BRB No. 93-1085

MIRIAM KAYE (Widow of GEORGE KAYE)	)	
Claimant-Petitioner	)	
v.	)	
CALIFORNIA STEVEDORE & BALLAST	)	
Self-Insured Employer-Respondent	)	
and	)	
CALIFORNIA STEVEDORE & BALLAST	)	
and	)	DATE ISSUED:
HIGHLANDS INSURANCE COMPANY	)	
Employer/Carrier- Respondents	)	
and	)	
MARINE TERMINALS CORPORATION	)	
and	)	
ITT HARTFORD - SPECIALTY RISK SERVICES	)	
Employer/Carrier- Respondents	)	
and	)	
MARINE TERMINALS CORPORATION	)	
and	)	

EL DORADO INSURANCE COMPANY)
BY AND THROUGH THE)
CALIFORNIA INSURANCE)
GUARANTEE ASSOCIATION)
)
Employer/Carrier-)
Respondents)
)
and)
)
MATSON TERMINALS,)
INCORPORATED)
)
Self-Insured)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Claim of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

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

Robert E. Babcock (Babcock & Associates), Portland, Oregon, for California Stevedore & Ballast, self-insured employer.

Albert H. Sennett and Marianne Tancor (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for California Stevedore & Ballast and Highlands Insurance Company, employer/carrier.

Judith A. Leichtnam (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for Marine Terminals Corporation and ITT Hartford - Specialty Risk Services, employer/carrier.

Frank B. Hugg and Jeanne M. Bates (Law Offices of Frank B. Hugg), San Francisco, California, for Marine Terminals Corporation and El Dorado Insurance Company,

By and Through the California Insurance Guarantee Association, employer/carrier.

Sloan White, San Francisco, California, for Matson Terminals Incorporated, self-insured employer.

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

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant, the widow of George Kaye (decedent), appeals the Decision and Order Denying Claim (90-LHC-1106) of Administrative Law Judge Thomas Schneider 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). The Board held oral argument in this case in San Francisco, California, on August 4, 1994.

Decedent was allegedly exposed to asbestos while working as a hold man for the named employers from 1959 until 1967. Decedent retired from his subsequent non-maritime employment in 1982 at the age of 65. In June 1989, decedent was diagnosed as having cancer of the stomach and esophagus. On July 9, 1989 decedent filed a claim for benefits under the Act against the following employers: Matson Terminals, California Stevedore & Ballast, Jones Stevedore, Crescent Wharf & Warehouse, Marine Terminals and San Francisco Stevedoring (the employers). In addition, decedent filed claims under the California State Workers' Compensation Act and third-party lawsuits against several manufacturers of asbestos products.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor

Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Thereafter, numerous settlements were executed by decedent. First, decedent entered into settlements pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i)(1988), with all of the named longshore employers.[1] In the settlements signed by Matson Terminals, California Stevedore & Ballast, and Jones Stevedore, each employer agreed to waive its subrogation rights and assign its compensation lien to decedent. Such a subrogation clause was not included in the settlement with Marine Terminals. In addition, decedent and claimant entered into settlements with five third-party defendants (the pre-death settlements); it is undisputed that written approval from any of the employers was not obtained pursuant to Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1)(1988).

On June 10, 1990, decedent died of metastatic gastric cancer. Subsequently, on July 17, 1990, claimant filed a claim for death benefits under the Act against the employers.[2] Thereafter, claimant entered into settlements with ten third-party defendants (the post-death settlements); it is undisputed that claimant did not obtain written approval from any of the employers of the post-death settlements. The net total of the pre-death and post-death settlements amounted to approximately $24,000.[3]

An evidentiary hearing was held in this matter on April 1 and 2, 1992. On July 23, 1992, another hearing was held to allow the parties to present legal arguments with regard to the employers' motions for summary judgment, based on the holding 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). In his Decision and Order, issued on January 15, 1993, the administrative law judge rejected claimant's argument that the Supreme Court's decision in *Cowart* should not be retroactively applied to the instant case since that decision was issued subsequent to the third-party settlements in the instant case. In arriving at this determination, the administrative law judge initially found that the Supreme Court's citation in *Cowart* to *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988), did not permit avoidance of the Section 33(g) bar, as *Sebben* concerned the issue of *res judicata*, not retroactivity. Applying the Supreme Court's decision in *James B. Beam Distilling Co.*

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[1]The Section 8(i) settlements were executed on March 1, 1990 with Jones Stevedore (for $8,500), Marine Terminals (for $12,750), and Matson Terminals (for $10,400 paid pursuant to a state workers' compensation settlement), and on June 6, 1990 with California Stevedore & Ballast (for $15,000 paid pursuant to a state workers' compensation settlement). Cl. Exs. 8-12, 15.

[2]At the informal conference held on December 4, 1990, Crescent Wharf and Warehouse was dismissed from the case. Cl. Ex. 25. On April 1, 1992, the first day of the hearing, claimant entered into a settlement with Fireman's Fund Insurance Company, the carrier for Jones Stevedoring and San Francisco Stevedoring, wherein Fireman's Fund agreed to pay $15,000 to claimant on behalf of both employers; this agreement included a subrogation clause. Tr. at 5. The administrative law judge approved this settlement. Tr. at 52.

[3]The administrative law judge noted that the parties appeared to agree that the amounts recovered from the third-party settlements are less than the benefits to which claimant would be entitled under the Act. *See* Decision and Order at 3. This finding is unchallenged on appeal.

v. Georgia, U.S. , 111 S.Ct. 2439 (1991), the administrative law judge then determined that since the Court in *Cowart* applied that holding to the parties before it, the rule in *Cowart* applied retroactively to the instant case. Next, relying on *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67 (CRT)(5th Cir. 1986), the administrative law judge found that the employers' waiver of their subrogation rights did not extinguish all their rights under Section 33, and thus the bar under Section 33(g)(1) could still be invoked. Lastly, the administrative law judge rejected claimant's argument that *Cowart* is distinguishable from the present case since *Cowart* involved only one employer while the instant case lists several respondents. Thus, since claimant did not obtain written approval of any of the third-party settlements as required by Section 33(g)(1) of the Act, the administrative law judge granted employers' motions for summary judgment and denied claimant's claim for death benefits.

On appeal, claimant contends that the administrative law judge erred in applying the Supreme Court's decision in *Cowart* retroactively to the instant case. Specifically, claimant argues that under the second prong of the rule enunciated by the Supreme Court in *Beam*, the administrative law judge should have considered claimant's reliance on prior precedent and, had he done so, the administrative law judge would have concluded that her reliance interests demanded entitlement to benefits on equitable grounds. Claimant further argues that *Cowart* is distinguishable from the instant case for two reasons. First, claimant avers that, unlike *Cowart*, the employers here had previously waived their subrogation rights, and thus had intentionally waived their right to require written consent of all future settlements. Second, claimant notes that in the instant case there are numerous employers; thus, claimant contends that to require her to obtain written approval where she does not know which employer is the responsible employer would impose an impossible barrier upon her request for benefits. Lastly, claimant asserts that the Supreme Court in *Cowart* misinterpreted Section 33(g)(1) of the Act.

In response to claimant's appeal, each of the employers advances similar arguments. Employers first argue that since the Supreme Court in *Cowart* applied its rule to the parties before it, the administrative law judge correctly applied *Cowart* retroactively to the instant case. The employers also assert that contrary to the Director's argument, by waiving their subrogation rights in settling decedent's claim, they did not waive their right under Section 33(g)(1) to require written approval of claimant's third-party settlements. They also argue that although there are numerous potential responsible employers in this case, Congress never stated that such a situation would excuse claimants from obtaining written approval of third-party settlements. Lastly, the employers assert that the Supreme Court correctly decided *Cowart*, and that the Benefits Review Board is not the forum to review the correctness of Supreme Court decisions.

In a reply brief, claimant argues that under the standard for retroactivity announced by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971), reliance interests and equitable considerations favor non-retroactive application of the Court's decision in *Cowart*. Claimant further argues that the employers' waiver of their subrogation rights presented a factual question of intent, which cannot be resolved by summary judgment.[4]

The Director, Office of Workers' Compensation Programs (the Director), has also filed a brief in this case, supporting the employers' contentions that *Cowart* should be applied retroactively, based on the Supreme Court's decision in *Harper v. Virginia Dept. of Taxation*, U.S. , 113 S.Ct. 2510 (1993). However, the Director further argues that since three of the potentially liable employers had previously waived their rights to subrogation, *Cowart* is distinguishable and therefore, claimant's death benefits claim would not be barred by Section 33(g)(1) if one of these employers is the responsible employer. The Director asserts that remand is necessary to determine the responsible employer if the Board accepts her legal theory.

