BRB No. 01-0218

ADDIE WELLS (Widow of LEON E. WELLS, SR.) Claimant-Petitioner v. INGALLS SHIPBUILDING, INCORPORATED and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, IN LIQUIDATION, by and through THE MISSISSIPPI INSURANCE GUARANTY ASSOCIATION Employer/Carrier-Respondents	)	DATE ISSUED: 10/30/01 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits and Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Scott O. Nelson (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimants.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Decision on

Motion for Reconsideration (1986-LHC-0868) of Administrative Law Judge David W. Di Nardi rendered 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked for employer as a clean up man from 1941 through 1947 and from 1951 through 1958, and was there exposed to asbestos. Decedent was diagnosed with asbestosis in 1995, and with cancer later that same year. CX 4; CX 13 at 2. Decedent filed a suit against third-party asbestos manufacturers and distributors on June 15, 1995. He died on April 28, 1996, from cancer, and claimant, his widow, filed a claim for death benefits under the Act on April 28, 1997. 33 U.S.C. §909; CX 4. Employer argued that claimant is not entitled to benefits because she executed unapproved third-party settlements subsequent to her husband's death in violation of Section 33(g) of the Act, 33 U.S.C. §933(g).

The administrative law judge first found that claimants, decedent's widow and minor adopted son,[1] established that decedent's death from cancer was causally related to his employment, and that they were entitled to death benefits based on the national average weekly wage at the time of decedent's death in 1996, as decedent was a voluntary retiree. Decision and Order at 14, 24; 33 U.S.C. §§909, 910(d)(2). He also awarded interest and funeral expenses. *Id.* at 25. The administrative law judge found that employer is the responsible employer. However, he found claimants' receipt of these benefits was barred as he found that claimant consummated unapproved third-party settlements with J.E. Steigerwald (Steigerwald), Combustion Engineering, Pittsburgh Plate & Glass (PPG) and Amatex Trust Claims Facility (Amatex). Accordingly, he held that Section 33(g) applied to bar claimants' entitlement to benefits under the Act. *Id.* at 34.

Claimant moved for reconsideration and modification, attaching a number of documents to her motion. Cl. Exs. 39, 40. Employer filed a motion to strike the attachments, EX 19, as well as a motion to strike/in opposition to claimant's motion. The administrative law judge considered the additional evidence offered by claimant and summarily concluded that the evidence does not change any of the findings of fact or conclusions of law and denied reconsideration. Claimant appeals both decisions, contending that the administrative law judge made numerous errors, procedural and factual, in concluding that Section 33(g)

[1]The minor child, Darwin Maqueal Wells, is decedent's and claimant's grandchild, born on November 1, 1992, whom they adopted on August 4, 1993. CX 3.

bars her entitlement to benefits. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in applying Section 33(g) to preclude her from receiving benefits under the Act. She first contends that with respect to Steigerwald, Section 33(g) was not applicable, as decedent personally signed the release and accepted the proceeds prior to his death. The administrative law judge found that although decedent had signed the release, and actually received a check from the company during his lifetime, Section 33(g) was applicable, as the formal dismissal was not filed by Steigerwald until after decedent's death.

Section 33(g)(1) states:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section 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 compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g). Section 33(g) will act as a bar only where the "person entitled to compensation" "enters into" an unapproved third-party settlement. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997). In *Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000), the decedent entered into a third-party settlement during his lifetime without the approval of employer, but the proceeds of the settlement were distributed to his widow, the claimant in that case, after his death. The Board held that Section 33(g) did not bar the claimant's claim, as the point of reference is the date upon which decedent entered into the settlement. In the instant case, decedent signed a release and received the settlement proceeds from Steigerwald on August 6, 1993, EX 7 at 60-61, CX 29 at 18, prior to his death on April 28, 1996. The formal order of dismissal, however, was not issued until October 11, 1996, CX 31. Pursuant to *Doucet*, the administrative law judge erred in concluding that the settlement occurred in 1996 rather than in 1993. Accordingly, as claimant was not a "person entitled to compensation" in 1993, we reverse the administrative law judge's finding that Section 33(g) bars claimant's entitlement to death benefits with respect to Steigerwald. *Yates*, 519 U.S. at 248, 31 BRBS at 5 (CRT).

We also agree with claimant's contention that the dismissal of third-party claims against Combustion Engineering and PPG do not constitute settlements. Claimant alleges

that these suits were dismissed because there was no proof that decedent was exposed to asbestos-containing products manufactured by either company. CX 31. The administrative law judge summarily found that "[t]hese dismissals also trigger the forfeiture provisions of Section 33(g)." Decision and Order at 29. Mere termination of a third-party action, however, is not a settlement under Section 33(g). *See Mills v. Marine Service*, 22 BRBS 335 (1989); *Rosario v. M.I. Stevedores*, 17 BRBS 50 (1985); s*ee also Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995) (Board held that a third-party settlement was not executed, based on several factors, among them that the claimant received no settlement monies). Accordingly, as there is no evidence that claimant entered into a settlement with or obtained a judgment against either Combustion Engineering or PPG, employer did not meet its burden of establishing the applicability of Section 33(g). *See Barnes v. Gen. Ship Serv.*, 30 BRBS 193 (1996). Thus, we reverse the administrative law judge's finding that the Section 33(g) bar applies with regard to Combustion Engineering or PPG.

Claimant next challenges the administrative law judge's finding that she executed a settlement with Amatex on several grounds. The facts relevant to this issue are as follows. On April 28, 1997, claimant signed a document selecting the law firm of Maples & Lomax as her attorneys. Maples & Lomax received a letter dated September 23, 1998, from the Amatex Trust. EX 12. The letter stated that the Trust had approximately 15 million dollars with which to settle all claims filed against it, that the bankruptcy court approved specific payout guidelines on May 9, 1996, for those claims, and it supplied the firm with the "proof of claim" forms necessary to assert claims against the fund. Counsel received a letter from the Amatex Trust dated September 23, 1998, enclosing a check to the Maples & Lomax trust account for $107,280, for all their claiming clients.[2] EX 16. On October 6, 1998, counsel

[2]The letter specified the payout schedule and stated:

> By cashing the Distribution Check your firm reaffirms its representation that it has authority to receive payment for your clients and the Distribution Check will be deposited in your firm's attorney escrow account.
>
> Cashing the Distribution Check constitutes a release of all the claims on the list of Claims Paid, unless you return to the Amatex Settlement Trust the payment attributable to a particular client's proof of claim.
> Your firm reaffirms its commitment to prompt delivery of the payments due to your clients.

EX 16.

deposited the Amatex check into their trust account. EX 13. The hearing in this case was held on October 29, 1999. On November 9, 1999, Maples & Lomax issued a letter and a check to the Amatex Trust, returning the $240 representing claimant's portion of the Amatex payout. EX 16.

The administrative law judge found that the acceptance and depositing of the Amatex check into the Maples & Lomax trust account was sufficient to constitute a settlement between claimant and Amatex. He concluded that claimants' entitlement to benefits under the Act ceased upon receipt and retention of that money. He noted that there was no evidence regarding whether Amatex would accept the refund check and that counsel's experience combined with the fact that they held onto the check for so long served to discredit the argument that a settlement had not been effected. Decision and Order at 33.

We have previously considered this issue in a case with an almost identical fact pattern. In *Williams v. Ingalls Shipbuilding, Inc.,* 35 BRBS 92 (2001), the Board stated:

> The payments made in this case are similar to the judgment and remittitur in *Banks* [*v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968)], as the Trusts sent payments to claimant and other plaintiffs based on reorganization plans which had been deemed fair and approved by the bankruptcy court. *See generally In re Joint Eastern and Southern District Asbestos Litigation*, 14 F.3d 151 (2d Cir. 1994); *Kane* [*v. Johns-Manville Corp.*], 843 F.2d 636 [(2d Cir. 1988)]; [*In re*] *Amatex* [*Corp.*], 755 F.2d 1034 [(3d Cir. 1985)]; [*In re*] *Dow Corning* [*Corp.*], 211 B.R. [545] at 599 [(Bankr. E.D. Mich. 1997)]. Claimant either could accept the amounts offered and consider the cases resolved, or she could decline the amounts and be placed at the end of the lists of the Trusts' "creditors." Negotiation for a greater amount was not an option, as the amount has been determined by the court. The absence of compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements support the conclusion that the Amatex . . . offers herein should not be considered settlements, but, rather, should be likened to "judgments." If they are considered "judgments," only notice to employer under Section 33(g)(2) is required.

Williams, 35 BRBS at 97. For the reasons stated in *Williams,* we vacate the administrative law judge's finding in this case that the Amatex payment held in trust for claimants in this case constitutes a settlement, and we remand the case for the administrative law judge to reconsider whether the payment in this case was a judgment rather than a settlement in accordance with *Williams*. If it is considered a "judgment," only notice to employer under

Section 33(g)(2)[3] is required.[4]

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[3]This section provides:

> 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 chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. §933(g)(2)(1994).

[4]Claimant contends that the administrative law judge erred in finding that settlements had been effected by her "representatives" and by applying Mississippi's agency law to define the term "representative" under Section 33(g). The administrative law judge found that claimant hired Maples & Lomax to represent her and that they had full authority to act on her behalf. Decision and Order at 21. In *Williams*, the Board stated that it need not delve into aspects of state agency law, as resolution of the case turned on the threshold questions of whether any third-party "settlements" were "executed." *Williams*, 35 BRBS 92.

Moreover, the administrative law judge's summary denial of claimant's motion for modification was in error. Section 22 of the Act permits the modification of a final award if the party seeking to alter the award can establish either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Any evidence not previously submitted to the administrative law judge can receive consideration only pursuant to a motion for modification; therefore, it is an abuse of discretion not to consider the new evidence presented in a modification proceeding. *Dobson v. Todd Pacific Shipyards Corp.,* 21 BRBS 174 (1988).

The administrative law judge stated that although the Amatex check was allegedly returned, after being kept in the account for over one year, there is no evidence that Amatex would accept the returned check and permit rescission of the settlement. As claimant contends, the administrative law judge should have accepted into evidence and considered the documents attached to her motion for modification, as well as any rebuttal evidence employer may have. Attached to her motion for reconsideration/modification, claimant included a document purporting to show a copy of the back of the returned check showing that Amatex endorsed and accepted the returned money. Ex. A to Motion for Reconsideration. The administrative law judge should have considered whether the evidence offered in support of modification could establish a mistake in fact as to the receipt of proceeds from Amatex, as it goes to establishing that Amatex accepted the return of the $240. Thus, the document attached to the motion for reconsideration/modification provides evidence relevant to establishing whether or not a settlement was in fact executed. *See Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992), *aff'g in pert. part and rev'g on other grounds Chavez v. Todd Shipyards Corp.*, 24 BRBS 71, 76 (1990); *Arnold v. Amoco Oil Co.*, 872 F.Supp. 1493 (W.D. Va. 1995); *Smith v. Jones Oregon Stevedoring Co.*, 33 BRBS 155, 159-160 (1999); *Barnes v. Gen. Ship Serv.*, 30 BRBS 193 (1996); 17 C.J.S. Contracts §65. On remand, therefore, the administrative law judge must address claimant's request for modification under Section 22 of the Act.

Claimant next contends that even if the Section 33(g) bar were applicable to her widow's claim, it does not affect the rights of the minor child. We agree. In this regard we note that in considering employer's entitlement to an offset of third-party settlements under Section 33(f), 33 U.S.C. §933(f)[5], courts have held that employer is entitled to offset only that third-party recovery apportioned to each party entitled to compensation. *I.T.O Corp. of Baltimore v. Sellman*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991). Although this case involves a Section 33(g) issue, the same interpretation of "person entitled to compensation" applies to Section 33(g) as to Section 33(f). *See Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000). Accordingly, as Section 33(g) applies to each person entitled to compensation, *i.e.,* the widow and the minor child, and no portion of the alleged settlements was apportioned to the minor child, the Section 33(g) bar does not in any event apply to the minor child. Thus, he is entitled to death benefits in accordance with Section 9, and the administrative law judge must enter an award of benefits to the child on remand.

Claimant last alleges that the administrative law judge erred in concluding that employer is not liable for a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e). Claimant argues that employer failed to file a timely notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d), and that the administrative law judge erred in focusing on the date of the notice of the claim, rather than date of the employer's knowledge of the injury or death, as the determinative date.

Section 14(e) provides that employer must either pay compensation within 28 days after such compensation becomes due or, pursuant to Section 14(d), controvert claimant's entitlement to such compensation within 14 days of its knowledge of claimant's injury. *See* 33 U.S.C. §§912(d)(1), 914(b), (d), (e). Contrary to employer's contention, its knowledge of claimant's injury, rather than its knowledge that a claim has been filed under the Act,

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[5]Section 33(f) states:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section 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 person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f).

commences the time in which employer must pay or controvert in order to avoid liability for a Section 14(e) penalty. *See Spear v. General Dynamics Corp.,* 25 BRBS 132 (1991). Failure to pay or controvert in a timely manner results in employer's liability for an additional 10 percent of the amount of compensation untimely paid. 33 U.S.C. §914(e). The Board has rejected the argument that there is no controversy until a claim has been filed. *Maddon v. Western Asbestos Co.,* 23 BRBS 55 (1989).

Claimant contends that she filed Form LS-201, Notice of Injury or Death, on April 28, 1997, and employer did not file Form LS-207, Notice of Controversion, until July 24, 1997. The administrative law judge found that claimant was not entitled to additional compensation, as employer received actual notice on July 22, 1997, and filed its Notice of Controversion on July 24, 1997. Decision and Order at 25.[6] In the instant case, employer received Form LS-201, notice of claimant's death on April 28, 1997, CX 1, and did not file a Form LS-207, notice of controversion, until July 24, 1997. CX 6. Since employer failed to file a timely notice of controversion, it is liable for a Section 14(e) penalty as a matter of law on benefits due from the time it received notice until it filed its notice of controversion. Therefore, on remand, the administrative law judge must assess a Section 14(e) penalty on any benefits he finds due during the relevant period.

Accordingly, the administrative law judge's findings that Section 33(g) bars the widow's claim with regard to Steigerwald, Combustion Engineering and PPG, and that the minor child's claim is barred by Section 33(g), are reversed. The findings that Section 33(g) bars the widow's claim as to Amatex Trust and that employer is not liable for a penalty under Section 14(e) are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[6]Although claimant did not raise the issue of a penalty under Section 14(e) before the administrative law judge, this issue may be raised at any time, as Section 14(e) provides for a mandatory penalty. *See Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

NANCY S. DOLDER
Administrative Appeals Judge