

BRB Nos. 93-0296
and 93-0296A

LUCILLE FORCE)	
(Widow of GEORGE FORCE))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
)	
KAISER ALUMINUM AND CHEMICAL)	DATE ISSUED:
CORPORATION)	
)	
and)	
)	
FIREMEN'S FUND INSURANCE)	
COMPANY)	
)	
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 on Remand and Decision Denying Petition for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Victoria Edises and Anne Landwehr (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Herman Ng (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, for employer/carrier.

Joshua T. Gillelan II (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor, Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and Decision Denying Petition for Reconsideration and employer cross-appeals the Decision and Order on Remand (86-LHC-1058) of Administrative Law Judge Alfred Lindeman 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. To recapitulate the facts, George Force (decedent) worked for employer in the early 1940's, during which time he was exposed to asbestos. In 1984, decedent was diagnosed with malignant mesothelioma; thereafter, in December 1984, decedent filed a claim under the Act. He died of his condition on March 24, 1985.

Prior to his death, decedent and his spouse Lucille Force (claimant) filed a third-party action against various asbestos manufacturers. Decedent sought recovery for his personal injuries and claimant sought recovery for potential wrongful death and loss of consortium. Before the instant claim for benefits under the Act proceeded to a formal hearing before the administrative law judge, decedent and claimant entered into a settlement of their third-party action for a net amount of \$408,360.¹ As part of the settlement, claimant and the couple's two children waived all of their potential claims for wrongful death against the settling third-parties.

Claimant filed her claim under the Act on June 14, 1985, seeking death benefits, decedent's accrued disability benefits, and reimbursement for decedent's medical treatment. In his initial Decision and Order, the administrative law judge determined that decedent's malignant mesothelioma arose out of and in the course of his employment with employer, that decedent was totally disabled by this condition, and that he died from it. Thus, the administrative law judge awarded permanent total disability compensation from August 17, 1984 to March 24, 1985, and death benefits from March 25, 1985 and continuing. Next, the administrative law judge found the testimony of claimant's civil attorney David McClain speculative, and rejected any apportionment of the third-party settlement on the ground that the settlement agreements had not allocated specific

¹In his Decision and Order on Remand, the administrative law judge found that the net sum of the third-party settlement was \$408,360, not \$480,360 as he had previously found. Neither party contests this finding.

amounts for the various covered claims. The administrative law judge therefore concluded that employer was entitled to offset its liability to claimant by the entire amount of the third-party settlement pursuant to Section 33(f) of the Act, 33 U.S.C. §933(f).

On appeal, the Board affirmed the administrative law judge's finding that Mr. McClain's testimony was insufficient to establish apportionment, and held that employer was entitled to credit its entire liability for disability and death benefits against the total net amount of the third-party settlement pursuant to Section 33(f). In rendering this determination, the Board stated that an employer may always offset its longshore liability by the net third-party settlement amount even if the settlement compensates claimant for such items as pain and suffering and punitive damages. The Board further stated that for purposes of a Section 33(f) credit, claimant was the "person entitled to compensation" for the award of death benefits, and decedent was the "person entitled to compensation" for the disability award. Thus, had the third-party settlement been apportioned between the parties, employer would only be entitled to offset its liability to *claimant* by those portions of the settlement claimant received for the surrender of her rights, and to offset its liability to *decedent* by those portions decedent received for the surrender of his rights. However, since apportionment was not established, the Board held that employer was entitled to offset its entire liability for both disability and death benefits against the total net settlement amount. *See Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1 (1989). Claimant appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit.

In its decision, the Ninth Circuit adopted the position of the Director, Office of Workers' Compensation Programs (the Director), that Section 33(f) does not distinguish among various types of damages that might be recovered in a third-party action. Thus, the court held that the administrative law judge did not err in allowing employer to offset claimant's receipt of non-economic damages such as pain and suffering and punitive damages against its liability under the Act. Next, the court rejected claimant's argument that she was not a "person entitled to compensation" at the time she entered into the settlement, and held that Section 33(f) does apply to her. Specifically, the court stated that Section 33(f) does not require that the claimant's status as a "person entitled to compensation" be determined at any particular time. Rather, the court determined that the only relevant question is whether the claimant is impermissibly recovering twice for the same injury. The court next held that Section 33(f) allows an employer to offset against its liability to claimant only that portion of the third-party settlement attributable to the claimant, which means that there must be an apportionment among parties to the settlement. The court thus held that the administrative law judge should have apportioned the third-party settlement among decedent, claimant and the two children, so that the amounts attributable to the children could have been factored out and the amounts attributable to decedent and claimant credited against their respective compensation due under the Act.² Moreover, the court held that it is employer's, and not claimant's, burden to establish apportionment. The court thus remanded the case to the administrative law judge for reconsideration of the issue of apportionment of the third-party settlement among the

²The court noted that the Force children did not file for benefits under the Act and are not entitled to them.

parties. *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991).

A second hearing in this case was held before the administrative law judge on June 17, 1992, at which time claimant, pursuant to the Ninth Circuit's decision, submitted additional evidence into the record with regard to the issue of apportionment. Employer did not submit any evidence at this hearing. In his Decision and Order on Remand, the administrative law judge rejected claimant's contention that the United States Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), requires a finding that she was not a "person entitled to compensation" at the time she entered into the third-party settlement. The administrative law judge therefore found that employer was entitled to an offset under Section 33(f) for the amount claimant received in settlement of her wrongful death cause of action. After noting that employer offered no evidence on the issue of apportionment, the administrative law judge relied on the previously discredited testimony of Mr. McClain in finding that 15 percent of the settlement was for wrongful death, with 10 percent allocated for claimant and 5 percent for the children. The administrative law judge then apportioned 5 percent of the net amount of the third-party settlement, \$408,360, and found that \$20,418 was not includable in employer's Section 33(f) offset. Next, the administrative law judge found that any unspecified portion of the third-party settlement attributable to claimant's loss of consortium is includable in employer's offset. The administrative law judge therefore found that employer was entitled to offset its longshore liability, for decedent's and claimant's claims, by the entire net amount of the third-party settlement, less the \$20,418 apportioned to claimant's children. In a Decision Denying Petition for Reconsideration, the administrative law judge affirmed his previous finding that, pursuant to the Ninth Circuit's holding in *Force*, employer was entitled to credit all amounts paid under the third-party settlement to both decedent and claimant without further apportionment between their respective causes of action.

On appeal, claimant contends that Section 33(f) should not apply to her at all, since she was not a "person entitled to compensation" at the time of the third-party settlement. Alternatively, claimant contends that the administrative law judge erred in allowing employer to credit, pursuant to Section 33(f), its liability for both disability and death benefits under the Act by the net amount of the third-party settlement received by both decedent and claimant. Additionally, claimant contends that the administrative law judge erred by holding that damages for claimant's loss of consortium were includable in employer's Section 33(f) credit against its longshore liability. Lastly, claimant asserts that the administrative law judge failed to follow the Ninth Circuit's requirement that employer establish apportionment, and failed to consider the evidence claimant submitted to supplement Mr. McClain's testimony regarding apportionment. Employer responds, asserting that the administrative law judge properly awarded it a credit consisting of the net amount of the third-party settlement received by both decedent and claimant, including any unspecified amount claimant may have received for loss of consortium.

In its cross-appeal, employer contends that the evidence does not support any apportionment of the amount claimant's children received in the third-party settlement. Claimant responds, urging affirmance.

The Director has filed a response brief in the instant case, arguing that the administrative law judge should not have awarded employer any credit against claimant's right to death benefits since, pursuant to *Cowart*, she was not a "person entitled to compensation" at the time she entered into the third-party settlement. In the alternative, the Director contends that if any credit is due against claimant's death benefits, it is only for the net amount of the settlement attributable to her cause of action for wrongful death.

I. Claimant's Death Benefits

We first address claimant's contention that, since she was not a "person entitled to compensation" at the time she entered into the third-party settlement, Section 33(f) may not be applied to provide employer any offset against her death benefits.³ While the Ninth Circuit in *Force* specifically rejected this argument, claimant presently argues that the Supreme Court's subsequent holding in *Cowart* redefined the meaning of the term "person entitled to compensation" such that a potential widow who enters into a third-party settlement would not be included in that definition. The Director, in response, has filed with the Board the brief he sent to the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), which is supportive of claimant's position.

Subsequent to the issuance of the Supreme Court's decision in *Cowart* and the administrative law judge's Decision and Order on Remand in this case, the United States Court of Appeals for the Ninth Circuit held that an injured employee's spouse and daughter were persons "entitled to compensation" under both Sections 33(g)(1) and 33(f) of the Act, 33 U.S.C. §933(g)(1), (f), at the time they settled their potential wrongful death actions prior to the death of the employee. *See Cretan*, 1 F.3d at 843, 27 BRBS at 93 (CRT); *cf. Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113 (CRT)(5th Cir.), *pet. for reh'g en banc denied*, 71 F.3d 880 (5th Cir. 1995), *pet. for cert. granted*, 64 U.S.L.W. 3762 (U.S. May 13, 1996)(No. 95-1081).⁴ In *Cretan*,

³Amended 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 attorney fees).

33 U.S.C. §933(f)(1988).

⁴The United States Court of Appeals for the Fifth Circuit, in *Yates*, 65 F.3d at 460, 29 BRBS at

the Ninth Circuit specifically stated that the holding in *Cowart* did not dictate the outcome of the case before it. *Cretan*, 1 F.3d at 847, 27 BRBS at 97 (CRT). Accordingly, pursuant to the Ninth Circuit's decisions in both *Cretan* and *Force*, we reject claimant's contention in this regard.

II. Apportionment Among the Parties

We next address claimant's contention that the administrative law judge erred by failing to apportion the third-party settlement between decedent and claimant. Specifically, claimant asserts that, pursuant to the Ninth Circuit's holding in *Force*, employer is not entitled to offset its entire liability for both disability and death benefits by the net amount decedent and claimant received in the third-party settlement; rather, claimant contends that Section 33(f) mandates that employer's liability for decedent's disability benefits should be offset by the net amount *decedent* received in the settlement, and employer's liability for claimant's death benefits should be offset by the net amount *claimant* received in the settlement for her wrongful death action. We agree.

In his Decision and Order on Remand, the administrative law judge apportioned the net amounts which he determined that claimant's children received in the third-party settlement, \$20,418, and deducted that amount from the total net amount received in the settlement (\$408,360 - \$20,418 = \$387,942). The administrative law judge then found that claimant's longshore awards, for both her death benefits and decedent's accrued disability benefits, are subject to offset under Section 33(f) by the net amounts received by both decedent and claimant in the third-party settlement, \$387,942. In his Decision Denying Petition for Reconsideration, the administrative law judge specifically stated that the Ninth Circuit's holding in *Force* entitled employer to credit all amounts paid under the settlements to both decedent and claimant without further apportionment between their respective longshore claims. However, a reading of the Ninth Circuit's decision in *Force* clearly indicates that the court came to the opposite conclusion. Specifically, the court stated that Section 33(f) allows an employer to offset only that portion of a third-party settlement attributable to the claimant. The court held that, in the instant case, the administrative law judge "should have apportioned the third party settlement among Mr. Force, Mrs. Force and the two children so that the amounts attributable to the children could have been factored out and the amounts attributable to Mr. and Mrs. Force credited against their *respective* LHWCA benefits." *See Force*, 938 F.2d at 985, 25 BRBS at 19 (CRT)(emphasis added).

Thus, the Ninth Circuit's decision in *Force* requires that, after factoring out the amounts the children received in the third-party settlement, the remaining net amount should have been apportioned between decedent and claimant, thereby entitling employer to a credit for each amount against decedent's and claimant's respective claims. Indeed, the Ninth Circuit affirmed the Board's prior holding on this issue. The Board previously concluded the following:

113 (CRT), rejected the Ninth Circuit's interpretation of Section 33(g)(1), holding that, pursuant to *Cowart*, potential widows cannot be considered persons "entitled to compensation" under that subsection. The United States Supreme Court has recently granted *certiorari* in *Yates*.

Thus, if the settlement recovery in the third party action had been apportioned between the parties, employer would only be entitled to offset its liability to *claimant* for death benefits against those portions of the third-party recovery received in exchange for the surrender of *her* rights and to offset its liability to *decedent* for accrued disability benefits against those portions of the third-party recovery received in exchange for the surrender of *his* rights.

Force, 23 BRBS at 6. By stating that the amounts attributable to decedent and claimant should be credited against their *respective* claims, the Ninth Circuit directed the administrative law judge to do exactly what the Board had previously suggested.⁵ On remand, however, the administrative law judge failed to follow the express instructions of the court.⁶

Accordingly, the administrative law judge's finding that employer is entitled to credit its entire longshore liability for both decedent's and claimant's claims by the net amount received by both decedent and claimant in the third-party settlement is vacated, and the case is remanded for the administrative law judge to reconsider this issue in accordance with the decision of the Ninth Circuit in *Force*.

III. Loss of Consortium

Claimant next contends that employer's liability for death benefits should not be offset by claimant's recovery for her separate injury of loss of consortium, as that injury does not arise from

⁵ In a footnote, the Ninth Circuit acknowledged that claimant has succeeded to decedent's disability claim. Hence, the court concluded, claimant will receive the disability award, offset by the amount decedent recovered from the third-party settlement. *Force*, 938 F.2d at 985 n.3, 25 BRBS at 19 n.3 (CRT).

Employer, in its brief, concedes that the Ninth Circuit "contemplates an offset as to that portion of the civil settlement monies attributable to claimant and decedent credited against each of their respective LHWCA benefits." See Employer's Brief at 10. Noting the court's footnote in *Force*, as set forth above, employer then asserts that since claimant has succeeded to decedent's claim for disability, claimant will be the recipient of those disability benefits; based upon this rationale, employer then asserts that the court recognized employer's entitlement to offset its liability to a particular claimant by the third-party damages received by that claimant. Employer's liability for disability benefits, however, is to decedent; upon decedent's death, his estate is entitled to his accrued disability benefits. Thus, employer's "liability" to claimant for disability benefits encompasses only its responsibility to pay decedent's accrued benefits to decedent's estate.

⁶At the formal hearing on remand, the administrative law judge indicated his agreement with claimant's interpretation of the Ninth Circuit's directive in *Force*. See June 17, 1992 Transcript at 13-14. In his decision, however, the administrative law judge summarily credited the settlement amount against both the disability and death benefits awards under the Act.

decedent's death. In support of her contention, claimant cites to the Ninth Circuit's decision in *Force*, wherein the court stated that under Section 33(f), an employer may offset the net amount of a third-party settlement "for the occupational injury or death that is compensable under the Act." *Force*, 938 F.2d at 984, 25 BRBS at 17 (CRT); see 33 U.S.C. §933(f). Claimant therefore argues that as her loss of consortium does not pertain to decedent's death, her recovery for loss of consortium should not be included in employer's Section 33(f) offset.

It is true that the Act does not provide spouses with a claim for loss of consortium. Further, it is axiomatic that in death benefits cases, compensation law refuses to recognize loss of consortium as a compensable claim. See generally 1 A. Larson, *Workmen's Compensation Law* §2.40 at 1-11 (1995). With regard to an offset under the Act, however, the Ninth Circuit stated in *Force* that Section 33(f) does not distinguish among the various types of damages that might be recovered in a third-party action for a particular injury or death. Rather, Section 33(f) provides that an employer may offset "the net amount recovered against such third person" for the injury or death compensable under the Act. 33 U.S.C. §933(f). The "net amount" is defined as the actual amount of recovery less litigation expenses. Section 33(f) sets forth no other deduction from the "net amount." Thus, the Ninth Circuit held that the administrative law judge did not err in allowing employer to offset non-economic damages such as pain and suffering and punitive damages. While loss of consortium was not mentioned specifically, the court further stated that the Act "allows employers to offset the *entire amount* of a claimant's third party recovery." *Force*, 938 F.2d at 984, 25 BRBS at 18 (CRT)(emphasis added).

Thereby, in accordance with the Ninth Circuit's decision in *Force*, we reject claimant's contention that employer is not entitled to offset her recovery for loss of consortium.

IV. Burden of Proof of Apportionment

Lastly, claimant contends that at the hearing held on June 17, 1992, employer failed to submit any evidence with regard to the issue of the apportionment of the third-party settlement between decedent and claimant. Thus, claimant argues, employer is not entitled to any offset for the net amounts decedent and claimant received as a result of the third-party settlement. At the June 17, 1992 hearing, claimant submitted three exhibits regarding the apportionment of the third-party settlement; specifically, the complaint in the third-party action, copies of the settlement checks, and copies of excerpts from *Jury Verdicts Weekly*. See Cl. Exs. 26-28; June 17, 1992 Hearing Transcript at 8-9, 11. Although, as claimant asserts, employer bears the burden of establishing apportionment pursuant to the court's decision in *Force*, the Act does not prohibit an employer from relying on evidence submitted by claimant in pursuit of establishing apportionment. Accordingly, claimant's contention is rejected.

Claimant argues alternatively that the administrative law judge erred in relying solely on the testimony of Mr. McClain without addressing or considering the supplemental documentation which she submitted into evidence. The Ninth Circuit in *Force* stated that the administrative law judge, in determining the apportionment of the third-party settlement, should look to such objective factors as

"how the settlement sum was actually distributed among the family members, and the going rate for settlements or judgments for the same types of injuries." *See Force*, 938 F.2d at 986, 25 BRBS at 20 (CRT). Herein, claimant submitted such evidence into the record. In addressing this issue, however, the administrative law judge relied solely on Mr. McClain's testimony, which he had previously rejected, without addressing the new evidence submitted by claimant. As the administrative law judge failed to consider all of the evidence presented before him, we vacate the administrative law judge's findings regarding the amounts decedent and claimant received as a result of the third-party settlement; on remand, the administrative law judge pursuant to *Force* must reconsider this issue, addressing all of the exhibits submitted into evidence, as well as the testimonial evidence.

V. Employer's Appeal

Lastly, we address employer's contention in its cross-appeal that the administrative law judge erred in factoring out the amounts claimant's children received as a result of the third-party settlement from its Section 33(f) offset. Specifically, employer asserts that there

is no evidence in the record to show that any amount of the settlement was apportioned to the children.

Employer's contention is without merit. While the settlement checks were made to decedent and claimant, not the children, the children were in fact signatories to the settlement. In *Force*, the Ninth Circuit specifically directed the administrative law judge to apportion the settlement amount among decedent, claimant and claimant's children. *Force*, 938 F.2d at 985, 25 BRBS at 19 (CRT). On remand, the administrative law judge, after noting that employer submitted no evidence regarding this issue, relied upon the testimony of Mr. McClain in factoring out the amount claimant's children received in the settlement from employer's Section 33(f) offset; thus, the administrative law judge properly followed the dictate of the Ninth Circuit on this point. We therefore affirm the administrative law judge's finding regarding the amount of the third-party settlement allocated for claimant's children.

Accordingly, the administrative law judge's finding that employer is entitled to offset its entire longshore liability for both decedent's and claimant's claims by the net amount received by both decedent and claimant in the third-party settlement, as well as the administrative law judge's apportionment finding, is vacated, and the case is remanded for reconsideration of the apportionment issue based on all the evidence of record, pursuant to the Ninth Circuit's decision in *Force*. In all other respects, the Decision and Order on Remand and the Decision Denying Petition for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge