and report the terms, conditions and amounts of such resolution of the claim.
>
> Section (a)(4) states that when a claimant settles for an amount less than the compensation to which he or she would be entitled under the Act without obtaining employer's prior written approval, he or she forfeits their right to compensation from employer regardless of whether employer has made payments to claimant or acknowledged claimant's entitlement to benefits.

negotiated. Employer contends that adequate notice was not provided until June 2, 1987, when it received copies of the settlements, and that this notice was untimely because it was given after employer began making compensation payments to claimant.

In Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988), aff'd, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990), the Board held that a claimant satisfies the requirements of Section 33(g)(2) if he provides notice to his employer of a third-party settlement prior to the time benefits are awarded by the administrative law judge. Tufano v. International Terminal Operating Co., 25 BRBS 285 (1992). In the instant case, even if employer's contention that June 2, 1987 is the first date adequate notice was provided is accepted, claimant complied with Section 33(g)(2) since notice was provided prior to the date the administrative law judge awarded benefits on August 2, 1989. See Mobley, supra. Contrary to employer's contention, there is no requirement that notice be given prior to the time employer begins making payments.[7]

APPORTIONMENT - SECTION 33(f)

If on remand the administrative law judge determines that claimant's claim is not barred by either Section 33(g)(1) or

[7]Since employer conceded that adequate notice was provided consistent with 20 C.F.R. §702.281 as of June 2, 1987, we need not specifically address the administrative law judge's findings regarding the invalidity of the regulations.

Section 33(g)(2), he must readdress the apportionment issue. As stated, supra, the administrative law judge modified the addendum apportionment statements ordering that 15 percent be distributed to claimant and 10 percent to the children. The administrative law judge also found that employer was entitled to a Section 3(e) credit for claimant's $29,750 interest in the California state settlement.

Assuming that claimant's right to compensation is not barred by Section 33(g), employer contends that the administrative law judge erred in apportioning the award among claimant and her children. Employer notes that claimant received $212,156.23 in recovery after attorney's fees and costs in various third party settlements and $29,750 in settlement of her state claim. Employer contends that the administrative law judge erred in finding that it was only entitled to offset 15 percent of the net third party recovery based on the addendums to the settlements and that it should be entitled to offset the full $212,156.23 net recovery. Employer contends that the "self-serving" addendum attached to each settlement are a sham and should be considered as such. Employer states that claimant testified that every check she received went into her and husband's joint account and therefore she actually received all the money. Employer therefore contends that the statements of apportionment do not correspond to how the money was actually distributed.

Employer further contends that the addendum do not constitute

substantial evidence of apportionment because no signatures appear on them to indicate that their terms were agreed upon or negotiated. Employer contends that if all settlements occurred on February 2, 1987, as the administrative law judge determined, the appended apportionment statements are mere post-settlement statements of claimant's counsel which are to be ignored pursuant to Force v. Kaiser Aluminum and Chemical Corp, 23 BRBS 1 (1989), aff'd in part and rev'd in part, Force v.Director, OWCP, 938 F.2d 981, 25 BRBS 13 (CRT)(1991). Claimant responds, urging affirmance.

Section 33(f) provides that

> [The] employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such persons in respect to such proceedings (including reasonable attorney's fees.

33 U.S.C. §933(f). Employer may offset only that portion of a third party settlement attributable to a person entitled to compensation and employer bears the burden of proving apportionment. Force v. Director, OWCP, 938 F.2d 981, 25 BRBS 13 (9th Cir. 1991) ,aff'g in part and rev'g in part Force v. Kaiser Aluminum and Chemical Corp., 23 BRBS 1 (1989). See also I.T.O. Corp. of Baltimore v. Sellman, 954 F.2d 239, 25 BRBS 101 (CRT)(4th Cir. 1992), aff'g in part and rev'g in part 24 BRBS 11 (1990)(Brown, J., dissenting).

In the instant case, the administrative law judge determined that claimant had apportioned the damages in varying percentages to her family based on the addendums attached to the settlements. He considered employer's contention that claimant supposedly received all the money and that "apportionments are inherently suspect and therefore unallowable" but found these arguments unconvincing.[8] The administrative law judge apparently tried the issue under the case law in effect at the time that claimant had the burden to prove apportionment, and if claimant failed to meet his burden, employer was entitled to the entire offset. See e.g., Force, supra, 23 BRBS 1 (1989). Because the law now provides that the burden to prove apportionment rests with employer and employer presented no evidence as to the proper apportionment of the family settlement, on remand, the administrative law judge should retry the issue, and provide employer with the opportunity to submit evidence on its burden of proof. See Force, 25 BRBS at 20.

ATTORNEY FEES (BRB No. 90-2004)

Claimant submitted a fee petition dated August 21, 1989 requesting $4,404 in attorney's fees for worked performed before

[8]Contrary to employer's assertion, claimant testified that her husband received some of the checks when he was alive, and that after his death, a trust had been set up under which everything she and her husband had were going to [her] three children equally. Claimant's testimony is corroborated by Herbert's testimony that they intended that all the family monies would be available for each member to share according to their needs, and that a trust had been set up by an attorney with he and his mother as trustees for that purpose.

the deputy commissioner from May 26, 1986 through July 28, 1988.[9] Employer objected to the fee petition contending that the work performed on decedent's claim should be disallowed, that the hourly rates for Victoria Edises and Bariel Beccar-Varela are excessive, and that claimant is entitled to an attorney's fee of $1842.50. In his Compensation Order - Award of Attorney's Fees, the district director noted that claimant's counsel had rendered necessary services in the successful prosecution of this compensation case, and approved a fee for the full $4,162.50 requested pursuant to Section 28. 33 U.S.C. §928. He noted that employer controverted the intervivos disability claim on October 9 [apparently, 1986] and instituted payments on December 28, 1986 after claimant's counsel's services were utilized. Further, the district director stated in his letter that he had reduced the requested hourly fee to conform with the fee schedule approved by the Administrative Law Judge in his Supplemental Decision and Order Awarding Attorney's Fees.

On appeal, employer contends as it did below that all of the

[9]This fee petition was itemized as follows:

Name	Status	Hours	Rate	Total
Victoria Edises	Attorney	13.9	$150	$2,085
Gabriel Beccar-Varela	Attorney	16	$140	$2,240
Sheila Cress	Law Student/ paralegal	.4	$85	$34
Marcia Yusavage	Paralegal/ legal assistant	.1	$50	$5
Jena McLemore	Paralegal/ legal assistant	.8	$50	$40

services performed in relation to decedent's intervivos claim should be disallowed. Employer asserts that claimant obtained no additional benefits for decedent as it voluntarily paid decedent compensation once it had the relevant data without the need for a conference or other adjudication. Further, employer asserts that all services listed in claimant's counsel's attorney's fee petition rendered prior to claimant's death claim filed on April 1, 1987[10] were not in furtherance of her claim since she had not yet made a claim and presumably was not yet represented by a firm. Employer therefore contends that Victoria Edises should be compensated for only 1.8 hours, Gabriel Beccar-Varela for 12.9 hours, and Marcia Yusavage (a paralegal) for .1 hours in the prosecution of claimant's claim.

Employer also contends that the hourly rate awarded for Ms. Edises services should be further reduced from $145 to $125 inasmuch as the issues before OWCP were not complex and claimant did not substantially prevail at that level. Employer maintains that the district director erred in failing to address the rate at which Gabriel Beccar-Varela should be compensated indicating that any rate above $125 is excessive. Claimant responds, urging affirmance of the fee award pointing out that the hourly rate awarded to Mr. Varela is $130, which is discerned by subtracting the known rates and hours from the overall award. Employer inconsistently replies that although the hourly rate awarded to

[10]Employer mistakenly refers to this date as March 17, 1989.

Mr. Varela is obviously $130, the district director erred in failing to support this award.

Under Section 28(b), when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b); See, e.g., Tait v. Ingalls Shipbuilding, Inc., 24 BRBS 59 (1990); Kleiner v. Todd Shipyards Corp., 16 BRBS 297 (1984).

Although employer incorrectly asserts that claimant is not entitled to a fee for services rendered in conjunction with decedent's intervivos disability claim because she was not a person entitled to compensation when these services were rendered, claimant is not entitled to a fee for these services on the facts presented in this case. Although decedent's claim was not barred by Section 33(g) and he was found to be entitled to medical and disability benefits, the right to these benefits was extinguished by employer's Section 33(f) and Section 3(e) credits. Accordingly, claimant did not ultimately obtain additional compensation for this claim, and if employer is liable for an attorney's fee, it would be only for those hours subsequent to claimant's filing of his claim.

If, on remand, the administrative law judge ultimately determines that claimant falls with the Section 33(g)(2) exception, (i.e, she settled for an amount greater than

employer's liability under the Act), since adequate notice was provided, claimant is entitled to an attorney's fees because she will have obtained greater compensation than that initially tendered or paid by employer. See Tait v. Ingalls Shipbuilding, 24 BRBS 59 (1990). If the administrative law judge determines that claimant falls outside the Section 33(g)(2) exception, since it is undisputed that claimant did not obtain employer's prior written approval of the third party settlements, claimant would not be entitled to attorney's fees inasmuch as she will not have obtained "additional compensation." See generally Kleiner, supra. In the event that attorney's fees are ultimately found to be due, we note that the district director's findings with regard to the applicable hourly rates are proper because employer concedes that Mr. Varela's hourly rate is $130 under the district director's award and employer's unsupported assertions are insufficient to establish that the district director abused his discretion in setting the hourly rate(s). See Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), aff'd on recon, 25 BRBS 346 (1992). Because the outcome of the attorney fee award is contingent on the administrative law judge's Section 33(g) determination, we vacate the District Director's Award of Attorney Fees, and remand for the District Director to reconsider the issue.[11] On remand, if an attorney's fee is

[11]Although not challenged on appeal, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fee may require modification on remand contingent on the administrative law judge's Section 33(g) determination.

awarded, the district director must state the basis for his fee reduction, if any. See

Roach v. New York Protective Covering Co., 16 BRBS 114 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the District Director's Award of Attorney Fees are vacated, and the case is remanded for reconsideration in a manner consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Law Judge