BRB Nos. 99-698
and 99-698A

DORELDA GILLILAND (Widow of DAROL GILLILAND) Claimant-Petitioner Cross-Respondent v. E. J. BARTELLS COMPANY, INCORPORATED and WAUSAU INSURANCE COMPANY Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: April 5, 2000 DECISION and ORDER

Appeal of the Decision and Order of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Peter W. Preston (Pozzi Wilson Atchison, L.L.P.), Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky, MacColl, Olson & Pfeifer, P.C.), Portland, Oregon, for employer/carrier.

Mark Reinhalter (Henry J. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (97-LHC-2356) of Administrative Law Judge Samuel J. Smith 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent died of work-related asbestosis and cancer on December 22, 1981, and his widow, claimant herein, filed a claim for death benefits on behalf of herself and her two dependent children in March 1982.[1] In February 1985, an administrative law judge awarded claimant and her children funeral expenses and death benefits and also awarded claimant decedent's permanent total disability benefits from October 15 through December 21, 1981. Jt. Ex. 1 at 5. Also in February 1985, claimant settled her tort claims against third-party defendants (manufacturers and suppliers of asbestos), and employer approved the settlements. One of the settlements was structured to include an annuity, and, according to the record, excluding fees and costs, the "present value" of the annuity portion of that settlement as of February 1985 was $182,907.76. Jt. Exs. 1, 10-11; Tr. at 10; Emp. Brief at 2 n.1. That value included the $161,000 which was used to purchase the 20-year annuity to be paid in installments to claimant beginning in February 1985 at rate of $750 per month with yearly increases of three percent.[2] *Id.* On July 2, 1996, employer filed a notice of controversion stating that it overpaid compensation in view of claimant's third-party recovery.[3] Because the parties could not resolve their differences with regard to the

[1]Decedent's eldest child, a son, was not a dependent child at the time of the death, and when claimant filed for death benefits under the Act, he was not a party to the claim.

[2]In a note dated June 23, 1995, claimant stated that her monthly income from the annuity was $1,414.30. Jt. Ex. 14.

[3]In its notice of final payment, it stated it had paid claimant $284,198.37 as of July 2,

computation of employer's offset of compensation against both the annuity portion of the third-party settlement and the recovery by the dependent children, they proceeded to a formal hearing.

1996. Jt. Exs. 15, 16.

Based on the decision 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), *aff'g in part and rev'g in part Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), and the Board's decision in *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd in part*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994), the administrative law judge found that the term "net income" in Section 33(f) of the Act, 33 U.S.C. §933(f), means the income "actually received." Thus, he concluded that the value of the annuity for purposes of employer's offset must be based upon the actual monthly annuity payments claimant receives, as the Act does not provide for a reduction of the annuity to its present value. Decision and Order at 6. The administrative law judge also found that the amounts received by decedent's children under the third-party settlement are excluded from employer's offset. *Id.* at 5. Claimant appeals the use of the actual monthly payment for calculating employer's offset, BRB No. 99-698, and employer cross-appeals the exclusion of the dependent children's third-party recovery from said computation, BRB No. 99-698A. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision in all respects.[4]

Claimant contends the administrative law judge erred in offsetting employer's liability for benefits against the actual value of the monthly payments of the annuity rather than offsetting its liability against the present value of the annuity when it was purchased in 1985. Claimant argues that the present value of the annuity is the amount on which employer based its approval of the third-party settlement, and she also questions employer's entitlement to a credit against the interest included in the annuity payments, as it would not be permitted to take a credit against any interest she would have earned by investing a lump sum payment. In this regard, claimant contends future claimants, who wish to obtain the full amount owed to them, will be compelled, despite the Act's preference for periodic payments, to accept lump sum payments. Employer contends the credit was properly calculated, and the Director agrees.

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

[4]On February 9, 2000, the Board requested the Director to file a brief in this case. We hereby grant the Director's motion to accept his brief in this case, which was filed one day late. 20 C.F.R. §§802.217, 802.219.

> reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f) (emphasis added). Situations similar to that in the case at bar have arisen previously, and provide ample support for the administrative law judge's finding that employer is entitled to a credit on an actual receipt basis. In *Force*, 938 F.2d at 981, 25 BRBS at 13(CRT), the decedent died from asbestos-related mesothelioma. Prior to his death, he filed a claim under the Act for his disability benefits and he and his wife also filed suits against asbestos manufacturers. Before the hearing under the Act, the third-party suits settled, with the decedent's wife and children waiving all potential rights to a wrongful death claim. After his death, the decedent's wife filed a claim under the Act, seeking the decedent's accrued disability and medical benefits and also seeking death benefits on her own behalf. *Force*, 938 F.2d at 982, 25 BRBS at 14-15(CRT). The court held that the "net amount" to offset under Section 33(f) is the "actual amount of recovery minus litigation fees," and that the employer was entitled to offset its liability against money received in the third-party suit for non-economic damages such as pain and suffering, as well as economic loss. *Id.*, 938 F.2d at 984, 25 BRBS at 17(CRT). Further, in affirming the Board on this point, the court held that an employer's offset must be apportioned among the parties to the claim. Specifically, an employer may credit its liability to a particular claimant only against third-party damages received by that claimant. As only the decedent and his widow were "entitled to compensation," the employer could offset settlement proceeds separately apportioned to them, but not any settlement money received by the children (who were not entitled to compensation under the Act). *Id.*, 938 F.2d at 985, 25 BRBS at 19(CRT); *Force v. Kaiser Aluminum & Chemical Corp*, 30 BRBS 128 (1996). The court established that the burden is on the employer to show apportionment among persons entitled to compensation, and, until such a showing is made, it remains liable for benefits and is not entitled to any offset. In establishing apportionment, the employer must show how the funds were actually disbursed. *Force*, 938 F.2d at 985-986, 25 BRBS at 19-20(CRT); *see also I.T.O Corp. of Baltimore v. Sellman*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Henderson v. Ingalls Shipbuilding, Inc.*, 30 BRBS 150 (1996).

In *Cretan*, 24 BRBS at 35, the Board addressed the application of a present value factor to an annuity to determine the employer's credit against the third-party settlements.[5] Specifically, the Board rejected the Cretans' assertion that the administrative law judge correctly reduced the annuity to its present value, concluding that the Act does not provide

[5]Although the Ninth Circuit's decision in *Cretan*, 1 F.3d at 843, 27 BRBS at 93(CRT), was overruled by *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997), neither court addressed the portion of the Board's decision relevant to the instant case.

for such a calculation. *Cretan*, 24 BRBS at 42. The Board stated that, instead, the employer was entitled to an offset in the amount of the lump sum payment, plus a "continuing credit" based on the actual payments made each month to the claimant. *Id.*

The Board based its decision in *Cretan* on its decision in *Maples v. Textports Stevedores Co.*, 23 BRBS 302, *aff'd sub nom. Textports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1(CRT) (5th Cir. 1991). In *Maples*, the Board addressed the novel issue of whether the claimant's right to "deficiency compensation" under Section 33(f) arises when

> the aggregate benefits otherwise payable under the Act equal the net amount of the employee's tort recovery or when the benefits otherwise payable under the Act reduced to their "present value" i.e., their value at the time of the third party recovery, equal the net amount of the tort recovery.

Maples, 23 BRBS at 305. The Board rejected the employer's assertion that the claimant's disability and "medical benefits should be accrued on a present value basis as of the date of the third party recovery[,]" and it held that the credit computation is made on a dollar-for-dollar basis. *Id.* at 304, 308. The Board reasoned that a reduction to present value of the compensation to be paid was not authorized by the plain language of the Act,[6] Board practice or the New York worker's compensation act on which the Longshore Act is based. *Id.* at 307-308.[7] The United States Court of Appeals for the Fifth Circuit affirmed, noting that administrative practice under the Act has been to allow a dollar-for-dollar credit with no interest on the credit and no present value discounting. *Textports Stevedores*, 931 F.2d at 333, 28 BRBS at 3(CRT). Moreover, the court recognized that an attempt to use "present value discounting in determining when deficiency compensation was due was invalidated" as

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[6]*Compare* 33 U.S.C. §933(f) *with* 33 U.S.C. §933(e)(1)(D) which specifically mentions "present value" calculations.

[7]In rejecting the present value method under Section 33(f), the Board also relied on its decision in *Balzer v. General Dynamics Corp.*, 22 BRBS 447 (1989), *recon. denied*, 23 BRBS 241 (1990) (Brown, J., dissenting), wherein it held that an employer's credit under Section 14(j), 33 U.S.C. §914(j), for voluntary advance payments of compensation made against compensation it owes is to be made on a dollar-for-dollar basis. *Cretan*, 24 BRBS at 42; *Maples*, 23 BRBS at 308 n.4.

being inconsistent with New York law, citing *Mohr v. Wiebusch & Hilger, Ltd.*, 247 A.D. 679, 289 N.Y.S. 421, *aff'd*, 272 N.Y. 655, 5 N.E.2d 378 (1936). *Textports Stevedores*, 931 F.2d at 333, 28 BRBS at 3(CRT).

The Director asserts that the most compelling reason for not using the present value method is to protect claimants. If the credit is taken only as the money is actually received, the risk for non-payment by the annuity company is placed on the employers and not on the claimants: *i.e.*, if the credit is taken from the purchase price, the employer is free from liability from that point until the credit is expended, whereas, if the credit is taken against each payment, non-payment by the annuity company acts to reinstate the employer's liability sooner. Thus, claimants are protected from risk of loss and there will be no under-compensation. The Director also notes that, in this case, claimant's annuity was purchased from a company of questionable financial stature whose responsibilities have since been assumed by the State of California Insurance Commission. Thus, it may in fact be contrary to claimant's best interests to grant employer a credit for amounts under the third-party settlement she may never receive.[8]

Claimant's argument for using the present value method has legal support only in that there is existing state law which uses that method in cases involving the effects of structured settlements on the rights of non-settling joint tortfeasors, contingent attorney fees, and employer offsets. *See, e.g., General Motors Corp. v. Reagle*, 102 Nev. 8, 714 P.2d 176 (1986) (tort); *Hagen v. Venem*, 366 N.W.2d 280 (Minn. 1985) (employer's reimbursement); *Donaghy v. Napoleon*, 543 F.Supp. 112 (D.N.J. 1982) (contingent fee). Nonetheless, the cases are not unanimous. *See, e.g., Bubnis v. Apfel*, 150 F.3d 177 (2d Cir. 1998) (social security benefits offset based on weekly allocation rate specified in decision approving state workers' compensation lump-sum settlement (which was specifically found not to be an annuity)); *Gelinas v. Sterling Industrial Corp.*, 139 N.H. 14, 648 A.2d 465 (1994) (employer's lien is against the net "amount of damages or benefits recovered" and lien does not apply until employee "actually receives damages to which he has been adjudged entitled"). In light of existing precedent under the Act, established by *Force*, *Cretan*, and *Maples*, we need not seek guidance elsewhere. Therefore, we affirm the administrative law judge's determination that employer's offset against claimant's third-party settlement under Section 33(f) is to be made on a dollar-for-dollar basis. Consequently, it was proper for him to conclude that employer has a continuing credit against the amount claimant receives under the annuity each month rather than require the annuity to be reduced to its present value at the time of the third-party settlement. *Force*, 938 F.2d at 984, 25 BRBS at 17(CRT); *Textports Stevedores*, 931 F.2d at 333, 28 BRBS at 3(CRT); *Cretan*, 24 BRBS at 42; *Maples*, 23 BRBS at 305.

[8]The Director also notes, as does employer, that contrary to claimant's contention, employer based its approval of the third-party settlement on the entire package, including the schedule of payments, and not just on the cost of the annuity.

In its cross-appeal, employer challenges the administrative law judge's decision to exclude all third-party proceeds received by decedent's children from the computation of employer's credit under Section 33(f). Employer contends it is entitled to an offset of an additional $30,000 ($15,000 per each then-dependent child) and that the administrative law judge misapplied the Ninth Circuit's ruling in *Force* by failing to differentiate between

dependent and non-dependent children.[9] It argues that *Force*, a basis for the court's decision in *Cretan*, 1 F.3d at 843, 27 BRBS at 93(CRT), is of questionable authority in light of *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997), which overruled *Cretan*. Instead of individual apportionment, employer asserts that its offset against its liability to claimant should be computed using an "aggregate" method because apportionment serves no purpose when everyone involved is a person entitled to compensation under the Act. Claimant responds that employer is not entitled to offset its liability for her future death benefits under Section 9, 33 U.S.C. §909, against the third-party recovery of her children. Claimant notes that employer was liable for the children's death benefits and that during that period her children also received payments under the third-party settlement. She agrees that employer would have been permitted to offset the $15,000 per child against its continuing liability for each child's death benefits; however, she argues that employer did not seek offset during that time, and it cannot retroactively offset its past liability against her current entitlement. The Director agrees with claimant's position.

In this case, employer has shown that decedent's daughters, who were persons entitled to compensation under the Act, received funds under the third-party settlement, and it has established the precise amount each recovered. Thus, employer fulfilled its obligation to show apportionment among the persons entitled to compensation. *Force*, 938 F.2d at 985-986, 25 BRBS at 19-20(CRT); *Henderson*, 30 BRBS at 153. Employer also has established that such funds were not included in its offset. As a Section 33(f) credit was never taken

[9]Under the terms of the settlement, each of decedent's children received a $5,000 lump-sum payment annually for four consecutive years. Decedent's son (non-dependent at the time of death) received the payments on March 23, 1987-1990, as did his eldest daughter. The younger daughter received payments on April 8, 1989-1992. These payments were made on the daughters' 21st through 24th birthdays. Emp. Ex. 8-8. Employer, correctly, does not dispute the exclusion of the son's recovery or the payments made on each daughter's 24th birthday from the offset calculation. *See* 33 U.S.C. §902(14); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113(CRT), *pet. for reh'g en banc denied*, 71 F.3d 880 (5th Cir. 1995), *aff'd*, 519 U.S. 248, 31 BRBS 5(CRT) (1997); *Sellman*, 967 F.2d at 971, 26 BRBS at 7(CRT); *Force*, 938 F.2d at 985, 25 BRBS at 19(CRT); *Henderson*, 30 BRBS at 153.

against this money, the daughters were overpaid by a total of $30,000. Because claimant and her children are/were all persons entitled to compensation, employer argues that an offset against claimant's death benefits of the previously overpaid $30,000 would fairly resolve the issue in a manner that is consistent with Section 33(f).

Section 33(f) states that an employer is entitled to a credit for "the net amount recovered" by a person entitled to compensation in the third-party settlement. While we agree that this "net amount" properly includes the $30,000 paid to the two dependent children, we hold that employer, in this case, has waited too long to obtain its Section 33(f) credit against those funds. As noted above, the decision in *Force* provides that an employer may offset its liability to a particular claimant only against third-party proceeds received by that claimant. This portion of the Ninth Circuit's decision in *Force* was not affected by the Supreme Court's decision in *Yates* and is still good law.[10] Thus, claimant is correct in asserting that employer may not offset its liability for her Section 9 death benefits against the $30,000 her children received in the third-party settlement as that money was not recovered by claimant. *See also Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Sellman*, 967 F.2d at 972-973, 26 BRBS at 9(CRT). Moreover, while at the time of the third-party settlements, and until they reached their 23rd birthdays, decedent's daughters were "persons entitled to compensation," and, indeed, were receiving compensation from employer, they are no longer entitled to compensation. Had employer sought a credit against their third-party recovery while they were still receiving compensation, there is no question that employer would have been entitled to a credit against the daughters' benefits. 33 U.S.C. §933(f). As decedent's daughters are no longer receiving benefits under the Act, employer's only continuing obligation is to claimant. Allowing an offset for the daughters' recoveries against claimant's entitlement would run counter to the established case law explicitly allowing an offset against compensation due for the proceeds apportioned only to that person entitled to compensation. Although employer is still liable for compensation related to decedent's death, the sole person entitled to compensation is claimant and not decedent's daughters, as their right to compensation has expired.[11]

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[10]In *Yates*, 519 U.S. at 248, 31 BRBS 5 (CRT), the Supreme Court held that the employee's survivors cannot be "persons entitled to compensation" within the meaning of Section 33(g), 33 U.S.C. §933(g), prior to the employee's death, rejecting the Ninth Circuit's contrary holding in *Cretan*, 1 F.3d at 843, 27 BRBS at 93 (CRT). The *Yates* court specifically declined to rule on the interpretation of "person entitled to compensation" under Section 33(f). *But see Taylor v. Director, OWCP*, 201 F.3d 1234 (9th Cir. 2000). The *Yates* decision did not address apportionment of third-party proceeds among persons who undeniably were entitled to compensation.

[11]The Board recently affirmed an administrative law judge's decision to allow an employer a credit for its overpayment of death benefits to a decedent's child against its continuing obligation for death benefits to the widow. *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999). The Board reasoned that under Section 14(j), 33 U.S.C. §914(j), an employer is entitled to be reimbursed for its overpayment of compensation out of unpaid compensation due and that the Act provides for only one death benefit. 33 U.S.C. §909(b). Where a decedent is survived by a spouse and one or more dependent children, the benefit includes additional compensation for the child or children, but is not considered to be two or

more separate benefits. *Hawkins*, 33 BRBS at 202; *see Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). Thus, reimbursement out of the same benefit was not prohibited. *Hawkins*, 33 BRBS at 202.

In light of *Force* and its progeny, we continue to hold that the individualized apportionment method is to be used to determine employer's credit under Section 33(f). *See Force*, 30 BRBS at 128. Thus, an employer's liability to a claimant for benefits under the Act may be offset only against the net amount of that claimant's third-party recovery. If an employer fails to take its Section 33(f) credit during a period when it is liable for compensation to that claimant, we hold that it may not seek reimbursement retroactively out of benefits due another claimant. Therefore, the administrative law judge in this case correctly excluded the $30,000 settlement recovery received by decedent's daughters from the calculation of employer's offset under Section 33(f).[12] *Force*, 938 F.2d at 985, 25 BRBS at 19(CRT); *see also Sellman*, 967 F.2d at 972-973, 26 BRBS at 9(CRT).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[12]We acknowledge that denying employer's request for an "aggregate" credit has resulted in a double recovery for the daughters in this case. Nevertheless, the courts have held that while double recovery is to be avoided, it is not absolutely prohibited by the Act. *Yates*, 519 U.S. at 261, 31 BRBS at 10(CRT); *Taylor v. Director, OWCP*, 201 F.3d 1234 (9th Cir. 2000).