

BRB Nos. 89-1330
and 90-2117

MEGAN KISHA MONETTE, Minor)	
(Putative child of STEPHEN O.)	
METOYER, deceased))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CHEVRON USA INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	DECISION and ORDER on
)	MOTION for RECONSIDERATION
Respondent)	<i>EN BANC</i>

Appeals of the Order on Motion for Summary Decision of Parlen L. McKenna, Administrative Law Judge, United States Department of Labor, the Decision and Order - Awarding Benefits and the Supplemental Decision and Order - Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor, and the Award of Attorney's Fees of Donnette S. Glenn, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Madeleine M. Landrieu (Gainsburgh, Benjamin, Fallon, David & Ates), New Orleans, Louisiana, for claimant.

Mary L. Grier Holmes (Milling, Benson, Woodward, Hillyer, Pierson & Miller), New Orleans, Louisiana, for self-insured employer.

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

HALL, Chief Administrative Appeals Judge:

Claimant has timely moved for reconsideration *en banc* of the Board's Decision and Order in *Monette v. Chevron USA Inc.*, 25 BRBS 267 (1992). 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(c), 802.407(b), 802.409. In its decision, the Board reversed the administrative law judge's determination that claimant's claim for death benefits was not barred by Section 33(g) of the Act, 33 U.S.C. §933(g) (1988), and his award of benefits to claimant. We hereby grant claimant's request to reconsider this case *en banc*, but deny the relief requested.¹

To recapitulate the facts of this case, claimant is the putative child of Stephen O. Metoyer (decedent). The decedent was employed as a platform worker assigned to a fixed platform located on the Outer Continental Shelf off the coast of Louisiana. He was fatally injured in a helicopter crash during the course of his employment on July 18, 1980; the decedent was survived by his parents, nine siblings, and an alleged illegitimate daughter, Megan Kisha Monette (claimant).

As a result of the death, a claim was filed on behalf of claimant, then approximately three years of age, on August 6, 1981, against employer for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). Claimant received no voluntary payments of compensation from employer. An action for damages was also filed on behalf of claimant in the United States District Court for the Eastern District of Louisiana against several third parties. In July 1984, without the written approval of employer, Stanley Monette, maternal grandfather and provisional tutor of claimant, entered into and executed a compromise agreement which released the third parties and dismissed employer from the action with prejudice. In consideration of this release, claimant recovered a net amount of approximately \$5,700.

Claimant continued to pursue an award of death benefits under the Act. On May 6, 1985, employer filed a motion for summary decision, arguing that claimant's claim for dependency benefits under the Act was barred pursuant to Section 33(g). Claimant contended that she had a vested right to these benefits as of July 16, 1984, as a result of her settling the third-party claim prior to the passage of the 1984 Amendments. Relying on *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd mem.*, 729 F.2d 777 (5th Cir. 1984), Administrative Law Judge McKenna found that on the facts of this case it would clearly be inequitable and unjust to bar relief and, therefore, denied employer's motion for summary decision.

The case was subsequently assigned to Administrative Law Judge Avery (hereinafter the administrative law judge), who declined to disturb the ruling of Judge McKenna that the claim was not barred by the settlement with the third parties. The administrative law judge thereafter concluded that claimant was a "surviving child" of the decedent and was, therefore, entitled to death

¹Claimant's request that the instant case be held in abeyance pending the decision of the United States Supreme Court in *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), is moot.

benefits pursuant to Section 9 of the Act, 33 U.S.C. §909.

On appeal, employer argued, *inter alia*, that this claim is barred and forfeited by claimant's compromise of her claim against the third parties without having first obtained in writing the approval of employer as required by Section 33(g)(1). The Board, in its decision, determined that the decision of the United States Court of Appeals for the Fifth Circuit in *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT)(5th Cir. 1991)(*en banc*), in which the court held that Section 33(g) contains no exceptions to the written approval requirement, is controlling in the present case. As it is not disputed that employer did not give its prior written approval to the settlement entered into on claimant's behalf, the claim for death benefits was thus held barred by Section 33(g). Accordingly, the Board reversed the administrative law judge's award of benefits to claimant. *Monette*, 25 BRBS at 272.

In her motion for reconsideration, claimant contends that the Board erred in holding her claim barred by Section 33(g); specifically, claimant asserts that the Board should have considered that her third-party claim was settled before the enactment date of the 1984 Amendments and in accordance with the then-controlling opinion of the United States Court of Appeals for the Fifth Circuit in *Kahny*. Employer responds, urging the Board to deny claimant's motion for reconsideration.

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

- (1) 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.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. §933(g)(1988)

In the instant case, claimant concedes that written approval of her settlement was not obtained from employer. However, claimant contends that Section 33(g)(1) of the Act should not act as a bar to her death benefits claim since her settlement was entered into prior to the effective date of the 1984 Amendments and was based upon then-current circuit court case law. Thus, claimant's motion for reconsideration rests on the contention that neither the 1984 Amendments to the Act nor subsequent case law should be applied retroactively to her claim.

We first address claimant's assertion that Section 33(g), as amended in 1984, should not be applied retroactively to her claim. This case is the first to raise issues related to a settlement entered into prior to the 1984 Amendments. Prior to the 1984 Amendments, Section 33(g) was virtually identical to current Section 33(g)(1). The Board construed this provision as applying only where the claimant was receiving compensation at the time of the settlement; the only United States Courts of Appeals to address the issue affirmed the Board's decisions in unpublished opinions. *See Kahny, supra; O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980). Section 33(g)(2), adopted in September 1984, added a notice requirement and the language terminating benefits "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." 33 U.S.C. §933(g)(2). Claimant argues that the amended provision does not apply to her July 1984 settlement and that her claim must be decided based on the statute and case law controlling at that time.

Analysis of the issue of whether the 1984 Amendments to the Act are to be applied retroactively to this case must begin with a discussion of the standard for retroactivity of legislation recently set forth by the United States Supreme Court in *Landgraf v. USI Film Products*, U.S. , 114 S.Ct. 1483 (1994). In *Landgraf*, the Court initially addressed what it described as two rules of statutory interpretation which appeared on the surface to be at odds: the presumption against retrospective application of a statutory provision, stated in many cases, versus the principle set forth in *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006 (1974), that a court should apply the law in effect at the time it renders its decision unless it would be "manifestly unjust to do so." The court found no real conflict between the *Bradley* principle and a *presumption* against retroactivity where the statute in question is unambiguous. *See Landgraf*, 114 S.Ct. at 1501 (emphasis in original). Thereafter, the Court set forth a two-step analysis for resolving statutory retroactivity disputes, stating that

[w]hen a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has specifically prescribed the statute's proper reach. If Congress has done so . . . there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Id., 114 S.Ct. at 1505. Thus, the Court concluded that the initial inquiry is to be directed to whether Congress has specifically provided for retrospective application; if Congress has clearly expressed the reach of the statute, no further inquiry need be made.

In the instant case, Congress specifically provided that the changes made to certain sections of the Act, including Section 33(g), by the 1984 Amendments are effective upon enactment of the amendments and "shall apply both with respect to claims filed after such date and to claims pending on such date." *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. No. 98-426, 98 Stat. 1639, 1655, §28(a). As Congress has thus expressly prescribed the reach of the 1984 Amendments to the Act, and to amended Section 33(g) specifically, claimant's contentions must be rejected. As the Supreme Court in *Landgraf* noted, "[r]equiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 114 S.Ct. at 1501. Given this decision, the fact that claimant's settlement pre-dated the Amendments cannot alter the result. Pursuant to *Landgraf*, we hold, based upon the clear language of the Congressional enactment, that Section 33(g) as amended must be applied to the present case, since it was pending on the effective date of the 1984 Amendments, September 28, 1984.

Subsequent to the issuance of our decision in this case, the United States Supreme Court affirmed the Fifth Circuit's decision in *Cowart*, holding that under the plain language of Section 33(g)(1), an injured employee forfeits his right to compensation benefits under the Act by failing to obtain the employer's written approval of a third-party settlement for an amount less than the compensation due under the Act.² *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992). In *Cowart*, the Supreme Court held that the claimant "became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability...." *Id.*, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). Thus, the claimant in that case became a person entitled to compensation at the time he suffered his work-related traumatic injury to his hand on July 20, 1983, prior to his entering into a third-party settlement. Despite the employer's conceded knowledge of the settlement, the Court held that the claimant was required to obtain the employer's written approval of the settlement pursuant to Section 33(g)(1). The Court noted that a claimant is required to provide notice of a settlement under Section 33(g)(2), but not to

²As we noted in the initial decision, the unpublished decision of the Fifth Circuit relied upon by claimant on appeal, *Kahny*, 729 F.2d at 777, was explicitly overruled by the Fifth Circuit in *Cowart*, 927 F.2d at 832, 24 BRBS at 96 (CRT).

obtain written approval, in two instances: "(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 the employer's total liability." *Id.*, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT).

The Board recently addressed the issue of the retroactive application of the Supreme Court's decision in *Cowart* to cases pending at the time of issuance of the *Cowart* decision in *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994). Following a discussion of Supreme Court precedents regarding retroactivity, *see, e.g., Harper v. Virginia Dept. of Taxation*, U.S. , 113 S.Ct. 2510 (1993), the Board held that where, as in *Cowart*, the Supreme Court applied its rule of law to the parties before it, the rule of law announced by the Court must be applied to parties in cases pending at the time the Court issued its decision. Thus, the Board determined that the Supreme Court's decision in *Cowart* was to be given retroactive effect. Accordingly, for the reasons set forth in *Kaye*, we hold that the Court's decision in *Cowart* applies to claimant herein. *See also Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). Under the precedent established by *Landgraf* and *Kaye*, that claimant may have relied upon the statute and case law at the time of her July 1984 settlement cannot alter the outcome.

In the instant case, it is clear that claimant was a "person entitled to compensation" under Section 33(g)(1) as defined by *Cowart*. Thus, as it is undisputed that claimant did not obtain written approval of the third-party settlement, her claim for benefits is barred by that subsection if the settlement entered into on her behalf was for an amount less than the amount of compensation to which she is entitled under the Act. *See Linton*, 28 BRBS at 282. As claimant filed a claim for death benefits under the Act, her potential entitlement to compensation derives from Section 9 of the Act, 33 U.S.C. §909, which provides that a single surviving child of a deceased employee is entitled to 50 percent of the employee's average wages. 33 U.S.C. §909(c). No party disputes the administrative law judge's finding that decedent's average weekly wage at the time of his death was \$393.78. As claimant's entitlement to death benefits vested upon the date of death of the decedent, July 18, 1980, it is a mathematical certainty that the net amount of the third-party settlement agreement entered into on claimant's behalf, approximately \$5,700, is less than the amounts due her under the Act. Thus, as Section 33(g)(1) as amended is applicable to the instant case, and claimant failed to obtain employer's written approval of the third-party settlement agreement, the panel's determination that the claim for death benefits is barred by Section 33(g)(1) of the Act is affirmed. *See Cowart, supra.*

Accordingly, claimant's motion for reconsideration *en banc* is granted, but the relief requested is denied.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I agree with my colleagues that the decision of the Supreme Court in *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), is controlling in this case and that the relief requested in claimant's motion for reconsideration must therefore be denied. My reasoning in reaching this decision differs from my colleagues in that, in my view, *Cowart* simply states the correct interpretation of Section 33(g), as amended in 1972 and in 1984. As I explained in my concurring opinion in *Tufano v. International Terminal Operating Co.*, 25 BRBS 285 (1992), the Board's interpretation of the phrase "person entitled to compensation" in *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980), was incorrect from the beginning and was not adopted by any appellate court in a published opinion. This interpretation did not follow the plain language of the statute. The phrase "person entitled to compensation" appears throughout Section 33 and should always have been construed consistently.

In my view, and as the Court held in *Cowart*, a claimant's status as a "person entitled to compensation" is not affected by the timing of the determination of entitlement.

Moreover, interpretation of the phrase "person entitled to compensation" is not affected by the 1984 Amendments, as this language was not altered as a result of the 1984 Amendments. In any event, Congress has spoken with clarity to the question of application of the 1984 Amendments, explicitly stating they apply to pending cases. The conclusion that *Cowart* controls is thus inescapable. The decision states the current law, clearly applicable to this case. As it cannot be disputed that claimant's compensation entitlement exceeds her third party recovery and facts similar to those in *Sellman v. I.T.O. Corp. of Baltimore*, 24 BRBS 11 (1990) (Brown, J., concurring and dissenting), *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*, U.S. , 113 S.Ct. 1579 (1993), have not been asserted, I agree that the claim is barred by Section 33(g). I therefore concur in the result reached in this case.

JAMES F. BROWN
Administrative Appeals Judge