

JESSE COOLEY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: <u>Dec. 17, 2014</u>
HUNTINGTON INGALLS,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Jesse Cooley, Bessemer, Alabama, *pro se*.

Susan F.E. Bruhnke (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Summary Decision (2014-LHC-00126) of Administrative Law Judge Larry W. Price 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant worked for employer as a courier and electrician for six years in the late 1970s, during which time claimant alleges he was exposed to asbestos. On September 6, 2011, claimant filed a claim under the Act, alleging he sustained an asbestos-related lung disease. In June 2012, claimant was diagnosed with an asbestos-related lung disease.

Through the discovery process, employer obtained a February 2013 release agreement that claimant entered into with J.T. Thorpe Company,<sup>1</sup> and an August 14, 2013, settlement statement from an attorney's office, indicating that the Johns Manville Asbestos Trust had paid \$900 on claimant's claim, with a net disbursement to claimant of \$328.22. On October 29, 2013, employer moved for summary decision, contending that claimant's entitlement to benefits under the Act is forfeited because of his failure to obtain employer's prior written approval of the third-party settlement(s) pursuant to Section 33(g)(1), (2) of the Act, 33 U.S.C. §933(g)(1), (2). The administrative law judge granted employer's motion. In so doing, the administrative law judge found that the undisputed material facts establish that claimant entered into a third-party settlement without notifying, or obtaining prior written approval from, employer. The administrative law judge, therefore, dismissed claimant's claim for benefits. Claimant, representing himself, appeals the decision, and employer responds, urging affirmance.

For the reasons that follow, we must vacate the administrative law judge's determination to grant summary decision. Summary decision is proper only when there are no genuine issues of material fact and no controversy concerning inferences to be drawn from the facts, such that the moving party is entitled to judgment as a matter of law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); 29 C.F.R. §18.41. The administrative law judge must look at the facts in the light most favorable to the party opposing summary decision to determine whether there is an absence of a genuine issue of material fact. See *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). In this case, the administrative law judge improperly drew inferences in favor of employer and did not apply relevant law to determine the applicability of Section 33(g).

Pursuant to Section 33(a), 33 U.S.C. §933(a), a claimant may proceed in tort against a third party if he determines that the third party may be liable for damages related to his work-related injuries. In order to protect an employer's right to offset any third-party recovery against its liability for compensation under the Act, 33 U.S.C.

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<sup>1</sup> The document titled, "J.T. Thorpe Company Successor Trust Release and Indemnity," is a boilerplate release, which, save for claimant's signature, date, and identifying information on the last page, is not specific to claimant's situation. This release notes, in relevant part, that for the "sum of One Dollar and other good and valuable consideration," claimant releases J.T. Thorpe Company Successor Trust, J.T. Thorpe Company and all its affiliations, employees, shareholders and insurer of any and all present claims causes or rights of action, demands and damages of every kind and nature whatsoever relating to asbestos-related diseases, injuries, cancers, and/or malignancies.

§933(f), a “person entitled to compensation”, depending on the circumstances, must either give the employer notice of a settlement with a third party or a judgment entered against a third party, or he must obtain his employer’s or carrier’s prior written approval of the third-party settlement.<sup>2</sup> Pursuant to Section 33(g)(1), prior written approval is necessary when the person entitled to compensation enters into a settlement with a third party for less than the amount for which the employer is liable under the Act. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); see *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3<sup>d</sup> Cir. 1995); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002). The Supreme Court held in *Cowart* that Section 33(g)(2) requires a person entitled to compensation to provide notice of the termination of the third-party proceedings to his employer in two instances: “(1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer’s total liability.” *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT). Section 33(g)(2) further states that if a claimant fails to obtain approval, where required, or to provide the required notice, then all rights to compensation and medical benefits are barred. *Esposito*, 36 BRBS 10.

In granting employer’s motion for summary decision, the administrative law judge appears to have assumed that claimant is a “person entitled to compensation” who entered into a “settlement” within the meaning of Section 33(g) because he received

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<sup>2</sup> Section 33(g), 33 U.S.C. §933(g), 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.

payment from a third party. These “findings” cannot be affirmed. The administrative law judge did not make a specific finding that claimant is a “person entitled to compensation” under *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT); in granting employer’s motion for summary decision, the administrative law judge erroneously drew an inference in employer’s favor on this point. *Gladney, et al. v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in the result); *see also Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in part on recon.*, 46 BRBS 57 (2012). In *Cowart*, the Supreme Court held that an employee becomes a “person entitled to compensation” at the moment his right to recovery vests and not when an employer admits liability. The Court stated that the normal meaning of entitlement includes a right or benefit for which a person qualifies, and does not depend upon whether the rights have been acknowledged or adjudicated, but only upon the person’s satisfying the prerequisites attached to the right. However, a claimant is not a “person entitled to compensation” if he would be entitled only to medical benefits. *Gladney*, 30 BRBS 25. Therefore, we remand the case for the administrative law judge to make a finding as to whether claimant was a “person entitled to compensation” to whom Section 33(g) potentially applies at the time he obtained payment from a third party. *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 6 (2004); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

In addition, the Board previously has considered whether a payment received from an asbestos trust fund constitutes a “settlement” pursuant to Section 33(g), and the administrative law judge did not address this precedent in rendering his decision in this case. In *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001), the claimant had claims against asbestos manufacturers in addition to her claim under the Act. The claimant’s attorneys received and held checks from both the Amatex Trust and the Manville Trust that had been distributed in accordance with a bankruptcy-court-approved distribution plan as a settlement for the asbestos-related claims. In the agreement, Amatex noted that cashing of the distribution check constituted a release of all claims made unless the payment was returned. Similarly, the Manville Trust issued a check, noting that the claimant had 180 days to accept or reject the offer. Because the acceptance of the money potentially could preclude her from receiving benefits under the Act, the claimant had her attorneys return the proceeds to the trusts. Nevertheless, the administrative law judge found that the claimant had settled her third-party claims for amounts less than the amount to which she would be entitled under the Act without first obtaining the employer’s written consent. Accordingly, the administrative law judge denied the claim for benefits under the Act pursuant to Section 33(g). In vacating the administrative law judge’s denial, the Board stated:

The payments made in this case are similar to the judgment and remittitur in *Banks [v. Chicago Grain Trimmers Ass’n, Inc.]*, 390 U.S. 459 (1968)], as the Trusts sent payments to claimant and other plaintiffs based on

reorganization plans which had been deemed fair and approved by the bankruptcy court. *See generally In re Joint Eastern and Southern District Asbestos Litigation*, 14 F.3d 151 (2<sup>d</sup> Cir. 1994); *Kane [v. Johns-Manville Corp.]*, 843 F.2d 636 [(2<sup>d</sup> Cir. 1988)]; [*In re*] *Amatex [Corp.]*, 755 F.2d 1034 [(3d Cir. 1985)]; [*In re*] *Dow Corning [Corp.]*, 211 B.R. [545] at 599 [(Bankr. E.D. Mich. 1997)]. Claimant either could accept the amounts offered and consider the cases resolved, or she could decline the amounts and be placed at the end of the lists of the Trusts' "creditors." Negotiation for a greater amount was not an option, as the amount has been determined by the court. The absence of compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements support the conclusion that the Amatex . . . offers herein should not be considered settlements, but, rather, should be likened to "judgments." If they are considered "judgments," only notice to employer under Section 33(g)(2) is required.

*Williams*, 35 BRBS at 97.

From the documents attached to employer's motion for summary decision, it appears that this case involves claimant's receipt of funds from a trust for asbestos claims and that claimant failed to obtain employer's prior written approval of his acceptance of funds from the trust. Whether claimant obtained a payment from an asbestos trust as in *Williams* or entered into a third-party settlement are genuine issues of material fact that affect the applicability of Section 33(g). *See generally Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). As the administrative law judge did not address *Williams* or the nature of the claimant's agreements with third parties in determining that claimant entered into a "third-party settlement" within the meaning of Section 33(g), we vacate the finding that claimant is barred from receiving benefits by Section 33(g). The case is remanded for further findings of fact and conclusions of law in view of *Williams*.

In reconsidering this case, if the administrative law judge finds that claimant obtained a "judgment" against the third party, only notice to employer under Section 33(g)(2) is required. *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT). Although employer gained knowledge of agreements through the discovery process,<sup>3</sup> the administrative law judge must address whether claimant satisfied his affirmative duty to notify employer, before employer has made any payments under to the Act or the entry of an award of

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<sup>3</sup> It is unclear from the record before the Board whether claimant obtained any funds through his agreement with the J.T. Thorpe Trust, or by what process claimant obtained funds from the Manville Trust.

benefits, of any third-party judgment he obtained.<sup>4</sup> *Williams*, 35 BRBS 92; *see also Fisher v. Todd Pacific Shipyards Corp.*, 21 BRBS 323 (1988). If, however, the administrative law judge determines that claimant entered into a third-party “settlement,” he also must determine whether the aggregate gross settlements were for an amount greater than or less than the compensation to which claimant would be entitled under the Act. *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994); *see also Cowart*, 505 U.S. 469, 26 BRBS 49(CRT). This consideration determines if the Section 33(g)(1) prior written approval requirement applies or if the Section 33(g)(2) notice requirement applies.<sup>5</sup> *Bundens*, 46 F.3d 292, 29 BRBS 52(CRT).

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<sup>4</sup> Based on the limited record before us, it appears employer has not yet made any payments, nor has there been an award of benefits. Thus, if claimant is a “person entitled to compensation” and Section 33(g)(2) applies, it is not too late for claimant to give notice of any judgment or of any aggregate settlements greater than his compensation entitlement. *See Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 561, 24 BRBS 49, 54(CRT) (9<sup>th</sup> Cir. 1990) (the purposes of the statute are satisfied “so long as the employer has notice of the settlement before it has made any payments and before the Agency orders it to make any payments”).

<sup>5</sup> The administrative law judge made no specific finding in this regard. Rather, he cited *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 21 BRBS 163(CRT) (5<sup>th</sup> Cir. 1988) for the proposition that the amount of the settlement is irrelevant because either employer is entitled to credit the proceeds against its liability or the right to benefits would be terminated for lack of notice. Decision and Order at 3. This statement is overbroad. The comparison under Section 33(g) is between the gross amount of the settlement and the lifetime compensation (not including medical benefits) to which claimant would be entitled. *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). Employer’s credit/offset, however, is only for the net amount of the third-party recovery, and thus employer’s liability is not necessarily “extinguished,” although this may be the practical result in most cases. 33 U.S.C. §933(f); *Gladney, et al. v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in the result).

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision is reversed, and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge