

BRB Nos. 92-2322
and 92-2322A

MAGGIE YATES)
(Widow of JEFFERSON YATES))
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
INGALLS SHIPBUILDING,)
INCORPORATED) DATE ISSUED:
)
and)
)
AMERICAN MUTUAL LIABILITY)
INSURANCE COMPANY, IN)
LIQUIDATION, BY AND THROUGH)
THE MISSISSIPPI INSURANCE)
GUARANTY ASSOCIATION)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent) DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits of Quentin P. McColgin,
Administrative Law Judge, United States Department of Labor.

Steven J. Miller (Ransom P. Jones, III, P.A.), Pascagoula, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate
Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director,
Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant, the widow of Jefferson Yates (decedent), appeals, and employer cross-appeals, the Decision and Order - Awarding Benefits (91-LHC-324) of Administrative Law Judge Quentin P. McColgin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board held oral argument in this case in Mobile, Alabama, on January 11, 1994.

Decedent worked for employer as a shipfitter for various periods between 1953 and 1967, during which time he was exposed to asbestos. Decedent voluntarily retired from his subsequent non-maritime employment in 1974. In March 1981, decedent was diagnosed as suffering from asbestosis, chronic bronchitis, and possible malignancy of the lungs. On April 16, 1981, decedent filed a claim for benefits under the Act. On May 26, 1981, he filed a third-party lawsuit in federal court against 23 manufacturers of asbestos products.

Prior to the adjudication of his longshore claim, decedent entered into settlement agreements with several of the third-party defendants. While claimant was not a named party plaintiff in the third-party action undertaken by decedent, she did sign each of these pre-death settlements as a co-releasor with regard to her loss of consortium. On June 8, 1982, employer admitted the compensability of decedent's claim under the Act and tendered benefits. Subsequently, on May 5, 1983, a Section 8(i), 33 U.S.C. §908(i) (1982), settlement was executed by the parties, awarding decedent a lump sum of \$15,000, open medical benefits and attorney's fees. Payment was made pursuant to an order of the deputy commissioner dated May 10, 1983. Following this order, decedent entered into additional third-party settlements which were also co-signed by claimant; in at least two of these settlements, claimant signed as a co-releasor with regard to potential wrongful death actions, in addition to her loss of consortium. With regard to these third-party settlements entered into by decedent and claimant prior to his death (the pre-death settlements), written approval by employer was not obtained.

Decedent died on January 28, 1986, due to prostate cancer.¹ On April 22, 1986, claimant filed a claim for death benefits under the Act; employer filed its notice of controversion on May 21, 1986. Claimant and decedent's six non-dependent, adult children continued decedent's federal court action, which converted from a personal injury action to

¹The parties stipulated that decedent's asbestosis contributed to his death. *See* Jt. Ex. 1.

a wrongful death action. Thereafter, claimant and decedent's children entered into settlements with the following three third-party defendants (the post-death settlements):

<u>Defendant</u>	<u>Date</u>	<u>Gross</u>	<u>Net</u>
Raymark	May 10, 1988	\$2,821	\$1,880.67
Wellington	April 5, 1989	\$60,000	\$36,000
Johns-Manville	June 19, 1989	\$43,000	\$25,800

Unlike the pre-death settlements, written approval from employer of the post-death settlements was obtained.

After concluding that it could credit against its potential compensation liability all the net proceeds from these settlements, and in light of claimant's age, 83, employer thereafter filed a motion to amend its "answer," admitting compensability of claimant's death benefits claim, but seeking a dismissal of the claim on the basis that it was a mathematical impossibility that it would ever have to pay claimant benefits. In response, claimant asserted that only her share, one-seventh of the net proceeds from the settlements, should be credited against employer's compensation liability under the Act.

In his Decision and Order Awarding Benefits, the administrative law judge, noting that claimant's claim for death benefits is separate and distinct from decedent's claim for disability benefits, found that at the time of the pre-death settlements, claimant was not "a person entitled to compensation" under Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), and was thereby exempt from that subsection's requirement that written approval of the third-party settlements be obtained from employer. Accordingly, the administrative law judge found that claimant's claim for death benefits under the Act was not barred pursuant to Section 33(g)(1). Furthermore, the administrative law judge found that claimant provided employer with notice of the pre-death settlements, as required by Section 33(g)(2) of the Act, 33 U.S.C. §933(g)(2). Next, the administrative law judge found that by operation of the Mississippi wrongful death statute, as well as claimant's own testimony, the proceeds of the post-death settlements were apportioned among claimant and decedent's six non-dependent children, such that claimant received only one-seventh of the net amount of those three settlements. However, the administrative law judge found that based on the terms of these post-death settlement agreements, employer was contractually entitled to receive a credit under Section 33(f) of the Act, 33 U.S.C. §933(f), for the entire amount of the net proceeds of these settlements, not only the one-seventh claimant received, to offset employer's liability for claimant's death benefits.² Accordingly, the administrative law judge awarded claimant death benefits, commencing January 28, 1986, pursuant to Section 9 of the Act, 33 U.S.C. §909, and found employer to be entitled to a credit, pursuant to Section 33(f), for the net amount of the post-death settlements entered into by claimant.

²The administrative law judge also found that claimant's attorney's fee for the third-party settlements, which was based on a 40 percent contingency fee contract, is reasonable. As such, the administrative law judge found that the fee shall be deducted as an expense in determining the net amount of claimant's third-party recovery under Section 33(f) of the Act. In an Order dated June 23, 1992, the administrative law judge denied employer's motion for reconsideration regarding this issue. The administrative law judge's findings in this regard are not challenged on appeal.

On appeal, claimant contends that the administrative law judge erred in finding that employer was entitled to offset its liability for claimant's death benefits by the entire net proceeds of the third-party settlements into which she entered subsequent to decedent's death. Specifically, claimant asserts that the administrative law judge misinterpreted the language of the three post-death settlements, since claimant could not contractually obligate herself to give employer a credit for those shares of the net proceeds which, under Mississippi law, were not her property but the property of her children. Employer responds, urging affirmance. In a reply brief, claimant asserts that it was not the intent of decedent's non-dependent heirs to give employer a credit for the settlement shares they received, and that since those heirs never filed claims under the Act for benefits, they are not subject to the Act's jurisdiction.

In its cross-appeal, employer first contends that, pursuant to the holding of the United States Supreme Court in *Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), claimant is "a person entitled to compensation" under Section 33(g)(1), and therefore was required to obtain employer's written approval of the pre-death settlements. Thus, employer avers that since claimant joined in decedent's third-party settlements, which employer did not approve, the administrative law judge erred in not finding that her subsequent claim for death benefits was barred pursuant to Section 33(g)(1).³ In addition to its appeal of the administrative law judge's finding with regard to Section 33(g)(1), employer, as a protective measure, contends that the administrative law judge should have awarded employer an offset for the net amount received by all third-party plaintiffs pursuant to Section 33(f), notwithstanding the language contained in the settlements themselves. Specifically, employer argues, *inter alia*, that under Section 33(f), the amount employer is entitled to offset against its liability is the net amount "recovered against such third person," not the amount necessarily recovered by claimant individually. Claimant responds, again urging affirmance of the administrative law judge's finding that her claim for death benefits is not barred by Section 33(g)(1) and reversal of his finding that employer was entitled to offset the total net proceeds of the post-death settlements against its liability under the Act. In reply, employer lastly contends that the holding of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *aff'g in part and rev'g in part* 24 BRBS 35 (1990), is dispositive of both the Section 33(g)(1) and 33(f) issues in the instant case.

The Director, Office of Workers' Compensation Programs (the Director), has responded to the appeals in this case, supporting claimant's contentions with regard to both Section 33(g)(1) and Section 33(f). Specifically, the Director contends that the United States Court of Appeals for the Ninth Circuit in *Cretan* misinterpreted the Supreme Court's decision in *Cowart* holding that a person becomes "entitled to compensation" at the moment his right to recovery vests. Since claimant's right to recovery did not vest until her husband died, the Director argues, she was not a "person entitled to compensation" at the time of the pre-death settlements, and thus, Section 33(g) does not bar her

³Before he settled his claim under the Act, decedent entered into settlements on May 13, 1981, March 29, 1982, and May 20, 1982. After the settlement order of May 10, 1983, decedent settled third-party claims on May 21, 1983, January 11, 1984, January 30, 1984, and January 31, 1984.

claim for death benefits. Moreover, the Director asserts that under Section 33(f), apportionment of a third-party recovery is *mandatory* since that subsection allows the employer to offset only that portion of a settlement attributable to the "person[s] entitled to compensation." The Director asserts that claimant's children were not "persons entitled to compensation" since they did not file claims under the Act. The Director also agrees with claimant that the administrative law judge misinterpreted the language of the post-death settlements; in the alternative, the Director argues that even if the administrative law judge was correct in finding that employer was contractually entitled to receive a credit for the post-death settlement proceeds attributable to claimant's children, Section 15(b) of the Act, 33 U.S.C. §915(b), prohibits such a result.

I. Section 33(g)(1)

The first issue presented by the appeals in this case is whether the administrative law judge properly determined that claimant's claim for death benefits under the Act was not barred by Section 33(g)(1) of the Act. We hold that the administrative law judge correctly concluded that Section 33(g)(1) did not bar claimant from pursuing her claim for death benefits.

Section 33(g)(1), 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.

33 U.S.C. §933(g)(1)(1988). Claimant concedes that the settlements entered into prior to decedent's death were not approved in writing by employer.⁴ The administrative law judge found that claimant, as a potential widow, was not a "person entitled to compensation" at the time that the pre-death settlements were executed.⁵ Moreover, the administrative law judge found that claimant's death benefits claim is separate and distinct from decedent's claim for benefits, and that her right to file a claim for death benefits did not arise until decedent's death. Thus, the administrative law judge found that claimant was under no obligation to obtain employer's written approval of the pre-death settlements, even though she acted as a co-releasor in signing them, and that Section 33(g)(1) does not act as a bar to her claim for death benefits.

Our consideration of employer's contentions on appeal must begin with a discussion of *Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), wherein the United States Supreme Court held 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. In *Cowart*, the claimant suffered a work-related injury and the employer paid temporary total disability benefits for ten months but refused to pay permanent partial disability benefits. During the period when he was not receiving benefits, the claimant settled a third-party action, but did not secure the employer's written approval of the settlement. The claimant argued that since the employer was not voluntarily paying benefits at the time of the settlement and a formal award of benefits had not been issued, he was not a "person entitled to compensation" under Section 33(g)(1). Thus, the claimant argued, compliance with Section 33(g)(1) was not required.

The Board agreed with the claimant's argument. *See Cowart v. Nicklos Drilling Co.*, 23 BRBS 42 (1989). However, the United States Court of Appeals for the Fifth Circuit reversed, holding that Section 33(g) contains no exceptions to the written approval requirement. *See Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991)(*en banc*). In affirming the Fifth Circuit's decision, 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." *Cowart*, U.S. , 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). Thus, the claimant became a person entitled to compensation at the time he suffered his work-related injury. Despite the employer's conceded knowledge of the settlement,⁶ the Court held that the claimant was required to

⁴As noted previously, employer approved the three post-death settlements. *See* Emp. Ex. 22.

⁵At the time the administrative law judge's Decision and Order was issued, the Supreme Court had not yet affirmed the Fifth Circuit's decision in *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT)(5th Cir. 1991)(*en banc*). The administrative law judge found that the Fifth Circuit's interpretation of Section 33(g)(1) was inapplicable to the instant case since it did not concern the issue of potential widows.

⁶Because the issue had not been briefed, the Court did not discuss the effect of employer's participation in the settlement. *Cowart*, U.S. , 112 S.Ct. at 2598, 26 BRBS at 53 (CRT).

obtain the employer's written approval of the settlement pursuant to Section 33(g)(1).⁷

As claimant and the Director assert in their respective briefs, the Supreme Court in *Cowart* did not consider the issue at bar, *i.e.*, whether a potential widow is a "person entitled to compensation" under Section 33(g)(1) prior to the death of her spouse, and thus whether that subsection would act as a bar to the widow's subsequent death benefits claim where the widow and decedent settled third-party claims without written approval prior to his death. Applying *Cowart* to the present claim, it is clear that decedent's pre-death settlements and his obligation to obtain employer's consent to those settlements are relevant to decedent's claim for disability benefits accruing prior to his death and not to his widow's claim for death benefits. As Judge Brown so cogently details in his concurring opinion, the facts of this case clearly demonstrate the relationship of the pre-death third-party settlements to the pre-death disability claim and the post-death settlements to the death benefits claim. Decedent entered into a Section 8(i) settlement of his disability claim in May 1983 for a lump sum of \$15,000, medical benefits, which ultimately amounted to \$454.50, and an attorney's fee. Employer's total liability for compensation and medical benefits was \$15,454.50, which was employer's lien in the third-party suit. The pre-death settlements netted a greater amount, sufficient to satisfy employer's lien in full. I fully agree with my colleague that since the amount of the pre-death settlements exceeded the compensation due decedent, written approval of those settlements was not required under Section 33(g)(1). Moreover, failure to obtain approval of those settlements cannot bar the subsequent claim for death benefits by decedent's widow, claimant herein. At the time of the pre-death settlements claimant had no vested right to death benefits.

In his decision, the administrative law judge found that under Section 9 of the Act, 33 U.S.C. §909, and Section 702.241 of the regulations, 20 C.F.R. §702.241, claimant's claim for death benefits is separate and distinct from decedent's claim for disability and medical benefits. *See* Decision and Order at 8-10. Thus, the administrative law judge determined that "the Act embodies the concept that [claimant's] action for death benefits would not be recognizable until [decedent's] death occurred." *Id.* at 9. Accordingly, after further finding that Congress did not confer a cause of action for Section 9 death benefits prior to the death of the injured employee, the administrative law judge determined that claimant, for purposes of Section 33(g)(1), could not have been deemed a "person entitled to compensation" until decedent's death occurred. In response to employer's contentions of error, claimant similarly asserts that her right to file a claim for death benefits did not vest until decedent's death from his work-related injury and, therefore, it is impossible for her to be deemed a "person entitled to compensation" *before* her husband's death.⁸

⁷The Court noted that a claimant is required to provide notice of a settlement under Section 33(g)(2), but not 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." *Cowart*, U.S. , 112 S.Ct. at 2597, 26 BRBS at 53 (CRT).

⁸Claimant also argues that *Cowart* is inapplicable to the instant case because the Supreme Court there interpreted Section 33(g)(1) as amended in 1984. This contention is without merit. In *Cowart*,

Both the United States Court of Appeals for the Fifth Circuit, wherein appellate jurisdiction of this case lies, and the Board have previously recognized the distinction between disability and death benefits claims. *See Travelers Insurance Co. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981); *Close v. International Terminal Operations*, 26 BRBS 21 (1992). In *Marshall*, the Fifth Circuit noted that a cause of action for death benefits does not arise until death. Similarly, in *Close*, a case which involved the question of whether Section 9 under the 1972 Amendments or 1984 Amendments applied, the Board held that the right to death benefits is separate and distinct from the right to disability benefits, and does not arise until the death of the employee occurs. This interpretation is supported by the Act,⁹ which sets forth two separate and distinct classes of claimants who may have a right to benefits, *i.e.*, injured employees who seek disability benefits and the spouses of injured employees who, as a result of the employees' work-related deaths, seek death benefits, *see* 33 U.S.C. §§908, 909, as well as Section 702.241(g) of the implementing regulations, which states that an agreement among the parties to settle a claim "shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits." 20 C.F.R. §702.241(g).

Moreover, this distinction between disability and death claims is supported by the decision of the Supreme Court in *Cowart*. Specifically, in determining when the claimant in that case became "a person entitled to compensation," the Court stated that "the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right." *Cowart*, U.S. , 112 S.Ct at 2595, 26 BRBS at 51 (CRT). The Court held that claimant *Cowart* became "a person entitled to compensation" at the moment his right to recovery vested. *Id.*, U.S. , 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). In the instant case, claimant's right to death benefits under the Act could not have vested *before* she became a widow. As the Director notes, numerous events may occur which could affect a spouse's future claim for death benefits before that spouse's right to death benefits vests; for example, the employee may die of a non-work related ailment, the employee's spouse may predecease the employee, a divorce may occur, or the law may change. The occurrence of any of these events would preclude a vesting of a

the Supreme Court noted that while Congress redesignated then subsection 33(g) to what is now (g)(1) by virtue of the 1984 Amendments, the phrase "person entitled to compensation" was not changed. *Cowart*, U.S. , 112 S.Ct. at 2589, 26 BRBS at 50 (CRT). It is also noted that claimant has never asserted, at the administrative law judge level or before the Board, that the 1984 Amendments to Section 33(g) are not applicable because the pre-death settlements were executed prior to the effective date of the 1984 Amendments.

⁹In setting forth the enactment dates for the 1984 Amendments to the Act, Congress specifically stated that the amended Section 9 was to apply to any death occurring after September 28, 1984. *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. Law 98-426, §28(d), 98 Stat. 1639, 1655; *see generally Mikell v. Savannah Shipyard Co.*, 24 BRBS 100, 103 n.1 (1990), *aff'd on recon.*, 26 BRBS 32 (1992).

right to death benefits under the Act. In *Marshall*, 634 F.2d at 843, 12 BRBS at 922, the Fifth Circuit noted the interrelationship between one of these pre-death factors, specifically the employee's injury and the employee's subsequent death, stating that death is not the only operative fact relevant to a determination of the availability of death benefits under the Act. Rather, while a cause of action for death benefits does not arise until death, the existence of a maritime-related injury must still be established.¹⁰ Thus, as numerous unforeseen events can terminate a potential entitlement to compensation if they occur prior to the employee's death, the right to recover death benefits cannot arise, or vest, until, at a minimum, an employee's death occurs leaving behind a surviving spouse. Accordingly, we reject employer's contention that the spouse of an injured employee is "entitled" to death benefits prior to the actual work-related death of the employee.

We note that the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *aff'g in part and rev'g in part* 24 BRBS 35 (1990), declined to extend the Supreme Court's statement that a person does not become "entitled to compensation" until the right to recovery vests, to the situation where a spouse and daughter of an employee settled their third-party tort actions prior to the death of the employee. Rather, the court in *Cretan* held that an injured employee's spouse and daughter were persons "entitled to compensation" at the time pre-death settlements were entered into and were therefore subject to the provisions of Sections 33(f) and (g). We, however, decline to accept this interpretation of Section 33(g)(1), as it is contrary to the Supreme Court's language in *Cowart*.¹¹ In our opinion, the decision of the Supreme Court in *Cowart*, as well as the Fifth Circuit's holding in *Marshall*, clearly supports a determination that a spouse's right to death benefits does not vest until he or she becomes a widower or widow upon the death of the injured employee. We therefore hold that at the time of the pre-death settlements in this case, claimant was not a "a person entitled to compensation," and thus was not subject to the requirements of Section 33(g)(1). Accordingly, we affirm the administrative law judge's finding that claimant's death benefits claim was not barred by Section 33(g)(1) of the Act.

II. Section 33(f)

We now address claimant's contention on appeal that the administrative law judge erred in finding that employer was entitled to credit the entire net proceeds of the post-death settlements entered into by claimant and decedent's six children against its compensation liability to claimant. In his Decision and Order, the administrative law judge rejected employer's argument that under

¹⁰Similarly, the United States Court of Appeals for the First Circuit in *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 10 BRBS 531 (1st Cir. 1979), acknowledged that the right to death benefits under the Act arises at death.

¹¹In fact, the Ninth Circuit, after noting that the language used by the Supreme Court regarding vesting did not refer to the facts in the case before the court, characterized the Court's statement as dicta and stated "[we] decline to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended." *Cretan*, 1 F.3d at 847, 27 BRBS at 98 (CRT).

Section 33(f),¹² claimant is not entitled to an apportionment of the post-death settlement proceeds. Instead, the administrative law judge found that under Mississippi's wrongful death statute, "[d]amages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children, all shall go to his wife." MISS. CODE ANN. §11-7-13 (1972).¹³ See Decision and Order at 18. Thus, the administrative law judge rejected employer's argument that claimant was attempting to obtain a double recovery since, under operation of the Mississippi statute, claimant was entitled to only one-seventh of the post-death settlement proceeds, and the evidence showed that claimant in fact received only one-seventh of the proceeds of those settlements. Tr. 27-28. The administrative law judge determined that under operation of state law, the settlement proceeds were apportioned among the parties, and that claimant never made any claims concerning apportionment according to the types of damages she received.

The administrative law judge went on to find, however, that as a matter of contract, employer was entitled to offset the total net amounts of the third-party post-death settlements, since language to this effect was contained in each of the three post-death settlements entered into by claimant and decedent's six non-dependent children, and approved by employer. The administrative law judge cited the pertinent language in the settlements entered into with Raymark, Wellington and Johns-Manville respectively. With regard to Raymark, the agreement states:

Releasors do hereby represent and warrant to Releasees that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including but not being limited to the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its

¹²Amended Section 33(f) provides:

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f)(1988).

¹³Since the federal third-party law suit was filed in Mississippi, the administrative law judge noted that the federal district court was required to apply Mississippi state law. See Decision and Order at 18.

insurance carrier paying or ordered to pay such compensation benefits to *any Releasor* shall first be given *credit for the consideration paid to Releasors* under this agreement, less reasonable cost collection, and shall make no payment of any compensation benefits to *any Releasor* until the *consideration paid to Releasors* under this agreement is exhausted. . . .

Emp. Ex. 21 at 4-5 (emphasis added).

The Wellington "Final Judgment Approving Settlement and Dismissing with Prejudice" states:

The Court finds that the above offer of settlement is reasonable and in the best interest of said parties, and it is therefore, approved, provided that if any claim be pending or hereafter filed by the plaintiff, the decedent's heirs, or anyone in privity with them for benefits under the Mississippi Workers' Compensation Act, the Federal Longshoremen's and Harbor Workers' Compensation Act, or any other law which provides benefits to be paid by the decedent's employer, and/or insurance carrier, and any such employer and/or insurance carrier be ordered to pay such benefits resulting from or in any way related to any matter, fact, or thing appearing in the Complaint filed in this cause, then under the provisions of the applicable compensation act such employer and/or its insurance carrier shall first be given *credit for the net amount* of the aforesaid sum *accruing to the plaintiff and the decedent's heirs*.

Emp. Ex. 21 at 20-21 (emphasis added). The administrative law judge noted that the Wellington settlement itself uses the same language as cited above in the Raymark settlement. Emp. Ex. at 31-32. He also acknowledged that the settlement with Johns-Manville uses different language, to wit:

The undersigned further agree to be responsible for the required reimbursement of all outstanding medical bills and/or worker compensation benefits paid to or on behalf of the undersigned to date, and shall indemnify and hold harmless the TRUST up to the amount of this settlement for any such sums adjudicated to be a lien upon this settlement.

Emp. Ex. 21 at 46. The administrative law judge noted, however, that the agreement also contains language similar to that used in the Raymark settlement, which gives employer credit for the entire amount of the net proceeds.¹⁴ Emp. Ex. 21 at 47-48. Thus, the administrative law judge concluded

¹⁴This clause of the settlement states:

The undersigned do hereby represent and warrant to the TRUST that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including, but not being

that with respect to the three post-death settlements, claimant is contractually obligated to give employer credit for the entire amount of the net proceeds, not only the one-seventh share she received.¹⁵

On appeal, claimant and the Director argue that the administrative law judge misinterpreted the language of the post-death settlements and contend that the settlements cannot give employer an offset for the amounts which decedent's heirs received. Claimant and the Director further argue that since decedent's heirs did not file their own claims under the Act, they are not "persons entitled to compensation" under Section 33(f) and, thus, that subsection cannot be used to entitle employer to offset the amounts which they received as a result of the post-death settlements. In its cross-appeal, employer challenges the administrative law judge's holding that Section 33(f) allows it a credit for only the net proceeds received by the claimant under the Act, contending that it should be entitled to offset the entire net amount of the proceeds recovered against the third-parties.

We agree with claimant and the Director that the administrative law judge erred in finding employer to be entitled to an offset for the total net proceeds of claimant's post-death settlements. Initially, the administrative law judge properly found that under Section 33(f), the settlement was clearly apportioned among the parties in the third-party action. Section 33(f) states that if "the person entitled to compensation" files a third-party lawsuit, employer is required to pay the excess of the amount which the Secretary determines is payable under the Act, "over the net amount recovered against such a third person." 33 U.S.C. §933(f). In the instant case, the settlement amounts were apportioned among claimant and her six non-dependent adult children consistent with Mississippi law. Only claimant filed a claim under the Act and was entitled to benefits. Therefore, only she can be deemed "a person entitled to compensation" under Section 33(f). See *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*

limited to, the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to *either of the undersigned shall first be given credit for the consideration paid to the undersigned* under this agreement, less reasonable cost of collection, and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted.

Emp. Ex. 21 at 47-48 (emphasis added).

¹⁵The administrative law judge noted that this contractual obligation was recognized by the United States Court of Appeals for the Fifth Circuit in *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987).

Aluminum and Chemical Corp., 23 BRBS 1 (1989).¹⁶

Employer urges, nonetheless, that we affirm the administrative law judge's determination that it was entitled to offset the full net amount of the settlements, as this decision was made not as a matter of law under Section 33(f), but as a matter of contract. We reject this argument, as the administrative law judge's decision is contrary to law. Initially, we disagree with employer's contention that the decision of the United States Court of Appeals for the Fifth Circuit in *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987), mandates affirmance of the administrative law judge's findings on this issue. In *Wilfred*, the Fifth Circuit held that the employee's widow, in signing a third-party settlement agreement, obligated herself to give employer a credit for all sums which she received as a result of that agreement. Unlike the employer in *Wilfred*, who actually was a party to and signed the third-party settlement agreement, employer herein was not a party to the third-party settlements, but merely approved those settlements. Thus, employer did not enter into a contract with the third party regarding the settlement proceeds. I completely agree with my concurring colleague's analysis of the contractual rights of claimant and employer and their effect on Section 33(f). Employer was neither a party to the contracts nor can it be considered a third-party beneficiary. Moreover, as Judge Brown points out, language in the contract with Raymark indicates employer is to receive credit for sums received by claimant. The court in *Wilfred* recognized claimant's obligation to give employer credit only for those sums which she herself had received, which is the result we hold is proper in the case at bar. Claimant here received only one-seventh of the settlement proceeds, and only the amounts received are subject to the offset.

Finally, we agree with the Director that, assuming, *arguendo*, the administrative law judge correctly interpreted the language of the post-death settlements as entitling employer to a credit of the entire net proceeds of the settlements, enforcement of such language would be tantamount to a waiver of claimant's compensation which is precluded by Section 15(b) of the Act, 33 U.S.C. §915(b).¹⁷ While our dissenting colleague maintains that Section 15 cannot be applied to the instant case since that section invalidates only agreements between employees and employers, we believe that to allow the surviving spouse of an employee seeking benefits under the Act to step into the shoes of the employee is a fair application of Section 15, and is consistent with the Supreme Court's requirement that the Act be liberally construed in order to effectuate its remedial purposes. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281, 14 BRBS 363, 368 (1980). We

¹⁶We therefore reject employer's argument that the administrative law judge should have found it entitled to a full credit of the net proceeds of the post-death settlements as a matter of law.

¹⁷Section 15(b) of the Act provides:

No agreement by an employee to waive his right to compensation under this chapter shall be valid.

33 U.S.C. §915(b).

therefore vacate the administrative law judge's finding that employer is entitled to a credit of the total proceeds of the post-death settlements, and hold that employer is entitled to offset only the amount claimant received in the post-death settlements, not the amounts received by decedent's other heirs.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is modified to reflect that employer is entitled to offset only claimant's one-seventh share of the post-death settlements against its compensation liability. In all other respects, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

Factually this is an unusual case and, in many respects, it is a case of first impression. Decedent, Jefferson Yates, worked as a shipfitter for Ingalls Shipbuilding, Incorporated for periods during 1953 and 1967 during which time he was exposed to asbestos particles. In March 1981, he was diagnosed as suffering from asbestosis and several other conditions. On April 16, 1981, he filed a claim against employer for benefits under the Longshore and Harbor Workers' Compensation Act. On May 26, 1981, he also filed a third-party lawsuit in the United States District Court for the Southern District of Mississippi against 23 manufacturers of asbestos products.

I. Section 33(g)(1)

Between April 1982 and March 1984 Mr. Yates entered into settlements with Armstrong, Garlock, Rockwool, and H.K. Porter, Inc., four of the defendants in the third-party suit. On May 5, 1983, he entered into a Section 8(i), 33 U.S.C. §908(i)(1982), settlement of his Longshore claim with employer for a lump sum of \$15,000, medical benefits and attorney's fees. The settlement was approved by the deputy commissioner on May 10, 1983. Subsequently, decedent entered into additional third-party settlements with GAF Corp., Owens-Corning Fiberglass and Owens-Illinois Inc. Decedent's wife, Maggie Yates, was not a party in the third-party suit but did sign the settlement agreements as a co-releasor. As to the seven settlements entered into during decedent's lifetime, written approval by employer was not obtained.

Decedent died on January 28, 1986. On April 22, 1986, his widow, claimant, filed a claim for death benefits under the Act against employer. Furthermore, claimant and decedent's six non-dependent adult children continued the third-party suit against the remaining asbestos defendants, which was then treated as a wrongful death action. Subsequently, claimant and the six children entered into settlements with Raymark on May 10, 1988, for \$2,821, Wellington on April 4, 1989, for \$60,000 and Johns-Manville on June 19, 1989, for \$43,000. Written approval of these three settlements was obtained from employer and LS-33 forms were filed. Emp. Ex. 22.

The first issue presented by the appeals is whether claimant's claim for death benefits is barred by Section 33(g)(1) of the Act which, as amended in 1984, holds, in effect, that when a person entitled to compensation enters into a settlement with a third person for an amount less than the compensation to which the person would be entitled under the Act, the employer shall be liable for compensation in excess of the net third-party recovery only if the employer and its carrier gave written approval prior to execution of the settlement. It is conceded that written approval was not obtained in connection with the seven settlements executed prior to decedent's death. Employer takes the position that claimant's death claim under the Act is barred because she participated in the pre-death settlements as a co-releasor and written approval was not obtained. The administrative law judge held that Section 33(g)(1) did not bar claimant because at the time of the pre-death settlements she was not a "person entitled to compensation" in that any claim for death she might have did not vest until decedent's death. The Director also takes this position.

Any discussion of the meaning of the phrase "person entitled to compensation" must begin with *Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992). The Supreme Court held that a claimant became a person entitled to compensation at the time of a work-related injury and that it was immaterial whether claimant was receiving compensation at the time of a third-party settlement. There were two sentences which the Supreme Court used to pinpoint its holding and which must be read together: "Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Cowart*, U.S. , 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). We, thus, have a clear guide as to the meaning of a "person entitled to compensation" where we have an injured employee who has a potential compensation claim and who files a third-party suit which he settles as the only party-in-interest. However, as claimant and the Director assert, the Supreme Court in *Cowart* did not have before it the question of whether a potential widow is a "person entitled to compensation" prior to the death of her husband, as in this case. Much was made of this issue by the administrative law judge and by the parties, including the Director, in their briefs. *Travelers Insurance Co. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981), is cited to show a distinction between disability and death claims. In *Cowart*, the court was dealing with a traumatic injury to a hand. Under those circumstances the right to recovery vested at the time of injury. In *Travelers*, however, the court pointed out that although the source of liability for death benefits under the Act is traced back to a maritime injury, it is clear that a cause of action for death benefits under Section 9 of the Act does not arise until death. That is the time the cause of action for death benefits vests. Based on this rationale, I agree with Judge McGranery that Section 33(g)(1) is not a bar to claimant in this case.

There is an additional reason why the right to further compensation is not barred in this case. Section 33(g)(1) of the Act bars further compensation if the person entitled to compensation settles a third-party claim *for an amount less than the person would be entitled to under the Act* without first obtaining written approval of employer and its carrier. Here, however, the pre-death settlements were for a net amount greater than what Mr. Yates would have received under the Act. Strangely, this obvious fact was never mentioned by any of the parties, the Director, or the administrative law judge. As stated above, Mr. Yates entered into a Section 8(i) settlement of his claim with employer on May 5, 1983, for the lump sum of \$15,000, medical benefits and attorney's fees. As a result of providing \$454.50 in medical benefits, plus the lump sum, the total compensation and medical costs amounted to \$15,454.50, and this amount constituted employer's total lien in the third-party suit. According to the record, the gross amount of the lifetime settlements with Armstrong, Garlock, H.K. Porter, Inc., GAF, Owens-Corning Fiberglass and Owens-Illinois was \$31,350, Emp. Ex. 13, less a 40 percent attorney's fee of \$12,575, leaving a net to Mr. Yates of \$18,785.¹⁸ Employer had notice of the settlements, asserted its lien and was paid in full \$15,454.50. The lien was paid in two installments, \$14,127.59 on January 31, 1984, out of the pre-death settlements, and the balance of \$1,327.29 on June 20, 1988, with proceeds from the settlement with Raymark, one of the approved

¹⁸The parties did not include in the computation the \$10 token consideration in the settlement with Rockwool. See Emp. Ex. 23 setting forth the gross and net amounts of all settlements.

post-death settlements. *See* Emp. Ex. 14. Since the Section 8(i) compensation settlement clearly determined and liquidated the amount of compensation to which Mr. Yates would be entitled and since the pre-death settlements were for a greater amount, and with employer receiving complete satisfaction of its lien, written approval of the settlements was not compelled by Section 33(g)(1). That section, therefore, would not bar a claim for further compensation by Mrs. Yates. As stated above, with the written approval of the three post-death settlements, there is no statutory bar to her right to further compensation.

II. Section 33(f)

I concur in the rationale of Judge McGranery's discussion of Section 33(f) and the conclusion that employer is entitled to offset only the amount received by claimant in the post-death settlements and not the amounts received by decedent's other heirs.

Upon the death of Mr. Yates, claimant's inchoate right to a possible death action became vested. She was then in the position of a "person entitled to compensation." Section 33(f) provides that when such person recovers from a third person, employer may be required to pay additional compensation in an amount determined by the Secretary over the net amount received by "such person" in the third-party actions. Clearly this refers solely to Mrs. Yates, and not the six adult children, who, because they were adult and non-dependent, were not entitled to a possible claim under the Act and who, in fact, never filed a claim under the Act. *See 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 and Chemical Corp.*, 23 BRBS 1 (1989) (in which the court held that Section 33(f) allows the employer to offset only that portion of a third-party settlement attributable to claimant). This view was also adopted by the United States Court of Appeals for the Fourth Circuit in *I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971, 26 BRBS 7 (CRT) (4th Cir. 1992), *modifying on recon.* 954 F.2d 239, 25 BRBS 101 (CRT)(4th Cir. 1992), *cert. denied*, 113 S.Ct. 1579 (1993), wherein it adopted the view of the Ninth Circuit and held that employer's offset rights are limited to the portion intended for claimant.

Despite the literal reading of Section 33(f) and the interpretation by two Courts of Appeals, employer contends that the releases in the Raymark, Wellington and Johns-Manville cases executed by claimant and the six adult children constituted a contract whereby employer was entitled to a complete offset of all monies received by all heirs rather than the one-seventh received by claimant. Employer, however, was not a party to the release agreements. It was not a signatory. They were entered into by claimant and the heirs, pursuant to a right granted by Mississippi statutory law, with three of the defendants in the third-party suit. Is employer contending it is a third-party beneficiary? It has not made any such assertion, nor does it appear that it would qualify. Such a contract must have been intended for the benefit of the third person. Absent such intent, the third person is merely an incidental beneficiary with no right to enforce the contract. The intent of the parties must be determined by the terms of the contract as a whole in the light of the circumstances under which it was made. The releases in question contain much more than the paragraph referring to credit. The body of each release is eight pages long covering, in boilerplate language, every conceivable claim, cause of action, lien, subrogation right, remedial right, direct or indirect, that could possibly be asserted against the third-party defendants, including any such action by Ingalls Shipbuilding, Incorporated, the employer in this case. *See generally* 17A Am. Jur. 2d Contracts, §§440, 441. Clearly, the intent of the releases was to protect Raymark, Wellington and Johns-Manville from any and all possible actions arising as a result of Mr. Yates' exposure to asbestos during the course of his employment. The releases were not for the benefit of Ingalls other than incidentally, and as a matter of law they do not benefit Ingalls over and above what is already contained in the provisions of Section 33(f) of the Act.

Of particular interest as to the intent of the releases, there is an acknowledgment in the record, employer's own exhibit, identified as Emp. Ex. 21 p. 17 of 57, which strangely has not been mentioned by anyone so far in this case. The acknowledgement, executed by claimant on April 27, 1988, in connection with the settlement with Raymark, one of the three post-death settlements, states her understanding that if successful in her compensation claim against Litton Systems, Inc. (actually the Ingalls subsidiary of Litton) that Litton "*will be given credit for the amount of money paid to me by Raymark* and that Litton will owe no further compensation "until the amount *received by me* from the above mentioned Defendant has been exhausted" [emphasis added]. This acknowledgement is evidence of claimant's understanding that only the amount she received would be credited to the offset.

I further concur with Judge McGranery who agrees with the Director that to interpret the releases in the post-death settlements to give credit of the entire net proceeds would be tantamount to a waiver of claimant's compensation that is precluded by Section 15(b) of the Act.

Accordingly I, too, would modify the administrative law judge's Decision and Order to reflect that employer is entitled to offset only claimant's one-seventh net share of the post-death settlements against its compensation liability and affirm the Decision and Order in all other respects.

JAMES F. BROWN

Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I fully agree with the lead opinion affirming the administrative law judge's determination that claimant was not "a person entitled to compensation" at the time of the pre-death settlements and, thus, that Section 33(g)(1) does not bar claimant's claim for death benefits. I respectfully dissent, however, from my colleagues' holding that claimant is entitled to an apportionment of the proceeds of the post-death settlements, such that employer is entitled to offset only the net amount claimant received from those settlements, not the amounts decedent's heirs received. I agree with the administrative law judge's findings on this issue, and would hold that by virtue of the specific language contained in the post-death settlements, claimant waived her right to apportionment.

The administrative law judge found that by operation of Mississippi law, claimant was entitled to an apportionment of the proceeds of the post-death settlements. *See* Decision and Order at 18. The majority points out that Section 33(f) of the Act, 33 U.S.C. §933(f), mandates such an apportionment as well. I am not in disagreement with these views. It is with regard to the applicability of Section 15, 33 U.S.C. §915, and its relation to the settlements, that I part company with the majority's opinion. The majority holds that even if the administrative law judge correctly construed the language in the post-death settlements as a waiver of claimant's right to an apportionment, enforcement of such language would be in violation of Section 15 of the Act. Section 15(a) and (b) of the Act provide:

- (a) *No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000.*

(b) No agreement *by an employee* to waive his right to compensation under this chapter shall be valid.

33 U.S.C. §915(a), (b)(emphasis added). Read together, I believe Section 15 invalidates agreements between only employees and their employers, in situations where the employer either deducts pay from the employee for the purpose of contributing to his own compensation, or where the employee seeks to waive his right to compensation. Based upon this interpretation of Section 15, I do not believe that this section of the Act is applicable to the instant case, as claimant was not an employee of employer. Moreover, the post-death settlements were agreements between claimant, decedent's heirs and three third-party defendants; employer was not a signatory to these agreements. Thus, a strict reading of Section 15 dictates that this section does not apply to the instant situation.

The language of the post-death settlements, as cited by the majority, does appear to waive claimant's right to an apportionment of the post-death settlements, a waiver that has been recognized by the United States Court of Appeals for the Fifth Circuit in *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987). I believe that Section 15 does not invalidate this waiver. Accordingly, I would affirm the administrative law judge's finding and hold that as a matter of contract, employer is entitled to a credit of the entire net proceeds of the post-death settlements, not just claimant's one-seventh share.

ROY P. SMITH
Administrative Appeals Judge