

## SECTION 33

### Introduction; Section 33(a)

Section 33, 33 U.S.C. §933, addresses situations in which an employee is injured during the course of his employment and a third party may be liable for damages for his injury or death. In such situations, the employee need not elect between his compensation remedy and a third-party suit.

Section 33(a) provides

If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

33 U.S.C. §933(a).

Section 33 is generally designed to foreclose injured employees from double recoveries where they receive both benefits under the Act and civil damages from a successful negligence action. The subsections define and delimit the rights of the employer and the employee to institute third-party actions and set up rules for allocating the proceeds of the third-party action between them. Subsections (b)-(d) address assignment of the right to file suit to employer under certain circumstances. Subsections (e) and (f) provide employer with offset or lien rights against the compensation due. Section 33(g) requires that the person entitled to compensation obtain employer's approval of settlements with third parties for an amount less than the compensation due under the Act; failure to obtain approval where required is an absolute bar to the receipt of benefits.

This section was amended by the 1984 Amendments, and these revisions were applicable to cases pending on appeal on September 28, 1984, the date of enactment.

In general, the key issue in cases under Section 33(a) is whether a third-party suit is for the same disability for which compensation is payable under the Act. *See United Brands Co. v. Melson*, 594 F.2d 1068, 1074, 10 BRBS 494, 498 (5th Cir. 1979), *aff'g* 6 BRBS 503 (1977) ("the section is clearly limited to the situation in which the third party is potentially responsible to both the employee and the covered employer"). Thus, the requirements of Section 33 with regard to employer's rights to offsets and to approve settlements do not apply where, for example, claimant settles a third-party suit based on asbestos exposure but is entitled to disability benefits for work-related hypertension or another condition. *See Todd Shipyards Corp. v. Director, OWCP [Chavez]*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998); *Richardson v. Newport News Shipbuilding &*

*Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x 249 (4<sup>th</sup> Cir. 2007); *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992) (Smith, J., dissenting on other grounds), *vacated on other grounds mem.*, 17 F.3d 396 (9th Cir. 1994).

## Digests

### Same Disability or Death

The Board remanded for the administrative law judge to determine whether settlements received by claimant as a result of asbestos exposure in suits against various ship owners, stevedores and insurers as a result of loading activities on ships which were not owned by Lykes Brothers were the results of suits against "third parties" as provided in Section 33(a), for which employer would be entitled to an offset under Section 33(f). *Castorina v. Lykes Bros. Steamship Co.*, 21 BRBS 136 (1988).

Following remand, the Board held that the third-party suits in this case fell within the definition of Section 33(a) because they and the claim under the Act against employer were undertaken as a result of the disability and impairment caused by claimant's work-related exposure to asbestos. Thus, the third-party suits were filed on account of the same disability for which compensation was payable under the Act. *Castorina v. Lykes Bros. Steamship Co.*, 24 BRBS 193 (1991).

The Board held that the administrative law judge properly granted employer an offset under Section 33(f) for the entire net amount of third-party asbestosis settlements, even though only 50 percent of claimant's disability was due to asbestosis. Under Section 33(a), the third-party suits were filed on account of the same disability being compensated under the Act, and employer was liable for the full extent of claimant's disability under the aggravation rule. *Chavez v. Todd Shipyards Corp.*, 21 BRBS 272 (1988).

The Board rejected the Director's argument that Section 33(g) does not bar claimant's right to compensation owed for a siderosis claim because the settlements claimant entered into were for his alleged asbestosis, which is a different injury than his siderosis. Since Section 33(a) specifically refers not to "injury," but to suits resulting from "disability," the Board held that the two claims do relate to the same disability in that both involve occupational lung diseases resulting in respiratory impairment. Therefore, the Board held that Section 33(g) was at issue with regard to both claims because claimant settled third-party suits resulting from his respiratory disability. However, the Board found Section 33(g) did not bar the claim on other grounds. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *modified on recon.*, 22 BRBS 430 (1989).

The Board modified this decision on reconsideration. The Board noted that its construction of Section 33(a) in the initial case did not affect the disposition on Section 33(g), so any error would be harmless. However, on reconsideration, the Director pointed out that if the settlements of the third-party asbestosis suits can invoke Section 33(a) with regard to the siderosis claim as being for the same disability, then employer would be entitled to offset the entire net recovery against its liability for the siderosis claim, and that this would be contrary to law. The Board held that this argument may have merit and thus modified its prior opinion to direct the administrative law judge to consider these arguments in determining what credit, if any, should be allowed for the asbestosis settlements in the event benefits are awarded for siderosis. *O'Berry v. Jacksonville Shipyards, Inc.*, 22 BRBS 430 (1989), *aff'g and modifying on recon.* 21 BRBS 355 (1988).

Applying the 1972 Act, the administrative law judge awarded death benefits by finding that the employee was permanently totally disabled at the date of death. The administrative law judge held that the award was not barred by Section 33 due to claimant's abandonment of a malpractice suit for the employee's death, finding that this action was beyond the scope of employer's subrogation interest. The Board reversed, holding that the plain language of Section 33(a) states that it is applicable on account of death or disability for which compensation is payable under the Act. Since the malpractice suit and the claim under the Act were similarly instituted due to the employee's death, employer had a subrogation interest under Section 33. The Board held that claimant's failure to pursue a third-party malpractice action to final judgment cannot bar claimant's right to compensation under the Act unless employer establishes that claimant's failure prejudiced it or its carrier's right of subrogation. The case was therefore remanded for findings pertaining to the prejudice issue. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on recon.*, 22 BRBS 335 (1989).

On reconsideration, the Board affirmed the administrative law judge's finding that Section 33 does not bar the claim. The Board agreed with the Director that only failure to comply with Section 33(g) can result in the claim's being barred, and that the 1959 Amendment to Section 33(a) supersedes prior precedent that required that a third-party claim be prosecuted to avoid prejudice to employer. *Mills v. Marine Repair Serv.*, 22 BRBS 335 (1989), *modifying on recon.* 21 BRBS 115 (1988).

The Board held that Section 33 did not apply in a case involving successive injuries covered under the Act where a settlement of a compensation claim for one injury was reached with another longshore employer. The Board found this result consistent with *Melson*, 594 F.2d 1068, 10 BRBS 494. Therefore, as Eagle Marine, with whom claimant settled his prior claim, did not cause injury to claimant during the course of his employment with employer and thus was not potentially liable to employer, it was not a "third party" under the Section 33(a) and employer was not entitled to a Section 33(f) credit for the prior settlement. *Uglesich v. Stevedoring Services of America*, 24 BRBS

180 (1991).

The Board affirmed the administrative law judge's finding that claimant's hearing loss claim was not barred by his prior third-party recovery for a crush injury. Section 33 was inapplicable since the hearing loss claim was not for the same disability as the prior third-party recovery. *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992) (Smith, J., dissenting on other grounds), *vacated on other grounds mem.*, 17 F.3d 396 (9th Cir. 1994).

Following remand after the Ninth Circuit held that a determination regarding the proper Section 33(f) setoff against possible third-party settlements was ripe for decision, *see Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992), *vacating and remanding Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), the Board held that in a case where claimant suffers two distinct disabilities, one of which is the basis for third-party litigation, the administrative law judge must determine whether each disability is work-related so as to ascertain which is being compensated, under the language of Section 33(a). If both are work-related, or if only the disability which was not the basis of the third-party suit is work-related, the Board held that employer is not entitled to an offset under Section 33(f). If the disability on which the third-party suit was based is the only work-related disability, then employer is entitled to offset its liability for the combined disability against the net proceeds of any third-party suit filed on account of that disability, consistent with Section 33(a). *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (McGranery, J., dissenting) (decision on remand), *aff'd on recon. en banc*, 28 BRBS 185 (1994) (Brown and McGranery, JJ., dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP [Chavez]*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

On reconsideration, the Board rejected the contention that employer's offset should be limited to that fraction of the whole disability caused by asbestosis. Two members reiterated the Board's holding that where claimant has two potentially work-related disabling conditions and files suit against a third party due to one of those conditions, employer's entitlement to a Section 33(f) offset depends on whether each condition is work-related. Two members dissented. *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (*en banc*) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 27 BRBS 80 (1993) (McGranery, J., dissenting) (decision on remand), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP [Chavez]*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

After the administrative law judge determined on remand that as claimant's hypertension was a separately compensable disability and that employer was thus not entitled to a Section 33(f) offset against his asbestos recoveries, the Ninth Circuit affirmed the Board's holding. The court stated that where claimant suffers two work-related injuries, either of which could have resulted in his total disability, he could have filed a claim under the Act and obtained total disability benefits for either condition. The court set

forth the Director's interpretation which permits offset under Section 33(f) only if the third-party payments are due to the sole and same injury that gives rise to the claim under the Act; otherwise employer would experience a windfall as claimant could have sought a recovery for the injury for which no third-party proceeds were available. The court thus held that the administrative law judge properly denied employer either a full or an apportioned credit under Section 33(f). *Todd Shipyards Corp. v. Director, OWCP [Chavez]*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998), *aff'g Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (McGranery, J., dissenting), *aff'd on recon. en banc*, 28 BRBS 185 (1994) (McGranery & Brown, JJ., dissenting).

In a case in which claimant was exposed to asbestos only with General Dynamics and only to other pulmonary irritants with employer, and in which he settled third-party claims regarding the asbestos exposure with General Dynamics' approval, the Board remanded the case for the administrative law judge to consider whether claimant's failure to get employer's approval barred the claim under Section 33(g) since it was liable for claimant's entire disability under the aggravation and responsible employer rules. The administrative law judge was to consider the argument that the two claims involve separate and distinct injuries. *Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994) (McGranery, J., dissenting).

Following remand, the Board held that claimant suffered two separate injuries as a result of distinct exposures with two employers, asbestosis while working at Electric Boat and chronic obstructive pulmonary disease while working for employer. Claimant properly obtained Electric Boat's written approval of the third-party settlements concerning his asbestosis. The Board held that since claimant was not exposed to asbestos at employer's facility, the Supreme Court's holding in *Cowart* does not require that claimant must also obtain employer's written consent. Employer did not purchase any asbestos products from the asbestos distributors and manufacturers against whom claimant filed his third-party suits, and it was undisputed that it did not expose claimant to asbestos during claimant's employment with employer; thus, under Section 33(b) of the Act, it was not an employer to whom claimant's right to file suit could be assigned. Accordingly, the Board affirmed the administrative law judge's finding that claimant's claim was not barred by Section 33(g). *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997).

The Board vacated the administrative law judge's finding that Section 33(g) barred claimant's asbestos-related claim for medical monitoring and his claim for disability benefits related to his COPD, and remanded for consideration of the entire record to discern the cause of claimant's disability. The Board instructed the administrative law judge to make findings consistent with *Chavez*, 27 BRBS 80, and then to determine the applicability of Section 33(g) based on these findings. In this regard, only if asbestosis is claimant's lone work-related disability can Section 33(g) be invoked to bar claimant's claim. If, however, after reviewing the medical evidence in light of *Chavez*, the

administrative law judge again found that claimant was disabled by both asbestosis and COPD, Section 33(g) cannot bar the disability claim because, under the aggravation rule, COPD is considered to be the disabling, compensable condition and therefore not the same disability for which claimant settled his third-party claims. Moreover, under the latter circumstance, claimant's claim for medical monitoring for any asbestos-related condition likewise cannot be barred because, ultimately, claimant would not be entitled to disability compensation for asbestosis, and a person entitled only to medical benefits is not a "person entitled to compensation" for purposes of Section 33(g). *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 6 (2004).

After remand, the Board affirmed the administrative law judge's finding under *Chavez*, 27 BRBS 80 (1993), that claimant's claim was not barred by Section 33(g), since he found that the third-party settlements were for asbestos-related conditions, and thus did not involve the same disability, *i.e.*, COPD related to inhalation of substances other than asbestos, for which claimant obtained disability benefits under the Act. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x 249 (4<sup>th</sup> Cir. 2007).

Where claimant settled the decedent's pending third-party suit after his death, the Board held that Section 33(g) did not bar her death claim because her claim under the Act and decedent's third-party suit were not for the same disability or death under Section 33(a). Claimant's third-party claim was dismissed. Thus, if claimant did not have the right to seek damages from the third party for her own benefit, employer did not have the right to seek damages from the third party on her behalf under Section 33(b), and Section 33(g) was inapplicable. *Mabile v. Swiftships, Inc.*, 38 BRBS 19 (2004).

## Third Party

If employer owns the vessel and is sued in its capacity as a vessel owner, it is a third party for purposes of Section 33. Employer is entitled to an offset under Section 33(f) for the amounts paid to claimant by the vessel in the third-party action. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995), *aff'g and rev'g* 28 BRBS 20 (1994); *Taylor v. Bunge Corp.*, 845 F.2d 1323 (5th Cir. 1988).

The Board affirmed the administrative law judge's finding that a third party, the vessel on which claimant was injured, was involved in the state court claim because claimant specifically released the barge from liability pursuant to Section 5(b) and a vessel, even if owned by claimant's employer, is a third party under the plain language of Section 5(b) of the Act. Because a third party was involved, Section 33(g) applied to this case. As claimant failed to comply with the provisions of Section 33(g)(1), the Board affirmed the administrative law judge's finding that claimant was not entitled to benefits under the Act. *Bockman v. Patton-Tully Transp. Co.*, 41 BRBS 24 (2007).

Where claimant filed a state claim against his nominal employer, a temporary employment agency, and a claim under the Act against his borrowing longshore employer, and then settled his state claim without the prior approval of the borrowing employer, the Board held that the administrative law judge erred in considering the nominal employer to be a "third party" and in applying the Section 33(g) bar to deny longshore benefits. As there was neither a third party nor a suit for civil tort damages involved in this case, the Board held that Section 33 is not applicable. Rather, employer, as the parties agreed, was entitled to a Section 3(e) credit against the state settlement. Consequently, the Board held that the administrative law judge erred in applying Section 33(g) instead of Section 3(e), and it remanded the case for resolution of this and any remaining issues. *Redmond v. Sea Ray Boats*, 32 BRBS 1 (1998), *vacated in part on other ground on recon.*, 32 BRBS 195 (1998).

The Ninth Circuit reversed the Board's holding that the last responsible employer is entitled to a credit for Section 8(i) settlement payments made by other potentially liable longshore employers in claimant's occupational disease claim. The court rejected employer's contention that Section 33(f) provides for a credit under these circumstances, as there is no "third party" potentially liable to both claimant and employer. *Alexander v. Director, OWCP*, 897 F.3d 205, 36 BRBS 25(CRT) (9<sup>th</sup> Cir. 2002), *rev'g in part Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1999) and 34 BRBS 34 (2000); *see also New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5<sup>th</sup> Cir. 2003), *rev'g in part* 35 BRBS 50 (2001), *cert. denied*, 540 U.S. 1141 (2004).

Claimant was injured and sought compensation under the Act as well as under the FTCA. The tort claim was dismissed as it was filed against the Navy Department, rather than the U.S., the only proper party defendant to a FTCA suit. Meanwhile, claimant settled his

claim under the Act and did not seek to amend his FTCA claim to name the U.S. as a party defendant or to appeal the district court's judgment. Employer sought subrogation rights pursuant to Section 33(b) against claimant's potential recovery in any malpractice claim against his attorneys. The court held that Section 33 was not applicable, as such subrogation rights extend only to claims against third parties for which compensation is payable under the Act, and not to any harm allegedly caused by his attorneys' negligent representation. *ITT Federal Services Corp. v. Montaña*, 474 F.3d 32 (1<sup>st</sup> Cir. 1997).

Because the definition of the term "person" in Section 2(1) of the Act does not include the United States government, claimant's settlement with the U.S. government under the Federal Tort Claims Act for an amount less than he was entitled to receive under the Act did not invoke the Section 33(g) bar, as the United States is not considered a "third person" under Section 33. *Milam v. Mason Technologies*, 34 BRBS 168 (2000) (McGranery, J., dissenting).

Claimant settled his claims in a United Kingdom court with his employer, "AG Jersey," and two related companies for an amount less than the amount he would be entitled to under the Act without obtaining prior written approval from the DBA carrier. The administrative law judge determined that one of the two related companies, "AG PLC," was a third party to the settlement, thereby precluding claimant's entitlement to further benefits under the Act pursuant to Section 33(g). The Board vacated the administrative law judge's finding, as he failed to explain why AG PLC, the parent company of AG Jersey, is not also claimant's employer – either under a borrowed employee test or by considering the companies as one entity. Further, the Board held it was error to apply res judicata or collateral estoppel to the UK court's decision, as the issue of whether the company was an employer under the Act was not before the court, and the parties to the UK claims and the Act claims were not identical. The Board also vacated the administrative law judge's finding that "AG UK," which performed many of the functions of an employer, is a borrowing employer, because he did not fully explain how AG UK satisfies the elements of a borrowing employer test. Therefore, the Board vacated the finding that Section 33(g) precluded claimant's recovery under the Act. The Board remanded the case for the administrative law judge to reconsider the employment relationships using the borrowed employee tests and/or to determine whether the entities should be considered as one by piercing the corporate veil. AG Jersey bears the burden of establishing that at least one of the employers is a third party. That there may be no offset for the recovery does not weigh in favor of the applicability of Section 33(g). *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, 47 BRBS 21 (2013).

In this case, on appeal for the second time, the issue continued to be whether claimant entered into a third-party settlement that had not been approved by the DBA carrier, thereby invoking the Section 33(g) bar. The administrative law judge addressed whether the three entities behaved such that they should be considered as a single entity (with claimant's employer), rendering none of them a "third person" under the Act. As Section

33(g) is an affirmative defense that must be raised and pleaded by an employer, the Board rejected AG Jersey's assertion that claimant, not it, must prove that the companies were a single entity. To the contrary, AG Jersey, as the proponent of the defense to try to avoid liability, bears the burden of showing that claimant entered into a: 1) fully-executed settlement; 2) with a third person; 3) without obtaining prior written approval from his employer and its carrier. As the burden lies with AG Jersey, the starting point is that the entities are all employers until proven otherwise. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

Under Section 33(g), the determination of whether a "third person" is involved in a settlement must be made at the time of the settlement. In this case, claimant agreed to settle his tort claims in December 2009. Prior to this date, a company called G4S had acquired the AG entities in their entirety and embarked on a restructuring of the corporate entity. Because AG Jersey bears the burden of establishing that a "third person" was involved in the settlement in order to invoke Section 33(g), and because there is no evidence of record as of the time of the settlement regarding the relationship among the G4S entities, AG Jersey did not establish that a "third person" participated in claimant's tort settlement. Accordingly, the Board reversed the administrative law judge's findings that AG PLC was a third party and that Section 33(g) barred claimant's recovery under the Act. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

## Section 33(b)

Under Section 33(b), an employee must pursue his rights against a negligent third party within six months of accepting a compensation award under the Act or his rights against the third party are assigned to the employer. The 1984 Amendments make three changes to Section 33(b). First, the amendments explicitly state that the award of an administrative law judge may operate to trigger the six month limitation period. Second, the amended version expressly defines “award” to mean a formal order issued by the deputy commissioner, an administrative law judge or the Board. *See Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 15 BRBS 152(CRT) (1983) (pre-amendment case holding that a lapse of six months after acceptance of *voluntary* compensation payments does not trigger assignment). Therefore, a memorandum of informal conference by a deputy commissioner memorializing employer's agreement to pay benefits would not satisfy the “award” requirement of this amended subsection. *Costa v. Danais Shipping Co.*, 714 F.2d 1 (3d Cir. 1983).

Finally, the amendment states that if an employer fails to commence an action against the third party within ninety days after assignment, the right to bring such action reverts to the claimant. This amendment overrules prior precedent.

In an early case, the Supreme Court stated that an employee did not automatically relinquish his right to proceed against a third party after the statutory six month period expired. Assignment to the employer was not recognized when it was demonstrated that the employer to whom the third party's rights were assigned would not pursue these rights because of a potential conflict of interest. *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525 (1956); *see also Caldwell v. Ogden Sea Transport, Inc., et al.*, 618 F.2d 1037 (4th Cir. 1980). However, *Czaplicki* was decided prior to a 1959 amendment adding the words “unless such person shall commence an action against such third person within six months after such award.”

The Supreme Court held that failure to institute a third-party action within the statutory six month period is an absolute bar to a subsequent action by an employee. *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981). In a subsequent case, the D.C. Circuit held the *Czaplicki* exception to the statutory period was no longer applicable and an employee is not permitted to institute a third-party action after expiration of the six month period. *Johnson v. Bechtel Assoc. Professional Corp.*, 717 F.2d 574 (D.C. Cir. 1983), *rev'd on other grounds sub nom. Washington Metro. Area Transit Auth. v. Johnson et al.*, 467 U.S. 925 (1984). The Fourth Circuit also held that the claimant's failure to bring a third-party action within six months operates as an assignment of the claim to employer, and the six month period is triggered without regard to subsequent suspensions in payment of a formal award of benefits. *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106 (4th Cir. 1982).

## Digests

Since Section 33(b) sets forth an employer's rights regarding assignment under Section 33, that subsection does not affect employer's entitlement to an offset pursuant to Section 33(f). *Castorina v. Lykes Bros. Steamship Co.*, 24 BRBS 193 (1991).

Claimant was injured and sought compensation under the Act as well as under the FTCA. The tort claim was dismissed as it was filed against the Navy Department, rather than the U.S., the only proper party defendant to a FTCA suit. Meanwhile, claimant settled his claim under the Act and did not seek to amend his FTCA claim to name the U.S. as a party defendant or to appeal the district court's judgment. Employer sought subrogation rights pursuant to Section 33(b) against claimant's potential recovery in any malpractice claim against his attorneys. The court held that Section 33 was not applicable, as such subrogation rights extend only to claims against third parties for which compensation was payable under the Act, and not to any harm allegedly caused by his attorneys' negligent representation. *ITT Federal Services Corp. v. Montaña*, 474 F.3d 32 (1<sup>st</sup> Cir. 1997).

## Section 33(c), (d)

Section 33(c) states that payment under Section 44, which provides for a \$5,000 payment to the Special Fund where an employee dies without survivors, operates as an assignment to the employer of all rights of the legal representative of the decedent to recover damages against a third person.

Section 33(d) provides that an employer to whom rights are assigned may either institute proceedings against a third party or enter into a compromise either with or without filing suit.

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Inasmuch as decedent had no dependents entitled to receive death benefits under the Act, pursuant to Section 33(c) only decedent's employer had standing to pursue a negligence claim against the third party. Section 33(c) provides that employer's mandatory death benefits payment into the Special Fund, *see* 33 U.S.C. §944(c)(1), operates as an assignment to the employer of all rights of the legal representative of the deceased to recover damages against the third party. *Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995).

### **Section 33(e)**

Section 33(e) provides for distribution of the proceeds where employer brings a successful third-party action. Under this section, when an employer is assigned a third-party claim and obtains a recovery, the recovery is first utilized to reimburse employer for litigation expenses, including any attorney's fee awarded, benefits actually provided to the employee under Section 7, all amounts already paid as compensation, and the present value of compensation due in the future. 33 U.S.C. §933(e)(1).

Section 33(e)(2) then provides that any excess amount must be paid to the person entitled to compensation or the representative. This provision was amended to 1984 to repeal a 20 percent set-aside of the excess amount in favor of employer.

## Section 33(f)

### In General

If the employee initiates action against the third party within the time period allowed under Section 33(b) and recovers damages therefrom, the employer, pursuant to Section 33(f), is entitled to credit the employee's third-party recovery against its liability for compensation payments under the Act. Under the 1984 Amendments, the employer may only set off the "net" amount recovered less the expenses "reasonably incurred" by the claimant in the course of the proceedings against the third party, including "reasonable" attorneys' fees. This amendment codifies the Fifth Circuit's holding in *Ochoa v. Employers National Ins. Co.*, 724 F.2d 1171 (5th Cir. 1984), *reaff'd following remand*, 754 F.2d 1196, 17 BRBS 49(CRT) (5th Cir. 1985), in which the court held that where an employee's third-party recovery was insufficient to cover both his attorney's fees and the compensation lien, the lien was payable out of the net recovery, after costs of litigation, including reasonable attorney's fees, were subtracted. The Board had reached a similar result, holding that an administrative law judge erred in computing the offset based on claimant's gross judgment rather than on his actual net recovery. *Luke v. Petro-Weld, Inc.*, 14 BRBS 269 (1981), *on remand from* 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980); *see also Nacirema Operating Co. v. Oosting*, 456 F.2d 956 (4th Cir. 1972), *cert. denied*, 409 U.S. 980 (1972).

The Act does not expressly provide for reimbursement from a judgment or settlement obtained by the worker from a third party of compensation benefits that an employer has already paid. *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980). The courts have, however, held that employer has a subrogation right to be reimbursed from a worker's net recovery from a third party for the full amount of compensation already paid. *See, e.g., Peters v. North River Ins. Co.*, 764 F.2d 306, 17 BRBS 114(CRT) (5th Cir. 1985). This is true even if the third-party award is reduced due to the employee's contributory negligence. *Hayden v. Kerr-McGee*, 787 F.2d 1000, *reh'g denied*, 790 F.2d 890 (5th Cir. 1986); *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967).

The Supreme Court has held that the employer does not have to pay a share of the employee's legal expenses in securing the third-party recovery. *Bloomer*, 445 U.S. 74. The 1984 Amendments to Section 33(f) did not modify the Supreme Court's decision in *Bloomer*, but reinforced it. Thus, under Section 33(f) one first determines the net amount of the recovery, which is the total recovery minus legal expenses. If the net amount exceeds the compensation due claimant under the Act, employer is not required to pay further benefits. If little or nothing is left after the lien and attorney's fees have been deducted from the recovery, the court may adjust the attorney's fees in order to obtain a sufficient recovery for the injured worker. The lien, however, remains inviolate and carrier cannot be liable for any of the attorney's fees. This is consistent with the

legislative history of the 1984 Amendment. *Bartholomew v. CNG Producing Co.*, 862 F.2d 555, 22 BRBS 42(CRT) (5th Cir. 1989).

If the third-party award is less than the benefits due, the employee is entitled to be paid the difference by the employer. If the award against the third party is greater than the benefits owed or previously paid by the employer, the employer is entitled to credit the employee's third-party recovery against not only its past obligations under the Act, but also any future obligations for which it may be responsible. *Webb v. Santa Fe Drilling Co.*, 2 BRBS 367 (1975). The employee is entitled to retain all proceeds of the third-party action remaining thereafter. The employer is not only entitled to credit the third-party recovery against its liability for compensation payments under the Act, but also for all past and future Section 7 medical benefits payable to the employee. *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Inscoe v. Acton Corp.*, 19 BRBS 97 (1986), *aff'd mem.*, 830 F.2d 1188 (D.C. Cir. 1987); *Ruby v. Dresser Offshore Services, Inc.*, 8 BRBS 432 (1978); *Webb*, 2 BRBS 367.

Employer is not permitted to include in its compensation lien on claimant's third-party recovery the sum paid by employer for a confirmation medical examination by its own physician. Employer also is not permitted to include in its lien the sum charged by the Department of Labor for an impartial examination of claimant. *Castro v. Maher Terminals, Inc.*, 710 F. Supp. 573 (D.N.J. 1989).

Claimant is entitled to offset the medical expenses paid by his private group insurance carrier because employer would have been liable for these expenses but for the fact that the private carrier had already paid them. Claimant does not receive a double recovery because he does not receive any reimbursement for these previously paid benefits. *Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1(CRT) (5th Cir. 1991). In affirming the Board's decision, the court stated that under Section 33(f) claimant's right to benefits resumes when the benefits "otherwise payable" under the Act equal the net amount of the third-party recovery. *Texports Stevedores Co.*, 931 F.2d at 334, 28 BRBS at 4(CRT).

Section 33(f) provides that employer has the first lien against the net proceeds of a third-party settlement; secondary lien rights are provided to the Special Fund and the carrier under Section 33(g)(3) and (h). Because employer is primarily liable for the payment of compensation to claimant and because the third-party action arose from the same disability for which employer would be responsible if claimant was unable to obtain recovery from a third party, the Board held that employer was entitled to priority on the lien for the third-party recovery. *Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206 (1989). The Board held that under Section 33(g)(3), however, the Special Fund's lien rights in third-party settlement proceeds have priority over the employer's offset rights against

future compensation under Section 33(f), as *Lindsay* is not determinative of this issue. To hold otherwise would render Section 33(g)(3) meaningless, as employer's continued liability for medical and funeral expenses in this case could create future obligations subject to offset at any time, and therefore postpone repayment to the Fund. *Perry v. Bath Iron Works Corp.*, 29 BRBS 57 (1995).

An employer need not formally intervene in a claimant's third-party suit to recoup from the claimant's third-party recovery any Longshore benefits previously paid. *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021 (5th Cir. 1987).

The Board has rejected an employer's attempt to compute its Section 33(f) offset on a present value basis for four reasons: (1) the plain language of the statute does not provide for it; (2) no case law provides for it and the consistent practice has been to compute deficiency compensation on a dollar-for-dollar basis; (3) the New York law on which Section 33 is based does not permit it; and (4) application of a present value would undercompensate claimants. *Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1(CRT) (5th Cir. 1991). In affirming the Board, the Fifth Circuit stated that while Section 33(e) refers to "present value" of future benefits, Section 33(f) does not. Given the different purposes of the two sections, they are not to be read together to allow a present value reduction for Section 33(f) purposes. *Texports Stevedores Co.*, 931 F.2d at 333, 28 BRBS at 2(CRT).

The Board has vacated an administrative law judge's conversion of a \$500 per month annuity to its alleged \$50,000 present value for purposes of calculating employer's net credit. Employer is entitled to a continuing credit of \$500 per month as it is paid to claimant. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd on other grounds*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

The Supreme Court, in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), stated that in the case where the claimant settles his third-party suit for greater than employer's liability under the Act, the employer's liability for compensation is "wiped out" by application of Section 33(f). *See also Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994). The Board has rejected the finding that Section 33(f) necessarily "wipes out" employer's total liability under the Act in all cases, although this may be the practical effect in many cases. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part). In neither *Cowart* nor *Cretan* was the court required to consider the long-term effect of medical treatment or of a worsening disability in an occupational disease case. In *Cowart*, the claimant sustained scheduled injury, and was deceased by the time the Supreme Court decided the case. Similarly, in *Cretan*, the employee was deceased, and inherent in the court's decision is the fact that the net amount of the third-

party recovery exceeded employer's liability for decedent's *inter vivos* claim for disability and medical benefits and for death benefits under Section 9. In *Harris*, the Board held that where the forfeiture provisions of Section 33(g) do not apply, the offset provision under Section 33(f) does not "extinguish" employer's total statutory liability, but provides employer a credit in the amount of the net third-party recovery against employer's liability for both compensation and medical benefits under the Act. 28 BRBS at 269. Similarly, the Board held in *Gladney, et al. v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring), that the Fifth Circuit's decision in *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), does not stand for the proposition that Section 33(f) extinguishes an employer's liability for benefits in all situations. *See, e.g., Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995), *aff'g and rev'g* 28 BRBS 20 (1994) (providing for deficiency compensation to minor son).

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The Board reiterated its holdings that an employer is entitled to a Section 33(f) credit in the amount of claimant's net proceeds of a third-party settlement against its liability for all past and future Section 7 medical benefits because the Section 33(f) offset for the "amount" determined to be payable to claimant under the Act includes both medical benefits and disability compensation, rejecting the administrative law judge's finding to the contrary. *O'Brien v. Evans Financial Corp.*, 31 BRBS 54 (1997) (Brown, J., dissenting on other grounds), *rev'd on other grounds sub nom. Evans Financial Corp. v. Director, OWCP*, 161 F.3d 30, 32 BRBS 193(CRT) (D.C. Cir. 1998).

The Board vacated an administrative law judge's holding that employer's credit was limited to the net amount of claimant's settlement in view of specific terms of the release executed by claimant which could provide a contractual basis for a credit in the gross amount of the settlement proceeds if the administrative law judge found that the release "clearly and unambiguously" demonstrated an intent to provide employer with such a credit. *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring).

The Board held that the pertinent question in this case is whether INA has a lien right under Section 33(f) against claimant's third-party recovery for benefits it voluntarily paid to claimant after his injury. Specifically, the Board determined that INA had a lien right absent a contractual waiver of this right. Further, since INA attempted to recoup its payments from Elf, the borrowing employer, instead of claimant or the third party, and the district court dismissed INA's intervention in the third-party case, INA could not rely on its Section 33(f) lien rights in seeking reimbursement from Elf in this case. *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998).

In light of existing case precedent in *Force*, *Cretan*, and *Maples*, holding that credits under Section 33(f) must be made on a dollar-for-dollar basis without taking into account

present value or interest, the Board held that the administrative law judge properly calculated employer's offset of a third-party settlement by crediting it for the actual amount claimant received each month under an annuity rather than awarding employer a credit based on the purchase price of the annuity. A compelling reason for adhering to this precedent is that, if the credit is taken as the money is actually received, the risk of non-payment by the annuity company is on employer rather than on claimant, thus ensuring that employer does not get a credit for third-party payments claimant may never receive. *Gilliland v. E. J. Bartells Co., Inc.*, 34 BRBS 21 (2000), *aff'd*, 270 F.3d 1259, 35 BRBS 103(CRT) (9<sup>th</sup> Cir. 2001).

The Ninth Circuit affirmed the Board's holding that employer was entitled to a dollar-for-dollar credit for the monthly payments claimant was receiving from a third-party defendant against death benefits payable by employer, at the time of receipt of each payment, rather than to a one-time credit for the present value of the annuity purchased by the third-party defendant to fund its settlement obligation. Claimant's interpretation is inconsistent with the Act's plain language that employer's offset is equal to the "actual amount recovered" by the claimant, nor is there any support for claimant's contention that employer's entire offset is to be taken at one time. *Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 35 BRBS 103(CRT) (9<sup>th</sup> Cir. 2001), *aff'g* 34 BRBS 21 (2000).

Where claimant, decedent's widow, did not institute civil proceedings against a third party, as required by the plain language of Section 33(f), and was not a signatory to the pre-death third-party settlement, the Board held that the Section 33(f) offset provisions were inapplicable. While claimant received a portion of the settlement funds, her receipt of the proceeds was not the result of the surrender of any of her rights, nor was it the result of any proceeding which she initiated. *Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000).

The Ninth Circuit reversed the Board's holding that the last responsible employer is entitled to a credit for Section 8(i) settlement payments made by other potentially liable longshore employers in claimant's occupational disease claim. The court rejected employer's contention that Section 33(f) provides for a credit under these circumstances, as there was no "third party" potentially liable to both claimant and employer. *Alexander v. Director, OWCP*, 897 F.3d 805, 36 BRBS 25(CRT) (9<sup>th</sup> Cir. 2002), *rev'g in part Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1999) and 34 BRBS 34 (2000).

The Board affirmed the administrative law judge's finding that employer is not entitled to a credit for the amount of medical benefits it would have had to pay decedent had he proceeded with his claim under the Act. As there is no liability under the Act to decedent, there is nothing against which the third-party proceeds can be credited. *Maples*, 931 F.2d 331, 28 BRBS 1(CRT), therefore, is distinguishable. Moreover, the proceeds of decedent's third-party lawsuit cannot be credited against employer's liability for death benefits. *Mabile v. Swiftships, Inc.*, 38 BRBS 19 (2004).

The party claiming a credit for the claimant's proceeds from a British tort suit, AG Jersey here, has the burden of proving the allocation of the settlement proceeds to show that it is deserving of a credit for benefits due under the Act. In this case, AG Jersey has not established the applicability of any of the Act's credit doctrines as: it did not show there were payments made under another workers' compensation act or the Jones Act (Section 3(e)); it did not show there was a reduction of benefits due to a modification of a prior award (Section 22); it did not show there was a third-party payment (Section 33(f)); and it did not show there was an injury under the schedule for which prior payments had been made (*Nash*). AG Jersey also did not show that the settlement payment was an advanced payment of compensation (Section 14(j)), as the details of the settlement have not been divulged. The Board also rejected the suggestion that it create another extra-statutory credit provision; double recoveries are not absolutely prohibited under *Yates*, 519 U.S. 248, 31 BRBS 5(CRT). The Board also rejected AG Jersey's argument that allowing double recovery would give non-U.S. citizens greater rights, stating that the rights of U.S. citizens and foreign nationals are not always equal under the Act. Therefore, the Board held that AG Jersey is not entitled to a credit for payments made to claimant pursuant to the tort settlement. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

The Board reiterated its holdings in *Gladney*, 30 BRBS 25, and *Pool*, 30 BRBS 183, that the Fifth Circuit's decision in *Villanueva*, 868 F.2d 684, does not stand for the proposition that Section 33(f) extinguishes an employer's total liability for benefits in all cases. Rather, Section 33(f) provides the employer with an offset in the amount of the claimant's net third-party recovery against its liability for compensation and medical benefits, and compensation and medical benefits are suspended until the net recovery is exhausted. *Pittman v. New Century Fabricators, Inc.*, 50 BRBS 17 (2016).

## **“Person Entitled to Compensation”**

The Board held in *Castorina v. Lykes Bros. Steamship Co.*, 21 BRBS 136 (1988) that the phrase "person entitled to compensation" does not apply in the same manner to Sections 33(f) and (g). While the definition of "person entitled to compensation" was limited under Section 33(g) to a claimant receiving compensation at the time of the third-party settlement, *see* discussion in Section 33(g) of the desk book, concerns regarding claimant's entitlement at the time of settlement were held inapplicable under Section 33(f). For purposes of Section 33(f), the Board held that one is a "person entitled to compensation" regardless of his benefit status at the time of the settlement as long as he ultimately obtains benefits under the Act. *See also Armand v. American Marine Corp.*, 21 BRBS 305 (1988).

In *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in part and rev'd in part sub nom. Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991), the Board rejected a widow's contention that she was not a "person entitled to compensation" at the time she settled her potential wrongful death claims prior to the death of the employee, in view of the decision in *Castorina*. *Cf. Jones v. St. John Stevedoring Co.*, 18 BRBS 68 (1986), *rev'd on other grounds sub nom. St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, *reh'g denied*, 823 F.2d 552 (5th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987) (a survivor is not a "person entitled to compensation" prior to the employee's death). In affirming the Board's decision, the Ninth Circuit deferred to the Director's view that Section 33(f) does not require that the claimant's status as a "person entitled to compensation" be determined at any particular time; the only relevant inquiry is whether the claimant is impermissibly recovering twice for the same injury regardless of when such payments occur. *Force*, 938 F.2d at 984, 25 BRBS at 18(CRT). The Board followed its decision in *Force* in *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994), and *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

In view of the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), the Ninth Circuit again discussed the meaning of the phrase "person entitled to compensation" under Section 33(f). *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994). In *Cowart*, the Supreme Court held that an employee becomes a "person entitled to compensation" under Section 33(g) at the moment his right to recovery vests and not when an employer admits liability. *Cowart*, 505 U.S. at 477, 26 BRBS at 52(CRT). The Court stated that the normal meaning of entitlement includes a right or benefit for which a person qualifies, and does not depend upon whether the rights have been acknowledged or adjudicated, but only upon the person's satisfying the prerequisites attached to the right. In *Cretan*, the Ninth Circuit held that the phrase "person entitled to compensation" must receive the same construction under Sections 33(f) and (g). In affirming the Board's holding that employer is entitled to an offset under Section 33(f), the court rejected the

claimants' contention that they were not "persons entitled to compensation" inasmuch as they settled their third-party suits prior to the employee's death. The court held that, consistent with *Force*, the right to death benefits does not have to become vested at the time of the third-party settlement for purposes of employer's offset; the inquiry is whether claimant is recovering twice for the same injury regardless of when payments for the injury occur. *Cretan*, 1 F.3d at 847, 27 BRBS at 98(CRT). The court's analysis led it to conclude that claimants were also "persons entitled to compensation" under Section 33(g) and that their failure to obtain employer's consent to the settlements barred their receipt of benefits, reversing the Board's decision on this issue. See *Force v. Kaiser Aluminum & Chemical Corp.*, 30 BRBS 128, 131 (1996).

The Fifth Circuit rejected the Ninth Circuit's interpretation of *Cowart* in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 29 BRBS 113 (CRT) (5th Cir. 1995), *aff'g Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994)(Brown, J., concurring) (Smith, J., dissenting). The Fifth Circuit affirmed the Board's holding that one is not a "person entitled to compensation" under *Cowart* in a death benefits claim until the death of the employee, specifically disagreeing with the *Cretan* court's interpretation of "person entitled to compensation" as contrary to the "vesting" discussion in *Cowart*. See *Henderson v. Ingalls Shipbuilding, Inc.*, 30 BRBS 150, 154 (1996). The Supreme Court affirmed the Fifth Circuit's decision and held that before an injured worker's death, the worker's spouse is not a "person entitled to compensation" for death benefits within the meaning of Section 33(g)(1). Accordingly, the worker's spouse does not forfeit the right to collect death benefits under the Act if she enters into a third-party settlement without employer's approval prior to the worker's death. The Supreme Court's decision resolves the prior split in the circuits as evidenced in *Yates* and *Cretan*. The Court, however, refused to rule on whether the construction of "person entitled to compensation" must be given the same meaning under subsection (f) as under subsection (g). *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

The Fourth Circuit also declined to rule on whether the construction of the term "person entitled to compensation" must be given the same meaning under Sections 33(f) and 33(g), noting that resolution of this issue was not necessary to deciding the case before it as employer did not establish any apportionment of the pre-death settlements and thus was not entitled to a credit. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998).

The Board addressed the issue of a credit for a third-party recovery received by a widow prior to her husband's death in a case where an administrative law judge initially awarded benefits and allowed employer a Section 33(f) credit for the net amounts received from previous third-party settlements. Subsequent to this decision but prior to the employee's death, the employee and his wife (claimant) entered into additional third-party settlements. In a subsequent decision, the administrative law judge declined to award employer a Section 33(f) credit for the net amounts claimant received in the post-

decision, pre-death, third-party settlements because she was not a “person entitled to compensation” when she entered into these settlements. On appeal, the Board rejected employer’s contentions that it was entitled to a credit either as a matter of contract or under the principle of equitable subrogation. The Board held, however, that employer was entitled to a credit pursuant to Section 33(f). The Board concluded that since employer’s right to a credit arose only after an award of death benefits had been made, claimant became a “person entitled to compensation” at this time and employer was entitled to a credit under Section 33(f). As the language of Section 33(f) which provides employer with a credit does not restrict to a specific time frame those recoveries which are subject to the credit, the Board concluded that Section 33(f) provides employer with a full credit for *all* amounts received from third-party settlements by a “person entitled to compensation.” *Taylor v. Plant Shipyard Corp.*, 32 BRBS 155 (1998) (Hall, C.J., concurring and dissenting), *rev’d sub nom. Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000).

On appeal, the Ninth Circuit reversed, interpreting the phrase “person entitled to compensation” identically under both Sections 33(f) and (g) of the Act, and thus held that decedent’s widow was not “a person entitled to compensation,” *i.e.*, death benefits, at the time she settled the third party cases because she lacked a prerequisite, *i.e.*, death of her spouse; accordingly, employer was not entitled to a credit under Section 33(f) for the portion of the pre-death settlement apportioned to the spouse. Although this would result in claimant’s receiving a double recovery, the court held, citing *Yates*, 519 U.S. 248, 31 BRBS 5(CRT) (1997), that this does not warrant a departure from the plain language of the statute. *Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000).

## **Apportionment of Employer's Offset - Same Injury or Disability**

In a case of first impression, the Board rejected the notion that because claimant's compensable disability was caused only in part by exposure to asbestos, employer was entitled to reduce its liability under the Act by an amount equal to only part of the amount received by claimant from settlements of third-party lawsuits against asbestos manufacturers. Accordingly, reasoning that it would be inconsistent to hold employer liable for claimant's entire pulmonary disability under the Act irrespective of the extent of the disability actually attributable to claimant's job with employer (under the "last injurious exposure" and "aggravation" rules) while limiting the amount of employer's offset to a percentage of claimant's net third-party recovery equal to the percentage of claimant's disability stemming from asbestos exposure, the Board upheld the administrative law judge's decision to grant employer a Section 33(f) offset for the entire amount of the net third-party recovery. *Chavez v. Todd Shipyards Corp.*, 21 BRBS 272 (1988).

In *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), the Board vacated as premature the administrative law judge's findings concerning the proper method of calculating the amount of employer's Section 33(f) setoff against any possible future third-party settlement, inasmuch as there had not yet been any settlements to credit. The Ninth Circuit reversed the Board's determination that the Section 33(f) apportionment issue was not ripe because no settlement had been executed between claimant and the third parties. The court stated that the uncertainty in the apportionment question created a practical hardship for both parties preventing an execution of a settlement. Thus, the matter met the traditional standard for determining ripeness, and the court remanded the case to the Board for consideration of the parties' theories of apportionment. *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992).

On remand the Board adopted the Director's position and held that where a claimant suffers two distinct disabilities, one of which is the basis for third-party litigation, an administrative law judge must determine whether each disability is work-related so as to ascertain which disability is being compensated. *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (McGranery, J., dissenting) (decision after remand). If both disabilities are work-related, or if only the disability which was not the basis of the third-party suit is work-related, the Board holds that employer is not entitled to an offset under Section 33(f) from the proceeds of the third-party suit. If the disability on which the third-party suit was based is the only work-related disability, then employer is entitled to offset its liability for the combined disabilities against the net proceeds of any third-party suit settled on account of that disability. The Board noted it remanded on this issue in *O'Berry v. Jacksonville Shipyards Inc.*, 22 BRBS 430 (1989), *aff'g and modifying on recon.* 21 BRBS 355 (1988). The contention that the settlement proceeds should be apportioned in any way for purposes of employer's offset was rejected based on *Chavez*, 21 BRBS at 272. *Chavez*, 27 BRBS at 84.

On reconsideration *en banc*, the Board again rejected the contention that employer's offset should be apportioned to limit it to that fraction of the whole disability caused by asbestosis. On the issue of whether the entire award was subject to offset, the Board equally divided; thus, the prior decision was affirmed. Two Board members reiterated the Board's holding that where claimant has two potentially work-related disabling conditions and files suit against a third party due to one of those conditions, employer's entitlement to a Section 33(f) offset depends on whether each condition is work-related. The two remaining Board members held that employer was entitled to a full offset. *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (*en banc*) (Brown and McGranery, JJ., dissenting). The Ninth Circuit affirmed the Board's decision, holding that because claimant suffered two work-related injuries, either of which could have resulted in his total disability, he could have filed a claim under the Act for either condition. The court set forth the Director's interpretation which permits offset under Section 33(f) only if the third-party payments are due to the sole and same injury that gives rise to the claim under the Act; otherwise employer would experience a windfall as claimant could have sought a recovery for the injury for which no third party proceeds were available. The court thus held that the administrative law judge properly denied employer either a full or an apportioned credit under Section 33(f). *Todd Shipyards Corp. v. Director, OWCP [Chavez]*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

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Initially, the Board remanded for the administrative law judge to determine whether settlements received by claimant as a result of asbestos exposure in suits against various ship owners, stevedores and insurers as a result of loading activities on ships which were not owned by Lykes Brothers were the results of suits against "third parties" as provided in Section 33(a), for which employer would be entitled to an offset under Section 33(f). *Castorina v. Lykes Bros. Steamship Co.*, 21 BRBS 136 (1988).

Following a decision on remand, the Board noted that Section 33 contains no requirement that an employer establish that a claimant's prior occupational exposure resulted in, contributed to, or aggravated the condition for which he sought compensation under the Act. Section 33(a) specifically refers not to injury but to suits resulting from disability for which compensation is payable under the Act; an employer's entitlement to a credit pursuant to Section 33(f), therefore, is not limited to those recoveries as a result of third-party lawsuits arising out of specific exposures alleged in the claim for compensation under the Act, as long as the same disability is involved. In this case, both the compensation claim and the third-party suit were for asbestos exposure. The Board determined that employer, who pursuant to the "last injurious exposure" and "aggravation" rules was responsible for compensating claimant for the entirety of his disability even though that disability may have been occasioned only in part by his employment with employer, may be entitled to a credit for the net amount of claimant's third-party settlements. *Castorina v. Lykes Bros. Steamship Co.*, 24 BRBS 193 (1991).

In a case involving successive injuries, the Board held that employer was not entitled to a credit under Section 33(f) for the \$25,000 which Eagle Marine paid to settle claimant's claim for a prior injury to his left knee because Eagle Marine was not a "third party" under Section 33(a). Also, employer was not entitled to a credit under any other provision of law because compensation for a prior scheduled injury cannot be offset against benefits for permanent total disability, even though awarded in this case for subsequent injury to the same scheduled member. *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

While claimant was undergoing surgery for low-back injuries received during his employment, he sustained further injury when he was dropped by nurses. Claimant settled his malpractice claim against the hospital for injuries resulting from this incident. The Board held that employer was not entitled to offset its liability for compensation relating to claimant's back injuries against the proceeds of the settlement under Section 33(f) as the settlement was for claimant's malpractice injuries only, and claimant's claim under the Act was only for disability resulting from the original injury. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1994).

## **Apportionment of Employer's Offset Among Claims and "Persons Entitled to Compensation"**

In *Brandt v. Stidham Tire Co.*, 16 BRBS 277 (1984), *aff'd in part, part on other grounds and rev'd on other grounds*, 785 F.2d 329, 18 BRBS 73(CRT) (D.C. Cir. 1986), the Board stated that the administrative law judge did not err in refusing to reduce a Section 33(f) offset of a third-party settlement for pain and suffering where there was no evidence establishing the amount of the settlement that constituted payment for pain and suffering. The D.C. Circuit, in affirming the Board's disposition, stated that employer's offset is for the "actual amount recovered" by the claimant, and that this result is consistent with the prevailing rule in state workers' compensation proceedings and under FECA. *Brandt*, 785 F.2d at 331, 18 BRBS at 75(CRT).

The Board again addressed the issue of apportionment of employer's credit based on the types of damages recovered by the employee or survivor in the third-party suit. In *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in part and rev'd in part sub nom. Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991), the Board held that testimony regarding the "likely" value of various elements in a third-party settlement is not sufficient to establish apportionment for the purposes of employer's offset under Section 33(f). Furthermore, the Board held, consistent with the court's opinion in *Brandt*, that employer may always offset its workers' compensation liability against the total net third-party recovery of a party even if it includes such items as pain and suffering and punitive damages.

The Board held, however, that if the settlement is apportioned among various plaintiffs, employer is only entitled to offset its liability to a particular plaintiff against those portions of the settlement received in exchange for the surrender of that plaintiff's rights. *Force*, 23 BRBS at 6. Thus, if the settlement is apportioned among parties, employer would be entitled to offset its liability to the widow for death benefits against those portions of the third-party recovery received in exchange for the surrender of her rights, and to offset its liability to the decedent for accrued disability benefits received in exchange for the surrender of his rights. *Id.* Inasmuch as the testimony was insufficient to establish apportionment, however, employer is entitled to an offset against the entire net settlement proceeds. *Id.*

The Board followed its *Force* decision in *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd on other grounds*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir 1993), *cert. denied*, 512 U.S. 1219 (1994), and *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990). In *Cretan*, the Board reversed the apportionment of employer's Section 33(f) credit among the claims of decedent, his wife and daughter. The Board held that the deposition testimony of decedent's and claimant's counsel in their third-party actions regarding the probable value of each released cause of action was inherently unreliable after-the-fact evidence. The Board held that evidence of apportionment of settlement proceeds among

released causes of action must be contained within the settlement agreement itself or in the approval of the settlement. Similarly, in *Ponder*, the Board held that the administrative law judge acted within his discretion in discrediting claimant's evidence regarding apportionment and in finding that any allocation made subsequent to the settlement was highly speculative where the settlement agreements themselves did not allocate amounts for the various claims, and where the attorney who supplied the affidavit regarding apportionment was an associate in the same firm as claimant's attorney. Absent competent evidence regarding apportionment of the children's interest in the third-party recovery, the administrative law judge properly determined that employer is entitled to credit the entire amount of the recovery against its liability under the Act. See also *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only) (employer is not entitled to an offset for the proceeds of decedent's malpractice claim against liability for widow's death benefits).

On appeal, the Ninth Circuit held in *Force* that Section 33(f) does not provide for apportionment among types of damages in third-party settlements. Thus, the court affirmed the finding that employer was entitled to an offset against the entire net amount of a claimant's third-party recovery including non-economic damages such as pain and suffering and punitive damages. The court held, however, that the administrative law judge erroneously permitted employer to offset its liability against the entire third-party settlement. Because Section 33(f) allows the employer to offset only that portion of a third-party settlement attributable to the claimant, there must be apportionment of damages among the parties to the settlement. As the *Force* children did not file claims and are not entitled to compensation under the Act, Section 33(f) simply does not apply to the children or their third-party recovery. The court held that, contrary to the Board's holding, employer, not claimant, bears the burden of proving apportionment of a settlement involving multiple parties, and it remanded the case for the administrative law judge to apply the proper legal standard and to allow employer to submit evidence to meet its burden of proof. The court stated that in making an apportionment determination, the administrative law judge should be wary of apportionment suggested by the settling parties or their counsel. Instead the administrative law judge should consider objective factors such as how the settlement sum was actually distributed among the members, and the going rate for settlements or judgments for the same types of injuries. *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991), *aff'g in part and rev'g in part Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989).

The Ninth Circuit's decision in *Force* has been followed by the Board in cases arising in all jurisdictions and by the Fourth and Fifth Circuits. In *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992), the Board rejected claimant's argument that the widow's portion of the third-party settlement could not be the subject of a Section 33(f) credit because it represented loss of consortium and wrongful death. The Board further rejected employer's argument that it was entitled to a Section 33(f) credit for the entire net amount

of a third-party settlement because there was no clear apportionment of the third-party settlement. The Board stated that employer must establish the amount of the settlement allocated to the parties entitled to compensation in order to receive any credit. Accordingly, because it was unclear whether the widow's estate, the only potential person entitled to compensation in this case, was actually a party to the settlement, and in light of the change in the burden of proof necessitated by the Ninth Circuit's decision in *Force*, the Board remanded to allow employer the opportunity to present evidence necessary for resolution of the Section 33(f) issues in this case. *Jones*, 25 BRBS at 361-362.

In *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part. part on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT)(4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993), the Fourth Circuit rejected the Director's argument that employer was not entitled to an offset because at least a part of the settlement proceeds represented loss of consortium. The court initially held that employer was entitled to an offset for the entire net amount of the settlement because the settlement agreement did not specifically apportion the amounts intended for the claimant and the amounts intended for family members. *Sellman*, 954 F.2d at 244, 25 BRBS at 108(CRT). On rehearing, however, the court held, consistent with the Ninth Circuit's decision in *Force*, that employers are not automatically entitled to a full offset whenever the settlement agreement fails to address the subject of apportionment; rather, the administrative law judge must address the particular circumstances of the case to determine the portion intended for claimant and the portion intended for family members. *Accord Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 29 BRBS 113(CRT) (5th Cir. 1995), *aff'g Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994) (Brown, J., concurring) (Smith, J., dissenting), *aff'd*, 519 U.S. 248, 31 BRBS 5(CRT) (1997); *Brown v. Forest Oil Corp.*, 29 F.3d 966, 28 BRBS 78(CRT) (5th Cir. 1994). Employer bears the burden of proof on the apportionment issue, and the Fourth Circuit suggested that since employer did not have the benefit of its holding that it should bear the burden of proof on apportionment, the administrative law judge may wish to reopen the record and permit employer to submit additional evidence on the issue. *Sellman*, 967 F.2d at 973, 26 BRBS at 9(CRT).

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The Fifth Circuit held that the widow, in signing a third-party settlement, contractually agreed to give employer a Section 33(f) credit for all sums received as a result of the agreement, but only to the extent of the sums which she personally received. *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, *reh'g denied*, 823 F.2d 552 (5th Cir. 1987), *aff'g in part and rev'g in part Jones v. St. John Stevedoring*, 18 BRBS 68 (1986), *cert. denied*, 484 U.S. 976 (1987).

The Fifth Circuit stated that employer's offset rights were limited to the portion of the recovery intended for the employee. Accordingly, employer could not apply its lien to the recovery of the employee's wife for loss of consortium. *Brown v. Forest Oil Corp.*,

29 F.3d 966, 28 BRBS 78(CRT) (5th Cir. 1994).

The Board vacated the administrative law judge's finding that employer was entitled to offset the total net amounts of the third-party post-death settlements, including the amounts received by the employee's heirs, by virtue of the language contained in the settlements. Since decedent's heirs did not file their own claims under the Act, Section 33(f) does not allow the amounts they received in the third-party settlements to be offset against claimant's death benefits as the children are not "persons entitled to compensation." The Board further held that assuming, *arguendo*, the administrative law judge correctly interpreted the language of the third-party settlements as entitling employer to credit the entire net proceeds of the settlements, enforcement of such language would be precluded by Section 15(b) of the Act, 33 U.S.C. §915(b). Thus, the Board held that employer is entitled to offset only the amount claimant received in the third-party post-death settlements, not the amounts received by decedent's other heirs, against its compensation liability. *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994) (Brown, J., concurring) (Smith, J., dissenting), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 29 BRBS 113(CRT) (5th Cir. 1995), *aff'd*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

The Fifth Circuit affirmed the Board's holding that employer was entitled to a credit under Section 33(f) for only the portion of the third-party settlement proceeds intended for the widow, following *Force*, *Sellman* and *Brown*, as the decedent's children did not file claims for death benefits and thus were not "persons entitled to compensation." The court further held that the language of the third-party settlements was too vague to support the finding that claimant agreed that employer would be entitled to a lien in the full amount of the proceeds. The court stated that the releases which purport to give employer a set-off for the entire amount refer to a "lien against compensation" and the only compensation employer was liable for was death benefits to the widow. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 29 BRBS 113(CRT) (5th Cir. 1995), *aff'g Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994) (Brown, J., concurring) (Smith, J., dissenting), *aff'd*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

In a state court apportionment of a third-party settlement, claimant's two minor children were each awarded \$15,000. Prior to the apportionment, claimant promised to place an additional \$25,000 from the settlement in trust for each child. The administrative law judge determined that employer was entitled to offset \$40,000, rather than \$15,000, of its liability to each child. The Board affirmed, holding that the trust agreement was valid and that the administrative law judge rationally inferred that the trust agreement was an integral part of the children's recovery from the third-party settlement. *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989).

The Board held that employer was entitled to a Section 3(e) credit for the entire net amount of the settlement of third-party suits that included a Jones Act suit. Where, as

here, the record is unclear as to how the settlement amount is apportioned among the various claims being settled, employer is entitled to offset the entire net amount against its liability under the Longshore Act. The Board further stated that even if employer were not entitled to a Section 3(e) credit, it would be entitled to a Section 33(f) credit, as claimant filed suit and recovered against third parties. *Bundens v. J.E. Brenneman Co.*, 28 BRBS 20 (1994), *aff'd and rev'd*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995).

The Third Circuit held that employer was entitled to a credit for the entire net proceeds of settlements of third-party suits, including a Jones Act suit, by virtue of the combination of Sections 3(e) and 33(f), and not by either alone, as the Board held, as the settlements were not apportioned by type of claim. Employer's entitlement to a credit must be separately calculated with respect to the separate claims of the widow and her son, however, as each is a person entitled to compensation. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995).

The Board held that the second administrative law judge erred in not giving collateral estoppel effect to the previous judge's award to employer of an offset under Section 33(f) for the entire net amount of the third-party settlements entered into by decedent and his wife (claimant). The effect of the second administrative law judge's finding, allowing employer a credit for claimant's pre-death recoveries against an award of death benefits, is to award a double offset to employer from the same recoveries. The Board remanded the case for the administrative law judge to consider employer's entitlement to an offset for settlements entered into after the first administrative law judge's decision. *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996).

The Board vacated the administrative law judge's finding that employer was entitled to credit its entire liability for both decedent's and claimant's claims by the net amount received by both decedent and claimant in the third-party settlement. Rather, pursuant to the Ninth Circuit's holding in *Force*, 938 F.2d 981, 25 BRBS 13(CRT), once the amounts the adult children received in the third-party settlement were factored out, employer was entitled only to a credit for each amount decedent and claimant received in the settlement against decedent's and claimant's respective claims. The Board, however, rejected claimant's contention that employer was not entitled to offset her recovery for loss of consortium, as Section 33(f) sets forth no such deduction from the term "net amount." Additionally, the Board rejected claimant's contention that employer was not entitled to any offset for the net amounts decedent and claimant received in the third-party settlement since employer failed to submit any evidence with regard to apportionment at the second hearing. While employer bears the burden of establishing apportionment, the Act does not prohibit an employer from relying on evidence submitted by claimant in pursuit of establishing apportionment. The Board remanded the case for the administrative law judge to consider the evidence claimant submitted into evidence, in order to determine the correct apportionment. Lastly, the Board rejected employer's contention that there was no evidence to show that any amount of the settlement was

apportioned to the children. The Ninth Circuit in *Force* specifically directed the administrative law judge to apportion the settlement amount among decedent, claimant and the children. Thus, the Board affirmed the administrative law judge's finding regarding the amount of the settlement allocated for claimant's children. *Force v. Kaiser Aluminum & Chemical Corp.*, 30 BRBS 128, 132 (1996).

In a case arising in the Fifth Circuit, the Board followed *Yates*, 65 F.3d at 460, 29 BRBS 119(CRT), in affirming the administrative law judge's determination that Section 33(f) did not allow employer to credit amounts received by claimant's non-dependent children against its liability for death benefits. The Board rejected the argument that the settlement releases provide for a greater lien, and reaffirmed that employer bears the burden of establishing apportionment of third-party recoveries. The Board further rejected employer's contention that the administrative law judge erred in failing to find claimant estopped from contesting employer's entitlement to an offset for amounts received by the children, holding that employer did not establish the necessary elements for application of the estoppel doctrine. *Henderson v. Ingalls Shipbuilding, Inc.*, 30 BRBS 150 (1996).

The Fourth Circuit held that because employer failed to meet its burden of demonstrating what portion of the third-party settlements entered into by the employee and his wife should be apportioned to the widow and what portion to the decedent, employer is not entitled to offset any of the settlements reached prior to the time decedent became "a person entitled to compensation" against either decedent's or the widow's claims. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998).

In a case where decedent's daughters received payments in accordance with a settlement, \$30,000 of which was received prior to their 23<sup>rd</sup> birthdays, the Board affirmed the administrative law judge's determination that employer could not take a credit for that money against its continuing liability for death benefits to claimant. At one time, the daughters were "persons entitled to compensation" and they were receiving compensation from employer. Had employer sought a credit against their third-party recoveries while they were receiving benefits, it would have been permitted to do so. As employer's only continuing obligation is to claimant, and as the law under Section 33(f) permits offsets only against proceeds apportioned to that person entitled to compensation, the Board affirmed the administrative law judge's use of the "individualized apportionment" method to determine employer's credit under Section 33(f), and it held that an employer may not seek retroactive reimbursement against benefits due another claimant. Consequently, it affirmed the administrative law judge's exclusion of the \$30,000 from employer's Section 33(f) offset. *Gilliland v. E. J. Bartells Co., Inc.*, 34 BRBS 21 (2000), *aff'd*, 270 F.3d 1259, 35 BRBS 103(CRT) (9<sup>th</sup> Cir. 2001).

The Board affirmed the administrative law judge's finding that employer was entitled to a complete recovery of the net amount of the settlement, as the terms of the settlement

clearly demonstrated an intent to provide employer with such by virtue of the guarantee of employer's lien, despite its later waiving it. Additionally, the Board affirmed the administrative law judge's finding that the apportionment of the settlement was 1/3 each to Ms. Valdez, Brad Valdez and Josh Valdez, as it was rational based on the testimony that the funds were never segregated as delineated in the district court judge's order, and as the administrative law judge is permitted, under *Force*, 938 F.2d 981, 25 BRBS 13(CRT) (9<sup>th</sup> Cir. 1991), to establish an apportionment other than that contained in the documentary evidence. *Valdez v. Crosby & Overton*, 34 BRBS 69, *aff'd on recon.*, 34 BRBS 185 (2000).

The Board affirmed the administrative law judge's finding that employer was not entitled to a credit for the amount of medical benefits it would have had to pay decedent had he proceeded with his claim under the Act. As there was no liability under the Act to decedent, there was nothing against which the third-party proceeds could be credited. *Maples*, 931 F.2d 331, 28 BRBS 1(CRT), therefore, is distinguishable. Moreover, the proceeds of decedent's third-party lawsuit cannot be credited against employer's liability for death benefits because claimant was not a "person entitled to compensation" with regard to these proceeds. *Mabile v. Swiftships, Inc.*, 38 BRBS 19 (2004).

## Waiver

A waiver in employer's insurance policy of its subrogation rights in a third-party claim does not affect an employer's right to a Section 33(f) set-off against future compensation. *Petro-Weld Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980). *Cf. Allen v. Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975) (where employer waives subrogation against a third party, it cannot assert a compensation lien for benefits already paid). In *Peters v. North River Ins. Co.*, 764 F.2d 306, 17 BRBS 114(CRT) (5th Cir. 1985), the court stated that, based on its holding in *Allen*, absent a waiver of subrogation, an employee and a third-party defendant may not settle the claim independently of employer's subrogation claim for reimbursement of the amount of compensation benefits employer has already paid to the employee under the Act.

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Employer did not waive its rights to a Section 33(f) offset when it settled the claim for a lump sum, including future medical treatment related to the accident. Employer was entitled to offset the amount of claimant's net third-party recovery under Section 33(f) and need not resume paying future medical expenses until those expenses exceed the net third-party recovery. *Inscoe v. Acton Corp.*, 19 BRBS 97 (1986), *aff'd mem.*, 830 F.2d 1188 (D.C. Cir. 1987).

The Board affirmed the administrative law judge's finding that employer waived its right to offset the proceeds of claimant's third-party settlement. The Board held that the administrative law judge was empowered to look outside the actual settlements to the Petition for Approval filed with the court because the terms of the agreements were ambiguous and not fully integrated in determining whether employer waived its right to offset. Based on the testimony of some of the attorneys involved in the third-party suit and on the language of the Petition for Approval, the administrative law judge rationally determined that the lien was waived and that compensation payments would continue to claimant uninterrupted. *Sellman v. I.T.O. Corp. of Baltimore*, 24 BRBS 11 (1990) (Brown, J., dissenting), *rev'd in part*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

The Fourth Circuit reversed the Board's affirmance of the finding that employer waived its right to a Section 33(f) offset because employer had agreed to have the settlement proceeds go directly to claimant and cease payments until its retained payments equaled the net value of the settlement. The court stated that Section 33(f) provides no basis for treating an employer's right to an offset differently depending on the time it takes to collect it. The court stated that it need not determine whether the settlement agreements were ambiguous on the waiver issue, as the Petition for Approval and testimony do not support the finding that employer waived its offset right. *I.T.O. Corp. of Baltimore v.*

*Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *rev'g in part* 24 BRBS 11 (1990) (Brown, J., dissenting), *cert. denied*, 507 U.S. 984 (1993).

The Board rejected claimant's contention that the word "lien," as used in employer's executed "Waiver of Lien," is interchangeable with the word "offset," as used in Section 33(f), and held that employer's subrogation rights are separate and distinct from its right under Section 33(f) to offset its compensation liability against the amounts claimant recovers from a third-party defendant. Since employer's Waiver of Lien stated only that employer waived "all past and future Liens for compensation paid or to be paid," and the record contained no indication that employer intended to waive its offset right under Section 33(f), the Board affirmed the administrative law judge's determination that employer retained an interest in the third-party settlements, and that claimant's failure to comply with Section 33(g) bars the claim. *Treto v. Great Lakes Dredge & Dock Co.*, 26 BRBS 193 (1993).

The Board remanded the case for consideration of whether the settlement agreement evidenced the parties' intent that carrier was entitled to the full amount of the agreed upon lien in satisfaction of its lien and credit rights prior to the Special Fund's satisfaction of its lien rights. *Perry v. Bath Iron Works Corp.*, 29 BRBS 57 (1995).

The Board held that employer waived its right to an offset against its liability for future medical benefits because it gave its written approval to the third-party settlement, which incorporated an agreement of which employer was aware and which provided in part that claimant would retain a certain amount of the proceeds from the settlement "free and clear" of employer's offset rights. Employer had the opportunity to object to the district director's order incorporating the agreement between claimant and the Special Fund limiting the offset rights to those of the Fund, and did not avail itself of the opportunity. Thus, the order became final. *O'Brien v. Evans Financial Corp.*, 31 BRBS 54 (1997) (Brown, J., dissenting), *rev'd in part sub nom. Evans Financial Corp. v. Director, OWCP*, 161 F.3d 30, 32 BRBS 193(CRT) (D.C. Cir. 1998).

On appeal, the D.C. Circuit held that, contrary to the Board's decision, there was insufficient evidence to support the conclusion that employer waived its right to a credit against its liability for future medical expenses. Specifically, the court held that none of the relevant documents, *i.e.*, the standard DOL third-party settlement consent form signed by employer, and two letters, contained evidence of a waiver. Rather, the consent form merely stated that employer had been advised of, and had approved, the third-party settlement, one letter was a cover letter with only cursory information, and the second letter consisted of an agreement between only the Special Fund and claimant with respect to the former's setoff rights. Moreover, in contrast to the Board's decision, the court held that employer's failure to object to the district director's Modified Compensation Order reflecting the terms of the third-party settlement cannot constitute a waiver of its right to

an offset against future medical expenses because nothing in the order compromised employer's right to this offset; thus, employer had no reason to challenge it. *Evans Financial Corp. v. Director, OWCP*, 161 F.3d 30, 32 BRBS 193(CRT) (D.C. Cir. 1998).

## Miscellaneous

In *Waganer v. Alabama Dry Dock & Shipbuilding Co.*, 12 BRBS 582 (1980), *rev'd on other grounds sub nom. Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982), the Board adopted an approach for apportioning Section 33(f) offset in a case where both employer and Section 10(h)(2) sources were liable for benefits

The Board affirmed the administrative law judge's determination that interest is to be computed on the benefits due after the award is calculated and Section 33(f) credits are deducted, since interest on the net amount is all that is required to make claimant whole. *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992).

The Fifth Circuit held that payments employer made to claimant under an invalid waiver agreement were subject to employer's lien on the proceeds of claimant's third-party settlement pursuant to Section 33(f). Employer attempted to comply with the Act by filing the necessary forms with DOL once it began making payments, and employer has a subrogation right in cases in which it makes voluntary payments. That employer failed to secure compensation did not affect its lien rights. *Brown v. Forest Oil Corp.*, 29 F.3d 966, 28 BRBS 78(CRT) (5th Cir. 1994).

The Fifth Circuit affirmed the administrative law judge's finding that employer was entitled to a credit under Section 33(f) of the Act for the full amount of claimant's net recovery, including pre-judgment interest. *Bourgeois v. Avondale Shipyards, Inc.*, 121 F.3d 219, 31 BRBS 137(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1022 (1998).

The Board held that the plain language of Section 33(f) provides employer an offset against future compensation due in the amount of the entire third-party net recovery, notwithstanding the fact that an unrelated pre-existing judgment creditor attached a portion of the net recovery. As there was no direct attempt to attach claimant's benefits under the Act, the Board rejected claimant's contention that Section 16 is applicable in the instant case. *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

## Section 33(g)

### In General

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 his compensation entitlement without obtaining employer's prior written consent. The section is intended to ensure that employer's rights are protected in a third-party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Collier v. Petroleum Helicopters, Inc.*, 17 BRBS 80 (1985), *rev'd on other grounds*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986).

Section 33(g) was altered by the 1984 Amendments. The wording of subsection 33(g)(1) is essentially the same as pre-amendment Section 33(g). It requires the employer's and carrier's prior written consent for any settlement in an amount less than the compensation to which the employee would be entitled under the Act. It states that if the third-party settlement is not approved in writing by the employer, the employee's right to benefits under the Act is barred. Under subsection 33(g)(2), which was added by the 1984 Amendments, if no written approval of a settlement is obtained as required in (g)(1), or if the employee fails to notify employer of any settlement obtained from or judgment against a third-party, then "all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged claimant's entitlement to benefits."

Interpreting the phrase "person entitled to compensation" in Section 33(g)(1) in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), the 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 Court stated that the normal meaning of entitlement includes a right or benefit for which a person qualifies, and does not depend upon whether the rights have been acknowledged or adjudicated, but only upon the person's satisfying the prerequisites attached to the right. The Court held that an employee is not required to get prior written approval of third-party settlements from employer in two situations: (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 employer's total liability under the Act. Under these circumstances, the claimant must give notice under subsection (g)(2). *Id.*, 505 U.S. at 482, 26 BRBS at 53(CRT).

Section 702.281 of the regulations, 20 C.F.R. §702.281, provides that every person claiming benefits under the Act shall promptly notify the employer and the district

director: 1) when a claim is made that someone other than employer is liable to the claimant for the injury or death, identifying such party by name and address; 2) legal action is instituted against such a party; and 3) any settlement, compromise or adjudication has been reached on such a claim. Subsection (b) essentially repeats the Section 33(g) requirement of written approval and states that the failure to obtain the required approval relieves employer of liability for compensation pursuant to Section 33(f) and for medical benefits under Section 7.

The Board held that the requirement in Section 702.281(a) that claimant provide notice when a third-party suit is instituted is not plainly inconsistent with Section 33(g), such that Section 702.281(a) must be invalidated. Although Section 702.281(a) requires a claimant to give notice to employer and the district director of more events than does Section 33(g), it provides no penalty for failure to give that notice. Thus, claimant's failure to give notice of the institution of a third-party suit cannot bar his claim pursuant to Section 33(g)(2). *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010).

Sections 33(g)(3) and (4) relate to the lien rights of the Special Fund and other trust funds.

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Section 33(g) is not a bar to claimant's recovery of compensation under the Act when employer conditions its consent to a third-party settlement on claimant's waiver of his right to compensation. Employer's condition for approval of the settlement violated 33 U.S.C. §915(b), which invalidates all agreements by the employee to waive his rights to compensation under the Act. *Rodriquez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984).

Where a third-party settlement occurs after the administrative law judge issues a Decision and Order and the Decision is appealed to the Board, employer's contention that claimant's entitlement to benefits is waived should be raised in a motion for modification before the administrative law judge, not in a motion to dismiss filed with the Board. *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985). See *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986) (remanding case to administrative law judge to consider evidence of third-party settlement).

The Board held that inasmuch as LIGA could not be held liable for benefits in this case in the stead of the insolvent carrier under Louisiana law, employer was liable for benefits. Claimant's failure to obtain separate prior written consent of the insolvent carrier or its liquidator of his third-party settlement thus could not bar the claim under Section 33(g)(1). *Deville v. Oilfield Industries*, 26 BRBS 123 (1992).

Because claimant had withdrawn his claim for benefits under the Act, the Board determined that

employer could not be aggrieved by the district director's approval of the withdrawal until claimant filed a new claim. Until that time, employer also could not be liable for benefits or deficiency compensation under Section 33(f). As claimant did not settle his third-party suits for an amount less than what he was entitled to receive under the Act (since he was entitled to nothing at present, having withdrawn his claim), the Board determined that, in accordance with *Cowart*, claimant was only required to inform employer of the settlements prior to adjudication or payment, and he did so. Consequently, the Board rejected employer's contention that claimant's "admission" that he failed to comply with the provisions of Section 33(g) barred him from filing any future claims related to his exposure to asbestos, and it determined that if the previously filed claim had been adjudicated, Section 33(g) would not have barred claimant's recovery of benefits. *Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (*en banc*) (Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993) (*en banc*) (Brown, J., concurring), *rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996).

The Board rejected claimant's attempt to distinguish *Cowart* on the basis that there were several potentially liable employers. Section 2(22) provides that the singular includes the plural, and moreover, claimant had no difficulty in joining all potentially liable employers to her compensation claim. Section 33(g) applies equally regardless of whether there is one or several potentially liable employers. *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994).

Where counsel representing claimant in the third-party suit accepted a settlement offer on claimant's behalf without her knowledge or consent with the understanding that the settlement would be nullified if claimant did not consent to it, he was not acting as her "representative" as that term is used in Section 33(g); under Section 33 the term "representative" refers to decedent's legal representative which normally excludes attorneys. Claimant also was not bound by her attorney's actions under the principles of agency, as he was not acting within his authority and claimant did not ratify his actions: she was not fully informed about her counsel's unauthorized acts and did not benefit from his actions. Moreover, her repudiation of the agreement when she learned of it and refusal to accept the settlement monies were inconsistent with ratification. Claimant's right to benefits was not barred by Section 33(g). *Stadtmiller v. Mallott & Peterson*, 28 BRBS 304 (1994), *aff'd sub nom. Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997).

The Ninth Circuit affirmed the Board's holding that claimant's third-party attorney was not her "representative," as that term is used in Section 33(g)(1), as Section 33(c) explicitly defines "representative" to mean "legal representative of the deceased." This interpretation is consistent with the provision of Section 33(g)(1), which refers to "compensation" to which a person (or person's representative) is entitled, as an attorney cannot receive compensation under the Act. The administrative law judge's determination, on agency principles, that claimant did not ratify her attorney's third-party settlement on her behalf is rational, given that she refused to sign a release and that the evidence did not indicate that claimant was aware that her attorney had dismissed her action against the third party or had received a payment earmarked for her as a result of the dismissal. Employer bears the burden of proving that claimant ratified her attorney's actions. *Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997).

The Ninth Circuit held that a claimant, whose benefits under the Act were barred pursuant to Section 33(g) for failure to obtain employer's prior written approval of a third-party civil action, was not precluded from seeking workers' compensation benefits under state law for the same injury. The court ruled that claimant's pursuit of California state workers' compensation benefits did not frustrate the purpose behind Section 33(g), which acts to "protect the rights of employers from unfairly low third-party settlements." Because permitting benefits under California law in this instance "does not act as an obstacle to Congress' purpose" in enacting Section 33(g)(2), the Act's forfeiture provision does not preempt state workers' compensation law. *Service Engineering Co. v. Emery*, 100 F.3d 659, 30 BRBS 96(CRT) (9th Cir. 1996).

Because the definition of the term "person" in Section 2(1) of the Act does not include the United States government, claimant's settlement with the U.S. government under the Federal Tort Claims Act for an amount less than he was entitled to receive under the Act did not invoke the Section 33(g) bar, as the United States is not considered a "third person" under Section 33. *Milam v. Mason Technologies*, 34 BRBS 168 (2000) (McGranery, J., dissenting).

In this case where claimant failed to obtain employer's written approval before executing a third-party settlement for an amount less than his compensation entitlement, the Board affirmed the administrative law judge's determination that employer properly terminated benefits as of September 6, 1999. Section 33(g)(1) provides that employer is not liable for benefits unless claimant obtains written approval "before the settlement is executed." As written approval was not obtained, and as the Board held that the settlement was fully executed as of August 24, 1999, claimant was not entitled to benefits as of the date of the settlement or thereafter. Thus, employer's termination of benefits on September 6, 1999, was not premature. *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002).

Claimant settled his claims in a United Kingdom court with his employer, "AG Jersey," /and two related companies for an amount less than the amount he would be entitled to under the Act without obtaining prior written approval from the DBA carrier. The administrative law judge determined that one of the two related companies, "AG PLC," was a third party to the settlement, thereby precluding claimant's entitlement to further benefits under the Act pursuant to Section 33(g). The Board vacated the administrative law judge's finding, as he failed to explain why AG PLC, the parent company of AG Jersey, is not also claimant's employer – either under a borrowed employee test or by considering the companies as one entity. Further, the Board held it was error to apply res judicata or collateral estoppel to the UK court's decision, as the issue of whether the company was an employer under the Act was not before the court, and the parties to the UK claims and the Act claims were not identical. The Board also vacated the administrative law judge's finding that "AG UK," which performed many of the functions of an employer, is a borrowing employer, because he did not fully explain how AG UK satisfies the elements of a borrowing employer test. Therefore, the Board vacated the finding that Section 33(g) precluded claimant's recovery under the Act. The Board remanded the case for the administrative law judge to reconsider the employment relationships using the borrowed employee tests and/or to determine whether the entities should be considered as one by piercing the corporate veil. AG Jersey bears the burden of establishing that at least one of the employers is a third party. That there may be no offset for the recovery does not weigh in favor of the applicability of Section 33(g). *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, 47 BRBS 21 (2013).

On appeal for the second time, the issue continued to be whether claimant entered into a third-party settlement that had not been approved by the DBA carrier, thereby invoking the Section 33(g) bar. The administrative law judge addressed whether the three entities behaved such that they should be considered as a single entity (with claimant's employer), rendering none of them a "third person" under the Act. As Section 33(g) is an affirmative defense that must be raised and pleaded by an employer, the Board rejected AG Jersey's assertion that claimant, not it, must prove that the companies were a single entity. To the contrary, AG Jersey, as the proponent of the defense to try to avoid liability, bears the burden of showing that claimant entered into a: 1) fully-executed settlement; 2) with a third person; 3) without obtaining prior written approval from his employer and its carrier. As the burden lies with AG Jersey, the starting point is that the entities are all employers until proven otherwise. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

Under Section 33(g), the determination of whether a "third person" is involved in a settlement must be made at the time of the settlement. In this case, claimant agreed to settle his tort claims in December 2009. Prior to this date, a company called G4S had acquired the AG entities in their entirety and embarked on a restructuring of the corporate entity. Because AG Jersey bears the burden of establishing that a "third person" was involved in the settlement in order to invoke Section 33(g), and because there is no evidence of record as of the time of the settlement regarding the relationship among the G4S entities, AG Jersey did not establish that a "third person" participated in claimant's tort settlement. Accordingly, the Board reversed the administrative law judge's findings that AG PLC was a third party and that Section 33(g) barred claimant's recovery under the Act. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

## Subsection (g)(1) - Prior Written Approval

Written consent need only be obtained by a "person entitled to compensation." Following the 1984 Amendments, the Board interpreted this phrase as applying to a person who is being paid compensation by employer either pursuant to an award or voluntarily at the time of the third-party settlement. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986), *appeal dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27(CRT) (11th Cir. 1987). The Board stated that its interpretation of subsection 33(g)(1) in *Dorsey* was consistent with the pre-amendment case law applying the Section 33(g) bar only when claimant is receiving compensation at the time of settlement. See *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980) (leading pre-amendment case); *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd mem.*, 729 F.2d 777 (5th Cir. 1984); *Caranante v. Int'l Terminal Operating Co.*, 7 BRBS 248 (1977). See also *Tufano v. Int'l Terminal Operating Co.*, 25 BRBS 285 (1992) (Brown, J., concurring); *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on recon.*, 22 BRBS 430 (1989); *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988); *Chavez v. Todd Shipyards Corp.*, 21 BRBS 272 (1988); *Evans v. Horne Bros., Inc.*, 20 BRBS 226 (1988); *Lewis v. Norfolk Shipbuilding & Dry Dock Co.*, 20 BRBS 126 (1987) (Brown, J., concurring); *Quinn v. Washington Metro. Area Transit Authority*, 20 BRBS 65 (1986), *appeal dismissed sub nom. Washington Metro. Area Transit Authority v. Director, OWCP*, 824 F.2d 94, 20 BRBS 13(CRT) (D.C. Cir. 1987). In the following cases, the Board held that the claims were barred under subsection (g)(1) for failure to comply with the prior written approval requirement, as the claimants were "persons entitled to compensation" under the Board's interpretation: *Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206 (1989); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Nesmith v. Farrell American Station*, 19 BRBS 176 (1986); *Gibson v. ITO Corp. of Ameriport*, 18 BRBS 162 (1986).

The Board followed the *Dorsey* holding in *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42 (1989). In *Cowart*, the claimant suffered a hand injury, and his employer paid temporary total disability benefits for ten months. Employer, however, refused to pay permanent partial disability benefits. In the period when claimant was not receiving compensation, he settled a third-party action. In its decision, the Board held that the claimant was not a "person entitled to compensation" as he was not receiving compensation at the time of the settlement; thus, subsection (g)(1) was not applicable. The Board held that the decision in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986), stating that there are no exceptions to the written approval requirement of Section 33(g)(1), was distinguishable, in that the claimant in *Collier* was receiving voluntary payments of compensation at the time of the third-party settlement and the narrow issue before the court was whether there was a waiver of subrogation. The Board further held

that the notice provision of subsection (g)(2) was satisfied. *Cowart*, 23 BRBS at 47.

The Fifth Circuit reversed the Board's decision in *Cowart*. *Nicklos Drilling Co. v. Cowart*, 907 F.2d 1552, 24 BRBS 1(CRT) (5th Cir. 1990). The court held that Section 33(g) contains no exceptions or qualifications and that a claimant is not entitled to benefits under the Act if he fails to obtain written consent from employer prior to settling a claim with a third-party tortfeasor, regardless of whether or not he is receiving benefits at the time of the settlement. In a companion case, *Petroleum Helicopters, Inc. v. Barger*, 910 F.2d 276, 23 BRBS 143(CRT) (5th Cir. 1990), *aff'd on recon. sub nom. Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93(CRT) (5th Cir. 1991) (*en banc*), *cert. denied*, 505 U.S. 1218 (1992), the court similarly held that decedent's widow was not entitled to benefits under the Act when she failed to obtain employer's consent prior to settling a claim with a helicopter manufacturer.

The Fifth Circuit reconsidered *Cowart* and *Barger* in an *en banc* decision, and reaffirmed the panel decisions. *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93(CRT) (5th Cir. 1991) (*en banc*). The court held that the prior written approval requirement of subsection (g)(1) applies regardless of whether the employer or its carrier is paying benefits at the time of the settlement. The court rejected the position that subsection (g)(2) was intended to apply when the claimant was not receiving benefits at the time of the settlement, holding that the subsection (g)(2) notice provision applies when the claimant receives a judgment, or when the settlement is for an amount less than the compensation to which he is entitled under the Act. The court took the unusual step of overruling its unpublished decision in *Kahny*. The Board, while noting its disagreement with the court's decision, followed it in two cases arising in the Fifth Circuit. *Lewis v. Chevron USA, Inc.*, 25 BRBS 10 (1991); *Monette v. Chevron USA, Inc.*, 25 BRBS 267 (1992), *aff'd on recon. en banc*, 29 BRBS 112 (1995) (Brown, J., concurring).

On a petition for writ of *certiorari*, the Supreme Court affirmed the decision of the Fifth Circuit. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992). The 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. *Id.*, 505 U.S. at 477, 26 BRBS at 52(CRT). The Court stated that the normal meaning of entitlement includes a right or benefit for which a person qualifies, and does not depend upon whether the rights have been acknowledged or adjudicated, but only upon the person's satisfying the prerequisites attached to the right. Inasmuch as the claimant suffered an injury to his hand in the course of his employment which gave him a right to compensation from his employer, he became a "person entitled to compensation" at that time. Due to his failure to obtain employer's prior written consent of his third-party settlement, his right to further benefits was terminated under Section 33(g)(1).

The Supreme Court stated that an employee is not required to get prior written approval of the settlements from employer in two situations: (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 employer's total liability under the Act. Under these circumstances, the claimant must give notice under subsection (g)(2). *Id.*, 505 U.S. at 482, 26 BRBS at 53(CRT).

In light of this language, the Board has held that it is critical that the administrative law judge determine whether the settlement amount is greater or less than the claimant's entitlement under the Act. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part); *see also Gladney, et al. v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in the result only) (holding, in case arising in the Fifth Circuit, that administrative law judge erred in granting summary judgment in 750 cases without making findings of fact necessary under *Cowart*); *see discussion, infra*. The Court in *Cowart* also stated that it was not deciding the retroactive or *res judicata* effects of its decision, nor was it addressing the late-raised argument that employer's alleged participation in the settlement brought the case outside the scope of Section 33(g)(1). *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT).

The *Cowart* decision left several issues unresolved. One unresolved issue involved the status of survivors who settle their third-party claims prior to the death of the employee. Prior to *Cowart*, the Board held that Section 33(g) did not bar survivor's benefits when the employee was alive at the time the "survivor" settled her third-party suit, since the survivor was not "entitled to compensation" at such time. *Jones v. St. John Stevedoring Co.*, 18 BRBS 68 (1986), *aff'd and rev'd sub nom. St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, *reh'g denied*, 823 F.2d 552 (5th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987). *See also Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992) (under *Cowart* for purposes of the death benefits claim the widow became a "person entitled to compensation" on the date of her husband's death). In *Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206 (1989), the Board held that Section 33(g) does not bar an estate's rights to disability compensation where the third-party settlement occurred after decedent's death. Because the employee's disability award necessarily terminated when he died, all rights which the estate had in the disability claim accrued prior to the settlement date. However, inasmuch as the widow was receiving death benefits at the time she entered into a third-party settlement, she was a "person entitled to compensation" within the meaning of pre-*Cowart* Section 33(g)(1) and was therefore required to comply with the written approval requirement in order to preserve her right to death benefits under the Act. The Board held that death benefits which accrued prior to the settlement are not barred, but that those after the settlement are, as claimant did not obtain employer's written approval. *Lindsay*, 22 BRBS at 210.

The Ninth Circuit did not adopt the reasoning that a survivor is not a "person entitled to compensation" until the death of the employee. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *aff'g and rev'g* 24 BRBS 35 (1990), *cert. denied*,

512 U.S. 1219 (1994). In reversing the Board's holding that the claims of a widow and child are not barred by Section 33(g), the court stated that the purposes of preventing the claimants from accepting too little in their third-party actions is not served if they are not considered to be "persons entitled to compensation" until the death of the employee.

The Board declined to accept this interpretation in a case arising in the Fifth Circuit. *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994) (Brown, J., concurring) (Smith, J., dissenting on other grounds), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 29 BRBS 113(CRT) (5th Cir. 1995). The Board held in *Yates* that under *Cowart* a survivor's right to recover death benefits does not arise or vest until the death of the employee. Thus, although the widow did not obtain employer's prior written approval of the third-party settlements entered into prior to the employee's death, the death benefits claim is not barred by Section 33(g)(1). The Fifth Circuit affirmed the Board's holding that one is not a "person entitled to compensation" under *Cowart* in a death benefits claim until the death of the employee, specifically disagreeing with the *Cretan* court's interpretation of "person entitled to compensation." Thus, claimant's failure to obtain employer's prior written approval of the pre-death settlements did not bar her claim for death benefits under the Act.

In affirming the Fifth Circuit's decision, the Supreme Court held that before an injured worker's death, the worker's spouse is not a "person entitled to compensation" within the meaning of Section 33(g)(1) for the purpose of receiving death benefits. Accordingly, the worker's spouse does not forfeit the right to collect death benefits under the Act if she enters into a third-party settlement without employer's approval prior to the worker's death. The Supreme Court's decision resolves the prior split in the circuits evidenced in *Yates* and *Cretan*. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

By the express language of the Court in *Cowart*, the retroactivity of its decision was left undecided. Initially, the Board remanded a case for the administrative law judge to consider the applicability of *Cowart* to a pending case. *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992). In *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994), however, the Board held that under the holdings in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the *Cowart* decision must be given retroactive effect inasmuch as the Court in *Cowart* applied the ruling to the parties before it. Inasmuch as the claimant in *Kaye* failed to obtain employer's prior written approval of her third-party settlements, her claim for death benefits was barred under Section 33(g).

Similarly, in *Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995) (Brown, J., concurring), *aff'g on recon. en banc* 25 BRBS 267 (1992), the Board applied *Cowart* to a case in which the third-party settlement was entered into prior to the enactment of the 1984 Amendments. *See also Pool v. General American Oil Co.*, 30 BRBS 183 (1996)

(Smith and Brown, JJ., dissenting on other grounds). The Board first addressed the law regarding the retroactivity of legislation; specifically the Board noted that the initial inquiry is whether Congress has provided for retrospective application of the provision. In this instance, the 1984 amendment to Section 33(g) was made applicable to both newly filed claims and claims pending on the date of enactment, and thus Section 33(g)(1) applies to this case. Moreover, inasmuch as claimant was a "person entitled to compensation" under *Cowart* and entered into a settlement for an amount less than the amount of death benefits she is entitled to under the Act, and failed to obtain employer's prior written consent of the settlement, her claim is barred by Section 33(g)(1). The Ninth Circuit subsequently applied this approach in *Reynolds v. Todd Pacific Shipyards Corp.*, 122 F.3d 37, 31 BRBS 71(CRT) (9th Cir. 1997), holding that the administrative law judge properly applied the Supreme Court's decision in *Cowart* to third-party settlements entered into prior to the enactment of the 1984 Amendments. The court noted that the decision in *Cowart* defined the term "person entitled to compensation" as it has always existed and not only in its post-amendment form.

The application of *Cowart* in occupational disease cases also raised new issues. The Board's decision in *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part), resolved some of these issues. *See also Gladney, et al. v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in the result only) (holding, in case arising in the Fifth Circuit, that administrative law judge in granting summary judgment in 750 cases without making findings of fact necessary under *Cowart*, and remanding for findings consistent with *Harris*). The Board held in *Harris* that as a voluntary retiree, a claimant must be aware of the relationship between his asbestos-related disease, his employment and a permanent physical impairment before he can be found to have an "injury" and thus a vested right to compensation under *Cowart*. A voluntary retiree is not "person entitled to compensation" under Section 33(g)(1) until he has a permanent physical impairment under the AMA *Guides* and is aware of the relationship between the impairment and the employment. The Board held that the adoption of this "manifestation" approach is consistent with the interpretation of the term "injury" in other sections of the Act dealing with occupational diseases. *Harris*, 28 BRBS at 261-263.

The Board also held that in considering whether a claimant is a "person entitled to compensation," the term "compensation" refers to periodic disability benefits and not to payments for medical treatment under Section 7. *Harris*, 28 BRBS at 264-265. The Board held that this construction is consistent with the decisions of Supreme Court and the Ninth Circuit, respectively, in *Marshall v. Pletz*, 317 U.S. 383 (1943), and *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988), interpreting the term "compensation" as meaning periodic disability benefits in varying contexts.

The Board, in *Mobley*, held initially that claimant was not a "person entitled to compensation" under *Dorsey* as he was not receiving disability benefits at the time of the settlement. In any event, the Board found Section 33(g)(1) would not apply as claimant was awarded no disability benefits and the amount of compensation thus did not exceed the amount of the settlement. The Board also held that even if subsection (g)(1) were applicable, it could only bar claimant's entitlement to disability compensation and not medical benefits. *Mobley*, 20 BRBS at 243; *see also Pinell v. Patterson Service*, 22 BRBS 61 (1989), *aff'd on other grounds mem.*, 20 F.3d 465 (5th Cir. 1994); *Sellman v. I.T.O. Corp. of Baltimore*, 24 BRBS 11 (1990) (Brown, J., concurring in part and dissenting on other grounds), *aff'd in part and rev'd on other grounds*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

In affirming the Board's decision in *Mobley*, the Ninth Circuit agreed that Section 33(g)(1) did not apply because as claimant was not disabled, he was not entitled to any compensation, and thus he did not enter into a settlement for less than the amount of compensation to which he was entitled. The court also held that the award of medical benefits was immaterial, as medical benefits and compensation are distinct terms under the Act. In this regard, the court noted that the absence of the term "medical benefits" in subsection (g)(1), combined with the term's inclusion in subsection (g)(2) indicates Congress did not intend to compel compliance with Section 33(g)(1) by one who is entitled only to medical benefits. 920 F.2d at 561, 24 BRBS at 53(CRT). The court did not address the Board's interpretation of "person entitled to compensation" or its statement that non-compliance with subsection (g)(1) would bar only compensation and not medical benefits. In a footnote in *Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186 (1993) (decision on recon.), *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J., concurring), the Board suggested that the latter rationale has survived *Cowart*, but state that it need not decide the issue in the case before it. *Cf. Cowart*, 505 U.S. at 475, 26 BRBS at 51(CRT) (holding all benefits were barred in that case). In *Harris*, the Board held that the court's reasoning in *Mobley* was not affected by *Cowart*.

In *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002), however, the Board re-examined the issue and held that non-compliance with Section 33(g)(1) of the Act results in the forfeiture of both disability compensation and medical benefits in accordance with Section 33(g)(2), pursuant to the plain language of Section 33(g)(2), the Supreme Court's discussion of Section 33(g)(2) in *Cowart*, and the plain language of the regulation at 20 C.F.R. §702.281(b). The Board rejected the claimant's assertion that he need only comply with one of the requirements of Section 33(g)(2), *i.e.*, prior approval *or* notice to employer. Rather, the Board held that if the requirements of Section 33(g)(1) are applicable, failure to obtain employer's prior approval of the settlement will result in the forfeiture of medical benefits pursuant to Section 33(g)(2).

Finally, before the forfeiture provisions of Section 33(g)(1) may be invoked, a determination must be made as to the amount of compensation to which the "person entitled to compensation" is entitled under the Act in comparison to the amount of the third-party settlement, as the bar only applies if the settlement amount is less than the compensation entitlement. Section 33(g) is inapplicable where it would have been impossible for claimant to recover under the Act an amount greater than her third-party settlement of \$5,000 in cash and a \$280,000 annuity for four years. *Jones v. St. John Stevedoring Co., Inc.*, 18 BRBS 68 (1986), *aff'd and rev'd sub nom. St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, *reh'g denied*, 823 F.2d 552 (5th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987). In *Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186 (1993) (decision on recon.), *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J., concurring), the Board held that although claimant was a "person entitled to compensation" under *Cowart*, she was not required to get employer's prior written consent of her third-party settlements inasmuch as the settlements were for more than she would be entitled to receive under the Act, unless she lived to be over 100 years old.

In its initial decision in *Harris*, 28 BRBS at 266, the Board held that in making the comparison between the amount of the settlement and the amount of compensation, the third-party settlements should be analyzed in the aggregate, and not individually, so as to correspond to employer's aggregate Section 33(f) credit, and that the net amount of the settlements, not the gross amount, should be compared to claimant's compensation entitlement. In *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995), *rev'g in part*, 28 BRBS 20 (1994), however, the Third Circuit held that the gross amount of the settlements should be compared to the amount of compensation to which each claimant is entitled, as Congress included the word "net" in Section 33(f) but did not do so in Section 33(g). In its decision on reconsideration *en banc* in *Harris*, 30 BRBS at 16, the Board adopted the holding in *Bundens* that the gross amount of the third-party settlements is the applicable figure for comparison purposes.

The court in *Bundens* also held that the Board erred in not separately considering Section 33(g)(1)'s applicability to the widow and the son, as each was a "person entitled to compensation" but it affirmed the finding that the claims were not barred as the gross amount of the third-party settlement, as apportioned to each claimant, exceeded the amount of compensation to which each was entitled under the Act. The amount of compensation in this case was a fixed amount, given that the widow remarried and the son finished his schooling. *Bundens*, 28 BRBS at 26-27.

Medical benefits are not included in the comparison between the settlement amount and amount of compensation to which the person is entitled under the Act. *Harris*, 28 BRBS at 267. This is based on the plain language of subsection (g)(1) that written approval is required if the claimant enters into a settlement "for an amount less than the *compensation*" to which he is entitled under the Act, and based on the decision in *Mobley*, previously discussed. Finally, the Board held in *Linton v. Container Stevedoring*

Co., 28 BRBS 282 (1994), that the total amount of compensation to which the claimant would be entitled over his lifetime must be compared to the settlement amount, rejecting the claimant's contention that only accrued benefits may be considered. An administrative law judge may use any reasonable method to determine this lifetime amount; the determination necessarily will entail findings as to claimant's extent of impairment and life expectancy, and the applicable compensation rate. Amounts subject to a Section 3(e) credit are not subtracted from the amount due under the Act. *Linton*, 28 BRBS at 287-289.

### Digests

The Board stated that if Section 33(g)(1) is applicable to the case (see Waiver discussion *infra*), then employer gave its prior written approval of the third-party settlement by virtue of its signature on the Mutual Release and Receipt prior to the time that the settlement was actually executed, although the parties reached agreement at an earlier date. It would serve no purpose to require employer's consent on Form LS-33 as employer's interests were adequately protected by its participation. *Deville v. Oilfield Industries*, 26 BRBS 123 (1992).

When a claimant, now deceased, settled a third-party case for an amount greater than the amount of benefits to which he was entitled under the Act, and where employer had been reimbursed the amount it paid pursuant to a Section 8(i) settlement out of the proceeds of the third-party settlement, Section 33(g) was inapplicable. *Deakle v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994). See also *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994).

In applying Section 33(g), the administrative law judge relied on the Fifth Circuit's decision in *Villanueva*, 868 F.2d 684, and did not determine if claimant's third-party settlement was for more or less than the amount claimant is entitled to under the Act. The Board remanded the case for a comparison between claimant's entitlement under the Act and his third-party settlement proceeds pursuant to *Gladney*, 30 BRBS 25. *Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Brown, J., dissenting).

At the hearing regarding claimant's death benefits case, employer conceded that claimant's failure to obtain written approval of third-party settlements she entered into with decedent did not bar claimant's claim for death benefits under Section 33(g)(1). Subsequent to the hearing, and prior to the issuance of the administrative law judge's decision, the Ninth Circuit issued *Cretan*, 1 F.3d 843, 27 BRBS 93(CRT), wherein the court held that potential widows are subject to the provisions of Sections 33(f) and (g) of the Act. Thereafter, in a letter to the administrative law judge, employer stated that it had changed its position with regard to Section 33(g) and requested that he consider Section 33(g) as a new issue, pursuant to 20 C.F.R. §702.336(b). The administrative law judge denied employer's request. The Board held that it was reasonable for employer to raise

the issue of Section 33(g) post-hearing based on the holding in *Cretan*, and that the administrative law judge's failure to consider the Section 33(g) issue post-hearing constituted an abuse of discretion under Section 702.336(b). Thus, the Board remanded the case for further findings. *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996).

The Board held that the administrative law judge acted within his discretion under 20 C.F.R. §702.336(b), when he refused to consider the Section 33(g) issue newly raised by employer after the administrative law judge's adverse decision, where employer waited more than three months after the issuance of *Cowart*, even though the decision was published prior to the issuance of the administrative law judge's decision. Moreover, the administrative law judge rationally found that as there were different interpretations of the section at issue by the courts at the time of the hearing and a Supreme Court decision was imminent, employer's failure to preserve the Section 33(g) defense for appeal was not excusable, justifiable or understandable. This case was thus distinguishable from *Taylor*, 30 BRBS 90 (1996). *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1992).

In the instant case, the Board held that claimant suffered two separate injuries as a result of distinct exposures with two employers, asbestosis while working at Electric Boat and chronic obstructive pulmonary disease while working for employer. Claimant properly obtained Electric Boat's written approval of the third-party settlements concerning his asbestosis. The Board held that since claimant was not exposed to asbestos at employer's facility, the Supreme Court's holding in *Cowart* does not require that claimant must also obtain employer's written consent. Employer did not purchase any asbestos products from the asbestos distributors and manufacturers against whom claimant filed his third-party suits, and it was undisputed that claimant was not exposed to asbestos during his employment with employer; thus, under Section 33(b) of the Act, employer was not one to whom claimant's right to file suit could be assigned. Accordingly, the Board affirmed the administrative law judge's finding that claimant's claim was not barred by Section 33(g)(1). *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997).

The Board affirmed the administrative law judge's finding that Section 33(g) was not a bar to claimant's entitlement because claimant suffered an adverse judgment on the merits of his Jones Act and maritime litigation because he was not a "seaman" due to the fact that the barge on which he was injured was not a "vessel." Because claimant had no entitlement on his third-party claims against Jones Act and maritime defendants, he could not have bargained away funds to which employer was entitled and which Section 33(g) was envisioned to protect. *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring).

In a case where claimant, the widow of an employee, entered into unauthorized third-party settlements subsequent to the employee's death, the Board held that pursuant to the

plain language of Section 33(g)(2), claimant forfeited her right to collect all death benefits, both accrued and future, when she failed to obtain employer's written approval. Accordingly, the Board reversed the administrative law judge's award of death benefits that had accrued prior to the third-party settlements. The Board further held that since funeral benefits are explicitly included in the definition of "compensation" at Section 2(12) of the Act, funeral benefits are also included in the term "compensation" under Section 33(g). Therefore, holding that funeral benefits are subject to forfeiture where compensation is barred by Section 33(g), the Board reversed the administrative law judge's award of funeral benefits. The Board overruled *Kahny*, 15 BRBS 212 (1982), to the extent it survived *Cowart*. *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998) (Smith, J., dissenting).

Where claimant, decedent's widow, was not a signatory to the pre-death third-party settlement, but received settlement funds subsequent to the employee's death, the Board rejected employer's contention claimant was obligated to obtain employer's authorization prior to accepting the settlement funds. The Board held that claimant did not "enter into" the agreement as she was not a signatory, and moreover, she was not a "person entitled to compensation" at the time of the settlement. Therefore, the Board affirmed the administrative law judge's finding that Section 33(g) did not bar claimant's claim for death benefits. *Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000).

The Board affirmed the administrative law judge's finding that Section 33(g) did not bar the widow's death benefits claim. Although the widow entered into a third-party settlement after her husband's death, at a time when she was a "person entitled to compensation" under *Yates*, the claims she settled were the decedent's pending suit for pain and suffering and economic loss. The state court had dismissed the claims the widow filed in her own right. As claimant was not a "person entitled to compensation" with regard to the third-party claims, and as the third party was not liable, pursuant to Section 33(a), for the same disability or death for which the widow sought benefits under the Act, claimant's death claim is not barred. The Board distinguished *Doucet*, 34 BRBS 62, and *Wyknenko*, 32 BRBS 16. In addition, as employer was not entitled to a credit under Section 33(f) for the proceeds of the third-party suit against its liability for death benefits, and as Section 33(f) and (g) must be read consistently, the death claim was not barred by Section 33(g). *Mabile v. Swiftships, Inc.*, 38 BRBS 19 (2004).

The D.C. Circuit rejected employer's contention that claimant's claim was barred by Section 33(g) inasmuch as claimant obtained employer's written consent prior to entering into the third-party settlement. Moreover, employer cannot claim that the settlement compromised its rights, as the court also held that none of the evidence of record supported a finding that employer waived its right to offset the settlement proceeds against its liability for future medical benefits. *Evans Financial Corp. v. Director, OWCP*, 161 F.3d 30, 32 BRBS 193(CRT) (D.C. Cir. 1998), *aff'g and rev'g O'Brien v. Evans Financial Corp.*, 31 BRBS 54 (1997) (Brown, J., dissenting).

The Fourth Circuit, relying on the reasoning of the Ninth Circuit in *Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), held that medical benefits are not to be included in the comparison between the amount of compensation entitlement and the amount of the third-party settlement. The court also adopted the reasoning of the Third Circuit in *Bundens*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995), in holding that, in comparing the amount of the third-party settlements and the amount of compensation entitlement, the *gross* amount of the settlements should be used. Further, citing the Board's decision in *Harris*, 30 BRBS at 9-10, the court rejected employer's argument that the employee became "a person entitled to compensation" in 1976, when he was last exposed to asbestos, holding that the employee suffered no injury even arguably giving rise to a claim for compensation until he learned he had developed asbestosis in 1988. The court also rejected employer's alternative argument that the employee became "a person entitled to compensation" in 1988, when he learned he had asbestosis, on two grounds. First, the court held that the fact that the employee may have been a "a person entitled to compensation" for *asbestosis* as early as 1988 was irrelevant to the distinct question of whether he was "a person entitled to compensation" for *mesothelioma*; the court stated that asbestosis and mesothelioma, although both caused by asbestos exposure, are distinct diseases giving rise to distinct disabilities for which the employee could, and apparently did, bring separate LHWCA claims. Second, the court held that because, at the time of his asbestosis diagnosis, the employee suffered only from minor symptoms and was able to continue full-time employment until his retirement in 1993, he was not entitled to even nominal compensation at the time of his asbestosis diagnosis pursuant to *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), and, thus, could not have been "a person entitled to compensation," even for asbestosis, at that time. The court accordingly held that the employee became "a person entitled to compensation" on June 6, 1994, the date of his diagnosis with mesothelioma. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998).

The Board rejected employer's assertion that claimant became a "person entitled to compensation" at the time of his alleged exposure to harmful materials at employer's facility. The Board followed its holding in *Harris*, 28 BRBS 254 and 30 BRBS 5, and the holding of the Fourth Circuit in *Sain*, 162 F.3d 813, 32 BRBS 205(CRT), that in occupational disease cases, the employee does not sustain an injury under the Act until he is aware of the relationship between the disease, the disability and the employment, and that in order to be "aware" of his disability, the employee must be aware that his work-related disease has caused a loss in wage-earning capacity, or, if he is a voluntary retiree, a permanent physical impairment. Since sustaining a disability is a necessary prerequisite to an award of compensation under *Cowart*, a person cannot be considered to be a "person entitled to compensation" until he has a loss in earning capacity or, in the case of a voluntary retiree, a permanent impairment. In this case, the parties stipulated that claimant had no loss in earning capacity or permanent impairment rating. He was thus not a "person entitled to compensation." The Board also rejected employer's contention that claimant's exposure to injurious stimuli triggered his entitlement to medical benefits, making claimant a "person entitled to compensation" on this basis, following the holdings that receipt of medical benefits alone does not make a claimant a "person entitled to compensation." As in *Sain*, the Board rejected employer's contention that claimant's exposure to injurious stimuli triggered his right to a nominal award under *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT), since in order to be entitled to a nominal award, the proponent must prove that there is a significant possibility of a future economic harm, and there was no evidence here which would establish a

right to benefits under the *Rambo II* standard. Thus, claimant had no vested right to recovery and *Rambo II* did not support a holding that claimant was a “person entitled to compensation.” *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

The Board held that the administrative law judge rationally looked to evidence in existence as of the time of the third-party settlements in order to determine that claimant was a “person entitled to compensation,” *i.e.*, substantial evidence supported the finding that was claimant aware at that time of the relationship between his work-related asbestosis and his inability to work. Nonetheless, claimant withdrew his claim for disability benefits for asbestosis and pursued only a claim for medical monitoring for an asbestos-related condition. In order for Section 33(g) to apply, the disability for which claimant seeks compensation under the Act must be the same disability for which he recovered from third parties. The case was remanded for the administrative law judge to address this issue. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 6 (2004).

After remand, the Board affirmed the administrative law judge’s finding under *Chavez*, 27 BRBS 80 (1993), that claimant’s claim was not barred by Section 33(g), since he found that the third-party settlements were for asbestos-related conditions, and thus did not involve the same disability, *i.e.*, COPD related to inhalation of substances other than asbestos, for which claimant obtained disability benefits under the Act. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff’d mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App’x 249 (4<sup>th</sup> Cir. 2007).

The Board affirmed the administrative law judge’s determination that Section 33(g) does not bar INA’s claim for reimbursement from Elf, the borrowing employer. Although the Board concluded that the administrative law judge did not properly determine whether Section 33(g) applied to this case, it held his error harmless, as Section 33(g) applies to bar a claimant’s right to benefits upon his entry into an unapproved third-party settlement and is not a basis for denying reimbursement between potentially liable employers or carriers in this case. *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998).

The Board held that as Section 33(g) is an affirmative defense, 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 future benefits. In this case there was evidence that claimant entered into third-party settlements, but there was a complete lack of evidence that employer did not give written approval of the settlement agreements. The Board rejected employer’s contention that it cannot prove a negative fact, and reversed the administrative law judge’s finding that the claim for compensation was barred pursuant to Section 33(g)(1). *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999).

The Board reversed the administrative law judge’s finding that the failure to timely file the Form LS-33 barred additional recovery, based on the facts of this case. Specifically, employer actually approved the settlement agreement prior to the third-party suit’s dismissal by the district judge, agreed to waive its lien, and acknowledged its approval on the proper form. Thus, employer acted directly to ensure, by its own actions, the protection of its rights to offset and/or recoupment. Moreover, the Board held that the filing of the Form LS-33 is a ministerial act, as

no further action is required of the district director thereafter. Thus, the late filing of the Form LS-33 with employer's approval on it does not trigger the Section 33(g) bar. *Valdez v. Crosby & Overton*, 34 BRBS 69, *aff'd on recon.*, 34 BRBS 185 (2000).

Claimant entered into third-party settlements for an amount less than his entitlement under the Act. He obtained his employer's approval, but did not obtain the written approval of a carrier. Claimant had been advised that carrier's policy was canceled and that carrier was insolvent, prior to the third-party settlement. Although employer had requested that LIGA take over claimant's claim, claimant was unaware of LIGA's potential liability until after the settlements. The Board held that once the carrier became insolvent, claimant was not obligated to obtain its approval, and it is manifestly unreasonable to suggest that claimant was required to obtain LIGA's approval under the circumstances presented. As carrier no longer secured payments under the Act, employer became solely liable for benefits under Section 4. Thus, employer's consent to the settlement satisfied Section 33(g)(1). *Meaux v. Franks Casing Crew & Rental Tools, Inc.*, 35 BRBS 17 (2001).

As the plain language of Section 33(g)(1) states that employer is liable for compensation "only if written approval of the settlement is obtained from *the employer and the employer's carrier*, before the settlement is executed," the Board held that the Act requires that claimant obtain the prior written approval of both employer and its carrier. The fact that *employer*, by virtue of an indemnity agreement, actively participated in the third-party proceedings does not obviate claimant's need to obtain *carrier's* approval. Under the circumstances of this case, moreover, employer's approval of the settlement cannot be imputed to carrier. The Board therefore affirmed the administrative law judge's finding that claimant's claim was barred due to his failure to obtain the prior written approval of employer's longshore carrier when he entered into the third-party settlement for an amount less than that which he would be entitled to receive under the Act. *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004).

Following a thorough discussion of the history of the asbestos trust funds and the Supreme Court's decision in *Banks*, 390 U.S. 459, the Board held that the payments from the trust funds to claimant in this case were similar to the judgment and remittitur in *Banks*. Moreover, in light of the absence of a compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements, the trust fund offers should be likened to "judgments" instead of "settlements." Thus, the Board vacated the administrative law judge's denial of benefits by virtue of the application of Section 33(g), and remanded the case for him to ascertain whether the sums received from the Amatex and Mansville trust funds were in "settlement" of the claims. If the administrative law judge determines on remand that the sums were akin to judgments, then only notice to employer under Section 33(g)(2) is required. If the administrative law judge determines that the sums were in "settlement" of the claims, then he must determine whether the settlements were fully executed. *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001).

The Board affirmed the administrative law judge's finding that claimant's third-party settlement was for an amount less than his entitlement under the Act. The Board rejected claimant's assertion that his settlement recovery also included the amount of his benefits under the Act because claimant's right to retain benefits was not explicitly part of the consideration given by employer or carrier in return for settling the claim. As claimant failed to obtain carrier's prior

written approval of the settlement, Section 33(g) bars his entitlement to benefits under the Act. The Board also held that carrier did not constructively approve the third-party settlement. Although claimant's counsel testified that carrier was involved in the settlement process, the only evidence is a letter in which carrier stated its disapproval. The administrative law judge found that claimant's counsel credibly described the communications between the attorneys, but the Board held that the administrative law judge properly found that these communications did not constitute sufficient participation in the settlement by carrier to preclude application of the Section 33(g) bar. *Bockman v. Patton-Tully Transp. Co.*, 41 BRBS 34 (2007).

Claimant filed a claim in 2012 for a 2010 vehicle accident and employer disputed the claim on multiple grounds, including timeliness of the claim, coverage, and whether the injury occurred during the course of claimant's employment. Because these defenses essentially assert that claimant was not "entitled" to compensation under the Act, claimant averred that employer was arguing that claimant is not a "person entitled to compensation" under Section 33(g) and, therefore, Section 33(g) is not applicable. The Board rejected this contention, relying on *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), which provides that an employee becomes a person entitled to compensation under Section 33(g) at the moment his right to recovery vests and not when an employer admits liability. As employer did not dispute claimant's employee status or the occurrence of the accident, the administrative law judge properly found that claimant is a "person entitled to compensation" under Section 33(g). As there was no other judicial proceeding such that employer could have taken an inconsistent position under oath, the administrative law judge also properly found that employer's defenses are not inconsistent and employer is not judicially estopped from asserting its Section 33(g) defense against claimant's claim for benefits. *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015), *modified in part on other grounds on recon.*, 50 BRBS 7 (2016).

Claimant entered into a confidential third-party settlement for the injuries he sustained in a 2010 vehicle accident. It is undisputed that claimant did not obtain prior written approval of the third-party settlement from employer and its carrier; thus, claimant did not comply with Section 33(g)(1), and, if applicable, that section would bar benefits. Claimant, however, notified employer of the third-party settlement prior to the payment of any benefits and the issuance of any award; thus, claimant complied with Section 33(g)(2), and, if applicable, that section would not bar claimant's benefits. In order to determine which subsection applies to claimant's case, a comparison must be made between claimant's entitlement under the Act and his third-party proceeds. Because the settlement is confidential, it is unknown whether the proceeds are greater than or less than claimant's compensation entitlement under the Act and which subsection applies. Accordingly, there remains a genuine issue of material fact on the applicability of Section 33(g), and it was improper for the administrative law judge to grant employer's motion for summary decision. The Board vacated the administrative law judge's orders and remanded the case for additional proceedings. The Board noted that *in camera* proceedings may be useful due to the confidentiality of the third-party settlement. *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015), *modified in part on recon.*, 50 BRBS 7 (2016).

Upon employer's motion for reconsideration of the Board's first decision in this case, 49 BRBS 71 (2015), asserting it did not concede to claimant's statement that he had notified employer a few months after his third-party settlement, the Board modified its decision. Specifically, the Board vacated the conclusion that claimant had complied with the Section 33(g)(2) notice requirement by notifying employer of the third-party settlement before both payment had been made and an award had been issued. Therefore, to the remand instructions in the prior decision the Board added the instruction that the administrative law judge fully discuss and determine whether the Section 33(g)(2) notice provision had been satisfied such that, once the administrative law judge determined whether the third-party settlement was for an amount greater than or less than the amount to which claimant was entitled under the Act, the administrative law judge would be able to state whether the Section 33(g)(2) bar applies. *Edwards v. Marine Repair Services, Inc.*, 50 BRBS 7 (2016), *modifying on recon.* 49 BRBS 71 (2015).

The Board held that the administrative law judge erred by comparing the net amount of claimant's third-party settlement proceeds to the amount of claimant's claimed lifetime entitlement to compensation under the Act. The Board followed its holding in *Harris*, 28 BRBS 254 and 30 BRBS 5, and the holdings of the Third Circuit in *Bundens*, 46 F.3d 292, 29 BRBS 52(CRT), and the Fourth Circuit in *Sain*, 162 F.3d 813, 32 BRBS 205(CRT), that in making the comparison under Section 33(g)(1), the gross, rather than the net, amount of the settlement should be used. The Board rejected employer's argument that the administrative law judge's use of the net amount of the third-party settlement is consistent with the Supreme Court's decision in *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT). Stating that the issue of whether the gross or net amount of the third-party settlement should be used in making the Section 33(g)(1) comparison was not raised in the *Cowart* case, the Board held that the Supreme Court's *Cowart* decision does not represent precedent that is directly contrary to that of the Board and the Third and Fourth Circuits. Thus, the Board vacated the administrative law judge's dismissal of the claim and remanded the case for the administrative law judge to determine whether Section 33(g) bars the claim by comparing the gross amount of the settlement to claimant's lifetime compensation entitlement. On remand, the administrative law judge may use any reasonable method to calculate claimant's lifetime compensation entitlement consistent with the principles set forth in *Linton*, 28 BRBS 282. *Pittman v. New Century Fabricators, Inc.*, 50 BRBS 17 (2016).

### **Subsection 33(g)(2) - Notice Provision**

The purpose of the notice requirement of subsection 33(g)(2) is to provide notice of a settlement, enabling an employer to protect its right to set off, under Section 33(f), the amount of a settlement against any future obligations it might have and allowing it to protect its right to reimbursement from the proceeds of the settlement in the amount of any payment employer has already made. *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988). To satisfy the requirements of Section 33(g)(2), employer must have notice of a third-party settlement before it has made any payments and before the agency announces the award of benefits. *Id.*; *see also Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). The Board has held that the plain language of subsection (g)(2) places on claimant an affirmative duty to notify employer of the third-party settlement, and that employer's mere knowledge of the settlement or the absence of prejudice to employer will not suffice to prevent the bar to compensation from being invoked. *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988).

In the following cases, employer had adequate notice under subsection 33(g)(2) before the award was entered: *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995), *aff'g in part* 28 BRBS 20 (1994); *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992); *Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186 (1993) (decision on recon.), *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J., concurring); *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd on other grounds*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994); *Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989), *rev'd on other grounds sub nom. Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988); *Lewis v. Norfolk Shipbuilding & Dry Dock Co.*, 20 BRBS 126 (1987) (Brown, J., concurring) (employer conceded at oral argument that it had actual knowledge of the settlement by virtue of having issued the settlement check).

In *Evans v. Horne Bros., Inc.*, 20 BRBS 226 (1988), the Board held that the subsection (g)(2) notice requirement was satisfied because the carrier authorized claimant's counsel to file a third-party action on its behalf, it acknowledged receipt of the settlement judgment, and the administrative law judge rationally concluded that the carrier participated in and approved the settlement.

Since subsection (g)(2) created a notice provision that did not exist prior to the enactment of the 1984 Amendments, the Board was faced with the issue of whether claimant's failure to give notice of a settlement entered into prior to the enactment of the Amendments bars the claim. The Board declined to accept an interpretation of subsection (g)(2) which imposed upon claimant an obligation which did not exist at the time the settlement was entered into and which he could not have anticipated at that time.

The Board held that it would be manifestly unjust under *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), to retroactively apply the notice provision of subsection (g)(2). *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). See also *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on recon.*, 22 BRBS 430 (1989). Cf. *Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Smith and Brown, JJ., concurring and dissenting); *Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995) (Brown, J., concurring), *aff'g on recon. en banc* 25 BRBS 267 (1992) (the Board holds that the *Cowart* interpretation of Section 33(g)(1) is to be applied to a settlement entered into prior to the enactment of the 1984 Amendments).

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In a case where claimant, the widow of an employee, entered into unauthorized third-party settlements subsequent to the employee's death, the Board held that pursuant to the plain language of Section 33(g)(2), claimant forfeited her right to collect all death benefits, both accrued and future, when she failed to obtain employer's written approval. Accordingly, the Board reversed the administrative law judge's award of death benefits that had accrued prior to the third-party settlements. The Board further held that since funeral benefits are explicitly included in the definition of "compensation" at Section 2(12) of the Act, funeral benefits are also included in the term "compensation" under Section 33(g). Therefore, holding that funeral benefits are subject to forfeiture where compensation is barred by Section 33(g), the Board reversed the administrative law judge's award of funeral benefits. The Board overruled *Kahny*, 15 BRBS 212 (1982), to the extent it survived *Cowart*. *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998) (Smith, J., dissenting).

Following a thorough discussion of the history of the asbestos trust funds and the Supreme Court's decision in *Banks*, 390 U.S. 459, the Board held that the payments from the trust funds to claimant in this case are similar to the judgment and remittitur in *Banks*. Moreover, in light of the absence of a compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements, the trust fund offers should be likened to "judgments" instead of "settlements." Thus, the Board vacated the administrative law judge's denial of benefits by virtue of the application of Section 33(g), and remanded the case for the administrative law judge to ascertain whether the sums received from the Amatex and Mansville trust funds were in "settlement" of the claims. If the administrative law judge determines on remand that the sums were akin to judgments, then only notice to employer under Section 33(g)(2) is required. If the administrative law judge determines that the sums were in "settlement" of the claims, then he must determine whether the settlements were fully executed. *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001).

The Board held that non-compliance with Section 33(g)(1) of the Act resulted in the forfeiture of both disability compensation and medical benefits in accordance with Section 33(g)(2), pursuant to the plain language of Section 33(g)(2), the Supreme Court's discussion of Section 33(g)(2) in *Cowart*, and the plain language of the regulation at 20 C.F.R. §702.281(b). The Board rejected the claimant's assertion that he need only comply with one of the requirements of Section 33(g)(2), *i.e.*, prior approval *or* notice to employer. Rather, the Board held that if the

requirements of Section 33(g)(1) are applicable, failure to obtain employer's prior approval of the settlement will result in the forfeiture of medical benefits pursuant to Section 33(g)(2). *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002).

The Board held that 20 C.F.R. §702.281(a) is not plainly inconsistent with Section 33(g) of the Act, such that Section 702.281(a) must be invalidated. Although Section 702.281(a) requires a claimant to give notice to employer and the district director of more events than does Section 33(g), there is no penalty for failure to give that notice. Thus, claimant's non-compliance with Section 702.281(a)'s provision to give notice of the institution of a third-party suit cannot bar his claim pursuant to Section 33(g)(2). Where claimant's third-party claims were dismissed without a settlement, the Board held that the forfeiture provision of Section 33(g) did not apply to bar claimant's benefits under the Act. Claimant neither settled his third-party claims nor obtained a judgment against a third party in those suits. Neither Section 33(g) nor Section 702.281(a) provides a penalty for failure to give notice of the institution of a third-party claim or the termination of such a claim by dismissal against the claimant without a settlement. The Board held that the administrative law judge correctly granted claimant's motion for summary decision on the Section 33(g) issue. *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010).

Employer raised a Section 33(g) defense to claimant's claim, as claimant had entered into a third-party settlement. It was undisputed that claimant did not obtain prior written approval of the third-party settlement from employer and its carrier. Claimant also did not notify employer of his settlement at the time of the settlement. In a footnote, the Board rejected claimant's assertion that his notice was timely because employer's failure to file a Section 30(a) report "tolled" the time for giving employer notice under Section 33(g)(2). Not only is Section 30(f) tolling inapplicable because it affects only the time-frame for a claimant to file a claim for compensation under Section 13, but tolling is unnecessary. Although claimant notified employer of the settlement sometime after the settlement, his notice was before employer paid any benefits and before the administrative law judge issued any award; this is sufficient and complies with the notice provision of Section 33(g)(2). *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015), *modified on recon.*, 50 BRBS 7 (2016).

Claimant entered into a confidential third-party settlement for the injuries he sustained in a 2010 vehicle accident. It is undisputed that claimant did not obtain prior written approval of the third-party settlement from employer and its carrier; thus, claimant did not comply with Section 33(g)(1), and, if applicable, that section would bar benefits. Claimant, however, notified employer of the third-party settlement prior to the payment of any benefits and the issuance of any award; thus, claimant complied with Section 33(g)(2), and, if applicable, that section would not bar claimant's benefits. In order to determine which subsection applies to claimant's case, a comparison must be made between claimant's entitlement under the Act and his third-party proceeds. Because the settlement is confidential, it is unknown whether the proceeds are greater than or less than claimant's compensation entitlement under the Act and which subsection applies. Accordingly, there remains a genuine issue of material fact on the applicability of Section 33(g), and it was improper for the administrative law judge to grant employer's motion for summary decision. The Board vacated the administrative law judge's orders and remanded the case for additional proceedings. The Board noted that *in camera* proceedings may be useful due to the confidentiality of the third-party settlement. *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015), *modified on recon.*, 50 BRBS 7 (2016).

Upon employer's motion for reconsideration of the Board's first decision in this case, 49 BRBS 71 (2015), asserting it did not concede to claimant's statement that he had notified employer a few months after his third-party settlement, the Board modified its decision. Specifically, the Board vacated the conclusion that claimant had complied with the Section 33(g)(2) notice requirement by notifying employer of the third-party settlement before both payment had been made and an award had been issued. Therefore, to the remand instructions in the prior decision the Board added the instruction that the administrative law judge fully discuss and determine whether the Section 33(g)(2) notice provision had been satisfied such that, once the administrative law judge determined whether the third-party settlement was for an amount greater than or less than the amount to which claimant was entitled under the Act, the administrative law judge would be able to state whether the Section 33(g)(2) bar applies. *Edwards v. Marine Repair Services, Inc.*, 50 BRBS 7 (2016), *modifying on recon.* 49 BRBS 71 (2015).

## Waiver and Employer Participation

The Board also has considered cases involving varying degrees of employer participation in the third-party suits, and the effect that this participation has on the claimant's duty to obtain prior written approval or to give notice. The Board held in *Collier v. Petroleum Helicopters, Inc.*, 17 BRBS 80 (1985), that Section 33(g) does not bar claimant's entitlement to future benefits and claimant has no obligation to obtain employer's approval of a settlement with a third party when employer has waived its subrogation rights against a third party. When employer waives its right to participate in a third-party action, it also waives its right to participate in a settlement between claimant and a third party. The Fifth Circuit reversed this decision and held that a claimant must obtain employer's written approval of a third-party settlement even though employer has contractually waived any subrogation rights against the third-party tortfeasor. *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986). In *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994), the Board assuming, *arguendo*, that employers waived their subrogation rights and assigned their compensation lien to claimant, held that this would not negate claimant's obligation to obtain prior written approval of her third-party settlements since employers still retain an offset right in the proceeds. *See also Treto v. Great Lakes Dredge & Dry Dock Co.*, 26 BRBS 193 (1993).

The Fifth Circuit affirmed the Board's affirmance of the administrative law judge's denial of benefits, under *Collier*, on the grounds that employer's waiver of its right of subrogation against (and employer's agreement to indemnify) the party from which claimant obtained his third-party settlement did not extinguish employer's interest in the settlement under Section 33(f), and that Section 33(g)'s approval and notice requirements are thus applicable. Claimant's failure to comply with Section 33(g) bars his entitlement to benefits under the Act. *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 21 BRBS 163(CRT) (5th Cir. 1988).

In a case decided prior to the 1984 Amendments, the Board held that claimant's failure to get employer's written approval of a third-party settlement was a bar to recovery of future benefits even though employer's carrier had been impleaded into the third-party action and had signed the settlement agreement. *Devine v. National Creative Growth, Inc.*, 16 BRBS 147 (1982) (Ramsey, C.J., dissenting). In his dissent, Judge Ramsey stated that the purpose of Section 33(g) is satisfied in this case since the carrier actively participated in the third-party action and signed the settlement agreement.

Employer's knowledge of a settlement and acceptance of its proceeds after the settlement is finalized is not a waiver of its rights under Section 33(g) where employer actively opposed the settlement during the negotiations. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986), *appeal dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27(CRT) (11th Cir. 1987). The legislative history of the 1972 Amendments indicates that Congress intended to reject theories such as estoppel

and substantial compliance to avoid the effect of non-compliance with Section 33(g). The Board has rejected a claimant's argument that a claims adjuster participated in the settlement negotiations by conveying proposed offers to her principle, the carrier. The Board stated that it is contrary to the purpose of Section 33(g), *i.e.*, the prevention of claimant's unilaterally bargaining away funds to which employer may be entitled, to characterize carrier's mere knowledge of the settlement proceedings when it opposed the settlement as a waiver of its right to approve the settlement. Inasmuch as claimant did not obtain prior written approval under subsection (g)(1), her claim for benefits is barred. *Nesmith v. Farrell American Station*, 19 BRBS 176 (1986). In contrast, in *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987), the Board held that where the claimant's third-party lawsuit had proceeded to final judgment prior to the date of settlement, and where the carrier had actively participated in bringing the third-party action to an end, the written approval requirement of Section 33(g)(1) was not invoked.

In *Pinell v. Patterson Service*, 22 BRBS 61 (1989), *aff'd on other grounds mem.*, 20 F.3d 465 (5th Cir. 1994), the Board concluded that, under the circumstances of this case, employer provided constructive approval of claimant's third-party settlement, thereby satisfying the requirements of subsection 33(g)(1). Employer maintained a blanket policy of withholding its written approval of third-party settlements in order to avoid exposure to future liability under the Act, and withheld written approval in this case despite its intervention in claimant's third-party tort suit, participation in the settlement negotiations and waiver of part of its lien. The Board noted that its holding was consistent with the purposes of Section 33(g) as interpreted by the Fifth Circuit in *Collier*. In effect, the Board adopted the approach taken by Judge Ramsey in his dissent in *Devine*.

The Board found *Pinell* indistinguishable from the facts presented in *Sellman v. I.T.O. Corp. of Baltimore*, 24 BRBS 11 (1990) (Brown, J., concurring in part and dissenting on other grounds), *aff'd in part and rev'd on other grounds*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). In *Sellman*, the employer was a co-plaintiff in the third-party suit, participated in the settlement negotiations, recovered directly from the defendants, and then refused to give written approval of claimant's settlement. The Board held that employer gave constructive approval to the settlement so that subsection (g)(1) does not bar the claim. The Board also held that when an employer is a party to the third-party action and encourages a settlement to which it is also a party, Section 33(g) has no application and cannot bar the claim. This result is compelled by the language of Section 33(g)(1) which states that "if the party entitled to compensation" enters into a settlement with a third party, employer's approval must be obtained. Under the facts presented in this case, the claimant cannot act to the detriment of employer.

In affirming the Board's decision on this issue, the Fourth Circuit agreed that the purposes of Section 33(g) would not be served by permitting the termination of benefits where

employer has ensured by its own action the protection of its offset rights. The court concurred that Section 33(g) is inapplicable where employer participates in the settlement and assents to its terms, under the plain language of Section 33(g)(1). *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

The Board followed *Sellman* in a case decided after *Cowart*, noting that the *Cowart* court specifically declined to address the significance of employer's participation in that case. In *Deville v. Oilfield Industries*, 26 BRBS 123 (1992), the Board held that Section 33(g) is inapplicable because employer intervened in the third-party suit on the side of the claimant, appeared at the hearing and contributed to the settlement agreement which provided for its offset. The Board also held that if Section 33(g)(1) applies, employer gave written approval prior to the execution of the settlement.

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The Board held that where claimant obtained a jury verdict against one of the third-party defendants, but then reached an agreement with two of the defendants for an amount less than the jury awarded, thereby resolving the third-party claim in its entirety, employer's participation in the settlement process, via carrier's actions in protecting its lien against claimant's recovery, was not sufficient to render Section 33(g)(1) inapplicable or to constitute constructive approval of the settlement. Carrier's counsel did not sign the settlement documents and specifically refused to agree to the settlement. Consequently, the Board affirmed the administrative law judge's conclusion that Section 33(g)(1) was applicable to this case. *Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Smith, J., dissenting).

The Board affirmed the administrative law judge's finding that employer's participation in third-party litigation did not amount to constructive approval of a settlement abrogating claimant's responsibility to secure employer's prior written approval of the settlement. Employer was impleaded as a third-party defendant in the tort litigation by another defendant and participated to a limited extent in the negotiations for a settlement of those proceedings by defending against the impleader and by agreeing to compromise its compensation lien. Employer never represented that it would approve the settlement and emphasized that the compromise of its lien could not to be construed as such approval. *Perez v. International Terminal Operating Co.*, 31 BRBS 114 (1997) (Smith, J., concurring).

The administrative law judge's ruling that Section 33(g) did not bar claimant's claim by virtue of employer's participation in third-party litigation was supported by substantial evidence and in accordance with applicable law. Despite claimant's failure to obtain employer's prior written approval of the settlement, employer's participation in third-

party Jones Act and maritime tort litigation precluded application of Section 33(g). Employer was both a defendant and an intervenor in the third-party litigation, and a release signed by claimant recited the agreement of all the parties by which employer avoided further liability and appeared to grant employer an offset in the gross amount of claimant's settlement recovery. The Board distinguished *Perez*, 31 BRBS 114, and *Pool*, 30 BRBS 183, where those employers had distanced themselves from settlement negotiations, did not appear on the side of claimant in the third-party litigation or specifically declined to sign the actual settlement agreement. *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring).

In this case where claimant failed to obtain employer's written approval before executing a third-party settlement for an amount less than his compensation entitlement, the Board affirmed the administrative law judge's finding that employer's participation in the third-party proceedings was insufficient to render Section 33(g)(1) applicable. Specifically, employer was named as a third-party defendant, was dismissed from the case one-and-a-half years before the trial date/settlement date and employer's third-party attorney remained active in the case only for discovery purposes. Although claimant's third-party attorney may have kept employer's attorneys informed about the settlement process, employer's attorneys did not participate in the negotiations and did not approve a settlement or sign a release. The Board distinguished *Sellman, Deville* and *Gremillion*, and concluded that employer in this case participated in the settlement process to an even lesser degree than did the employer in *Pool*, a case where Section 33(g)(1) applied. Consequently, the Board affirmed the administrative law judge's determination that employer's involvement in the third-party litigation did not rise to the level which would constitute constructive approval of the settlement or render Section 33(g)(1) inapplicable, and Section 33(g)(1) applied to bar claimant's entitlement to compensation. *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002).

As the plain language of Section 33(g)(1) states that employer is liable for compensation "only if written approval of the settlement is obtained from *the employer and the employer's carrier*, before the settlement is executed," the Act clearly requires that claimant obtain the prior written approval of both employer and its carrier. The Board held that the fact that *employer*, by virtue of an indemnity agreement, actively participated in the third-party proceedings did not obviate claimant's need to obtain *carrier's* approval. Under the circumstances of this case, moreover, employer's approval of the settlement could not be imputed to carrier. The Board therefore affirmed the administrative law judge's finding that claimant's claim was barred due to his failure to obtain the prior written approval of employer's longshore carrier when he entered into the third-party settlement for an amount less than that which he would be entitled to receive under the Act. *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004).

The Board held that carrier did not constructively approve the third-party settlement. Although claimant's counsel testified that carrier was involved in the settlement process,

the only evidence was a letter in which carrier stated its disapproval. The administrative law judge found that claimant's counsel credibly described the communications between the attorneys, but the Board held that the administrative law judge properly found that these communications did not constitute sufficient participation in the settlement by carrier to preclude application of the Section 33(g) bar. *Bockman v. Patton-Tully Transp. Co.*, 41 BRBS 34 (2007).

## Existence of a Settlement

The discontinuance of a third-party action without the distribution of funds does not constitute a "compromise" requiring the written consent of the employer. *Rosario v. M.I. Stevedores*, 17 BRBS 150 (1985). In *Rosario*, the agreement to dismiss was conditioned on the third party's payment of compensation. Since the third party did not pay claimant, there was no compromise because of a failure of consideration.

The Supreme Court has held that an employee's acceptance of a judicially ordered remittitur in a third-party action does not constitute a compromise within the meaning of Section 33(g). *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). *Cf. Gibson v. ITO Corp. of Ameriport*, 18 BRBS 162 (1986) (mere intervention of the trial judge at the pretrial stage to encourage settlement is not a judicial determination within the meaning of *Banks*); *Morauer & Hartzell, Inc. v. Woodworth*, 439 F.2d 550 (D.C. Cir. 1970) (same).

In *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in part, part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992), the Board affirmed the administrative law judge's finding that no settlement of a third-party suit occurred because there was no acceptance, surrender, mutual consent or consideration present. The administrative law judge properly found, on the basis of parol evidence, that while there were extensive settlement negotiations, no actual settlement or compromise existed, and that Section 33(g) is not applicable. The Ninth Circuit agreed that no settlement occurred despite the appearance of claimant's name on a settlement order, and that the administrative law judge did not err in relying on extrinsic evidence to prove the non-existence of a settlement. *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992). *See also Stadtmiller v. Mallott & Peterson*, 28 BRBS 304 (1994), *aff'd sub nom. Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997) (although Board need not reach the issue, the evidence is such that no settlement occurred; the order dismissing the third-party suit in light of an alleged settlement was vacated).

In *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995), the Board held that the administrative law judge's finding that no settlement occurred for purposes of applying Section 33(g) was supported by substantial evidence. The proposed settlement was contingent on employer's release of its lien; employer did not release that lien, and claimant received no settlement funds nor did he sign any releases. Thus, the Section 33(g) bar is inapplicable. A claimant's termination of or failure to pursue a third-party action does not affect the rights or obligations of the parties under Section 33(g). Section 33(g) applies only where there has been a settlement or judgment. In this case, the administrative law judge rationally found the parties did not execute a settlement. Accordingly, any prejudice to employer resulting from claimant's failure to prosecute his third-party suit cannot terminate employer's liability under the Act.

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An "Offer of Judgment" pursuant to Rule 68 of the Federal Rules of Civil Procedure is properly categorized as a settlement agreement according to case law. There must be an offer and acceptance under contract law, and judgments entered pursuant to Rule 68 are self-executing. There is no independent judicial evaluation of the merits of claimant's third-party claim, and claimant has the option of not accepting the offer, although there is a disincentive to do so. The Board therefore affirmed the administrative law judge's finding that the Rule 68 Offer of Judgment was tantamount to a formal settlement agreement and thus, is a "compromise" for purposes of Section 33(g)(1). Consequently, since claimant failed to obtain employer's written approval before the Rule 68 settlement agreement was executed, the administrative law judge properly found that the claim was barred by the provisions of Section 33(g)(1). *Broussard v. Houma Land & Offshore*, 30 BRBS 53 (1996).

The Board held that where claimant obtained a jury verdict against one of the third-party defendants, and the district court judge entered a "judgment" documenting the jury's verdict, but then claimant reached an agreement with two of the defendants for an amount less than the jury awarded, thereby resolving the third-party claim in its entirety without employer's approval, claimant entered into a compromise within the meaning of Section 33(g). Because the "judgment" entered by the court was not a final judgment or a partial final judgment pursuant to FRCP 54(b), and was subject to revision, the Board affirmed the determination that the judgment did not invoke the notice provisions of Section 33(g)(2), and the case must be remanded for consideration under the Section 33(g)(1) settlement provisions. The Board distinguished this situation from those cases wherein the fact-finders in third-party claims indisputably entered final judgments and set values on the third-party claims. *Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Smith and Brown, JJ., dissenting on other grounds).

Where claimants did not succeed in the third-party suit, as the district court granted summary judgment in favor of the defendants and then assessed court costs against claimants, claimants' election to forego an appeal in return for the defendants' agreement to waive their right to costs is not a settlement for purposes of Section 33(g). The parties did not compromise the third-party case, claimants did not receive settlement proceeds, and the money which the defendants waived were not settlement funds which employer would be entitled to credit. Consequently, the Board affirmed the administrative law judge's determination that claimants' claim for death benefits was not barred by Section 33(g). *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

Because the Section 33(g) bar is in the nature of an affirmative defense, the employer bears the burden of proving that the claimant executed a settlement agreement without the employer's prior written approval. The Board rejected employer's contention that a settlement agreement signed by the claimant is considered an executed settlement as a

matter of law, holding, rather, that inquiry must be made, on the facts of each case, into whether the settlement was executed prior to its submission to the employer for its approval. The Board affirmed the administrative law judge's finding that settlement agreements between claimant and three third-party defendants were fully executed on the basis of uncontested evidence that claimant personally signed the settlement releases, that settlement proceeds were paid to claimant's attorney as her trustee, and that claimant's civil actions were dismissed with prejudice against the three defendants. Claimant characterized the settlements as "executory," based on letters post-dating claimant's signing of the releases which stated that the settlement agreements were contingent upon employer's consent and would be rescinded if consent was not obtained. The Board disagreed that the settlements were executory, holding that rescission of an agreement must return both parties to the *status quo ante*, and, here, the court's dismissal with prejudice of the third-party actions foreclosed a restoration of the parties' original positions. *Barnes v. General Ship Service*, 30 BRBS 193 (1996).

Holding that employer did not satisfy its burden of proving that claimant entered into fully executed third-party settlements prior to obtaining employer's written approval, the Board distinguished *Barnes*, 30 BRBS 193, from a case where, first, unlike *Barnes*, the two third-party releases specifically conditioned the agreements on approval by the responsible longshore employer or carrier, creating specific conditions precedent which were never performed. Second, the settlement proceeds were in fact returned to the third parties once claimant failed to obtain approval by the responsible employer or carrier, unlike the situation in *Barnes*. Thus, the Board held that as the conditions precedent on the faces of the releases were not satisfied, the agreements signed by claimant were not fully executed. While claimant consented to the order dismissing the two civil actions against the third parties pursuant to the releases, the Board noted that a claimant's termination of or failure to pursue a third-party action does not affect the rights or obligations of the parties, and thus, a dismissal alone of a third-party action is insufficient to invoke the Section 33(g) bar. *Smith v. Jones Oregon Stevedoring Co.*, 33 BRBS 155 (1999).

Where claimant, decedent's widow, was not a signatory to the pre-death third-party settlement, but received settlement funds subsequent to the employee's death, the Board rejected employer's contention that claimant was obligated to obtain employer's authorization prior to accepting the settlement funds. The Board held that claimant did not "enter into" the agreement as she was not a signatory, and moreover, she was not a "person entitled to compensation" at the time of the settlement. Therefore, the Board affirmed the administrative law judge's finding that Section 33(g) did not bar claimant's claim for death benefits. *Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000).

Following a thorough discussion of the history of the asbestos trust funds and the Supreme Court's decision in *Banks*, 390 U.S. 459, the Board held that the payments from the trust funds to claimant in this case were similar to the judgment and remittitur in

*Banks.* Moreover, in light of the absence of a compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements, the trust fund offers should be likened to “judgments” instead of “settlements.” Thus, the Board vacated the administrative law judge’s denial of benefits by virtue of the application of Section 33(g), and remanded the case for the administrative law judge to ascertain whether the sums received from the Amatex and Mansville trust funds were in “settlement” of the claims. If the administrative law judge determined on remand that the sums were akin to judgments, then only notice to employer under Section 33(g)(2) was required. If the administrative law judge determined that the sums were in “settlement” of the claims, then he must determine whether the settlements were fully executed. *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001).

In determining whether settlements have been fully executed, the Board held that the administrative law judge must consider, on a case by case basis, numerous factors, including, *inter alia*, whether the claimant agreed to a settlement, whether she signed a release, and whether any third-party suits had been dismissed. The Board concluded that the administrative law judge’s decision that settlements had been fully executed in this case cannot stand because the administrative law judge relied only on counsel’s receipt of money for claimant and did not consider other relevant factors. As the administrative law judge erroneously denied claimant’s motion for modification, to which she attached evidence which, if credited, could establish that no settlements were executed (funds returned, check lapsed), the Board remanded the case for the administrative law judge to conduct the appropriate Section 22 proceedings. *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001).

The Board rejected claimant’s assertion that his third-party settlement was not executed until he received the settlement proceeds from the third-party defendant on October 4, 1999. Rather, because claimant signed a general release in return for \$60,000 on August 24, 1999, and filed a stipulation of dismissal with prejudice in the court the same day, the parties could not rescind the agreement and return to the *status quo ante*. Therefore, the Board held that the settlement was fully executed as of August 24, 1999. *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002).

## Same Injury or Disability

Section 33(g) applies only to suits filed by a claimant which fall within Section 33(a). Thus, a third-party suit must be for the same “disability or death” for which compensation is sought under the Act. Thus, Section 33(g) was held inapplicable to a settlement by an employee with a second non-covered employer who was not potentially responsible to both the employee and the covered employer under Section 33(f). *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

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The Board held that Section 33 does not apply in a case involving successive injuries covered under the Act where a settlement of a compensation claim for one injury is reached with another longshore employer. This result is consistent with *Melson*, 594 F.2d 1068, 10 BRBS 494. Therefore, as Eagle Marine, with whom claimant settled his prior claim, did not cause injury to claimant during the course of his employment with employer and thus was not potentially liable to employer, it was not a "third party" under the Section 33(a) and Section 33(g) did not bar the claim. *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

The Board initially rejected the Director's argument that Section 33(g) did not bar claimant's right to compensation owed for his siderosis claim because the settlements claimant entered into were for his alleged asbestosis, which is a different injury than his siderosis. Since Section 33(a) specifically refers not to "injury," but to suits resulting from "disability," the Board held that the two claims related to the same disability in that both involve occupational lung diseases resulting in respiratory impairment. Therefore, the Board held that Section 33(g) was at issue with regard to both claims because claimant settled third-party suits resulting from his respiratory disability. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on recon.*, 22 BRBS 430 (1989).

The Board modified this decision on reconsideration. The Board noted that its construction of Section 33(a) in the initial case did not affect the disposition on Section 33(g), so any error would be harmless. However, on reconsideration, the Director pointed out that if the settlements of the third-party asbestosis suits can invoke Section 33(a) with regard to the siderosis claim as being for the same disability, then employer would be entitled to offset the entire net recovery against its liability for the siderosis claim, and that this result would be contrary to law. The Board held that this argument may have merit and thus modified its prior opinion to direct the administrative law judge to consider these arguments in determining what credit, if any, should be allowed for the asbestosis settlements in the event benefits are awarded for siderosis. *O'Berry v. Jacksonville Shipyards, Inc.*, 22 BRBS 430 (1989), *aff'g and modifying on recon.* 21 BRBS 355 (1988).

Applying the 1972 Act, the administrative law judge awarded death benefits by finding that the employee was permanently totally disabled at the date of death. The administrative law judge held that the award was not barred pursuant to Section 33 by claimant's abandonment of a malpractice suit for the employee's death, which he determined was beyond the scope of employer's subrogation interest. The Board reversed, holding that the plain language of Section 33(a) states that it is applicable on account of death or disability for which compensation is payable under the Act. Since the malpractice suit and the claim under the Act were similarly instituted due to the employee's death, employer had a subrogation interest under Section 33. The Board held that claimant's failure to pursue a third-party malpractice action to final judgment would not bar claimant's right to compensation under the Act unless employer established that claimant's failure prejudiced it or its carrier's right of subrogation. The case was therefore remanded for findings pertaining to the prejudice issue. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on recon.*, 22 BRBS 335 (1989).

On reconsideration, the Board affirmed the administrative law judge's finding that Section 33 did not bar the claim. The Board agreed with the Director that only failure to comply with Section 33(g) can result in the claim's being barred, and that the 1959 Amendment to Section 33(a) supersedes case law that required that a third-party claim be prosecuted to avoid prejudice to employer. *Mills v. Marine Repair Serv.*, 22 BRBS 335 (1989), *modifying on recon.* 21 BRBS 115 (1988).

The Board affirmed the administrative law judge's finding that claimant's hearing loss claim was not barred by his prior third-party recovery for a crush injury. Section 33 was inapplicable since the hearing loss claim was not for the same disability as the prior third-party recovery, and the claim therefore could not be barred by Section 33(g). *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992) (Smith, J., dissenting on other grounds), *vacated on other grounds mem.*, 17 F.3d 396 (9th Cir. 1994).

In a case in which claimant was exposed to asbestos only with General Dynamics and only to other pulmonary irritants with employer, and in which he settled third-party claims regarding the asbestos exposure with General Dynamics' approval, the Board remanded the case for the administrative law judge to consider whether claimant's failure to get employer's approval bars the claim under Section 33(g) since it is liable for claimant's entire disability under the aggravation and responsible employer rules. The administrative law judge was to consider the argument that the two claims involve separate and distinct injuries. *Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994) (McGranery, J., dissenting).

Following remand, the Board held that claimant suffered two separate injuries as a result of distinct exposures with two employers--asbestosis while working at Electric Boat and chronic obstructive pulmonary disease while working for employer. Claimant properly obtained Electric Boat's written approval of the third-party settlements concerning his

asbestosis. The Board held that since claimant was not exposed to asbestos at employer's facility, the Supreme Court's holding in *Cowart* does not require that claimant must also obtain employer's written consent. Employer did not purchase any asbestos products from the asbestos distributors and manufacturers against whom claimant filed his third-party suits, and it was undisputed that it did not expose claimant to asbestos during claimant's employment with employer; thus, under Section 33(b) of the Act, it was not an employer to whom claimant's right to file suit could be assigned. Accordingly, the Board affirmed the administrative law judge's finding that claimant's claim was not barred by Section 33(g)(1). *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997).

The Board vacated the administrative law judge's finding that Section 33(g) barred claimant's asbestos-related claim for medical monitoring and claim for disability benefits related to his COPD, and remanded for consideration of the entire record to discern the cause of claimant's disability. The Board instructed the administrative law judge to make findings consistent with *Chavez*, 27 BRBS 80, and then to determine the applicability of Section 33(g) based on these findings. In this regard, only if asbestosis was claimant's lone work-related disability could Section 33(g) be invoked to bar claimant's claim. If, however, after reviewing the medical evidence in light of *Chavez*, the administrative law judge again found that claimant was disabled by both asbestosis and COPD, Section 33(g) could not bar the disability claim because, under the aggravation rule, COPD would be considered to be the disabling, compensable condition and therefore not the same disability for which claimant settled his third-party claims. Moreover, under the latter circumstance, claimant's claim for medical monitoring for any asbestos-related condition likewise could not be barred because, ultimately, claimant was not entitled to disability compensation for asbestosis, and a person entitled only to medical benefits is not a "person entitled to compensation" for purposes of Section 33(g). *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 6 (2004).

Following remand, the Board affirmed the administrative law judge's finding under *Chavez*, 27 BRBS 80 (1993), *aff'd on recon.*, 28 BRBS 185 (1994), *aff'd*, 139 F.3d 120, 32 BRBS 67(CRT) (9<sup>th</sup> Cir. 1998), that claimant's claim was not barred by Section 33(g), since he found that the third-party settlements were for asbestos-related conditions, and thus did not involve the same disability, *i.e.*, COPD related to inhalation of substances other than asbestos, for which claimant obtained benefits under the Act. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x 249 (4<sup>th</sup> Cir. 2007).

While claimant was undergoing surgery for low-back injuries received during his employment, he allegedly was dropped by nurses, and as a result thereof, sustained further injuries resulting in incontinence, bowel and bladder problems, and impotency. Employer paid compensation benefits to claimant until it discovered that claimant had

settled his malpractice case against the hospital, and at that time, employer stopped making payments, contending that as claimant did not seek its written consent prior to approving the malpractice settlement, the longshore claim was now barred under Section 33(g). The Board found that where compensation under the Act is sought only for disability due to the primary injury, and not for subsequent aggravations resulting from medical treatment, and the third-party settlement relates solely to the latter, Section 33 does not apply. Accordingly, the Board found that as claimant's only claim was for disability resulting from the back injury, employer remained liable for compensation, but that any claim claimant may make for compensation for his problems due to malpractice would be subject to the Section 33 bar. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1994).

### **Section 33(g)(3)**

In a pre-1984 Amendment case, reversed by the United States Court of Appeals for the District of Columbia Circuit, the Board held that despite the absence of express statutory language on the issue, the Special Fund has a right of subrogation and a lien on third-party recoveries. *Carter v. Director, OWCP*, 15 BRBS 481 (1983), *rev'd*, 751 F.2d 1398, 17 BRBS 18(CRT) (D.C. Cir. 1985). In reversing, the court relied on the absence of express authority in the pre-1984 Act. The 1984 Amendments add new subsection 33(g)(3), however, which authorizes the Special Fund to obtain a lien on any third-party settlement or judgment, regardless of whether the Fund has agreed to or has received actual notice of the settlement or judgment.

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Section 33(f) provides that employer has the first lien against the net proceeds of a third-party settlement; secondary lien rights are provided to the Special Fund and the carrier under Sections 33(g)(3) and (h). Because employer was primarily liable for the payment of compensation to claimant and because the third-party action arose from the same disability for which employer would be responsible if claimant was unable to obtain recovery from a third party, employer was entitled to priority on the lien for the third-party recovery. *Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206 (1989).

The Board held that under Section 33(g)(3), the Special Fund's lien rights in third-party settlement proceeds have priority over the employer's offset rights under Section 33(f). The Board held that *Lindsay*, 22 BRBS 206, was not determinative of this issue. To hold otherwise would render Section 33(g)(3) meaningless, as employer's continued liability for medical and funeral expenses in this case could create future obligations subject to offset at any time, and therefore postpone repayment to the Fund. *Perry v. Bath Iron Works Corp.*, 29 BRBS 57 (1995).

**Section 33(g)(4)**

Any payments under a trust fund which has complied with Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. §186(c), are a lien on proceeds received from third parties and this lien has priority over the Special Fund's lien. 33 U.S.C. §933(g)(4).

### Section 33(h)

Under Section 33(h), when an insurance carrier has assumed payment of compensation, it is subrogated to the employer's Section 33 rights. The issue has arisen as to whether a provision of an insurance contract between an employer and a carrier in which the carrier has waived its subrogation rights precluded the carrier's entitlement to a Section 33(f) credit against the employee's third-party recovery. The Fifth Circuit has held the contractual waiver of Section 33(h) subrogation rights by the compensation carrier barred its entitlement to a lien for benefits paid. *Allen v. Texaco*, 510 F.2d 977 (5th Cir. 1975); *Capps v. Humble Oil & Refining Co.*, 536 F.2d 80 (5th Cir. 1976). See discussion under Section 33(f).

The Fifth Circuit has also held that where the Act and the state workers' compensation law were concurrently applicable, but there was no indication in the record that claimant had elected his state benefits over the federal remedy, it was error for the district court to grant summary judgment to a third-party defendant on the basis of a provision of the state statute which bars claims against third parties. The court held that application of the state bar to recovery could not survive an election of the federal remedy in view of the Act's purpose to provide uniformity of treatment to all maritime workers and the fact that Louisiana, the situs, was the only jurisdiction to bar recovery under its workers' compensation law against statutory employers. *Jenkins v. McDermott, Inc.*, 734 F.2d 229, 16 BRBS 102(CRT) (5th Cir. 1984), *vacated in part on other grounds*, 742 F.2d 191 (5th Cir. 1984).

### Section 33(i)

Section 33(i) provides that the right to compensation under the Act is the exclusive remedy to an employee or his survivors if he is injured or killed by the negligence of any person in the same employ.

### Digests

The Eleventh Circuit affirmed the district court's dismissal of a suit by a plaintiff, who worked on a nonappropriated fund instrumentality, against her supervisor, a civilian employee of the Department of the Army, for an injury occurring at work. The court held that since the plaintiff and her supervisor were both federal employees who worked for the same employer, they were "persons in the same employ" under Section 33(i) and therefore the government and the supervisor are relieved of liability. *Traywick v. Juhola*, 922 F.2d 786 (11th Cir. 1991).

Although nominally employed by different companies, because claimant and his co-worker were borrowed servants of the same employer, when claimant was injured by his co-worker, Section 33(i) barred claimant's suit against the nominal employer of the co-worker in a tort action under the theory of *respondeat superior*. Claimant's sole remedy is under the Act; claimant cannot assert against the nominal employer his non-existent right against the co-worker. The court stated that the borrowed servant becomes the employee of the borrowing employer, and that therefore claimant and the co-worker were "persons in the same employ" within the meaning of Section 33(i). *Perron v. Bell Maintenance & Fabricators*, 970 F.2d 1409, *reh'g denied*, 976 F.2d 732 (5th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993).