



BRB No. 15-0112

DARRELL EDWARDS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MARINE REPAIR SERVICES,)	DATE ISSUED: <u>Mar. 10, 2016</u>
INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	ORDER on MOTION for
)	RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board’s decision in this case, *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. The Director, Office of Workers’ Compensation Programs (the Director), responds, urging the Board to deny the motion. Claimant has not responded to employer’s motion. Upon review of employer’s contentions, we grant employer’s motion for reconsideration and the alternative relief requested by employer. Accordingly, the Board’s Decision and Order is modified as set forth below.

In its decision, the Board held that claimant had complied with the notice provision of Section 33(g)(2), 33 U.S.C. §933(g)(2), such that claimant’s right to benefits under the Act would not be barred if Section 33(g)(1), 33 U.S.C. §933(g)(1), is not applicable. The belief that there was no dispute as to whether claimant had notified employer of his third-party settlement within months of its execution was based upon a statement in claimant’s response to employer’s motion for summary decision, in

conjunction with the undisputed fact that employer filed a motion for summary decision because claimant had executed a third-party settlement. As claimant undisputedly had not complied with the prior written approval provision of Section 33(g)(1), and there appeared to be no dispute regarding his compliance with the notice requirement, the Board remanded the case for the administrative law judge to address which subsection of Section 33(g) applies.¹ *Edwards*, 49 BRBS at 74-75.

Employer has clarified in its motion for reconsideration that it did not concede to the assertion in claimant's response brief. Therefore, the matter is clearly one in dispute and must be resolved by the administrative law judge. Consequently, we vacate the Board's conclusion that claimant complied with the notice provision in Section 33(g)(2). We modify the remand order of our original decision to include the instruction that the administrative law judge must fully discuss and determine whether the Section 33(g)(2) notice provision has been satisfied, based on all the relevant facts, such that, if claimant's third-party settlement was for an amount greater than or equal to his compensation entitlement under the Act, the administrative law judge would be able to state whether the Section 33(g)(2) bar applies.² *See Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988); *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001); *Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186 (1993) (decision on recon.), *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J.,

¹ Specifically, the Board stated that the administrative law judge must make a comparison between claimant's gross third-party settlement and his lifetime compensation entitlement under the Act, excluding medical benefits. *Edwards*, 49 BRBS at 74-75; *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). The Board noted that it is employer's burden to establish the applicability of the Section 33(g) defense. *Edwards*, 49 BRBS at 75 n.9; *see also 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), *cert. denied*, 507 U.S. 984 (1993); *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

² However, we reject employer's assertion that the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), overrules *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), as it pertains to the timing of the Section 33(g)(2) notice. While the Supreme Court addressed the situations which would require a claimant to give an employer notice of a third-party resolution, as opposed to obtaining the employer's prior written approval, *Cowart* did not address the timing of that notification. *Cowart*, 505 U.S. at 481-483, 26 BRBS at 52-53(CRT).

concurring); *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); *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988). *Lewis v. Norfolk Shipbuilding & Dry Dock Co.*, 20 BRBS 126 (1987) (Brown, J., concurring).

Accordingly, employer's motion for reconsideration and the alternate relief it requests are granted, and the Board's initial decision in this case is modified as stated herein. 20 C.F.R. §802.409. In all other respects, the Board's decision is affirmed, and the case is remanded for further proceedings consistent with the Board's decisions.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge