

BRB No. 99-0929

AUDREY DOUCET)	
(Widow of DUREL DOUCET))	
)	
Claimant-Respondent)	
)	
v.)	
)	
AVONDALE INDUSTRIES,)	
INCORPORATED)	DATE ISSUED: <u>June 2, 2000</u>
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Jill D. Trahan (Gertler, Gertler, Vincent & Plotkin, L.L.P.), New Orleans, Louisiana, for claimant.

Richard S. Vale (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees (98-LHC-2647) of Administrative Law C. Richard Avery 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 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts involved in this case are not in dispute. Durel Doucet (decedent) died of

work-related mesothelioma on March 21, 1998. Prior to his death, decedent filed a third-party action against several asbestos manufacturers. On March 9, 1998, decedent entered into a settlement with Owens-Corning without the approval of employer. It is undisputed that decedent's widow, claimant herein, was not a signatory to this agreement. Subsequent to decedent's death, Owens-Corning forwarded the settlement proceeds to decedent's attorney, who subsequently distributed the money to claimant.¹ Thereafter, claimant filed a claim for death benefits and funeral expenses under Section 9 of the Act, 33 U.S.C. §909.

The only issues to be resolved before the administrative law judge were whether claimant's claim for death benefits and funeral expenses under the Act is barred by Section 33(g) of the Act, 33 U.S.C. §933(g), and if not, whether employer is entitled to a credit under Section 33(f) of the Act, 33 U.S.C. §933(f), for the monies claimant received as a result of decedent's settlement with Owens-Corning. In his Decision and Order, the administrative law judge determined that claimant's claim was not barred by Section 33(g), as claimant was not a "person entitled to compensation" at the time decedent entered into the third-party settlement with Owens-Corning. The administrative law judge further found that employer was not entitled to a credit pursuant to Section 33(f), as claimant did not enter into the third-party settlement with Owens-Corning, and thus, the offset provisions of Section 33(f) are inapplicable. Accordingly, the administrative law judge awarded claimant death benefits and funeral expenses pursuant to Section 9 of the Act.²

¹In its brief, employer contends that the Owens-Corning settlement funds were distributed by counsel directly to claimant without opening decedent's succession. *See* Employer's Brief at 5. At the hearing, claimant testified that decedent's children did receive their share of the settlement proceeds, *see* Tr. at 17, but the record does not show how the funds were apportioned.

²In his Decision on Employer's Motion for Reconsideration, the administrative law judge reduced his award of funeral expenses from \$6,431.84 to \$3,000, pursuant to the statutory limit under Section 9(a) of the Act, 33 U.S.C. §909(a).

Subsequent to the issuance of the administrative law judge's Decision and Order, claimant submitted a petition for an attorney's fee for work performed before the administrative law judge, requesting a fee totaling \$11,156.25, representing 63.75 hours of legal services performed at an hourly rate of \$175, plus \$364.09 in expenses. Employer filed objections to the fee request. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded claimant's counsel a fee of \$9,412.50, representing 62.75 hours of legal services performed at an hourly rate of \$150, plus \$364.09 in expenses.

On appeal, employer contends that the administrative law judge erred in concluding that Section 33(g) of the Act does not bar claimant's death benefits claim and in not awarding it a credit, pursuant to Section 33(f), for the proceeds claimant received as a result of decedent's third-party settlement with Owens-Corning. Employer further challenges the administrative law judge's award of an attorney's fee to claimant's counsel, asserting that the fee awarded is excessive. Claimant responds, urging affirmance of the administrative law judge's decisions.

The first issue presented by the instant appeal is whether Section 33(g) bars claimant's claim for compensation. In support of its contention of error, employer contends that claimant became a "person entitled to compensation" at the time of decedent's death, and therefore, claimant was required to obtain employer's approval of the settlement between decedent and Owens-Corning prior to accepting the settlement funds upon decedent's death. For the reasons set forth below, we affirm the administrative law judge's determination that claimant's claim for benefits is not barred by Section 33(g).

Section 33(g) provides a bar to claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than her compensation entitlement without obtaining employer's written consent.³ *Estate of Cowart v.*

³Section 33(g), as amended in 1984, states:

(1) If the person entitled to compensation . . . 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 . . . 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.

Nicklos Drilling Co., 505 U.S. 469, 26 BRBS 49 (CRT)(1992). In addressing the meaning of the phrase “person entitled to compensation” in *Cowart*, the United States Supreme Court held that an employee becomes a person entitled to compensation at the moment his right to recovery vests, and not when an employer admits liability. The right to recovery vests when the claimant satisfies the prerequisites attached to the right, *i.e.*, when the employee suffers the work-related injury. *Id.*, 505 U.S. at 477, 26 BRBS at 52 (CRT). Thereafter, in a death benefits case, the Court reiterated that a “person entitled to compensation” means only that the person satisfies the prerequisites attached to the right to compensation; thus, the Court held that a surviving spouse is not a “person entitled to compensation” prior to the death of the employee, and therefore, that spouse does not forfeit the right to collect death benefits under the Act for failure to obtain employer’s written approval of third-party settlements entered into prior to the employee’s death. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5 (CRT)(1997).

In the instant case, the administrative law judge determined that claimant was not “a person entitled to compensation” at the time decedent entered into his third-party settlement with Owens-Corning on March 9, 1998, and therefore, Section 33(g) is inapplicable to the instant case. In rendering this determination, the administrative law judge rejected employer’s contention that since claimant became a person entitled to compensation at the time of her husband’s death, she was obligated to obtain employer’s authorization of the third-party settlement prior to accepting the funds from that settlement. Rather, the administrative law judge found that the third-party settlement was finalized when decedent signed the agreement, not when claimant received the funds by way of decedent’s attorney, and since claimant played no part in the actual settlement, the Section 33(g) bar is inapplicable.⁴

33 U.S.C. §933(g)(1)(1994).

⁴The administrative law judge distinguished *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998)(Smith, J., dissenting), wherein the Board held that a widow who entered into unauthorized third-party settlements subsequent to her husband’s death forfeited her right to collect death benefits and funeral expenses pursuant to Section 33(g). By contrast, the administrative law judge determined that claimant was not a signatory to the Owens-Corning third-party settlement, and that decedent alone accepted the terms of the settlement. *See* Decision and Order at 5.

Section 33(g) will act as a bar only where the “person entitled to compensation” “enters into” an unapproved third-party settlement. 33 U.S.C. §933(g)(1)(1994). In the instant case, claimant was not a “person entitled to compensation” at the time decedent entered into the third-party settlement with Owens-Corning since, as a potential widow, she had not yet satisfied the prerequisites attached to the right to receive death benefits. *See Yates*, 519 U.S. at 248, 31 BRBS at 5 (CRT). In arguing that claimant became a person entitled to compensation at the time of decedent’s death, and therefore that she was obligated to obtain employer’s authorization for the Owens-Corning settlement prior to accepting the funds from the settlement, employer argues that the third-party settlement was not fully executed until Owens-Corning paid the agreed upon amount to claimant.⁵ We reject this contention. The plain meaning of Section 33(g) provides that the bar to compensation is triggered “[i]f the person entitled to compensation . . . enters into a settlement with a third person” for an amount less than the compensation to which the person would be entitled under the Act, without the employer’s approval. 33 U.S.C. §933(g)(1)(1994). In this regard, the Board has held that in order to determine whether the Section 33(g) bar applies, inquiry must be made into whether the third-party settlement was fully executed prior to submission to the employer for its approval. *See Smith v. Jones Oregon Stevedoring Co.*, 33 BRBS 155 (1999); *Barnes v. General Ship Service*, 30 BRBS 193 (1996). Employer bears the burden of proving that claimant entered into fully executed settlements without its prior written approval in order to bar claimant’s receipt of benefits. *See Mallot & Peterson v. Director, OWCP [Stadtmiller]*, 98 F.3d 1170, 30 BRBS 87 (CRT)(9th Cir. 1996), *cert. denied*, 117 S.Ct. 1824 (1997).

In the instant case, it is undisputed that claimant was not a signatory to the March 9, 1998 settlement with Owens-Corning. *See Employer’s Brief* at 7; *Emp. Ex. 13*. Thus, claimant did not “enter into” this agreement. It is axiomatic that no third-party settlement exists where the claimant does not sign the release. *See, e.g., Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992). Moreover, the receipt of the settlement funds by claimant does not mark the full execution of the third-party settlement as claimant did not “enter into” the Owens-Corning agreement. The point of reference is the date upon which decedent entered into the settlement with Owens-Corning, March 9, 1998. At this point, pursuant to *Yates*, claimant was not a person entitled to compensation. Thus, as claimant was clearly not a “person entitled to compensation” as of March 9, 1998, and did not enter into any agreement with Owens-Corning on that date, we hold that the administrative law judge’s determination that Section 33(g) does not bar claimant’s claim for death benefits is rational and in accordance with law. Accordingly, we affirm the administrative law judge’s finding on this issue.

⁵“Execution of a contract includes performance of all acts necessary to render it complete as an instrument and imports idea that nothing remains to be done to make complete and effective contract.” BLACK’S LAW DICTIONARY 510 (5th ed. 1979).

We now address employer's contention that the administrative law judge erred in finding that employer is not entitled to a credit pursuant to Section 33(f) of the Act for the amount claimant received as a result of decedent's third-party settlement with Owens-Corning; in support of its assertion of error, employer argues, as it did with respect to Section 33(g), that claimant's receipt of the settlement funds makes her a party to the settlement, and therefore entitles employer to a credit under Section 33(f). In his decision, the administrative law judge found that employer was not entitled to a credit pursuant to Section 33(f) for the amount received since claimant did not enter into the third-party agreement.

When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989); see *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998)(Smith, J., dissenting); *Story v. Navy Exchange Center*, 30 BRBS 225 (1997). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, a review of the Section 33(f) issue properly begins with the language of that section. Section 33(f), as amended in 1984, 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 attorney fees).

33 U.S.C. §933(f)(1994). Section 33(f) therefore allows employer a credit for the net amount recovered by a "person entitled to compensation" who institutes civil proceedings for the same injury or death.⁶ *Id.* We need not address claimant's status as a "person entitled to compensation" for purposes of employer's offset under Section 33(f), as employer's contention that Section 33(f) is applicable to the instant case fails for a separate reason.⁷ As

⁶Thus, the Board has held that recoveries must be apportioned so that the amounts recovered by the employee offset his entitlement to disability benefits while any amounts paid to the spouse offset death benefits. *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in part, part sub nom. Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 12 (CRT)(9th Cir. 1991).

⁷In rendering his determination, the administrative law judge distinguished the instant

discussed *supra*, it is undisputed that decedent, not claimant, instituted the third-party action against Owens-Corning based on his disability, and that decedent alone signed the third-party settlement. To support its argument that claimant was a party to this agreement, employer points to the language of the settlement wherein decedent agreed to release Owens-Corning, “on my behalf and also on behalf of my administrators, assigns, executors, heirs and representatives” from any and all claims including, “to the extent that such claims might now or at some time in the future become capable of being released under Louisiana law, claims for wrongful death and all claims arising out of alleged wrongful death, including loss of financial support, loss of love and affection, loss of consortium service and society” Emp. Ex. 13. However, the settlement agreement, signed only by decedent, further states: “Nothing herein shall be construed to be a stipulation for the benefit of any third person nor as a benefit to anyone other than appearer and the parties released herein.”⁸ Emp. Ex. 13. At the hearing, claimant testified that she did not read the Owens-Corning settlement agreement prior to decedent signing it, and she did not sign it “[b]ecause it wasn’t my lawsuit.” Tr. at 21.

While claimant received at least a portion of the settlement funds, apparently through decedent’s counsel’s escrow account, her receipt of the proceeds of the settlement was the result only of the distribution of her husband’s estate; thus, the receipt of the proceeds was not the result of the surrender of any of her rights, nor was it the result of any proceedings which

case from *Taylor v. Plant Shipyard Corp.*, 32 BRBS 155 (1998)(Hall, C.J., dissenting), *rev’d sub nom. Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197 (CRT)(9th Cir. 2000). In *Taylor*, the Board held that where the claimant entered into third-party settlements prior to the death of her husband, the employer was entitled to a credit under Section 33(f), as the language of Section 33(f) which provides the employer with a credit does not restrict to a specific time frame those recoveries which are subject to a credit. In reversing the Board’s determination, the United States Court of Appeals for the Ninth Circuit held that the phrase “person entitled to compensation” should be construed to have the same meaning in Section 33(f) and Section 33(g), in accordance with the canon of statutory construction that identical terms within the same statute bear the same meaning. The court then concluded that since the claimant was not a “person entitled to compensation” when she entered into the third-party settlements pursuant to Section 33(g), as she had not satisfied the prerequisites attached to the right to collect death benefits, she was not a “person entitled to compensation” under Section 33(f), and therefore the employer was not entitled to a credit under Section 33(f).

⁸Subsequent to decedent’s death, the third-party action was amended to include claimant and decedent’s children as parties to the action for the purpose of continuing the third-party action, specifically noting that claimant was not pursuing any wrongful death action in order to pursue a death benefits claim under the Act. *See* Cl. Ex. 20. Thereafter, claimant was dismissed as a party with respect to any wrongful death action. *See* Cl. Ex. 21.

she initiated.⁹ See, e.g., *Martin v. Kaiser Co. Inc.*, 24 BRBS 112, 125 (1990)(Dolder, J., concurring). Accordingly, as claimant did not institute civil proceedings against Owens-Corning, we hold that Section 33(f) does not apply in the instant case. We therefore affirm the administrative law judge's determination that employer is not entitled to offset from its liability for death benefits the amount claimant received from the third-party settlement entered into between decedent and Owens-Corning.

Lastly, employer challenges the administrative law judge's award of an attorney's fee to claimant's counsel. Specifically, employer contends that the hours and billing rate awarded by the administrative law judge are excessive. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge reduced the hourly rate requested from \$175 to \$150, finding the latter to be a fair and reasonable rate. The administrative law judge further accepted claimant's counsel voluntary reduction of eight one-quarter hour charges to one-eighth of an hour charges. Thus, the administrative law judge awarded claimant's counsel a fee of \$9,412.50, representing 62.75 hours of legal services performed at an hourly rate of \$150, and \$364.09 in expenses.

We reject employer's contentions regarding the number of hours and hourly rate awarded by the administrative law judge. In his supplemental decision, the administrative law judge reduced the number of hours and the hourly rate sought by claimant's counsel. Employer has not met its burden of showing that the administrative law judge abused his discretion in this regard. See *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Accordingly, the number of hours and hourly rate awarded by the administrative law judge are affirmed. Moreover, employer's specific objection to counsel's method of billing in minimum increments of one-quarter hour is rejected, as the administrative law judge accepted claimant's counsel's voluntary reduction of eight of these charges to one-eighth of an hour, thereby giving tacit approval to the remaining one-quarter hour charges. Thus, the administrative law judge's award conforms to the criteria set forth by the United States Court of Appeals for the Fifth Circuit. See *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999). Accordingly, we affirm the attorney's fee awarded to claimant's counsel by the administrative law judge.

Accordingly, the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge are affirmed.

⁹At the hearing, claimant testified that decedent's children also received funds pursuant to the settlement agreement, subsequent to decedent's death. Tr. at 17.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge