

BRB No. 97-1432

LOIS TAYLOR)
(Widow of GLENN TAYLOR))
)
Claimant-Respondent) DATE ISSUED:
)
v.)
)
PLANT SHIPYARD)
CORPORATION)
)
and)
)
INDUSTRIAL INDEMNITY)
COMPANY)
)
Employer/Carrier-)
Petitioners) DECISION and ORDER

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

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

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order Upon Remand (92-LHC-3517) 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 and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time this case has come before the Board. To recapitulate

the facts, Glenn Taylor (decedent) worked as a shipfitter in the 1950's at the shipyards of both Bethlehem Steel Corporation (Bethlehem) and Plant Shipyard Corporation (Plant), where he was exposed to asbestos. Decedent retired from his subsequent non-maritime employment in 1980 due to poor health, and filed a state workers' compensation claim in 1981. After being diagnosed with cancer in 1983, asbestos fibers were discovered in decedent's left lung after it was removed in January 1984. Thereafter, in October 1984, decedent filed a third-party action against several asbestos manufacturers. Decedent filed his initial claim for benefits under the Act on December 28, 1984, wherein two different employers were named. He amended his claim on March 17, 1986, and again on December 10, 1986, to name Bethlehem and Plant as potential responsible employers.

On October 21, 1987, decedent entered into three separate third-party settlements, the gross total of which was \$266,500, with defendants Fibreboard Corporation (\$250,000), Babcock & Wilcox Company (\$15,000), and Garlock, Incorporated (\$1,500). Decedent also entered into a third-party settlement on April 11, 1988, with Combustion Engineering, Incorporated for \$17,500. Decedent's wife, Lois Taylor, co-signed each of the settlements as a co-releasor, thereby settling her loss of consortium and potential wrongful death actions.¹

In his February 14, 1989 Decision and Order, Administrative Law Judge Alexander Karst relied on the Social Security Administration records in evidence and found that Plant was the last responsible employer. Next, Judge Karst determined that decedent had suffered from a 70 percent whole man impairment and awarded decedent permanent partial disability benefits pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Lastly, Judge Karst found Plant entitled to receive a credit pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e), for the amounts decedent had received from his state workers' compensation claim, as well as a credit under

¹Decedent's son also signed the settlement with Fibreboard as a co-releasor. Under the terms of this settlement, decedent received \$100,000 for his personal injury action, Lois Taylor received \$50,000 for loss of consortium, and Mrs. Taylor and decedent's son received \$100,000 for any potential wrongful death action. Dec. Ex. 20 at p.146. The other two settlements did not contain provisions for the apportionment of the settlement proceeds.

Section 33(f) of the Act, 33 U.S.C. §933(f), for the entire amount of the net proceeds of the third-party settlements. Judge Karst thereafter denied both decedent's and employer's respective requests for reconsideration.

Subsequent to Judge Karst's decision, decedent and his wife entered into another third-party settlement on November 17, 1990 with Manville Corporation for \$150,000. Decedent died of lung cancer on February 13, 1991. Thereafter, decedent's widow (claimant) filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. In his September 3, 1993, Decision and Order, Administrative Law Judge Thomas Schneider (the administrative law judge) granted Bethlehem's motion to be dismissed as a party, inasmuch as Judge Karst had previously ruled that Plant (hereinafter employer) was the last responsible employer. Having dismissed Bethlehem from the proceedings, the administrative law judge concluded that he need not consider the issue of the applicability of Section 33(g), 33 U.S.C. §933(g), which was raised by Bethlehem after the conclusion of the hearing. The administrative law judge next awarded death benefits, but also found that, based on the holdings of the United States Court of Appeals for the Ninth Circuit in *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991), and *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994), employer was entitled to a credit under Section 33(f), 33 U.S.C. §933(f), for the net amounts claimant received in the third-party settlements entered into by her and decedent. Employer filed a motion for reconsideration seeking a denial of claimant's death benefits pursuant to *Cretan*, which the administrative law judge denied on October 4, 1993.

On appeal, the Board affirmed the administrative law judge's finding that employer is the responsible employer. Next, the Board held that the administrative law judge erred in failing to consider the issue of the Section 33(g) bar, as *Cretan* decided a new issue involving the language of Section 33(g)(1) which was not addressed by the United States Supreme Court in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992). Lastly, the Board vacated the administrative law judge's determination that employer is entitled to a Section 33(f) offset with regard to the net amount of claimant's pre-1989 potential wrongful death actions, and held as a matter of law that based on the doctrines of collateral estoppel and judicial estoppel, the issue of a Section 33(f) offset with regard to the settlements entered into prior to Judge Karst's 1989 decision should have been precluded from litigation, inasmuch as that issue had been previously litigated in decedent's disability case. The Board held that on remand, if the administrative law judge found that claimant's death benefits claim was not barred by Section 33(g)(1), he must consider employer's entitlement to a Section 33(f) credit for the amounts apportioned to claimant with regard to the third-party settlements entered into

subsequent to Judge Karst's decision, since employer had not received a credit with regard to those settlements. *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996).

Subsequent to the Board's decision, the Supreme Court issued its decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 117 S.Ct. 796, 31 BRBS 5 (CRT)(1997), wherein the Court held that a surviving spouse is not a "person entitled to compensation" pursuant to Section 33(g) 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 the employer's written approval of third-party settlements entered into prior to the employee's death. In his Decision and Order Upon Remand, the administrative law judge found that, pursuant to *Yates*, claimant's right to death benefits was not barred by Section 33(g). The administrative law judge then found that claimant was not a "person entitled to compensation" within the meaning of Section 33(f) prior to the death of decedent, and therefore, employer is not entitled to a Section 33(f) credit for the amounts claimant received from third-party settlements entered into prior to decedent's death. For the sake of judicial economy, in the event of reversal of his interpretation of Section 33(f), the administrative law judge calculated the amounts apportioned to claimant from the settlements claimant and decedent entered into with Manville Corporation on November 17, 1990 and Combustion Engineering on April 11, 1988.²

On appeal, employer contends that the administrative law judge erred in not awarding it a credit for the net amounts claimant received in the third-party settlements claimant entered into with Manville Corporation and Combustion Engineering. Specifically, employer asserts that under the principle of equitable subrogation, it is entitled to an offset for claimant's third-party recoveries regardless of when the recoveries were made, as decedent's injury and death were the result of the negligence of a third party. Employer further asserts that the administrative law judge's decision contradicts the Act's prohibition against double recoveries. Lastly, employer argues that based on the language of the Manville Corporation and Combustion Engineering third-party settlements, employer is contractually entitled to receive a credit under Section 33(f) for the amount of the net proceeds claimant received from those settlements. Claimant responds, urging affirmance of the administrative law judge's Decision and Order Upon Remand, contending that she was not a "person entitled to compensation" under Section 33(f) at the time she

²The third-party settlement claimant and decedent entered into with Combustion Engineering on April 11, 1988, the gross amount of which was \$17,500, was not subject to the Section 33(f) credit Judge Karst awarded employer in his February 14, 1989, Decision and Order Awarding Benefits.

entered into the third-party settlements. In a reply brief, employer reiterates that the administrative law judge erred in not awarding it a credit pursuant to Section 33(f). Claimant has filed a petition for an attorney's fee for legal services rendered before the Board, to which employer has filed objections.

I. *Credit As a Matter of Contract*

Initially, we will address employer's contention on appeal that the administrative law judge erred in not addressing the issue of whether it is entitled to an offset of the net amounts claimant received from the third-party settlements with Manville Corporation and Combustion Engineering as a matter of contract, since these settlements contain specific indemnification language against the subrogation claims of employer. While we agree with employer that it raised this argument before the administrative law judge on remand, we hold that any error committed by the administrative law judge in not addressing employer's argument is harmless, as employer has no enforceable contractual rights as a matter of law.

Specifically, decedent's and claimant's agreement with Manville Corporation states in pertinent part:

RELEASORS agree to indemnify the TRUST against all liability, including but not limited to attorneys' fees and expenses, resulting from any subrogation claim or liens concerning any compensation or medical payments due or claimed to be due under state or federal law or regulation or contract and from any and all other liability arising out of the claims by RELEASORS, with the exception of the consideration recited herein. RELEASORS warrant that they, or their attorney(s), have checked all records and verify that there are no such liens outstanding. It is the express intention of the parties to this RELEASE to limit the TRUST's liability to that recited herein.

Emp. Ex. 11.

The agreement with Combustion Engineering states in pertinent part:

As a further material consideration and inducement for this compromise settlement, the undersigned agree to hold harmless and indemnify and insure Combustion Engineering, Inc., from any and all claims, demands, actions or causes of action of subrogation, or otherwise asserted by any person or legal entity which has furnished, supplied and/or paid or will furnish, supply and/or pay benefits, anything

of value, or any form of compensation to or for the undersigned for any claimed expenses, detriment, or damages resulting to the undersigned from said alleged incidents, save and except with respect to claims for indemnity and/or contribution by co-defendants in the pending action.

Emp. Ex. 10.

The essence of employer's contention is that since claimant is contractually obligated to indemnify the third parties against employer's subrogation, it should, as a matter of contract, be entitled to a credit for the net amount claimant received in the third-party settlements with Manville Corporation and Combustion Engineering. However, in *Yates v. Ingalls Shipbuilding*, 28 BRBS 137 (1994)(Brown, J., concurring; Smith, J., dissenting), the Board rejected a similar argument presented by an employer. In *Yates*, the administrative law judge found that the employer was entitled to an offset of the entire net amount of the third-party settlements, not merely the one-seventh portion the surviving spouse received, as a matter of contract, as these agreements contained language which provided the employer with a credit for the consideration paid to the releasors. The Board, in modifying the administrative law judge's decision, held that as the employer was neither a party to the third-party settlements nor a third-party beneficiary, it had no right to enforce the terms of the agreements.³ Moreover, the Board held that to enforce such agreements would be in violation of Section 15(b) of the Act.⁴ See *Yates*, 28 BRBS at 137.

Like the situation in *Yates*, employer in the instant case was not a party to, nor a signatory of, the third-party settlements, and therefore, does not have the right to enforce the terms of the agreements. Moreover, assuming employer did possess

³On appeal, the Fifth Circuit did not reach the issue of whether the Board properly held that the employer had no right to enforce the terms of the third-party settlements, as the court held that the language of the settlements did not clearly and unambiguously require the surviving spouse to give the employer a credit for any sums that exceeded the net amount she received from the settlement. See *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 466, 29 BRBS 113, 117-118 (CRT)(5th Cir. 1995).

⁴Section 15(b) of the Act provides:

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

33 U.S.C. §915(b).

such a right, the interpretation employer seeks is at odds with the plain language contained in the Manville Corporation and Combustion Engineering settlements. These third-party settlements do not guarantee employer a credit, as the contractual language in *Yates* arguably did; rather, the settlements in the case at bar provide that claimant will indemnify the third parties in actions of subrogation. By requesting the Board to enforce the relevant third-party settlements in the instant case and grant it a credit, employer seeks an interpretation that would convert the indemnification rights of the third-party defendants into a right on the part of employer to receive a Section 33(f) credit. Contrary to employer's contention, employer's right to a credit cannot be extrapolated from these agreements.⁵ See *Perry v. Bath Iron Works Corp.*, 29 BRBS 57 (1995); *Treto v. Great Lakes Dredge & Dock Co.*, 26 BRBS 193 (1993); see also *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980).

Employer further asserts that if it is not granted a credit as a matter of either law or contract, it will be forced to seek indemnification by undergoing unnecessary litigation. However, the possibility that employer may be required to seek indemnification through a tort action does not compel us to depart from Board precedent and the plain language of the third-party settlements. Manville Corporation and Combustion Engineering entered into settlements with decedent and claimant for their own benefit, to protect them from possible actions arising out of decedent's exposure to asbestos during the course of his employment. The settlements were not entered into for the benefit of employer. See *Yates*, 28 BRBS at 153 (Brown, J., concurrence). Based on the Board's holding in *Yates*, we hold that employer lacks standing to enforce the indemnification clauses of the third-party settlements. Employer's contention to the contrary is therefore rejected.

II. *Equitable Subrogation*

The next issue presented by this appeal is whether employer is entitled to a credit, as a matter of equity, for the amounts claimant received in the third-party settlements with Manville Corporation and Combustion Engineering. In its appeal,

⁵A "lien" is defined as "a claim of charge on property for payment of some debt, obligation or duty." *Black's Law Dictionary* 832 (5th ed. 1979). "Credit" is defined as "the correlative of a debt; that is, a debt considered from the creditor's standpoint, or that which is incoming or due to one." *Id.* at 331.

employer argues that, assuming claimant was not a “person entitled to compensation” under Section 33(f) at the time she entered into the third-party settlements with Manville Corporation and Combustion Engineering, it should still be entitled to offset against its liability for death benefits the amounts claimant received from these settlements, as the right to a credit is so fundamental that no specific statutory provision is required. Specifically, employer asserts that under the doctrine of equitable subrogation, the third-party tortfeasor, not employer, must be the party ultimately responsible for the benefits owed to claimant under the Act. Relying on the Supreme Court’s decision in *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980), employer asserts that its right to such a credit is inviolable. For the reasons that follow, employer’s contention is rejected.

Contrary to employer’s assertion, the Act does not embody the principle of equitable subrogation. Rather, the Act contains specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury, disability or death. See 33 U.S.C. §§903(e), 914(j), 933(f). Section 3(e) provides employer with a credit for payments under other workers’ compensation laws or the Jones Act, see 33 U.S.C. §903(e),⁶ and Section 33(f) provides an offset against amounts due under the Act for any recovery from a third party who is liable in damages for the same disability or death. 33 U.S.C. §933(f). Section 14(j) covers the advance payment of benefits pursuant to the Act. 33 U.S.C. §914(j);⁷ see, e.g., *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). In addition, an independent credit doctrine exists in case law which provides employer with a credit for prior disability payments under certain circumstances to avoid a double recovery of compensation for the same disability. See *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(*en banc*); *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975). Case law demonstrates that an employer’s right to a credit under these provisions or doctrines has limitations. Thus, disability payments which a claimant receives from the Veteran’s Administration are not subject to a Section 3(e) credit. See *Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 21 BRBS 114 (CRT)(9th Cir. 1988). Similarly, payments which a claimant receives from the Railroad Retirement Board are not subject to a credit under

⁶Section 3(e) provides that “any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers’ compensation law or section 688 of Title 46 . . . shall be credited against any liability imposed by this chapter.” 33 U.S.C. §903(e)(1994).

⁷Section 14(j) provides that “[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.” 33 U.S.C. §914(j).

Section 3(e). See *Wilson v. Norfolk & Western Railway Co.*, 32 BRBS 57 (1998). A claimant's attorney's fee is excluded in calculating the amount of an offset pursuant to Section 3(e). See *Jenkins v. Norfolk & Western Railway Co.*, 30 BRBS 109 (1996).

Moreover, employer's reliance on *Bloomer* appears to be misplaced. In *Bloomer*, the Supreme Court held that an employer's lien against a third-party recovery must not be reduced by the employee's expenses in obtaining the third-party recovery. Subsequent to this decision, Congress amended Section 33(f) to provide employer with a credit for the net amount a "person entitled to compensation" receives from a third-party recovery; specifically, that "[s]uch net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees)." 33 U.S.C. §933(f)(1994). Thus, an employer's right to a credit is not absolute.

As the Act contains specific credit provisions, employer's contention that no statutory provision is needed to secure its right to a credit must fail. Employer must derive its right to a credit from a specific provision in the Act, or from the independent credit doctrine. It is undisputed that neither Sections 3(e) and 14(j), nor the independent credit doctrine, apply in the instant case. Since claimant has received payments from third-party settlements, the only provision under the Act that applies in the instant case is Section 33(f).

III. Section 33(f)/Double Recovery

We now address employer's contention on appeal that the administrative law judge erred in finding that employer is not entitled to a credit pursuant to Section 33(f) for the amounts claimant received in the third-party settlements with Manville Corporation and Combustion Engineering. In his Decision and Order Upon Remand, the administrative law judge, relying on the decision of the United States Supreme Court in *Cowart* and *Yates*, determined that claimant was not a "person entitled to compensation" under Section 33(f) when she entered into the relevant third-party settlements, as she was not yet a widow at that time. Thus, the administrative law judge concluded that employer is not entitled to any offset resulting from those settlements pursuant to Section 33(f). On appeal, employer asserts that by adopting the plain meaning of the term "person entitled to compensation," as it is used in Section 33(g), the administrative law judge created a manifest injustice by denying employer its right to a Section 33(f) credit; specifically, employer asserts that since the administrative law judge's interpretation of Section 33(f) denies it a credit and allows claimant a double recovery, it is both absurd and unjust, and the Board must reverse the administrative law judge's decision. We hold that employer is entitled to a credit under Section 33(f) for the net amount of the settlement recoveries apportioned to the surviving spouse; once claimant became a "person entitled to compensation" by virtue of her entitlement to an award of death benefits, Section 33(f) provides employer a credit for the net settlement recoveries, regardless of when the amounts were received.

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 *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998) (Smith, J., dissenting); *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, a review of the Section 33(f) issue properly begins with the language of that section. Section 33(f), as amended in 1984, states:

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)(1994).⁸ On its face this provision allows employer a credit for the net amount recovered by a “person entitled to compensation” for the same injury or death. Thus, the Board has held that recoveries must be apportioned so that the amounts recovered by the employee offset his entitlement to disability benefits while any amounts paid to the spouse offset death benefits. *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff’d in part part Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991). While *Force* was decided prior to the Supreme Court’s decisions in *Cowart* and *Yates* interpreting the term “person entitled to compensation” for purposes of Section 33(g), we do not believe the intervening cases affect its underlying premise, *i.e.*, that the net amount of a settlement recovery by the employee offsets employer’s liability for disability benefits, while net amounts apportioned to a spouse offsets the payments due as death benefits.

⁸This provision complements Section 33(e), 33 U.S.C. §933(e), with subsection (f) providing employer a credit where claimant institutes proceedings under subsection (b) and subsection (e) applying to the disposition of the proceeds where the right to institute proceedings is assigned to employer.

The Supreme Court has yet to resolve whether a “person entitled to compensation” in Section 33(f) encompasses a surviving spouse who entered into third-party settlements prior to the death of the employee. In addressing the interpretation of Section 33(g) in *Cowart*, 505 U.S. at 469, 26 BRBS at 51-52 (CRT), the Court held that an employee becomes a “person entitled to compensation” at the moment his right to recovery vests, rather than when an employer admits liability. The Court found that the right to recovery vests when the employee satisfies the prerequisites attached to the right, which in that case occurred when the employee suffered his work-related injury. Thus, in *Cowart*, the Court held that under the plain language of Section 33(g)(1),⁹ an employee forfeits his right to compensation benefits by failing to obtain the employer’s written approval of a third-party settlement entered into after his work-related injury for an amount less than the compensation due under the Act. In *Yates*, 117 S.Ct. at 796, 31 BRBS at 5 (CRT), the Supreme Court held that a surviving spouse who entered into third-party settlements prior to the death of the employee was not a “person entitled to compensation” under Section 33(g)(1) at the time she entered into the settlements, as she did not satisfy at that time the prerequisites for obtaining death benefits under the Act. The Court relied on the specific language of Section 33(g) and its prior holding in *Cowart* to hold that in applying Section 33(g), the time for determining whether a person is “entitled to compensation” is the time of the settlement. Therefore, the Court held that the surviving spouse did 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 before the employee’s death.

⁹Section 33(g)(1) states:

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)(1994).

In its discussion of the issue presented in *Yates*, the Supreme Court declined to address whether its interpretation of the term “person entitled to compensation” for purposes of Section 33(g) applied without qualification to Section 33(f), see *Yates*, 117 S.Ct. at 803, 31 BRBS at 10 (CRT), although the court had declared in *Cowart*, that a “person entitled to compensation” must have the same interpretation in Section 33(f) and 33(g), in light of the “basic canon of statutory construction that identical terms within an Act bear the same meaning” (citations omitted). *Cowart*, 505 U.S. at 479, 26 BRBS at 52 (CRT).

We construe a “person entitled to compensation” to have the same meaning in Section 33(f) and Section 33(g), that is, a person with a vested right to compensation as the Supreme Court has construed the term in *Cowart* and *Yates*. The fact that claimant was not a “person entitled to compensation” pursuant to Section 33(g) on the date she entered into her third-party settlements prior to her husband’s death, however, does not compel the conclusion that she is not a “person entitled to compensation” pursuant to Section 33(f), whose settlement proceeds are credited against employer’s liability. As we have discussed, for the purpose of application of Section 33(g) the determination of who is a “person entitled to compensation” is made at the time a person enters into a third-party settlement. See *Yates*, 117 S.Ct. at 803, 31 BRBS at 10 (CRT). For the purpose of application of Section 33(f), however, the critical time is the time of award. That is because Section 33(f) mandates that employer receive credit for the net “amount” received by a “person entitled to compensation” from a third-party settlement for the same disability or death. Employer’s right to a credit only arises when employer is held liable to pay benefits under the Act to a person who has entered into a third-party settlement. That liability is imposed at the time of an award of benefits. Since the determination of who is a “person entitled to compensation” is made at the time of award, every person awarded benefits has *ipso facto*, a vested right to benefits, hence, every person awarded benefits must be a “person entitled to compensation.” In the case at bar, claimant’s right to compensation vested at the time of the employee’s death. She was thereafter awarded benefits. Because she was then a “person entitled to compensation,” employer was entitled to a credit against its liability for all “amounts” received pursuant to Section 33(f).¹⁰

¹⁰We recognize that the Board’s decision in *Henderson v. Ingalls Shipbuilding, Inc.*, 30 BRBS 150 (1996), rejected the argument that employer was entitled to a credit for pre-death settlements. The Board, however, summarily found this result compelled by the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113(CRT) (5th Cir. 1995), *aff’d*, 117 S.Ct. 796, 31 BRBS 5(CRT) (1997). In view of the Supreme Court’s subsequent decision, we believe it is appropriate to further consider this

We disagree with our dissenting colleague, who would hold that employer has no right to credit the net proceeds of claimant's settlement against its liability because claimant was not a "person entitled to compensation" when she received the proceeds of the settlement. We consider this analysis flawed because at the time of award, claimant is indisputably a "person entitled to compensation" and at that time, Section 33(f) gives employer a credit for the net proceeds which the "person entitled to compensation" has received from all third-party settlements, including those received in the past, on account of the same injury or death. The Ninth Circuit made clear in *Force* that employer's right to a credit under Section 33(f) does not depend upon when the claimant had become a "person entitled to compensation." *Force*, 938 F.2d at 984, 25 BRBS at 18 (CRT). The court held that although Mrs. Force was not a "person entitled to compensation" pursuant to Section 33(g) when she entered into the settlement prior to her husband's death, she had become a "person entitled to compensation" at the time of application of Section 33(f), and as a result, employer was authorized to credit the net proceeds of her settlement against her death benefits. As the language of Section 33(f) which provides an employer with a credit does not restrict to a specific time frame those recoveries which are subject to the credit, one must conclude that Section 33(f) provides an employer with a full credit for *all* amounts which have been received from third-party recoveries by a "person entitled to compensation."

Our interpretation of Section 33(f) conforms to the purpose of the Act, as it allows claimants one recovery, either from employer or a third party; providing a full credit to employers for amounts received for the same disability or death avoids the receipt of a double recovery by claimant. As we have discussed, the Board and the courts have previously held that third-party settlements should be apportioned among the deceased employee, the surviving spouse and children, so that the amounts attributable to the deceased employee and the surviving spouse can be credited against their respective compensation due under the Act. See *Brown v. Forest Oil Corp.*, 29 F.3d 966, 28 BRBS 78 (CRT)(5th Cir. 1994); *I.T.O. Corp. v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT), *vacated in part on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT)(4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Force*, 938 F.2d at 981, 25 BRBS at 13 (CRT); *Force v. Kaiser Aluminum & Chemical Co.*, 30 BRBS 128 (1996). Our interpretation of Section 33(f) in the instant case effectuates this scheme. Moreover, it provides a recovery comparable to that under Section 33(e) where the third-party action is instituted by employer.

issue.

Based upon the foregoing, we reverse the administrative law judge's determination that employer is not entitled to a credit under Section 33(f) of the Act, and hold that employer is entitled to a credit for the net amounts claimant received from the third-party settlements with Manville Corporation and Combustion Engineering. In rendering his decision, the administrative law judge calculated the net amount apportioned to claimant for both third-party settlements to total \$41,272. This finding is unchallenged on appeal. We therefore hold that based on the net amounts apportioned to claimant by virtue of the third-party settlements with Manville Corporation and Combustion Engineering, employer is entitled to offset its death benefits liability to claimant under Section 33(f) by the additional amount of \$41,272. Finally, inasmuch as we reverse the administrative law judge's determination denying employer the credit to which it is entitled pursuant to Section 33(f), claimant's counsel's petition for an attorney's fee for work performed before the Board is denied, as the Act requires a showing of success on the merits before any attorney's fee becomes appropriate. See *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997).

Accordingly, the administrative law judge's denial of a credit to employer under Section 33(f) is reversed, and his decision is modified to reflect that employer is entitled to an offset of its liability to claimant for death benefits in the amount of \$41,272, pursuant to Section 33(f) of the Act. In all other respects, the Decision and Order Upon Remand is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

JAMES F. BROWN
Administrative Appeals Judge

HALL, Chief Administrative Appeals Judge, concurring and dissenting:

I fully agree with the majority's opinion that employer is not entitled to an offset against its death benefits liability to claimant as a matter of either contract or the doctrine of equitable subrogation. Moreover, I agree with the majority's holding that

claimant was not a “person entitled to compensation” at the time she entered into the third-party settlements with Manville Corporation and Combustion Engineering. I respectfully dissent, however, from my colleagues’ holding that employer is entitled to a credit against its liability for death benefits for the settlement amounts claimant obtained prior to her spouse’s death pursuant to the provisions of Section 33(f) of the Act. For the reasons that follow, I would affirm the administrative law judge’s interpretation of Section 33(f) and his consequent denial of an offset to employer for these amounts

Section 33(f) of the Act, as amended in 1984, states:

If the person entitled to compensation institutes proceedings within the period prescribed his 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 his respect to such proceedings (including reasonable attorney fees).

33 U.S.C. §933(f)(1994).

At the time she entered into the third-party settlements with Manville Corporation and Combustion Engineering, claimant was not a “person entitled to compensation” under Section 33, as the decedent had not yet died. Claimant thus did not satisfy the prerequisites attached to the right to receive death benefits at the time of the settlements. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 117 S.Ct. 796, 31 BRBS 5 (CRT) (1997); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992). Pursuant to a plain reading of the statute, I believe that the issue of whether employer is entitled to a credit under Section 33(f) for the net amounts claimant received as a result of third-party recoveries entered into prior to becoming a “person entitled to compensation” ends at this point. As claimant was not a “person entitled to compensation” at the time she entered into the relevant third-party settlements, Section 33(f) cannot apply to the settlements in dispute.

In challenging the administrative law judge’s decision, employer argues that

the administrative law judge's interpretation results in claimant's receipt of a double recovery, a result contrary to Act's policy. I agree with my colleagues, as well as employer, that the Act discourages such double recoveries. However, under the Supreme Court's decision in *Yates*, employer is simply not entitled to a Section 33(f) credit in the instant case for settlements which occurred before she became a "person entitled to compensation." In this case, limiting employer's credit to settlements after the death of her spouse does not result in a double recovery for the widow, but in her full receipt of the death benefits to which she is entitled. There is no basis for offsetting her recovery for her husband's death against settlements finalized before he died.

I acknowledge that the Supreme Court in *Yates* did not explicitly address the question of whether the same interpretation of the term "person entitled to compensation" applies without qualification to both Section 33(g) and Section 33(f). See *Yates*, 117 S.Ct. at 803, 31 BRBS at 10 (CRT). Rather, without deciding the issue, the Court in *Yates* considered employer's argument that an adherence to the plain meaning of Section 33(g) would result in an abrogation of its right to offset its liability for death benefits under Section 33(f) by the amounts received by the surviving spouse as a result of pre-death third-party settlements. Recognizing that the Act reflects a policy of avoiding double recoveries by virtue of Section 3(e) of the Act, 33 U.S.C. §903(e), the Court nevertheless stated that this policy is not absolute. See, e.g., *Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 21 BRBS 114 (CRT)(9th Cir. 1988). The Court acknowledged that an exclusion of surviving spouses prior to the death of the employee from the meaning of "person entitled to compensation" under Section 33(f) would create the possibility of double recoveries, but the Court did "not find the possibility of such recovery in this context to be so absurd or glaringly unjust as to warrant a departure from the plain meaning of the statute." *Yates*, 117 S.Ct. at 804, 31 BRBS at 10 (CRT). The Court further stressed that a credit under Section 33(f) of the Act is not an employer's exclusive remedy against third parties responsible for an employee's injury, noting that an employer is free to seek indemnification against such a third party through a tort action in state or federal court. *Id.* Clearly, the Court in its analysis presupposed that if a claimant is not a "person entitled to compensation" at the time of the third-party recoveries, Section 33(f) becomes inapplicable. Indeed, the majority's holding is contrary to Board precedent on this very issue. In *Henderson v. Ingalls Shipbuilding, Inc.*, 30 BRBS 150 (1996), the Board held that where a claimant does 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 the claimant's death benefits for the pre-death settlement recoveries. This decision is not an anomaly; in prior cases addressing this issue, the underlying premise is that only recoveries received once claimant becomes a "person entitled to compensation" are subject to

the credit. See, e.g., *Yates*, 117 S.Ct. at 796, 31 BRBS at 10 (CRT); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); *Castorina v. Lykes Bros. Steamship Co.*, 21 BRBS 136 (1988).

Accordingly, I believe that a plain reading of Section 33(f) supports the administrative law judge's decision. As the majority recites, it is well-established that, when interpreting a statute, the starting point is the plain meaning of the words of the statute. See *Mallard v. U.S. District Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989). Subsection (g) cross-references subsection (f), and the same terms in the two subsections must be given the same meaning. Just as the courts have determined that, in order for Section 33(g) to apply, the party entering into a settlement must be a "person entitled to compensation" at the time of this demonstrative event, I believe that the plain reading of Section 33(f) requires that employer's credit is limited to those obtained by a "person entitled to compensation."

Thus, I would hold that since claimant in the instant case was not a "person entitled to compensation" at the time she entered into the pre-death third-party settlements with Manville Corporation and Combustion Engineering, employer is not entitled to a credit for these amounts under Section 33(f). Accordingly, I would affirm the administrative law judge's determination on this issue. In addition, I would grant claimant's counsel's request for an attorney's fee in its entirety.

BETTY JEAN HALL, Chief
Administrative Appeals Judge