

BRB No. 93-1334

KATHLEEN HENDERSON	)	
(Widow of EARL HENDERSON)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	DATE ISSUED:
INCORPORATED	)	
	)	
and	)	
	)	
MISSISSIPPI INSURANCE	)	
GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Steven J. Miller, Pascagoula, Mississippi, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (92-LHC-2118) of Administrative Law Judge C. Richard Avery 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 if they 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).

Earl Henderson (decedent) worked for employer in the 1940's, during which time he was exposed to asbestos. In 1981, decedent was diagnosed with malignant mesothelioma; thereafter, on February 24, 1982, decedent filed a claim under the Act.<sup>1</sup> Prior to his death, decedent and his spouse Kathleen Henderson (claimant) filed a third-party action against various asbestos manufacturers. Before the instant claim for benefits under the Act proceeded to a formal hearing before the administrative law judge, decedent and claimant entered into settlements with six of the defendants named in their third-party action for a total net amount of \$38,036.93. In each of the six third-party settlements, decedent and claimant executed releases discharging the defendant from any further claim by either decedent or claimant.

In a Decision and Order filed on November 20, 1985, Administrative Law Judge Ben H. Walley awarded decedent disability benefits under the Act based on an agreement reached by the parties. Judge Walley ordered employer to pay a lump sum of \$16,000 to decedent in satisfaction of all benefits accrued prior to September 26, 1985, noting employer's agreement not to assert a lien on any of the past third-party recoveries or the Mississippi workers' compensation payments to reduce this lump sum payment. Judge Walley further ordered employer to pay compensation for permanent total disability commencing September 21, 1985, at a weekly compensation rate of \$308.49, less a credit of \$112 for the Mississippi workers' compensation benefits, and to provide Section 7, 33 U.S.C. §907, medical benefits to decedent.

Decedent died of mesothelioma on January 22, 1986, and claimant filed a claim for death benefits under the Act; a compensation order was entered on March 12, 1987, awarding death benefits at a weekly compensation rate of \$231.60, less the \$112 received under the Mississippi statute.<sup>2</sup> On April 24, 1987, claimant amended the third-party complaint against the asbestos manufacturers to make it a claim for wrongful death brought by her and her four adult, non-dependent children. On August 28, 1989, claimant, on her own behalf and through a power of attorney on behalf of her four children, entered into a third-party settlement with the Wellington Group for a gross amount of \$210,000. The Wellington release provides that any employer ordered to pay workers' compensation benefits to the releasers shall first be given credit for the consideration paid to the releasers. The United States District Court judgment approving the Wellington settlement also contains such a provision. After the attorney's fee and expenses and reimbursement of disability and widow's benefits paid under the Act by the carrier were subtracted from the gross proceeds, each of the adult children received \$16,612.55, while claimant received no proceeds.

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<sup>1</sup>Decedent also filed a claim for permanent total disability benefits against International Paper Company under the Mississippi Workers' Compensation Act, and, on October 4, 1982, he was awarded Mississippi workers' compensation in the amount of \$112 per week, beginning October 15, 1981, and continuing for a period not to exceed 450 weeks.

<sup>2</sup>Although claimant did not receive Mississippi workers' compensation widow's benefits, she did receive the state workers' compensation disability benefits awarded to decedent for the duration of the 450-week period they were awarded, a period which ended on July 9, 1990. Employer credited these payments against claimant's death benefits under the Act.

Claimant submitted to employer an LS-33 Form requesting approval of the Wellington settlement, noting that the gross amount of the settlement was \$210,000 and the net amount was "gross amount minus attorney's fees and expenses." Employer stopped paying claimant death benefits under the Act in September 1989. Claimant also entered into a third-party settlement with the Johns-Manville Trust, again on behalf of herself and her four children, for a gross amount of \$200,000. The Johns-Manville release contains a provision regarding a credit for workers' compensation similar to that contained in the Wellington release. After deductions for the attorney's fee and expenses and reimbursement to the carrier for claimant's death benefits from the gross proceeds, claimant received \$13,263.86, and each of her children received \$23,900.<sup>3</sup> In November 1989, the deputy commissioner indicated that no further benefits were due until the third-party recovery was absorbed; claimant sought reinstatement of benefits in February 1991, and the case was referred to the Office of Administrative Law Judges for a formal hearing for resolution of the amount of the credit to which employer is entitled under Section 33(f).

In his Decision and Order, the administrative law judge first determined that, pursuant to the language of Section 33(f), 33 U.S.C. §933(f), employer is not entitled to a credit for amounts received from the two post-death third-party settlements by claimant's four adult children. Next, the administrative law judge rejected employer's argument that the two post-death settlement releases provide a contractual basis for employer to credit the adult children's net proceeds, finding that the contractual language provides that employer is entitled to credit the settlement proceeds of only those parties having a successful longshore claim. The administrative law judge further rejected employer's contention that it was misled by the information furnished in claimant's LS-33 forms, noting there is no evidence of detrimental reliance. Lastly, the administrative law judge ruled that employer is not entitled to a credit against its present compensation liability to claimant for the six pre-death third-party settlements inasmuch as employer failed to make a showing regarding apportionment of those settlements. The administrative law judge thus determined that employer was entitled to receive a credit pursuant to Section 33(f) for the net amount received by claimant alone from two post-death settlements.

On appeal, employer first contends, with respect to the post-death settlements, that the administrative law judge erred in finding that Section 33(f) does not allow employer to offset its liability for death benefits by amounts received by claimant's children, the non-dependent heirs at law. Employer further contends that the administrative law judge erred in not recognizing a contractual basis for allowing employer to credit the amounts received by the adult children and in not finding claimant estopped from objecting to allowing employer a credit for all net third-party recoveries based upon the representations contained in the LS-33 Forms. Finally, employer assigns error to the administrative law judge's failure to allow employer to offset its liability for death benefits by the amount of unused net third-party recoveries received by decedent and claimant prior to decedent's death. Claimant responds, urging affirmance of the administrative law judge's

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<sup>3</sup>Employer's attorney stated at the hearing that it had been reimbursed in full for all disability and death benefits previously paid under the Act out of the proceeds of the Wellington and Johns-Manville settlements.

### I. Post-Death Settlements

We first address employer's contention that the administrative law judge's determination that Section 33(f) does not allow employer to credit amounts received by claimant's non-dependent children from the post-death third-party settlements against its liability for claimant's death benefits is contrary to the specific language of that statutory provision.<sup>5</sup> Subsequent to the filing of briefs in the instant case, the United States Court of Appeals for the Fifth Circuit, under whose appellate jurisdiction this case arises, issued its decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113 (CRT) (5th Cir. 1995), *pet. for cert. granted*, 64 U.S.L.W. 3762 (U.S. 1996)(No. 95-1081). Addressing the precise argument advanced by employer in the instant case, the court held that, pursuant to the plain language of Section 33(f), the employer is entitled to credit only the net amount received from post-death third-party settlements by the widow, and not the net amounts received by the non-dependent children. *Accord Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991); *see also I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971, 26 BRBS 7 (CRT) (4th Cir. 1992), *cert. denied*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1579 (1993). Therefore, pursuant to the court's holding in *Yates*, we reject the construction of Section 33(f) urged by employer.

We further reject employer's alternative arguments that apportionment of the third-party recovery should be allowed only where the settlement order and/or releases specify the amounts recovered by each party, and that claimant bears the burden of proof to establish apportionment. The administrative law judge in the instant case found that the post-death settlements were

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<sup>4</sup>We hereby deny employer's Motion to Strike Claimant's Response Brief to Employer/Carrier's Reply Brief. 20 C.F.R. §802.219. Additionally, we note that employer's request to maintain this appeal before the Board for a period of 60 days beyond September 12, 1996, is rendered moot by our disposition of this case.

<sup>5</sup>Amended 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).

apportioned among claimant and her four children in accordance with the State of Mississippi's wrongful death statute. We note that the third-party settlements at issue in *Yates* were apportioned among the widow and her non-dependent children on the basis of the same Mississippi statute. See *Yates*, 65 F.3d at 462, 29 BRBS at 114 (CRT). Moreover, contrary to employer's averment that claimant bears the burden of establishing apportionment of the third-party recoveries, the courts that have addressed the question of the burden of proof of apportionment have uniformly held that the employer bears the burden of proof regarding apportionment of third-party settlements. See *Force*, 938 F.2d at 985, 25 BRBS at 19-20 (CRT); *Sellman*, 967 F.2d at 973, 26 BRBS at 9 (CRT); *Jones v. U.S. Steel Corp.*, 25 BRBS 355, 361 (1992).

Employer's next argument, that provisions contained in the post-death settlement releases provide a contractual basis for allowing employer to offset the net amount of the recoveries of both claimant and the non-dependent children, is also controlled by the decision of the Fifth Circuit in *Yates*, wherein the court rejected the precise argument advanced by employer in the instant case. Construing contractual language virtually identical to that found in the two post-death settlement releases in the case at bar, the court held, first, that the release provisions do not clearly indicate an intent to grant employer a credit against any larger portion of the settlement amount than would be subject to a compensation lien, and, second, that a compensation lien would be imposed on only the settlement proceeds received by the widow inasmuch as she was the only party to the settlement who was entitled to compensation. *Yates*, 65 F.3d at 466-67, 29 BRBS at 117-118 (CRT). Thus, for the reasons stated in *Yates*, we reject employer's contention of error.

Next, we reject employer's contention that the administrative law judge erroneously declined to find that claimant is estopped from contesting employer's entitlement to an offset for amounts recovered by her non-dependent children from the post-death third-party settlements based upon representations in the LS-33 Forms filed by claimant. See generally *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27 (CRT)(9th Cir. 1996). Based on our review of the record, we affirm the administrative law judge's finding that there is no evidence to support employer's assertion that it relied solely on the information supplied by claimant in the LS-33 Forms in electing to approve the third-party settlements. As noted by the administrative law judge, the LS-33 Forms reflect accurate dollar amounts for the gross amounts of the third-party settlements. Moreover, we note the absence of record evidence that might establish that employer was ignorant of the full contents of the post-death third-party settlements, including the adult children's inclusion as plaintiffs and the apportionment of the settlement proceeds, that employer relied solely on the information supplied by claimant in the LS-33 Forms, and that claimant intended that employer approve the settlements based solely on the information claimant provided in the LS-33 Forms. We conclude, therefore, that employer has not established the necessary elements for application of the estoppel doctrine. See generally *Rambo*, 81 F.3d at 840, 30 BRBS at 27 (CRT).

Accordingly, the administrative law judge's finding that employer is not entitled to an offset for amounts received by claimant's non-dependent children is affirmed.

## II. Pre-Death Settlements

Lastly, we address employer's contention that the administrative law judge erred in not allowing employer a credit against claimant's death benefits under the Act for the third-party settlements entered into by decedent and claimant prior to decedent's death. This issue is also controlled by the Fifth Circuit's holding in *Yates* that the claimant in that case was not "a person entitled to compensation" under Section 33 at the time of the pre-death settlements because her right to death benefits did not vest until her husband's death. *Yates*, 65 F.2d at 464, 29 BRBS at 116 (CRT). We therefore hold, consistent with the Fifth Circuit's decision in *Yates*, that at the time of the pre-death settlements claimant was not "a person entitled to compensation" for purposes of Section 33(f). Because, at the time of the pre-death settlements, claimant did not fall within the definition of "a person entitled to compensation," the provisions of Section 33(f) may not be applied to provide employer with an offset against claimant's death benefits for the pre-death settlement recoveries. In light of our holding that this issue is controlled by the Fifth Circuit's construction of the term "a person entitled to compensation" in *Yates*, we need not consider the administrative law judge's findings nor the parties' contentions regarding the issue of the apportionment of the pre-death recoveries between decedent and claimant. Thus, we affirm the administrative law judge's determination that employer is not entitled to an offset for the pre-death third-party settlements.

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge