

EARLY MUMFORD	)	BRB Nos. 93-1463
	)	and 93-1463A
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Cross-Petitioner	)	
	)	
	)	
STEVEN NICHOLSON	)	BRB No. 94-3670
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Orders of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant Mumford.

Hayden S. Dent (Scruggs, Millette, Lawson, Bozeman & Dent), Pascagoula, Mississippi, for claimant Nicholson.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky and Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant Mumford and the Director, Office of Workers' Compensation Programs (the Director), appeal the Order Dismissing Claim on Summary Decision (93-LHC-705), and claimant Nicholson appeals the Order Granting in Part and Denying in Part Motion for Reconsideration (93-LHC-6994), of Administrative Law Judge Quentin P. McColgin rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).<sup>1</sup> We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

In each case, employer moved to dismiss the claimant's claim for benefits under the Act on the basis that each entered into third-party settlements without employer's prior written approval in violation of Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1). In *Mumford*, BRB Nos. 93-1463/A, the administrative law judge found that because claimant has been diagnosed with asbestos-related pleural plaques that place him at risk for the development of future pulmonary problems with a resultant economic disability, he is entitled to a *de minimis* award. Thus, the administrative law judge found that claimant is a "person entitled to compensation," and as he entered into third-party settlements without employer's prior written approval, his claim is barred by Section 33(g). The

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<sup>1</sup>We hereby consolidate for purposes of decision the appeals by claimant Mumford and the Director, BRB Nos. 93-1463 and 93-1463A, with the appeal of claimant Nicholson, BRB No. 94-3670. 20 C.F.R. §802.104(a).

administrative law judge also rejected the contention that he must determine whether claimant's third-party settlement recovery is greater or less than his compensation entitlement under the Act, citing *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989).

In *Nicholson*, BRB No. 94-3670, the administrative law judge found that because claimant is an active employee and has been diagnosed with asbestos-related pleural plaques, he is entitled to a *de minimis* award based on a doctor's opinion that his lung disease may progress. The administrative law judge therefore found that claimant is a "person entitled to compensation" and as he entered into third-party settlements without employer's prior written approval, his claim is barred by Section 33(g). The administrative law judge granted employer's motion for summary decision on this issue.<sup>2</sup>

On appeal, claimants and the Director contend that the claimants are not entitled to *de minimis* awards, stating that the administrative law judge failed to apply the correct standard for determining entitlement to a *de minimis* award and that the "evidence" of record does not satisfy the standard.<sup>3</sup> Claimants and the Director also contend that the grants of summary decision on the Section 33(g) issue are inappropriate as the administrative law judge failed to make the necessary findings of fact. Employer responds, seeking affirmance in both cases.

We agree that the administrative law judge erred in determining that each claimant is entitled to a *de minimis* award and therefore is a "person entitled to compensation" for purposes of Section 33(g). These cases arise within the jurisdiction of the United States Court of Appeals for the Fifth Circuit and the standard for *de minimis* awards enunciated by that court is set out in *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). In *Hole*, the court stated that a *de minimis* award is an appropriate remedy when the claimant has a present physical impairment and it may be concluded from the evidence that there is a significant possibility of future economic harm as a result of the injury, the extent of which is presently not determinable. *Hole*, 640 F.2d at 773, 13 BRBS at 240; *see also Rambo v. Director, OWCP*, 81 F.3d 840 (9th Cir. 1996); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984).

The administrative law judge based his finding that claimant Mumford is entitled to a *de minimis* award on an August 25, 1989, medical report by Dr. Lorino attached to copy of claimant's

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<sup>2</sup>The *Nicholson* case was consolidated before the administrative law judge with over 700 other cases. *Nicholson* was severed and dismissed pursuant to Section 33(g). The administrative law judge denied employer's motion for summary judgment in the other cases, and remanded them to the district director for "appropriate action." The other 700 cases were appealed to the Board, which dismissed employer's appeals as interlocutory. *Nicko, et al. v. Ingalls Shipbuilding, Inc.*, BRB No. 94-2910 *et al.* (July 27, 1995).

<sup>3</sup>No hearings were held in these cases and thus no documents were formally admitted into evidence.

response to the administrative law judge's order to show cause why employer's motion for summary judgment should not be granted. This report states that claimant has "pleural changes secondary to his previous asbestos exposure. He remains at risk for the development of bronchogenic carcinoma, mesothelioma, or for the development of pulmonary asbestosis." The doctor advised that claimant have an annual chest x-ray and a pulmonary function study every two years to monitor his condition.

The administrative law judge concluded "it is inferred from this report that there is a significant possibility that claimant's condition will become both physically and economically disabling sometime in the future." Order at 3. He therefore found that claimant Mumford is entitled to a *de minimis* compensation award and is thus a person entitled to compensation within the meaning of Section 33(g)(1) of the Act.

The administrative law judge based his finding that claimant Nicholson is entitled to a *de minimis* award on a copy of claimant's claim form and a undated medical report appended thereto which claimant attached to a brief in opposition to employer's motion for reconsideration. This report, by Dr. Rubin, states that claimant has "pleural pulmonary asbestosis, including pleural thickening and an interstitial infiltrate coupled with a restrictive ventilatory defect. His condition is not disabling. [He] is at risk for the progression of his asbestos related lung disease . . . [and] for the development of malignancies ...." The administrative law judge also noted that claimant Nicholson was 37 years old at the time he filed his claim and had worked as an electrician since 1967. The administrative law judge concluded "[i]t is therefore found that claimant Nicholson is entitled to a *de minimis* compensation award. He therefore is found to be a person entitled to compensation and, in accordance with Section 33(g)(1) of the Act, his claim shall be dismissed." Order at 3.

Claimants and the Director correctly assert that the administrative law judge's findings of entitlement to *de minimis* awards are not supported by the evidence he cites. Although Dr. Lorino's report states that due to his asbestos exposure claimant Mumford is at risk of developing certain diseases, the report is devoid of mention of a present physical impairment and the likelihood of future economic harm. The report states that claimant has been employed in various longshore employment since 1960, does not experience dyspnea, that his exercise tolerance is well-preserved and that he can walk ten blocks or climb 50 steps without difficulty. Similarly, although Dr. Rubin's report states that due to his asbestos exposure claimant Nicholson is at risk of developing certain diseases, the report is devoid of mention of a present physical impairment and the likelihood of future economic harm. The report states that claimant has been employed since 1967 and that he complains of shortness of breath when hurrying or walking up a slight hill, but Dr. Rubin specifically concludes that claimant is not disabled. In the absence of evidence of that a claimant has a present physical impairment and the likelihood of a significant possibility of future economic harm, it is improper for an administrative law judge to enter a *de minimis* award. See *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990); *Adams v. Washington Metropolitan Area Transit Authority*, 21 BRBS 226 (1988); *Palmer v. Washington Metropolitan Area Transit Authority*, 20 BRBS 39 (1987). Moreover, it was improper for the administrative law judge to make these findings in these cases without holding hearings and giving the parties the opportunity to develop evidence on this issue. See 20 C.F.R. §§702.336, 702.338. We therefore vacate the administrative law judge's findings that claimant Mumford and claimant Nicholson are entitled to *de minimis*

awards and his consequent finding that each is a "person entitled to compensation" for purposes of Section 33(g). On remand, after giving the parties the opportunity to present evidence, the administrative law judge must consider the evidence under the standard enunciated in *Hole*, 640 F.2d at 769, 13 BRBS at 237.

Claimants and the Director also challenge the administrative law judge's findings regarding the applicability of Section 33(g) and his interpretation of this section in light of the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992).<sup>4</sup> For the reasons stated in *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd in part and modified in part on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring and dissenting), we hold that the administrative law judge erred in dismissing claimants' claims, as there are unresolved issues of material fact affecting the applicability of Section 33(g). Accordingly, we vacate the administrative law judge's Orders, and we remand these cases for further action consistent with law. *Id.*; see also *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995); *Gladney, et al. v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring); *Linton v. Container Stevedore Co.*, 28 BRBS 282 (1994); *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994).

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<sup>4</sup>In *Mumford*, employer has filed a supplemental brief to which claimant responds. Employer contends that the decision of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2705 (1994), supports its contention that the claim is barred by Section 33(g). This case is not controlling in the jurisdiction of the Fifth Circuit. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113 (CRT), *pet. for reh'g en banc denied*, 71 F.3d 880 (5th Cir. 1995), *aff'g Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994), *pet. for cert. granted*, 64 U.S.L.W. 3762 (U.S. May 13, 1996) (No. 95-1081). Moreover, as claimant notes, these cases are inapposite as they deal with when a surviving spouse becomes a "person entitled to compensation," and this case does not present that factual scenario.

Accordingly, the Orders of the administrative law judge dismissing the claims of claimants Mumford and Nicholson are vacated, and the cases are remanded to the administrative law judge for reconsideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge