

MARJORIE C. WILLIAMS)
(Widow of ELIAS L. WILLIAMS))
)
 Claimant-Petitioner)
)
 v.)
)
 INGALLS SHIPBUILDING,)
 INCORPORATED) DATE ISSUED: June 8, 2001
)
 and)
)
 AMERICAN MUTUAL LIABILITY)
 INSURANCE COMPANY, IN)
 LIQUIDATION, by and through)
 THE MISSISSIPPI INSURANCE)
 GUARANTY ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Robin Reid Boswell (Nelson & Boswell), Pascagoula, Mississippi, for claimant.

Donald P. Moore (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Decision on Motion for Reconsideration (1996-LHC-1851) of Administrative Law Judge David W. Di Nardi rendered on a claim filed pursuant to the provisions of the Longshore and Harbor

Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked for employer as a carpenter in the 1940's, during which time he was exposed to asbestos. In 1993, decedent was diagnosed with asbestosis, and in 1994, he was diagnosed with lung cancer. Cl. Exs. 4-12. In July 1994, decedent entered into an agreement with Babcock & Wilcox, settling an asbestos claim for \$2,000, of which decedent received \$800. Emp. Ex. 7. He died on December 14, 1994, having settled no additional suits, and on December 7, 1995, claimant, decedent's widow, filed a claim for death benefits under the Act. Cl. Exs. 1, 32. Employer argued that claimant is not entitled to benefits because she executed unapproved third-party settlements subsequent to her husband's death, in violation of Section 33(g) of the Act, 33 U.S.C. §933(g).

The administrative law judge first found that decedent's death was causally related to his employment. Decision and Order at 8, 10. He then found that claimant is entitled to death benefits based on the national average weekly wage at the time of decedent's death in 1994, as decedent was a voluntary retiree. *Id.* at 13, 15. He also awarded interest and funeral expenses. *Id.* at 15-16. Based on the parties' stipulations, the administrative law judge found that employer is the responsible employer; however, he denied benefits. He concluded that claimant's third-party counsel, Maples & Lomax, acting on claimant's behalf, accepted and/or deposited checks from the Amatex Trust Claims Facility, representing Amatex Corporation (formerly the American Asbestos Textile Corporation), a bankrupt third-party defendant, and the Manville Personal Injury Settlement Trust, and that these actions constituted unapproved acceptances of settlement offers for amounts significantly less than the amount to which claimant would be entitled under the Act. *Id.* at 20-24. Accordingly, he held that Section 33(g) applied to bar claimant's entitlement to benefits under the Act. *Id.* at 24-25.

Claimant timely moved for reconsideration and modification, attaching a number of documents to her motion. Cl. Ex. 32. Mr. Lomax also filed a letter, explaining his actions in the third-party proceedings. Cl. Ex. 33. Employer filed a motion to strike Mr. Lomax's letter and the attachments thereto, Emp. Ex. 12, as well as a motion to strike/in opposition to claimant's motions. The administrative law judge denied employer's motion to strike Mr. Lomax's letter, stating "it is proper for Attorney Lomax to file for reconsideration." Further, the administrative law judge "considered the matter[,] "conclude[d] there is no valid basis for modification" of the decision, and denied reconsideration. Claimant appeals both decisions, contending the administrative law judge made numerous errors, procedural and factual, in concluding that Section 33(g) bars her entitlement to benefits. Employer responds, urging affirmance.

The facts on which the Section 33(g) arguments are based deal primarily with actions taken by Maples & Lomax with respect to two third-party claims. On May 9, 1995, claimant signed a document selecting the law firm of Maples & Lomax as her attorneys. Maples & Lomax received a letter dated October 9, 1996, from the Amatex Trust. The letter stated that the Trust had approximately 15 million dollars with which to settle all claims filed against it, that the bankruptcy court approved specific payout guidelines on May 9, 1996, for those claims, and it supplied the firm with the “proof of claim” forms necessary to assert claims against the fund.¹ Counsel received a letter from the Amatex Trust dated September 23, 1998.² Enclosed was a check to the Maples & Lomax trust account for \$107,280 for all their claiming clients; \$480 was earmarked for claimant. Cl. Ex. 28. On October 6, 1998, counsel deposited the Amatex check into their trust account. Emp. Ex. 6. In mid-1999, employer propounded additional interrogatories and requests for admissions to claimant in discovery of the claim under the Act. In September 1999, claimant answered, denying any third-party settlements. In a supplemental set of answers in October 1999, claimant admitted to counsel’s holding the \$480, as well as a check in the amount of \$9,000 received from the

¹The Bankruptcy Court confirmed the Chapter 11 reorganization plan of Amatex to cover all liability for personal injuries due to asbestos exposure from its products. The court authorized payment of claims for: mesothelioma (\$1,200), lung cancer (\$480), other cancer (\$240), and asbestosis that causes death (\$480) provided the claimant qualifies for payment, *i.e.*, if the injured worker worked in an occupation and was exposed to asbestos textile products in an industry and state matching the established grid, *e.g.*, the plan covers shipyard or textile workers in Mississippi. Cl. Ex. 28. The final payout schedule, noted herein, was set forth in the September 23, 1998, letter.

²The letter specified the payout schedule and stated:

By cashing the Distribution Check your firm reaffirms its representation that it has authority to receive payment for your clients and the Distribution Check will be deposited in your firm’s attorney escrow account.

Cashing the Distribution Check constitutes a release of all the claims on the list of Claims Paid, unless you return to the Amatex Settlement Trust the payment attributable to a particular client’s proof of claim.

Your firm reaffirms its commitment to prompt delivery of the payments due to your clients.

Cl. Ex. 28.

Manville Trust.³ Cl. Ex. 25, 27. On October 13, 1999, Maples & Lomax issued a letter and a check to the Amatex Trust, returning the \$480 representing claimant's portion of the Amatex payout. Cl. Ex. 28. The hearing in this case was held on October 27, 1999.

Employer argued that counsel's depositing of the Amatex check in their trust account and retaining the amount therein for over one year, and the holding of the Manville check, constituted unapproved settlements pursuant to Section 33(g)(1), 33 U.S.C. §933(g)(1). Accordingly, employer asserted that claimant's personal knowledge is irrelevant, as counsel had the authority to act on her behalf by virtue of her decision to retain them. Nor, it argued, does it matter that claimant ultimately did not accept the money, as claimant only effected such rejection after employer extracted information concerning the payments through the discovery process.

The administrative law judge found that the acceptance and depositing of the Amatex check into the Maples & Lomax trust account and the holding of the Manville check by Maples & Lomax were sufficient actions to constitute settlements between claimant and these third parties. He concluded that claimant's entitlement to benefits under the Act ceased upon receipt and retention of that money. He noted that, although there was no evidence regarding whether Amatex would accept the refund check, counsel's experience combined with the fact that they held onto the check for so long served to discredit the argument that a settlement had not been effected. Decision and Order at 23. In moving for modification, claimant argued that the administrative law judge made factual errors, as the attachments to the motion establish that the Amatex and Manville suits have not been settled. Cl. Ex. 32. Moreover, claimant asserted that she made a request at the hearing to leave the record open for evidence documenting Amatex's acceptance of the refund check, but the administrative law judge denied the request, stating that the information would be cumulative and irrelevant. Tr. at 68-70. As stated above, the administrative law judge denied the motion for

³According to the supplemental answers, the Manville check, as an offer of settlement, was paid to Maples & Lomax on decedent's behalf on August 19, 1999, and received by them on August 26, 1999. *See* Cl. Exs. 25, 27, 32. The terms gave decedent 180 days to accept or reject the offer. As of the dates of the interrogatory answers and the October 27, 1999 hearing, no decision had been made by claimant or counsel with regard to this offer. Cl. Ex. 25; Tr. at 30, 41.

reconsideration and did not address the motion for modification.

Claimant contends the administrative law judge erred in applying Section 33(g) to preclude her from receiving benefits under the Act. She first contends the administrative law judge erred in finding that settlements had been effected by her “representatives” and by applying Mississippi’s agency law to define the term “representative” under Section 33(g). The administrative law judge found that claimant hired Maples & Lomax to represent her and that they had full authority to act on her behalf. Decision and Order at 21. Further, the administrative law judge rejected claimant’s assertion that the decision of the United States Court of Appeals for the Ninth Circuit in *Mallott & Peterson v. Director, OWCP [Stadtmiller]*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997), is controlling precedent. He found that because this case arises within the United States Court of Appeals for the Fifth Circuit and because state law controls the determination of whether a settlement has been executed, the Ninth Circuit case is distinguishable.

Section 33(g)(1) states:

If the person entitled to compensation (*or the person’s representative*) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (*or the person’s representative*) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (*or the person’s representative*). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g) (emphasis added). Section 33(c) of the Act, 33 U.S.C. §933(c), defines “representative” as the “legal representative of the deceased. . . .” As claimant states, the Board has held that the term “representative” in Section 33(g) does not include a claimant’s legal counsel, and the Ninth Circuit affirmed this conclusion. *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). Employer concedes that legal counsel are not included as “representatives” under Section 33(g); however, it argues that the administrative law judge correctly used the principles of agency law to find that settlements were executed by claimant’s authorized agents. As employer asserts, an attorney’s ability to bind his client to an agreement or stipulation is governed by state agency principles. *Stadtmiller*, 98 F.3d at 1174, 30 BRBS at 89(CRT); *Stadtmiller*, 28 BRBS at 310. However, we need not delve into aspects of state agency law, as resolution of this case turns on the threshold questions of whether any third-party “settlements” were

“executed.”⁴

In this regard, claimant contends that the funds she received from the Amatex and Manville Trusts are not “settlements” as contemplated by Section 33(g)(1), but court-approved payments akin to “judgments.” She argues that, because there are limited dollars in the trust funds, and the payments therefrom are made according to a court-approved schedule, involving no negotiation, bargaining or mutual concessions, which would be necessary to establish the existence of a “settlement,” no settlements have been executed. Claimant further contends that the administrative law judge erred in finding that any settlement agreements were fully executed, and in rejecting her motion for modification attempting to establish this fact. Claimant’s contentions on appeal raise issues of first impression. For the reasons that follow, we vacate the administrative law judge’s finding that claimant’s entitlement to death benefits is barred by Section 33(g), and we remand this case for further proceedings.

Section 33(g) provides that the claimant must obtain prior written approval of a third-party settlement if the gross proceeds of the aggregate settlements are in an amount less than that to which the claimant would be entitled under the Act. *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in result only); *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part). Absent that approval, the claimant forfeits such entitlement. 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992). The claimant need only notify the employer under Section 33(g)(2) if she obtains a judgment against the third parties or if she settles the third-party claim for an amount greater than that to which she is entitled under the Act. *Id.*; 33 U.S.C. §933(g)(2). The Section 33(g) bar is in the nature of an affirmative defense, placing the burden on the employer of proving that the claimant entered into a fully executed settlement without prior written approval. *Stadtmitter*, 98 F.3d 1170, 30 BRBS 87(CRT); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999); *Barnes v. General Ship Service*, 30 BRBS 193 (1996).

⁴Nevertheless, it appears the administrative law judge reasonably concluded that Maples & Lomax are claimant’s agents who had real or apparent authority to act on her behalf. See *Stadtmitter*, 98 F.3d at 1173-1174, 30 BRBS at 88-89(CRT); *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989); *Stadtmitter*, 28 BRBS at 310-311; *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172 (Miss. 1990).

On remand, the administrative law judge first must consider whether the sums claimant received were indeed in “settlement” of her claims against the third parties. The Act does not define the term “settlement.”⁵ The Board has affirmed an administrative law judge’s finding that no settlement agreement was consummated because there was no “acceptance, surrender, mutual consent or consideration.” *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71, 76 (1990), *aff’d in part and rev’d on other grounds Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992). “As generally used in the field of litigation, ‘[a] settlement is an agreement to terminate or forestall all or part of a lawsuit.’ *Gorman v. Holte*, 164 Cal.App.3d 984, 211 Cal.Rptr. 34, 37 (1985). It is ‘the conclusion of a disputed or unliquidated claim, and attendant differences between the parties, through a contract in which they agree to mutual concessions in order to avoid resolving their controversy through a course of litigation.’ *McCleary v. Armstrong World Indus., Inc.*, 913 F.2d 257, 259 (5th Cir.1990) (*quoting Priem v. Shires*, 697 S.W.2d 860, 863 n. 3 (Tex.App.1985).” *Taggi v. United States*, 35 F.3d 93, 96 (2^d Cir. 1994); *see also* 17 C.J.S. Contracts §35 (agreement or mutual consent necessary).

In order to properly address whether monies received from the trust funds constitutes a settlement, a review of the facts underlying the asbestos trust funds is helpful. In 1982, Amatex filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §§1101 *et seq.* At that time, more than 16,000 lawsuits had been filed against asbestos-related companies, Amatex included, and the plaintiffs sought an aggregate of more than one billion dollars in damages. The conservative estimate of Amatex’s potential liability was \$20,000,000, an amount greatly exceeding its combined assets and insurance coverage. In 1983, in order to satisfy the asbestos claims against it, and to continue its business operations, Amatex filed a proposed reorganization plan with the bankruptcy court. *In re Amatex Corp.*, 755 F.2d 1034 (3^d Cir. 1985). A similar scenario caused Johns-Manville to apply for Chapter 11 reorganization. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 639-641 (2^d Cir. 1988). In fact, although it failed, the initial Johns-Manville trust was the model for many future plans for companies coping with mass asbestos litigation. *See In re Dow Corning Corp.*, 211 B.R. 545 (Bankr.E.D. Mich. 1997).⁶

⁵We note, however, that the heading of Section 33(g) states: “*Compromise* obtained by person entitled to compensation.” (emphasis added).

⁶In *dicta*, the court discussed various plans, including the failure of the original Johns-

Manville reorganization. The court stated that the plan failed, in part, because planners underestimated the number and amount of actual claims, and the trust administrators liquidated claims in amounts greater than projected. *Dow Corning*, 211 B.R. at 599.

Section 524(g) of the Bankruptcy Code, 11 U.S.C. §524(g), permitted the creation of these types of trusts in response to the mass number of personal injury lawsuits being filed against asbestos companies. The procedures allow claimants to assert claims against these trusts only by filing “proof of claim” forms, as the Code enjoins other entities from filing suit against the company or fund. *Id.*; see *In re the Celotex Corp.*, 204 B.R. 586 (Bankr.M.D. Fla. 1996). This restriction against mass litigation and a “race to the courthouse” seeks to ensure orderly and fair administration of the liquidation plan for both present and future claimants (also referred to as “creditors” or “claim holders”). See generally *Amatex*, 755 F.2d at 1036; *Celotex*, 204 B.R. 586. Reorganization plans are within the jurisdiction of the bankruptcy court and must be submitted, voted on, and approved before they may be implemented. See 11 U.S.C. §1129; *Celotex*, 204 B.R. 586. One key aspect of the process is correctly estimating the aggregate claims to be filed against a trust, *Dow Corning*, 211 B.R. at 600, so that the interests of present as well as future claimants are protected.⁷ Thus, the plans and courts must establish schedules whereby various classes of claimants are paid pre-determined cash amounts to resolve their lawsuits.⁸ See *Celotex*, 204 B.R. at 600, 602, 613 (claim

⁷In *Dow Corning*, the court was faced with litigation involving injuries related to breast implants. That court declined to follow the *Kane* court’s decision that future litigants have an interest in the administration of the trust. *Dow Corning*, 211 B.R. at 273; cf. *Amatex*, 755 F.2d at 1042-1043 (court held that future asbestos claimants were entitled to a representative in the reorganization process).

⁸In confirming a reorganization plan, the bankruptcy court specifically stated:

The Trust is, and shall be deemed to be, for all purposes, including, but not limited to, for purposes of insurance and indemnity, the successor to Celotex

holders will receive “Allowed Amount” of cash; punitive damage claims are disallowed as they would impede fair distribution). This procedure inherently prohibits individual claimants from suing or negotiating with the company or fund to resolve their individual claims.

and Carey Canada in respect of Asbestos Claims. An Allowed Asbestos Claim *shall be, and be deemed to be, a judgment against the Trust* (as successor for all purposes to the liabilities of Celotex and Carey Canada in respect of Asbestos Claims) in the Allowed Amount of such Allowed Asbestos Claim.

In re the Celotex Corp., 204 B.R. 586, 620 (Bankr.M.D. Fla. 1996) (emphasis added).

The Supreme Court's decision in *Banks v. Chicago Grain Trimmers' Assn.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968), provides further guidance on the issue of whether the sums claimant accepted were in "settlement" of her claims. In *Banks*, the widow and minor children of a deceased longshoreman obtained a \$30,000 jury verdict in their third-party claim. The judge informed the parties he would grant the defendant's motion for a new trial unless the plaintiffs accepted a remittitur of \$11,000. Without consulting the employer, the plaintiffs accepted the remittitur, and the court entered judgment for \$19,000. *Banks*, 390 U.S. at 460-461. When the plaintiffs sought benefits under the Act, the employer disputed their entitlement based on their failure to get written approval prior to accepting an amount less than the judgment. The Supreme Court noted that a remittitur is not the equivalent of a mutual agreement among the parties but is "a judicial determination of recoverable damages[.]" *Id.* at 467. The Court declared that the protection supplied by Section 33(g) of the Act to an employer is not required when a fact-finder independently evaluates the situation in a third-party claim and awards damages; therefore it reversed the denial of benefits. *Id.* Thus, the claimant in *Banks* was compelled to accept the remittitur so as to avoid further litigation and a potential loss of the amount she was awarded. However, the amount of the reduced award was determined solely by the judge and was unquestionably a "judgment" which needed no employer approval. *Id.*; compare with *Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Brown, J., concurring and dissenting) (claimant obtained a jury verdict; thereafter he negotiated and accepted an amount less than the verdict without the employer's approval, invoking Section 33(g)(1) and *Broussard v. Houma Land & Offshore*, 30 BRBS 53 (1996) (Rule 68 Offer of Judgment⁹ is "tantamount to a formal settlement agreement[;]" Board declined to place form over substance).

⁹Rule 68 of the Fed. R. Civ. P. permits a defendant, until 10 days before trial, to offer to allow a judgment to be taken against it. If the plaintiff rejects the offer, but does not receive a more favorable judgment after trial, the plaintiff must pay the costs incurred after the offer was made.

The payments made in this case are similar to the judgment and remittitur in *Banks*, as the Trusts sent payments to claimant and other plaintiffs based on reorganization plans which had been deemed fair and approved by the bankruptcy court. See generally *In re Joint Eastern and Southern District Asbestos Litigation*, 14 F.3d 151 (2^d Cir. 1994); *Kane*, 843 F.2d 636; *Amatex*, 755 F.2d 1034; *Dow Corning*, 211 B.R. at 599. Claimant either could accept the amounts offered and consider the cases resolved, or she could decline the amounts and be placed at the end of the lists of the Trusts' "creditors." Negotiation for a greater amount was not an option, as the amount has been determined by the court. The absence of compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements support the conclusion that the Amatex and Manville offers herein should not be considered settlements, but, rather, should be likened to "judgments."¹⁰ If they are considered "judgments," only notice to employer under Section 33(g)(2) is required.¹¹

If the sums received are found to be in "settlement" of claimant's third-party claims, the administrative law judge must consider whether the settlements were fully executed. The Board has held that several factors are relevant to this determination, including such things as: whether the claimant agreed to a settlement, whether she signed a release, whether she obtained and retained money from the third-party defendant, whether the conditions precedent to any settlement have been satisfied, whether the claimant's counsel had the authority to settle a claim on her behalf, whether any third-party suits had been dismissed, and/or whether any settlement had been rescinded, thereby returning the parties to the *status quo ante*. These factors are considered on a case-by-case basis. See *Barnes*, 30 BRBS at 197-198; *Chavez*, 24 BRBS 71.

The Ninth Circuit's decision in *Chavez*, 961 F.2d at 1413, 25 BRBS at 139(CRT), is instructive in this case. In *Chavez*, the court affirmed the Board's decision holding that an administrative law judge's decision that no settlement occurred was supported by substantial

¹⁰The administrative law judge also should consider whether claimant's rights against the third parties could be assigned to employer, if the prerequisites to Section 33(b) of the Act were satisfied. 33 U.S.C. §933(b). If the employer does not have a cause of action against the Trusts, Section 33(g) is not applicable. *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).

¹¹Employer, in the alternative, argues that claimant failed to notify it within a reasonable time pursuant to Section 33(g)(2). Contrary to employer's assertion, through the discovery process, it was notified of the third-party claims and payments before it made any payments and before any award under the Act was announced. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3^d Cir. 1995); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 15 (CRT), 24 BRBS 49(CRT) (9th Cir. 1990).

evidence. In that case, the employer relied on Good Faith Settlement Orders entered by a court and including claimant as a named claimant in asserting that claimant had entered into a settlement under Section 33(g). The court found more than sufficient evidence supported the administrative law judge's finding, as there was no evidence of an actual settlement agreement executed by the parties, claimant testified he had not received any settlement amounts, his third-party attorney testified that he had not agreed to any settlement on behalf of claimant and that any checks received had been returned, and representatives of the third-party defendants declared that no settlement agreement had been reached and they were unaware of any releases signed by claimant.

In *Smith v. Jones Oregon Stevedoring Co.*, 33 BRBS 155 (1999), the Board held that Section 33(g) did not bar the claimant's entitlement to death benefits. In that case, the claimant entered into two third-party settlement agreements, both of which required approval of the longshore employer as a condition precedent, and both of which provided that, absent such approval, the settlements would become void and the settlement proceeds would be returned. As the employer did not approve those settlements, the condition precedent was not satisfied and the proceeds were returned. Therefore, the Board held that the agreements were not fully executed and the Section 33(g) bar was not invoked. *Smith*, 33 BRBS at 159-160.

In comparison, the Board held that the settlements in *Barnes*, 30 BRBS 193, were fully executed without approval of the employer, thereby invoking the Section 33(g) bar. In *Barnes*, the claimant signed agreements which released and discharged the third-party defendants, with prejudice, in return for a sum of money. Although the cover letters to these agreements indicated an intent to make the settlements contingent upon the employer's approval, and they contained a promise to return the money if approval was not given, the agreements themselves contained no such language. As the civil actions were dismissed with prejudice, and the settlement proceeds were being held in trust by claimant's counsel, the Board held that the settlements were fully executed. It concluded that the promise to return the money did not constitute a rescission of the agreement, and because the cases were dismissed, the parties could not return to *status quo ante*. Therefore, the settlements were fully-executed, unapproved settlements which invoked the Section 33(g) bar and precluded the claimant from recovering benefits under the Act. *Barnes*, 30 BRBS at 197-198.

In the case before us, in holding that claimant executed third-party settlements without employer's approval, the administrative law judge relied heavily on the presumption that claimant's counsel had authority to act on her behalf and on the fact that they held money in trust for her. Although he noted that claimant may not have known about the funds and did not release the defendants from their liability, he found that counsel's receipt of the money, alone, was sufficient to execute a settlement as that term is used in Section 33(g), on claimant's behalf. Such an analysis is incomplete and cannot stand. It disregards the other

factors necessary to determine whether a settlement has been executed, *see* discussion *supra*, and it presumes a settlement exists merely by virtue of counsel's ability to receive funds on claimant's behalf. As *Chavez* and *Smith* demonstrate, where the facts demonstrate that claimant has executed no releases and received no funds and that her attorneys have not completed fully executed agreements and have returned funds, there is ample evidence that a settlement has not occurred.

Moreover, the administrative law judge's summary denial of claimant's motion for modification was in error. Section 22 of the Act permits the modification of a final award if the party seeking to alter the award can establish either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The fact-finder has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection of the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks*, 390 U.S. 459. Any evidence not previously submitted to the administrative law judge can receive consideration only pursuant to a motion for modification; therefore, it is an abuse of discretion not to consider the new evidence presented in a modification proceeding. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988).

As claimant contends, the administrative law judge should have accepted into evidence and considered the documents attached to her motion for modification, as well as any rebuttal evidence employer may have. Attached to her motion for modification, claimant included a copy of the \$9,000 Manville Trust check and related paperwork, notice that the Manville offer and check expired and the claim would have to be reactivated, notice that the Amatex claim remains unsettled, and a copy of the back of the return check showing that Amatex endorsed and accepted the returned money. Cl. Ex. 32. If credited, the evidence offered in support of modification could establish a mistake in fact, in that Amatex accepted the return of the \$480 and the Manville offer expired without action by claimant. Cl. Ex. 32. Thus, documents attached to the motion for modification provide evidence relevant to establishing that the claims remain unresolved and that no settlements were executed. *See Chavez*, 961 F.2d 1409, 25 BRBS 134(CRT); *Arnold v. Amoco Oil Co.*, 872 F.Supp. 1493 (W.D. Va. 1995); *Smith*, 33 BRBS at 159-160; 17 C.J.S. Contracts §65. On remand, therefore, the administrative law judge must address claimant's request for modification under Section 22 of the Act.

Accordingly, the administrative law judge's finding that Section 33(g) bars claimant's claim is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order is affirmed.¹²

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

¹²Claimant also argues the administrative law judge erred in denying counsel the opportunity to apply for an attorney's fee. If, on remand, claimant is found to be entitled to benefits under the Act, then her counsel may be entitled to an attorney's fee award payable by employer. 33 U.S.C. §928.