

BRB No. 97-1114

LORRAIN B. HAMILTON (Widow of EVERETTE HAMILTON, SR.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING, INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Reconsideration of James Guill, Associate Chief Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Reconsideration (91-LHC-994) of Associate Chief Administrative Law Judge James Guill 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).

On March 21, 1982, the employee died from lung cancer. The surviving widow filed her claim for death benefits on March 9, 1984. From 1984 to 1990, the widow entered into

several third-party settlements with asbestos manufacturers. On September 5, 1990, employer filed a Motion to Dismiss, asserting that the claim should be dismissed as claimant had entered into the third-party settlements without employer's prior written approval in violation of Section 33(g) of the Act, 33 U.S.C. §933(g). On December 31, 1990, the district director referred this case to the Office of Administrative Law Judges with the claimant's name listed as "Everette L. Hamilton, Sr. (Deceased)." On November 13, 1992, Associate Chief Administrative Law Judge G. Marvin Bober granted employer's Motion to Dismiss after finding that "claimant" is a "person entitled to compensation" and concluding that when "claimant" entered into the third-party settlements without employer's prior written approval, employer's liability for paying "claimant's" compensation and medical benefits was extinguished pursuant to Section 33(g). In his decision dismissing the claim, Judge Bober identified the claimant as the employee even though his Decision and Order was entitled "Lorraine B. Hamilton, Widow of Everett Hamilton, Sr." Judge Bober stated that no claim for death benefits had been filed.

On November 24, 1992, the district director filed Judge Bober's Decision and Order. On December 2, 1992, the Director filed a Motion for Reconsideration asserting that Judge Bober erred in stating that no claim for death benefits had been filed. The Director requested that Judge Bober amend his Decision and Order to accurately reflect that this case "included" a death benefits claim and to reopen the record to receive a copy of the death benefits claim attached to his motion. Employer responded to the motion by requesting that Judge Bober reopen the record for the submission of additional evidence which it attached to its motion indicating that the widow entered into the third-party settlements without employer's prior written consent after she filed her death benefits claim. Employer argued that while Judge Bober incorrectly stated that no claim for death benefits was filed, his order of dismissal was proper because the widow was a "person entitled to compensation" when she entered into the third-party settlements without employer's prior written approval.

On February 2, 1993, Judge Bober denied the Director's Motion for Reconsideration as untimely filed. The Director appealed his decision, and subsequently, the Board reversed Judge Bober's decision. *Hamilton v. Ingalls Shipbuilding, Inc.*, 30 BRBS 84 (1996). The Board held that the Director's Motion for Reconsideration was timely filed on December 2, 1992, eight days after Judge Bober's decision was filed with the district director on November 24, 1992, within the 10-day requirement, and remanded the case to the administrative law judge for consideration of the merits of the Director's motion.

On March 26, 1997, Associate Chief Administrative Law Judge James Guill¹ (the administrative law judge) granted the Director's motion, amended Judge Bober's November 13, 1992, Decision and Order to reflect that the widow filed a death benefits claim, and notified the parties that her death benefits claim filed on March 9, 1984, remains

¹Judge Guill considered this case on reconsideration after noting that Judge Bober is no longer with the Office of Administrative Law Judges.

pending before the district director. The administrative law judge stated that he was without jurisdiction to adjudicate her claim until it was referred to the Office of Administrative Law Judges. He denied employer's motion, in response to the Director's motion, to reopen the record for submission of additional documents which provide further support for Judge Bober's dismissal under Section 33(g).

On appeal, employer requests that the administrative law judge's Decision and Order on Reconsideration be amended to reflect that there are no claims pending before the district director because the death benefits claim was the only claim ever filed in this case and it was properly dismissed. Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded to employer's appeal.

After consideration of the scant administrative file before us, we are unable to grant employer's request that the administrative law judge's decision be amended to reflect that no claims are pending before the district director. Despite employer's assertion that the only claim ever filed in this case was the death benefits claim which was dismissed, the file is unclear on this point. Consequently, we vacate the administrative law judge's decision and remand this case to the administrative law judge for further clarification. The file makes it clear that the widow filed a claim for death benefits in 1984 after her husband died in 1982, and that she subsequently entered into third-party settlements between 1984 and 1990. The file is unclear, however, as to whether the employee filed an *inter vivos* claim and whether Judge Bober was adjudicating the employee's claim or the widow's claim. Hence, on remand, the administrative law judge should determine these facts.

Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), requires that a "person entitled to compensation" obtain employer's prior written consent for third-party settlements that are less than the compensation to which he would be entitled under the Act. See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992). The widow was a "person entitled to compensation" at the time she entered into the third-party settlements as all of the settlements were consummated after the employee's death. See *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 117 S.Ct. 796, 31 BRBS 5 (CRT)(1997); *Reynolds v. Todd Pacific Shipyards Corp.*, 122 F.3d 37, 31 BRBS 71 (CRT)(9th Cir. 1997); *Wyknenko v. Todd Pacific Shipyards Corp.*, BRBS , BRB No. 97-1023 (Feb. 25, 1998)(Smith, J., dissenting). Thus, the widow's claim is barred if the gross amounts of the settlements were for less than the compensation to which she would be entitled under the Act. See *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT)(3d Cir. 1995); *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5 (1996)(Brown and McGranery, JJ., concurring in part and dissenting in part)(decision on recon. *en banc*), *aff'g and modifying*, 28 BRBS 254 (1994).

On remand, the administrative law judge must also determine if the decedent ever filed an *inter vivos* claim for disability benefits or if the widow sought disability benefits on behalf of the estate of her deceased husband. See *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). If no such claim was filed, then employer is correct that the only pending claim is the widow's claim. If a disability claim was filed, the administrative law judge must adjudicate it as Section 33(g) is inapplicable to bar this claim as all of the third-party

settlements were entered into by his widow after the employee ' s death.

Accordingly, the administrative law judge's Decision and Order on Reconsideration is vacated, and the case is remanded to the administrative law judge for findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge