

DOROTHY F. COX)	BRB No. 92-2288
(Widow of RAY G. COX))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
)	
VIVIAN JONES)	BRB No. 92-2289
(Widow of CASSIE R. JONES, SR.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
AMERICAN MUTUAL LIBERTY)	
INSURANCE COMPANY, BY AND)	
THROUGH THE MISSISSIPPI)	
INSURANCE GUARANTY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeals of the Decision and Order Granting Employer's Motions for Summary Judgment of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Steven J. Miller (Ransom P. Jones, III, P.A.), Pascagoula, Mississippi, for claimants Cox and Jones.

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

employer and employer/carrier.

Before: SMITH and DOLDER, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant Dorothy Cox, the widow of Ray Cox, appeals the Decision and Order Granting Employer's Motion for Summary Judgment (92-LHC-325), and claimant Vivian Jones, the widow of Cassie R. Jones, Sr., appeals the Decision and Order Granting Employer's Motion for Summary Judgment (91-LHC-1360), of Administrative Law Judge C. Richard Avery 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).¹ 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 F.2d 359 (1965); 33 U.S.C. §921(b)(3).

Mr. Cox, who was allegedly exposed to asbestos while working for employer, filed a claim for benefits under the Act on January 20, 1984. In addition, he filed a third-party civil lawsuit against several asbestos manufacturers. On March 7, 1987, Mr. Cox entered into a settlement of his longshore claim pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), wherein he received the sum of \$2,500. Mr. Cox died of asbestosis on April 9, 1990. Thereafter, on September 21, 1990, his widow filed a claim for death benefits under the Act. Additionally, the third-party civil lawsuit filed by Mr. Cox was amended to a wrongful death action on behalf of Mrs. Cox and Mr. Cox's heirs. It is uncontested that during 1990 and 1991, claimant Cox entered into settlement agreements with four third-party defendants without the prior written approval of employer. The net total received by claimant Cox from these four settlements amounted to \$2,020.11.

Mr. Jones, who had allegedly been exposed to asbestos while working for employer, died of cancer on October 4, 1978. His widow filed a claim for death benefits under the Act on February 19, 1987. In addition to her claim under the Act, Mrs. Jones filed a third-party civil action against several manufacturers of asbestos products. It is uncontested that between 1987 and 1991, claimant Jones entered into five third-party settlement agreements with several of the third-party defendants without the prior written approval of employer. The net total received by claimant Jones from these five settlements was \$2,902.96.

¹We hereby consolidate for purposes of decision employers' appeals of Administrative Law Judge C. Richard Avery's Decision and Order Granting Employer's Motion for Summary Judgment in claimant Cox's case, BRB No. 92-2288, and Decision and Order Granting Employer's Motion for Summary Judgment in claimant Jones' case, BRB No. 92-2289. 20 C.F.R. §802.104.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Employer in each case filed a motion before the administrative law judge for summary judgment.² The administrative law judge, after initially determining that there remained no issue of material fact since both claimants settled third-party actions against asbestos manufacturers without the prior approval of employer, found that application of the United States Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), *aff'g* 927 F.2d 828, 24 BRBS 93 (CRT)(5th Cir. 1991)(*en banc*), resulted in both claims being barred pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g)(1988). In neither case did the administrative law judge make a finding as to whether the third-party settlements were for an amount less than employer's liability for compensation under the Act. The administrative law judge granted employer's motions for summary judgment and dismissed both claims.

On appeal, the claimants contend that the administrative law judge erred in granting summary judgment without making a finding, in each case, as to whether the third-party settlements were for an amount greater or less than the total amount of employer's liability for compensation under the Act. Claimants thus contend that the cases should be remanded for a comparison between the amount of compensation to which they would be entitled under the Act and the amount of their respective settlements, in order to determine whether Section 33(g)(1) applies. Additionally, claimant Jones asserts that it was improper, under 29 C.F.R. Part 18, for the administrative law judge to grant summary judgment based on employer's amended motion, where the prior administrative law judge in her case denied employer's first motion for summary judgment. Employer responds in each case, urging affirmance of the administrative law judge's granting of summary judgment as the claimants failed to comply with Section 33(g)(1) of the Act and thus forfeited all rights to benefits from employer. In the alternative, employer asserts that even if the claimants' third-party recoveries exceeded the compensation due under the Act, the claims would be extinguished by virtue of Section 33(f) of the Act, 33 U.S.C. §933(f).

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §18.40(a), Motion for Summary Decision, any party may move, with or without supporting affidavits, for summary decision at least twenty days before the fixed date for any hearing. Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary judgment for either party. 29 C.F.R. §§18.40(d), 18.41(a).³

²In *Jones*, employer's original motion for summary judgment was denied by Administrative Law Judge Kenneth A. Jennings on January 2, 1992. When the case was subsequently assigned to Administrative Law Judge C. Richard Avery, employer filed an amended motion for summary judgment on March 25, 1992.

³The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contain no support for claimant Jones' assertion that employer had ten days within which to file a motion for reconsideration after Administrative Law Judge Jennings'

The purpose of the summary judgment procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Id.* In determining if summary judgment is appropriate, the court must look at the record in the light most favorable to the party opposing the motion. *Hahan v. Sergeant*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

In the present cases, the question of whether the third-party settlements were for an amount less than employer's liability for compensation under the Act is an issue of material fact which directly relates to the applicability of Section 33(g)(1). The administrative law judge thus erred in granting summary decisions in favor of employer in the present cases without first rendering the necessary calculations in order to compare claimant's settlement amounts with the amount of employer's liability under the Act. For the reasons discussed *infra*, however, we hold that this error was harmless, and we affirm the dismissal of the claims pursuant to Section 33(g)(1).

Section 33(g)(1), as amended in 1984, states in pertinent part:

- (1) 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)(1)(1988).

We begin our analysis with a discussion of *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), wherein the United States Supreme Court held that under the plain language of Section 33(g)(1), a claimant forfeits his right to further compensation benefits by failing to obtain the employer's written approval of a third-party settlement. In that case, the claimant suffered a work-related injury and the employer paid temporary total disability benefits for ten months. However, the employer refused to pay permanent partial disability benefits. In the meantime, the claimant settled a third-party action, but did not secure the employer's written approval of the settlement. The claimant argued that since the employer was not voluntarily paying benefits at the time of the settlement, and a formal award of

denial of employer's initial motion for summary judgment. *See* 29 C.F.R. §§18.40, 18.41. Accordingly, claimant Jones' argument that employer's amended motion for summary judgment was untimely is rejected.

benefits had not been issued, he was not a "person entitled to compensation" under Section 33(g)(1). Thus, the claimant argued, compliance with Section 33(g)(1) was not required.

The Board agreed with the claimant's argument. See *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42 (1989). However, the United States Court of Appeals for the Fifth Circuit reversed, holding that Section 33(g) contains no exceptions to the written approval requirement. See *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991)(*en banc*). In affirming the Fifth Circuit's decision, the Supreme Court held that the claimant "became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability . . ." *Cowart*, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). Thus, the claimant became a person entitled to compensation at the time he suffered his work-related injury. Despite the employer's conceded knowledge of the settlement, the Court held that the claimant was required to obtain the employer's written approval of the settlement pursuant to Section 33(g)(1).

In *Cowart*, the Court explicitly noted that a claimant is not required to obtain prior written approval of third-party settlements from an employer 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*, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT). With regard to the latter calculation, the Board has recently held that the term "compensation" in Section 33(g) refers only to weekly disability benefits. *Harris v. Todd Pacific Shipyards Corp.*, BRBS , BRB Nos. 93-2227, 93-2554 (Oct. 25, 1994). Since Section 33(g)(1) applies only where claimant enters a third party settlement "for an amount less than the compensation to which [the claimant] would be entitled," the amount of claimant's disability benefits must be compared to the settlement amount. Moreover, the Board has held that total amount of compensation to which claimant would be entitled over his or her lifetime is the relevant figure to be compared with the net amount of claimant's third-party settlements in the aggregate.⁴ See *Linton v. Container Stevedore Co.*, BRBS , BRB No. 93-0427 (Oct. 27, 1994).

In the instant cases, it is clear that each claimant was a "person entitled to compensation" at the time she entered into her third-party settlement agreement. See *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994)(Smith, J., dissenting on other grounds)(wherein the Board held that a potential widow was not a "person entitled to compensation" under Section 33(g)(1) prior to the death of her husband). Furthermore, it is undisputed by the parties that the claimants did not obtain written approval of their third-party settlement agreements. Thus, the claimants' claims for death benefits are barred by Section 33(g)(1) if the aggregate net amounts of the settlements into which they entered without employer's prior written approval are less than the amount of compensation to which they are entitled under the Act. See *Linton*, slip op. at 5. In the instant cases, however, the administrative law judge granted employer's motions for summary judgment without setting forth his calculation of the "less than" comparison required by Section 33(g)(1). See *id.*, slip op. at 8. Based upon the facts of these cases, however, we hold that the administrative law judge's error in this

⁴In *Harris*, BRBS , BRB Nos. 93-2227, 93-2554, the Board held that in cases of multiple third-party settlements, such as the cases at bar, the net amount of the multiple settlements are to be aggregated in determining the total amount of the third-party recovery. See *Harris*, slip op. at 13.

regard is harmless, and that remand for the administrative law judge to reconsider the applicability of the Section 33(g)(1) forfeiture provision would serve no judicial purpose, since the determination as to whether the net aggregate amounts of the third-party settlements are greater than employer's potential liability under the Act is readily calculable based upon the claimants' own admissions contained in their respective Answers to Interrogatories. *See, e.g., Bundens v. J.E. Brenneman Co.*, 28 BRBS 20 (1994); *Glenn v. Todd Shipyards Corp.*, 26 BRBS 186 (1993), *aff'd on recon.*, 27 BRBS 112 (1993)(Smith, J., concurring in the result).

Claimants Cox and Jones each filed a death benefits claim under the Act; thus, their potential entitlement to compensation derives from Section 9 of the Act, 33 U.S.C. §909, which provides that, during widowhood, a widow of a deceased employee is entitled to 50 percent of the employee's average wages. 33 U.S.C. §909(b). Section 9(e) states that an employee's average weekly wage shall not be less than the national average weekly wage as determined by the Secretary of Labor. 33 U.S.C. §909(e). As claimants' entitlement to death benefits vested upon the dates of death of their spouses, specifically April 9, 1990 and October 4, 1978, respectively, it is a mathematical certainty that the net amounts of the third-party settlement agreements which claimants Cox and Jones entered into, \$2,020.11 in claimant Cox's case and \$2,902.96 in claimant Jones' case, are less than the amounts due them under the Act.⁵ Consequently, Section 33(g)(1) is applicable to the instant cases and, pursuant to the claimants' failure to obtain employer's written approval of their third-party settlement agreements, we hold that the administrative law judge properly determined that their claims for death benefits are barred by Section 33(g)(1) of the Act. *See Cowart, supra.*

⁵Claimant Cox, in her Answers to Interrogatories dated April 3, 1991, stated that she had entered into four third-party settlement agreements, the net aggregate total of which was \$2,020.11. *See* Exhibit B. Claimant Jones, in her Answers to Interrogatories dated November 13, 1991, stated that she had entered into five third-party settlement agreements, the net aggregate total of which was \$2,902.96. *See* Exhibit B.

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Judgment in claimant Cox's case, BRB No. 92-2288, and the Decision and Order Granting Employer's Motion for Summary Judgment in claimant Jones' case, BRB No. 92-2289, are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge