

BRB No. 97-1023

EMMA WYKNENKO )  
(Widow of MIKE WYKNENKO) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 TODD PACIFIC SHIPYARDS ) DATE ISSUED: \_\_\_\_\_  
 CORPORATION )  
 )  
 and )  
 )  
 FIREMAN'S FUND )  
 INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits, Order Granting Motion for Reconsideration and Supplemental Order Awarding Benefits, and Order Denying Motion to Vacate Supplemental Order and to Reopen Record of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Lance Palmer (Levinson, Friedman, Vhugen, Duggan & Bland), Seattle, Washington, for claimant.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for employer/ carrier.

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

BROWN, Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits, Order Granting Motion for Reconsideration and Supplemental Order Awarding Benefits, and Order Denying Motion to Vacate Supplemental Order and to Reopen Record (96-LHC-495) of Administrative Law Judge Edward C. Burch 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). The Board held oral argument in this case on September 17, 1997, in Seattle, Washington. 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 facts involved in this case are not in dispute. Mike Wyknenko worked for employer as a pipefitter in 1941 and 1942, during which time he was exposed to asbestos. After working as a pipefitter for two other shipyards during the subsequent three years, Mr. Wyknenko left shipyard employment, worked predominantly as a truck driver, and ultimately retired in 1980. On March 18, 1987, Mr. Wyknenko was diagnosed by his treating physician, Dr. Bondi, as suffering from chronic lung disease due to smoking and his prior asbestos exposure. On May 28, 1987, Mr. Wyknenko filed a claim for benefits under the Act. In addition, he filed a third-party civil lawsuit against several asbestos manufacturers and distributors.

Mr. Wyknenko subsequently entered into settlements of his third-party lawsuit with the following third-party defendants (the pre-death settlements):

<b>Defendant</b>	<b>Date of Settlement</b>	<b>Gross Settlement Amount</b>
Anchor Packing	February 25, 1988	\$500
Combustion Engineering	January 6, 1989	\$1,500
Eagle-Picher Industries	June 20, 1989	\$3,000
H.K. Porter Co.	September 5, 1989	\$1,383
Garlock, Inc.	November 14, 1989	\$425
Center Members	February 5, 1990	\$6,000
Fibreboard	September 12, 1991	\$1,200 cash; \$1,800 deferred
UNR Asbestos Disease Claims Trust	April 15, 1992	\$400

Claimant, Mr. Wyknenko’s spouse, signed as co-releasor in the settlements with Combustion Engineering, Eagle-Picher Industries, H.K. Porter Co., Garlock, Inc., Center Members, and Fibreboard. Written approval by employer of these pre-death settlements was not obtained.

Mr. Wyknenko (decedent) died on October 22, 1992, of cardio-respiratory arrest resulting from respiratory failure related to chronic obstructive pulmonary disease and asbestosis. Claimant filed a claim under the Section 9 of the Act, 33 U.S.C. §909, for death benefits and funeral expenses on March 3, 1993. Subsequently, on May 6, 1995, claimant accepted a settlement from Manville Personal Injury Settlement Trust for a gross amount of \$1,200 (the post-death settlement). Claimant did not obtain employer’s written approval of this post-death settlement.

In his January 7, 1997, Decision and Order - Awarding Benefits, the administrative law judge first found that decedent’s claim was not time-barred under Sections 12 or 13 of the Act, 33 U.S.C. §§912, 913, as decedent did not become aware of the relationship

between his disease, his employment and his permanent impairment until March 18, 1987. Next, the administrative law judge determined that the holding of the United States Supreme Court in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992), was to be given retroactive effect; accordingly, the administrative law judge found that decedent was a “person entitled to compensation” within the meaning of Section 33(g) of the Act, 33 U.S.C. §933(g). Having determined that the compensation due decedent under the Act was greater than the aggregate gross amount of his third-party settlements, *i.e.*, \$16,208, the administrative law judge concluded that decedent’s claim for benefits was barred by Section 33(g)(1) and (2) of the Act, 33 U.S.C. §933(g)(1), (2)(1994). Additionally, pursuant to 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), *cert. denied*, 512 U.S. 1219 (1994), the administrative law judge found that claimant was a “person entitled to compensation” under Section 33(g) of the Act at the time she entered into the pre-death third-party settlements, as well as the post-death settlement. As claimant’s death benefits would be greater than the gross amount of the third-party settlements which she executed, the administrative law judge found that claimant was barred from receiving death benefits under Section 33(g)(2) of the Act. Lastly, the administrative law judge determined that since claimant’s funeral benefits did not constitute “compensation” under Section 33(g)(2), and therefore are not barred by that subsection, claimant was entitled to receive \$3,000 for funeral expenses pursuant to Section 9(a) of the Act, 33 U.S.C. §909(a).

Employer thereafter filed a motion for reconsideration with the administrative law judge requesting that he reconsider his finding that claimant was entitled to funeral expenses. Subsequent to the administrative law judge’s January 1997 Decision and Order, the United States Supreme Court issued its decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, U.S. , 117 S.Ct. 796, 31 BRBS 5 (CRT)(1997), wherein the Court held that a surviving spouse who entered into third-party settlements prior to the death of the employee was not at that time a “person entitled to compensation” under Section 33(g). In his Order Granting Motion for Reconsideration and Supplemental Order Awarding Benefits dated February 28, 1997, the administrative law judge ruled that since the case was before him for reconsideration, his previous decision was not yet final, and therefore, the case was subject to retroactive application of the Court’s holding in *Yates*. Thus, pursuant to the holding in *Yates*, the administrative law judge found that claimant became a “person entitled to compensation” on October 22, 1992, the date of decedent’s death. The administrative law judge further found that since claimant failed to obtain employer’s written approval of the post-death settlement executed on May 6, 1995, claimant was barred from any compensation that would have accrued subsequent to that date. However, the administrative law judge concluded that Section 33(g) did not bar claimant from receiving the death benefits which had accrued from the time of decedent’s death until the time she entered into the post-death third-party settlement. Thus, the administrative law judge awarded claimant death benefits at a compensation rate of \$180.29 per week for the period October 22, 1992 until May 6, 1995. Next, the administrative law judge reaffirmed his previous finding that funeral benefits are not “compensation,” and therefore are not subject to the Section 33(g) bar. The administrative law judge further found that, in light of

*Yates*, even if funeral benefits were considered “compensation,” claimant’s funeral benefits would not be barred by Section 33(g), since those benefits accrued prior to the May 6, 1995, post-death third-party settlement. Lastly, considering employer’s right to offset its liability against claimant’s third-party recovery under Section 33(f) of the Act, 33 U.S.C. §933(f), the administrative law judge found that employer failed to meet its burden of showing the net third-party recovery received by claimant. Thus, the administrative law judge found that employer was not entitled to a credit pursuant to Section 33(f).

On March 13, 1997, employer moved to vacate the administrative law judge’s February 28, 1997, Order, and reopen the record. The administrative law judge denied employer’s motion in an order issued on March 27, 1997, finding no violation of due process with regard to the issue of a Section 33(f) credit, and no cause to reopen the record to consider whether claimant failed to give notice of the third-party settlement under Section 33(g)(2).

On appeal, employer challenges the administrative law judge’s award of death benefits from October 22, 1992 through May 5, 1995, as well as his award of funeral benefits, to claimant. Specifically, employer contends that the Supreme Court’s holding in *Cowart* compels a finding that all rights to compensation, not merely future or prospective benefits, must be terminated when a claimant fails to obtain employer’s written approval of a third-party settlement under Section 33(g)(1). Thus, employer contends that since claimant failed to obtain employer’s written approval of the May 6, 1995, third-party settlement, Section 33(g) bars her entitlement to all death benefits. With regard to funeral benefits, employer argues that the Act expressly includes funeral benefits within the meaning of “compensation” under Section 2(12), 33 U.S.C. §902(12), and therefore, the administrative law judge erred in finding that Section 33(g)(2) does not bar claimant’s request for funeral benefits. Moreover, employer asserts that pursuant to *Cowart*, where written approval of a third-party settlement is not obtained under Section 33(g)(1), all benefits, including funeral expenses, are barred. Alternatively, employer argues that if claimant’s funeral expenses are recoverable in the instant case, employer should be allowed to offset this amount against claimant’s gross recovery from her third-party settlements pursuant to Section 33(f). Lastly, employer asserts the administrative law judge erred in finding that employer is not entitled to a credit pursuant to Section 33(f); specifically, employer argues that by raising the new issue of Section 33(f) apportionment on reconsideration, without notice or an opportunity for employer to present evidence, the administrative law judge violated employer’s Constitutional right to due process, as well as Sections 702.336 and 702.338 of the Act’s implementing regulations, 20 C.F.R. §§702.336, 702.338. Thus, should the Board affirm the administrative law judge’s award of benefits to claimant, employer requests that the case be remanded for a determination of the reasonable value of employer’s lien against claimant’s third-party recoveries.<sup>1</sup> Claimant

---

<sup>1</sup>On June 25, 1997, the administrative law judge issued an order awarding claimant’s counsel an attorney’s fee payable by employer. 33 U.S.C. §928(a). Employer does not contest the amount of the fee, but asserts that if claimant’s entire claim for death benefits is barred by Section 33(g), the award of an attorney’s fee is improper. See Employer’s Brief

responds, urging affirmance of the administrative law judge's award of benefits.

The threshold issue presented by this appeal is whether the administrative law judge properly determined that claimant is entitled to the death and funeral benefits that accrued prior to the date of the 1995 third-party settlement, despite the fact that claimant failed to obtain employer's prior written approval of that settlement as required by Section 33(g). When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989); see *Story v. Navy Exchange Center*, 30 BRBS 225 (1997). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, our review of the Section 33(g) issue properly begins with the language of that section. Section 33(g), as amended in 1984, states:

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

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

33 U.S.C. §933(g)(1), (2)(1994).

In *Cowart*, the Supreme Court held that under the plain language of Section 33(g)(1), a claimant forfeits his right to compensation benefits by failing to obtain the employer's written approval of a third-party settlement which is for an amount less than the compensation due under the Act. The Court held that an employee becomes a "person entitled to compensation" at the moment his right to recovery vests, not when an employer admits liability. The right to recovery vests when the claimant satisfies the prerequisites

---

at 34.

attached to the right, *i.e.*, when the employee suffers the work-related injury. *Cowart*, 505 U.S. at 477, 26 BRBS at 51-52 (CRT). In a death benefits case, the Supreme Court reiterated that a "person entitled to compensation" means only that the person satisfies the prerequisites attached to the right to compensation; thus, the Court held that a surviving spouse is not a "person entitled to compensation" prior to the death of the employee, and therefore, that spouse does not forfeit the right to collect death benefits under the Act for failure to obtain employer's written approval of third-party settlements entered into prior to the employee's death. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 796, 31 BRBS 5 (CRT)(1997).

In finding that claimant is entitled to death benefits from the date of decedent's death, October 22, 1992, through May 6, 1995, the date of the post-death third-party settlement, the administrative law judge cited language contained in the majority decision in *Cowart*, wherein Justice Kennedy stated at the outset that under Section 33(g), "if a third-party claim is settled without the written approval of the worker's employer, all *future* benefits including medical benefits are forfeited." See *Cowart*, 505 U.S. at 471, 26 BRBS at 50 (CRT)(emphasis added); see Order Granting Motion for Reconsideration and Supplemental Order Awarding Benefits at 3. We agree with employer, however, that the administrative law judge's finding is contrary to the express language contained in Section 33(g)(2), which states that if no written approval of a third-party settlement is obtained, or if claimant fails to notify employer of the settlement, "*all rights* to compensation and medical benefits . . . shall be terminated . . . ." See 33 U.S.C. §933(g)(2)(emphasis added). Contrary to our dissenting colleague's opinion, we believe the plain language of Section 33(g)(2) requires the termination of a claimant's *right* to all compensation, including compensation which has accrued, once the claimant fails to obtain written approval of a third-party settlement after becoming a person entitled to compensation.

This view is supported by the holding in *Cowart* that all benefits were barred by claimant's failure to obtain employer's approval. The language cited by the administrative law judge is *dicta* at the beginning of the opinion and is not the holding of the Court. Moreover, our opinion is supported by a recent decision of the United States Court of Appeals for the Ninth Circuit, wherein jurisdiction of this case lies. In *Reynolds v. Todd Pacific Shipyards Corp.*, 122 F.3d 37, 31 BRBS 71 (CRT)(9th Cir. 1997), the court held that where a widow entered into unauthorized third-party settlements subsequent to the death of the employee, but prior to the 1984 Amendments and *Cowart*, *Cowart* was to be given retroactive effect. The court did not consider the widow's entitlement to death benefits that had accrued prior to the third-party settlements, but determined that *Cowart* "requires the *dismissal*" of the widow's entire claim. *Id.*, 122 F.3d at 38, 31 BRBS at 72 (CRT) (emphasis added). Similarly, in *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994), the Board held that the *Cowart* decision must be given retroactive effect since the Court in *Cowart* applied the ruling to the parties before it. Inasmuch as the claimant in *Kaye* failed to obtain the employer's prior written approval of her third-party settlements, her claim for death benefits was barred under Section 33(g).<sup>2</sup> In neither case did the Board or the court

---

<sup>2</sup>Similarly, in an unpublished decision, the United States Court of Appeals for the

distinguish those benefits due prior to a settlement from those due after. Since *Reynolds* establishes that a claim must be dismissed where consent is not obtained as required by Section 33(g)(1), it is clear that no rights to benefits remain once the bar is invoked.

---

Eleventh Circuit affirmed an administrative law judge's dismissal of a hearing loss claim where the claimant failed to obtain the employer's written consent of a third-party settlement. *Sumerlin v. Alabama Dry Dock and Shipbuilding Co.*, No. 96-6999 (11th Cir. June 26, 1997). There, the administrative law judge determined that claimant's entire claim was barred by Section 33(g), despite the fact that some or all of the claimant's hearing loss benefits had accrued.

In the instant case, claimant became a "person entitled to compensation," specifically death benefits, on October 22, 1992, the day of decedent's death. It is uncontroverted that claimant subsequently failed to obtain employer's written approval of her 1995 post-death third-party settlement. Based on the foregoing, we hold that pursuant to the plain language of Section 33(g)(2), as well as the holdings in *Cowart* and *Reynolds*, claimant forfeited her right to collect all death benefits, both accrued and future, when she failed to obtain employer's written approval of the 1995 post-death third-party settlement. Accordingly, the administrative law judge's award of death benefits is reversed.<sup>3</sup> We next address employer's challenge to the administrative law judge's decision to award claimant funeral benefits. Section 2(12) of the Act defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." 33 U.S.C. §902(12). In awarding claimant funeral benefits, the administrative law judge nevertheless found that Section 33(g)(2), by distinguishing between "compensation" and "medical benefits," is consistent with the reasoning that since medical benefits are paid as reimbursement for expenses incurred, they are not considered "compensation." See *Marshall v. Pletz*, 317 U.S. 383 (1943). Next, reasoning that funeral benefits are comparable to medical benefits in that the Act provides only for a reimbursement of expenses already incurred, the administrative law judge found that Section 33(g)(2) does not bar claimant's request for funeral expenses. The administrative law judge found support for this finding in *Kahny v. Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd mem. sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984)(table), a case which was decided by the Board prior to the 1984 Amendments and *Cowart*. In *Kahny*, the Board held that, notwithstanding the definition of "compensation" in Section 2(12) of the Act, a widow who had received only reimbursement for funeral expenses from the employer was not a "person entitled to compensation" at the time of her third-party settlement for purposes of Section 33(g), and therefore her claim was not barred by that subsection. The Board based this holding on the principle that different meanings may attach to the same word or phrase under the Act, depending upon the purposes of the various sections. *Kahny*, 15 BRBS at 218.

---

<sup>3</sup>In response to employer's appeal, claimant argues that the payment she received in May 1995 from Manville Personal Injury Trust Settlement is not a third-party settlement contemplated by Section 33(g). Thus, claimant asserts that the forfeiture provision of that section should not apply. Claimant, however, did not appeal the administrative law judge's finding that the forfeiture provision of Section 33(g) applies to the 1995 settlement; accordingly, we will not address this issue. See *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989); *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988). Claimant further contends that *Cowart* should not be retroactively applied to her. Initially, it is not clear how this argument aids claimant as *Cowart* was decided prior to decedent's death and claimant's entry into the settlement. There is thus no retroactivity issue here. In any event, however, as we have discussed, both the Ninth Circuit and the Board have held that inasmuch as the Supreme Court in *Cowart* applied the ruling to the parties before it, that decision is applicable to all cases.



We concluded that the rationale in *Kahny* is no longer viable. Initially, of course, the Board's underlying holding regarding when a claimant becomes a "person entitled to compensation" was rejected in *Cowart*.<sup>4</sup> After reviewing other subsections where the phrase "person entitled to compensation" appears, the Supreme Court cited the "basic canon of statutory construction that identical terms within the Act bear the same meaning," *Cowart*, 505 U.S. at 478-479, 26 BRBS at 52 (CRT), as support for its holding that claimant becomes a "person entitled to compensation" when his right to recovery vests. Inasmuch as funeral benefits are explicitly included in the definition of "compensation" at Section 2(12) of the Act, we hold that funeral benefits are included in the term "compensation" under Section 33(g). Funeral benefits are thus subject to forfeiture where compensation is barred by Section 33(g). The administrative law judge's award of funeral benefits is therefore reversed. To the extent it survives the decisions in *Cowart* and is inconsistent with the holding herein, *Kahny* is overruled.<sup>5</sup>

Lastly, as the administrative law judge's awards of death benefits and funeral benefits have been reversed, we need not address employer's contentions with regard to its right to a lien under Section 33(f), 33 U.S.C. §933(f), as they are moot. As we have reversed the administrative law judge's award of death and funeral benefits, the administrative law judge's award of claimant's counsel attorney's fee, payable by employer, is vacated. 33 U.S.C. §928(a).

Accordingly, the administrative law judge's award of death and funeral benefits to claimant is reversed. The claim for all benefits under Section 9 is barred by Section 33(g).

---

<sup>4</sup>Prior to the Supreme Court's decision, the United States Courts of Appeals for the Fifth Circuit, sitting *en banc*, overruled its unpublished decision in *Kahny* affirming the Board's decision on this issue. *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991), *aff'd*, 505 U.S. 469, 26 BRBS 49 (CRT) (1996).

<sup>5</sup> Additionally, in his Order Granting Motion for Reconsideration and Supplemental Order Awarding Benefits, the administrative law judge stated that pursuant to *Yates*, even if funeral benefits are considered "compensation," claimant's funeral benefits would not be barred by Section 33(g) because those benefits accrued prior to the May 6, 1995 settlement. Based on our holding above, this finding is reversed.

SO ORDERED.

---

JAMES F. BROWN  
Administrative Appeals Judge

I concur:

---

NANCY S. DOLDER  
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' holding that claimant's failure to obtain employer's written approval of the 1995 post-death third-party settlement terminates her right to death and funeral benefits which were due prior to the date of the settlement. I believe that there is nothing in the language of Section 33(g) or the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992), which provides for the forfeiture of compensation which has become due and payable prior to the date of an unapproved third-party settlement. For the reasons set forth below, I would affirm the administrative law judge's award of death benefits which accrued during the period between decedent's death in 1992 and the 1995 settlement. In addition, I would affirm the administrative law judge's award of funeral benefits to claimant, as these benefits had clearly accrued prior to 1995.

Section 33(g)(2) of the Act states that if no written approval of a third-party settlement is obtained from the employer, or if an employee fails to notify employer of such a settlement, "all rights to compensation and medical benefits under this chapter shall be terminated . . ." 33 U.S.C. §933(g)(2)(1994). In its reading of this subsection, the majority focuses its attention on the words "all rights to compensation." I agree that once claimant enters into an unapproved settlement "all rights to compensation" terminate. However, the full provision states that all rights to compensation "shall be terminated," this provision thus cannot support the conclusion that the forfeiture provision retroactively applies to the period prior to a third-party settlement. A claimant's right to all compensation due terminates upon the execution of an unapproved third-party settlement. See *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). However, this language does not support the taking of compensation which accrued prior to the settlement; as such benefits have already vested in the claimant, they cannot be "terminated."

The plain language of Section 33(g) thus does not support a retroactive taking of benefits which accrued prior to the date of a third-party settlement. The Court's decision in *Cowart* is consistent with this view. In summarizing the requirements of Section 33(g) in *Cowart*, the Court stated that Section 33(g) provides that "under certain circumstances, if a

third-party claim is settled without the written approval of the worker's employer, all *future* benefits including medical benefits are forfeited." 505 U.S. at 471, 26 BRBS at 50 (CRT). The administrative law judge properly relied on this statement in analyzing the issue herein, as it flows from the plain language of the Act. The Board used similar language in a pre-*Cowart* case explicitly addressing the applicability of the Section 33(g) bar to benefits accrued prior to a third-party settlement in *Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206 (1988). In *Lindsay*, employer argued that a 1985 settlement entered into by the widow barred the estate's claim for disability benefits due prior to the employee's 1983 death as well as the widow's claim for benefits.<sup>6</sup> The Board rejected the argument that the claims for accrued disability benefits and death benefits due prior to the settlement were barred, stating that "Section 33(g) applies prospectively to terminate claimant's right to additional compensation due as of the date of settlement." *Id.*, 22 BRBS at 210. This holding follows the language of Section 33(g) and, consistent with its dictate, the Board held in *Lindsay* that claimant's rights to benefits terminated as of the date of the settlement. Although decided prior to *Cowart* neither *Cowart*, nor the subsequent decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, U.S. , 117 S.Ct. 796, 31 BRBS 5 (CRT)(1996), is contrary to the reasoning in *Lindsay*.

In *Cowart*, the Supreme Court held that the claimant "became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability." *Cowart*, 505 U.S. at 477, 26 BRBS at 51-52 (CRT). The right to recovery vests, the Court reasoned, when the claimant satisfies the prerequisites attached to the right. *Id.* Thus, the claimant became a person entitled to compensation at the time he suffered his work-related injury. In *Yates*, the Court held that a survivor's right to recover death benefits does not arise or vest until the death of the employee. Although the widow in *Yates* did not obtain the employer's prior written approval of third-party settlements entered into prior to the employee's death, the Court ruled that the death benefits claim was not barred by Section 33(g). The Court stressed that the relevant period for determining claimant's status as a "person entitled to compensation" is the date of the third-party settlement.

---

<sup>6</sup>In *Lindsay*, the Board held claimant was a person entitled to compensation as of the date of the settlement based on a prior award of benefits. Although *Cowart* rejected the test used by the Board in determining claimant's status as a person entitled to compensation, the result on this issue is the same under *Cowart*.

The decisions in *Cowart* and *Yates* do not explicitly address the precise argument raised here and, contrary to my colleagues' reasoning, I do not agree that they support reversal of the administrative law judge. First, as I have discussed, *Cowart* contains language supporting the administrative law judge's decision. In holding that the controlling time period is the date of settlement, moreover, *Yates* supports my view that this date is the date at which claimant's right to benefits terminates. Finally, the facts regarding accrued benefits are not developed in *Cowart*, *Yates*, or any of the cases cited by my colleagues.<sup>7</sup> Thus, the holdings in *Reynolds v. Todd Pacific Shipyards Corp.*, 122 F.3d 37, 31 BRBS 71 (CRT)(9th Cir. 1997), and *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994), do not affect my analysis of the issue presented here. In each case, a widow's claim for death benefits was held barred by Section 33(g), as the widow failed to procure the employer's written approval of third-party settlements entered into subsequent to the employee's death. However, the issue presented in the instant case, specifically whether a widow is entitled to receive death benefits which accrued prior to her entering into an unapproved settlement, was raised in neither case and was not therefore addressed by the respective panel.<sup>8</sup>

In view of the Court's holdings in *Cowart* and *Yates*, there is no question that claimant was a person entitled to compensation on the date she entered into the 1995 settlement without obtaining employer's prior written consent as required by Section 33(g). Her right to receive benefits thus terminated at that time, *i.e.*, all benefits from the date of the settlement were subject to forfeiture. However, I can find no language in either *Cowart* or *Yates*, or in Section 33(g) itself, that requires the forfeiture of her right to benefits which became due after the date of death and before the date of the settlement. Prior to that date, the widow had no duties under Section 33(g). Until the date of the settlement, there was no statutory bar to the payment of death benefits.

---

<sup>7</sup>Contrary to employer's contention, a holding that accrued benefits were barred is not implicit in its facts, as *Cowart* addressed only the approximately \$6,000 in scheduled permanent partial disability benefits due after employer's credit was exhausted, an amount that, if the award were paid periodically, would have been due only after the date of the settlement.

<sup>8</sup>In fact, depending on the timing of the settlement and the amount of employer's credit, no accrued benefits may be payable.

Under Section 14(b) of the Act, compensation becomes due within 14 days after employer receives formal notice or has knowledge of an injury or death. In this case, death benefits clearly became due and payable to claimant prior to the date of the 1995 third-party settlement. My colleagues' holding here permits a retroactive taking of vested benefits, a result contrary to the benefits structure of the Act as well as Section 33(g). In cases where an employee dies before his claim is adjudicated and leaves no survivors, the Board and courts have recognized that the employee has a vested right to benefits which accrued during his lifetime and his estate is entitled to the accrued benefits, regardless of when an award is entered. See *Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT)(11th Cir. 1986), *aff'g Andrews v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 209 (1985). See also *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994); *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, *modified on other grounds on recon.*, 28 BRBS 156 (1994). As the Eleventh Circuit noted in *Alabama Dry Dock*, a contrary rule would allow employer to escape liability based on delays in the adjudication of her claim. Similarly, under the present holding, entitlement to benefits becomes dependent upon when the claim is adjudicated or paid. *Cowart* does not support this result. In fact, in reversing the Board's reliance on claimant's receipt of benefits as determinative under Section 33(g), the Court stated that entitlement is a "right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated." *Cowart*, 505 U.S. at 477, 26 BRBS 51 (CRT). Claimant here established her entitlement to death benefits from October 1992 to May 1995. See *Lindsay*, 22 BRBS at 210; *Shoemaker*, 20 BRBS at 217-218. The fact that employer did not timely pay the benefits due is irrelevant to her entitlement. The Section 33(g) bar simply cannot apply prior to the date of the third-party settlement.

For the foregoing reasons, I would affirm the administrative law judge's award of accrued death benefits, and funeral benefits,<sup>9</sup> to which claimant was entitled prior to the date of the 1995 third-party settlement. I would vacate, however, the administrative law judge's determination that employer is not entitled to a credit under Section 33(f) of the Act, 33 U.S.C. §933(f), and remand the case to allow employer the opportunity to demonstrate the amount of its lien under Section 33(f). While employer litigated this case

---

<sup>9</sup>I agree with my colleagues that funeral benefits must be considered "compensation" for purposes of Section 33(g). In the wake of *Cowart*, the Board has held that the statutory definition of "compensation," 33 U.S.C. §902(12), applies to Section 33(g). See *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 55 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part).

under *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994), the prevailing law in the Ninth Circuit at the time, the holding in *Yates* represented a significant change in the law, and therefore, employer should be given the opportunity to present evidence with regard to its lien rights.

---

ROY P. SMITH  
Administrative Appeals Judge