I. Retroactivity of Cowart

The threshold issue presented by this appeal is whether the administrative law judge properly determined that the Supreme Court's holding in *Cowart* should be retroactively applied to the instant case. We hold that the administrative law judge correctly concluded that the United States Supreme Court's decision in *Cowart* should be retroactively applied to this case.

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). In the instant case, claimant concedes that written approval of neither

[4]Pursuant to Section 802.215 of the regulations, 20 C.F.R. §802.215, California Stevedore & Ballast filed a supplemental brief in opposition to claimant's petition for review, accompanied by a petition for leave to file a supplemental brief. In response, claimant filed a motion to strike the supplemental brief, accompanied by a reply to the supplemental brief. In an Order issued on February 18, 1994, the Board denied claimant's motion to strike, granted the motion for leave filed on behalf of California Stevedore & Ballast, and accepted both briefs as part of the record.

the pre-death nor the post-death settlements was obtained. However, claimant contends that Section 33(g)(1) of the Act should not act as a bar to her death benefits claim based on her reliance on prior decisions by the Board and the United States Court of Appeals for the Ninth Circuit; specifically, claimant asserts that since she was not receiving benefits at the time the settlements were entered into, she did not believe written approval of the third-party settlements was necessary based upon then-current case law.

Consideration of the issue of retroactivity must begin with a discussion of *Estate 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), a claimant forfeits his right to further compensation benefits 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. However, the employer 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, the Court held that the claimant was required to obtain the employer's written approval of the settlement pursuant to Section 33(g)(1).[5]

Lastly, the Court stated:

> We need not today decide the retroactive effect of our decision, nor the relevance of res judicata principles for other LHWCA beneficiaries who may be affected by our decision. Compare *Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-123, 109 S.Ct. 414, 423-425 (1988). We do recognize the stark and troubling possibility that

[5]The Court noted that an employee is required to provide notice of a settlement under Section 33(g)(2), but not obtain written approval, in only 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).

> significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary . . . . But Congress has spoken with great clarity to the precise question raised by this case.

Cowart, U.S. , 112 S.Ct. at 2598, 26 BRBS at 53 (CRT). Thus, the issue of whether the ruling in *Cowart* should be applied retroactively was not before the Supreme Court in the *Cowart* case itself. However, a review of Supreme Court case law addressing the issue of retroactivity leads us to the inescapable conclusion that *Cowart* must be retroactively applied to the instant case.

Claimant asserts that the standard for retroactivity set forth by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971), should have been applied by the administrative law judge. We disagree. In *Chevron Oil*, the Court set forth three factors to be considered when considering a question of nonretroactivity:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation". . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the `injustice and hardship' by a holding of nonretroactivity."

Chevron Oil, 404 U.S. at 106-107, 92 S.Ct. at 355. Subsequent to its ruling in *Chevron Oil*, however, the Supreme Court modified its approach to retroactivity in *James B. Beam Distilling Co. v. Georgia*, U.S. , 111 S.Ct. 2439 (1991), and *Harper v. Virginia Dep't of Taxation*, U.S. , 113 S.Ct. 2510 (1993).

The retroactivity issues in those cases had their inception when, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049 (1984), the Supreme Court struck down a Hawaii statute which taxed imported alcohol at a higher rate than alcohol manufactured in Hawaii as violating the Commerce Clause of the United States Constitution. Thereafter, in *Beam*, a Kentucky bourbon manufacturer brought suit against the State of Georgia, claiming a similar Georgia law was likewise inconsistent with the Commerce Clause, and, in addition, sought a tax refund of $2.4 million. The state trial court found the Georgia tax law unconstitutional, but using the analysis described in *Chevron Oil*, refused to apply its ruling retroactively. The Supreme Court of Georgia affirmed the trial court in both respects.

Deciding only the issue of retroactivity, the Supreme Court in *Beam* reversed. In

announcing the judgment of the Court,[6] Justice Souter noted that in *Bacchus* the Court did not grant the request for a refund of taxes paid under the law which was found unconstitutional. Instead, the Court remanded the case for consideration of the refund issue, since this issue had not been adequately developed on the record, nor passed upon by the state courts below. *See Bacchus*, 468 U.S. at 277, 104 S.Ct. at 3058. Thus, in *Beam*, Justice Souter wrote that since the remand in *Bacchus* concerned only the remedy issue, *Bacchus* should be read to have retroactively applied its rule of law to the parties before it. Justice Souter then stated that it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. In this regard, Justice Souter stated:

> Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases.

Beam, U.S. , 111 S.Ct. at 2448. Thus, Justice Souter concluded that, with regard to an issue of choice of law, "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."[7] *Id.*

Thereafter, in *Harper*, the Supreme Court adhered to the standard set forth in Justice Souter's opinion in *Beam*, stating affirmatively: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[8] *Harper*, U.S. , 113 S.Ct. at 2517. Thus, in

[6]In *Beam*, Justice Souter, joined by Justice Stevens, announced the judgment of the Court, in which Justice White concurred. Justice Blackmun also wrote a concurring opinion in which Justices Marshall and Scalia joined. In addition, Justice Scalia wrote a separate concurrence in which Justices Marshall and Blackmun joined. Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined.

[7]As in *Bacchus*, the Court in *Beam* remanded the case for consideration of the appropriate remedy, *i.e.*, to consider whether a tax refund was appropriate.

[8]In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 109 S.Ct. 1500 (1989), the Supreme Court invalidated Michigan's practice of taxing retirement benefits of federal employees while exempting retirement benefits paid by the state or its localities. The State of Michigan had conceded that a

Harper, the Court held that since the rule of law announced in a previous decision was applied to the parties before it, that rule of law is to be applied to all subsequent parties. The Court noted that its decision makes it clear that the *Chevron Oil* test cannot determine the choice of law based on the equities of a particular case. *Harper*, U.S. , 113 S.Ct. at 1516 n. 9.

In the instant case, the administrative law judge discussed the progression of Supreme Court retroactivity cases through *Beam* and determined that, pursuant to *Beam*, *Cowart* must be given retroactive effect as the holding in *Cowart* was applied to the parties in that case. In challenging the administrative law judge's reliance on the decision in *Beam*, claimant relies on the statement in Justice Souter's opinion that "the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases." *Beam*, U.S. , 111 S.Ct. at 2448. Claimant, however, misconstrues the word "remedial," and is incorrect when she argues that the instant case involves a remedial issue, not a choice of law issue. In *Beam*, the Court retroactively applied its rule in *Bacchus* and held that a state law which taxes imported liquor at a higher rate than local alcohol violates the Commerce Clause. That issue involved solely a choice of law. What the Court in *Bacchus* and *Beam* did not decide was the *remedy* to be applied. The remedy issue in those cases concerned the question of whether the petitioners were entitled to a tax refund now that the alcohol tax provision was invalidated; in both cases, the Court remanded to the lower courts for consideration of the proper remedy to be applied. Thus, where a rule of law may require retroactivity, the appropriate remedy to be applied can still be left open for the lower courts. Indeed, Justice Souter states flatly: "The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Beam*, U.S. , 111 S.Ct. at 2448.

Pursuant to the standard for retroactivity set forth by the Supreme Court in *Harper*, the determinative issue in the case before us is whether the Court in *Cowart* applied its rule of law to the parties before it. The answer, clearly, is yes. Thus, applying the Supreme Court's decision in *Harper* to the issue of retroactivity in this case, we hold that since the Court applied its ruling in *Cowart* to the parties before it, *Cowart* must be given retroactive effect to the parties in the instant

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refund to federal retirees was the appropriate remedy. Subsequently, Virginia amended a statute similar to the old Michigan statute. The petitioners in *Harper*, federal and military retirees, sought a refund of taxes assessed by Virginia prior to the revision of the statute. The Virginia Supreme Court affirmed the lower court's denial of relief, holding that under *Chevron Oil* and *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 110 S.Ct. 2323 (1990), *Davis* should not be applied retroactively. The Supreme Court in *Harper* reversed, holding that as the rule of law announced in *Davis* was applied to the parties before the Court, it is to be given retroactive effect to all subsequent parties. The Court, however, remanded the case for consideration of the remedy to which the retirees are entitled.

case.[9] Accordingly, the administrative law judge's finding on this issue is affirmed.[10]

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[9]Inasmuch as *Harper* has modified the approach to retroactivity the Court previously took in *Chevron Oil*, claimant's argument that the administrative law judge erred in not applying the three *Chevron Oil* factors regarding nonretroactivity is rejected. Consequently, claimant's reliance on *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 110 S.Ct. 2323 (1990), is misplaced since that decision, issued prior to *Beam* and *Harper*, followed the Court's approach in *Chevron Oil*. In addition, we reject claimant's reliance on *Prince v. Matson Terminals, Inc.*, 26 BRBS 589 (ALJ)(1992). A decision by an administrative law judge has no precedential effect on cases before the Board. Moreover, we note that in a subsequent decision, the administrative law judge in *Prince* disavowed the analysis he applied in that case and held that under *Harper*, the rule of law set forth by the Court in *Cowart* must be given retroactive effect. *See Goldade v. Todd Pacific Shipyards*, 27 BRBS 540 (ALJ)(1994).

[10]Citing *Krause v. Bethlehem Steel Corp.*, BRBS , BRB Nos. 89-3165, 90-2004 (December 30, 1992), claimant asserts that the Board has been reluctant to apply *Cowart* retroactively. (By Order dated April 8, 1993 the Board granted the claimant's motion to have the *Krause* decision published.) In *Krause*, the issue of retroactivity was not before the Board. In fact, the Board noted that *Cowart* was issued subsequent to the issuance of the administrative law judge's decision and order, and thus, remanded the case for the administrative law judge to reconsider the effect of Section 33(g)(1) as construed by the Court in *Cowart*, and to determine whether *Cowart* should be applied retroactively.

II. Does Section 33(g)(1) Bar Claimant's Claim

We now address claimant's alternative argument that *Cowart* is distinguishable from the instant case.[11] In contending that *Cowart* is distinguishable, claimant and the Director argue that three employers' waivers of their subrogation rights, contained in their Section 8(i) settlements with decedent, are tantamount to a waiver of all their rights under Section 33 of the Act. Thus, claimant and the Director argue that since these employers no longer had any rights under Section 33, claimant was under no obligation to obtain written approval of her third-party settlements under Section 33(g)(1). We disagree.

The Section 8(i) settlements decedent entered into with three of the potentially responsible employers[12] each contain a clause in which the respective employer agreed to waive its subrogation rights and assign its compensation lien to decedent.[13] *See* Cl. Exs. 8, 11, 15. Initially, we note that since these agreements were entered into solely with decedent, and the employers agreed to assign their compensation lien to decedent only, it is questionable whether these settlements have any bearing on whether claimant's claim is subject to the provisions of Section 33(g)(1). We need not enter this thicket today, however, for even if we assume that the employers had waived their subrogation rights and assigned their compensation lien to claimant, this would not negate claimant's obligation to obtain written approval of her third-party settlements pursuant to Section 33(g)(1), since a waiver of subrogation rights does not preclude application of an offset by the employer pursuant to Section 33(f) of the Act, 33 U.S.C. §933(f)(1988).[14] *Treto v. Great Lakes Dredge and*

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[11]Under the holding of the United States Court of Appeals for the Ninth Circuit, wherein this case arises, in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), a potential widow is "a person entitled to compensation" and is subject to the written approval provision of Section 33(g)(1). Therefore, claimant was required to obtain written approval by the employers of the pre-death settlements. As previously stated, it is uncontroverted that written approval of neither the pre-death nor post-death settlements was obtained from claimant herein.

[12]As stated above, the Section 8(i) settlement decedent entered into with Marine Terminals does not contain a subrogation clause. *See* Cl. Ex. 9.

[13]The language used in each subrogation clause is nearly identical. For example, the subrogation clause in the settlement with California Stevedore & Ballast states: "As added consideration to the proposed settlement, defendant CALIFORNIA STEVEDORE & BALLAST waives its subrogation rights and assigns their compensation lien to claimant, GEORGE KAYE." Cl. Ex. 15.

[14] Section 33(f) of the Act provides:

> (f) 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

Dock Co., 26 BRBS 193 (1993); *see also I.T.O. Corporation of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT)(4th Cir. 1992), *vacated in part on other grounds*, 967 F.2d 971, 26 BRBS 7 (CRT)(4th Cir. 1992), *cert. denied*, 113 S.Ct. 1579 (1993); *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 21 BRBS 163 (CRT)(5th Cir. 1988); *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67 (CRT)(5th Cir. 1986); *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980).[15] Thus, where employers do not waive their right to an offset against a claimant's net third-party recovery, they retain an interest in the third-party settlements entered into by the claimant. The claimant is therefore still subject to the provisions contained in Section 33(g)(1).[16] *See*, *e.g.*, *Treto*, 26 BRBS at 199. In the instant case, the employers waived only their subrogation rights, not their offset rights under Section 33(f).[17] Accordingly, claimant was still required, pursuant to Section 33(g)(1), to obtain the employers' written approval of her third-party settlements, an event which all parties agree did not occur.

Claimant further attempts to distinguish the instant case from *Cowart* by arguing that since, unlike the situation in *Cowart*, there are several potentially liable employers in this case, it would be

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> 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's fees).

33 U.S.C. §933(f)(1988).

[15]We hereby reject the Director's argument that *Collier* and *Petro-Weld* should not be applied outside the Fifth Circuit. Moreover, the Director's assertion at oral argument that *Treto* is distinguishable from *Collier* and *Petro-Weld* is without merit. *See* Oral Argument Transcript at 44-46; *see also Treto*, 26 BRBS at 197-198.

[16]As the Director indicates, the attorney for California Stevedore & Ballast stated before the administrative law judge that his client had previously waived its credit rights under Section 33(f). *See* July 23, 1992 Transcript at 9, 12. Thus, the Director argues that the administrative law judge should have made factual findings as to the scope of the parties' waivers. However, the waiver clause contained in the Section 8(i) settlement between decedent and California Stevedore references only a waiver of subrogation. *See* Cl. Ex. 15. Since the language appears to be unambiguous on its face, under the parol evidence rule, the administrative law judge was not required to admit evidence as to the intent of the parties. *See generally* 17A AM. JUR. 2D *Contracts* §§396, 398, 402 (1991).

[17]Claimant's reliance on *Sellman*, 954 F.2d at 239, 25 BRBS 101 (CRT), is misplaced. In *Sellman*, the United States Court of Appeals for the Fourth Circuit held that since the employer participated in the third-party settlements, written approval by the employer of the settlements was not required under Section 33(g)(1). In the instant case, the employers never participated in the third-party settlements.

impossible for her to comply with Section 33(g). Claimant further points out that Section 33(g)(1) only requires written approval of the "employer" in the singular. Thus, claimant argues that since there are several employers in the instant case, it was impossible for her to know which of the employers is the responsible employer prior to an evidentiary hearing.[18] Claimant's argument is without merit. Claimant points to no language in Section 33(g)(1) or the Congressional history of this subsection, and provides no relevant case law, which supports her contention that Section 33(g)(1) was not meant to apply to a situation where the responsible employer may be one of several employers. Indeed, this is often the situation in Section 33(g)(1) cases.[19] As the employers point out, claimant bore no hardship in joining all the named employers to the instant matter; therefore, there should have been no hardship identifying them to obtain their written approval of the third-party settlements. Moreover, Section 2(22) of the Act, 33 U.S.C. §902(22), provides: "The singular includes the plural and the masculine includes the feminine and neuter." Thus, there is no support for claimant's contention that she is not subject to the provisions under Section 33(g)(1) simply because the responsible employer is one of several employers.

Based on the foregoing, we hold that the administrative law judge properly found that claimant's claim for death benefits is barred by Section 33(g)(1) of the Act. It is uncontroverted that she did not obtain the employers' written approval of her third-party settlements and pursuant to *Cowart*, she was required to do so.[20]

[18]In her brief, the Director disagrees with claimant on this point, asserting that the fact that Section 33(g) explicitly refers to only a single third-party settlement does not render that provision inapplicable where more than one third-party defendant is named in the civil suit. *See* Director's Brief at 3.

[19]The employers also point out that at his deposition with regard to his disability claim, decedent testified that he believed he was last exposed to asbestos in 1967 while working at Pier 80. Cl. Ex. 1 at 18, 26.

[20] Claimant's argument that the United States Supreme Court misinterpreted Section 33(g)(1) in *Cowart* is rejected and deserves no further discussion.

Accordingly, the Decision and Order Denying Claim of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge