

VIRGINIA WEIR)	
(Widow of ROBERT WEIR))	
)	
Claimant-Respondent)	
)	
v.)	
)	
LOCKHEED SHIPBUILDING)	DATE ISSUED:
COMPANY)	
)	
and)	
)	
HELMSMAN MANAGEMENT)	
SERVICES)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order - Denying Employer's Motion for Summary Judgement of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Russell A. Metz (Metz, Frol & Jorgensen), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order- Denying Employer's Motion for Summary Judgment (91-LHC-966) of Administrative Law Judge Ellin M. O'Shea rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge 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).

Claimant is the widow of Robert Weir, an employee of employer who was diagnosed as having mesothelioma in 1988. On April 5, 1989, the employee filed a third-party lawsuit against various asbestos manufacturers. On May 1, 1989, employer filed its First Report of Injury or Occupational Illness, Form LS-202, in which it indicated that the employee had informed employer that he had mesothelioma of the lung allegedly due to his work for employer as a coppersmith. Robert Weir died on June 16, 1989, at the age of 74. On August 10, 1989, claimant filed a claim for

death benefits. Employer filed a Notice of Controversion on August 11, 1989, and a second notice on November 10, 1989. Employer did not make any voluntary payments of compensation for these claims.

In October 1989, claimant began entering into settlements with the third-party asbestos manufacturers. On April 27, 1990, employer was notified of four settlements with third parties and on February 6, 1991, claimant's attorney notified employer that claimant had agreed to a total of seven settlements with third parties to that date, totalling \$41,570.70. Claimant did not obtain employer's prior written approval for any of the settlements.

The administrative law judge found that as claimant was not a person entitled to compensation at the time of the settlements, her failure to obtain employer's written approval of the settlements did not bar her right to compensation under Section 33(g)(1) of the Act. 33 U.S.C. §933(g)(1)(1988). Moreover, the administrative law judge found that as it was undisputed that employer had been provided with notice of the settlement, claimant's right to benefits was also not barred pursuant to Section 33(g)(2) of the Act. 33 U.S.C. §933(g)(2)(1988).

On appeal, employer contends that the United Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589 (1992), is dispositive in this case and requires reversal of the administrative law judge's denial of its summary judgement motion.¹ Neither claimant nor the Director has responded to this appeal.

As employer correctly asserts, the United States Supreme Court issued its decision in *Cowart* on the same day that the administrative law judge issued her decision in the present case.² In *Cowart*, the Court held that a claimant becomes a "person entitled to compensation" within the meaning of Section 33(g) at the moment his right to recovery under the Act vests. *Cowart*, 112 S.Ct. at 2595. Thus, under *Cowart*, a claimant need not be receiving compensation or have had an adjudication in her favor at the time of the third-party settlement in order for the Section 33(g)(1) prior written approval requirement to apply. In *Cowart*, however, the Court also recognized that prior written approval was not necessary and that notification to employer under Section 33(g)(2) will suffice in two instances: (1) where the employee obtains a judgment, rather than a settlement against a third party; and (2) where the settlement was for an amount greater than or equal to the employer's total liability. The Court reasoned that while the purpose of the Section 33(g)(1) written approval requirement is to assure that employer is protected from the employee's accepting too little for his cause of action in the third party suit, notification provides full protection to employer under these circumstances. *Id.* at 2597-2598.

Under *Cowart*, in this case claimant was a "person entitled to compensation" at the time of

¹Employer moved for expedited review, which the Board granted on February 5, 1993.

²However, the Decision and Order was not filed with the Office of Workers' Compensation Programs, Fourteenth Compensation District until June 26, 1992.

the third party settlements as her husband's injury and death occurred prior to October 1989 when she began settling these cases.³ However, it is not clear from the record whether the amount of the third-party settlements is less than employer's total liability under the Act. The administrative law judge did not resolve this issue but assumed that the settlements were less for the purpose of resolving the legal issue presented by the parties' motions for summary judgment, *i.e.*, whether claimant was a person required to obtain employer's prior written approval of the settlements. In so concluding the administrative law judge noted:

Claimant states, and it is so, that without supporting authority, evidence affidavit or statistical information, employer's presentation alleges that the amount of the settlements is less than the amount to which the decedent's estate and Virginia Weir are potentially entitled under the Act.

Decision and Order at 3. Inasmuch as the question of whether the settlement amounts exceeded employer's liability under the Act is pivotal to resolution of Section 33(g) issues under *Cowart*, we vacate the administrative law judge's finding that claimant's right to compensation is not barred pursuant to Section 33(g)(1) and remand for reconsideration of the Section 33(g) issues in this case in light of *Cowart*. On remand, the administrative law judge must reconsider the application of Section 33(g)(1) in this case as it is construed by the Court in *Cowart*, and determine whether its holding should be retroactively applied in this case. If on remand the administrative law judge concludes that *Cowart* is to be accorded retroactive effect and that the amount of the third party settlements was less than employer's liability under the Act, then the right to compensation of claimant and decedent's estate is barred under Section 33(g)(1) as it is undisputed that employer's prior written approval was not obtained. If, however, the administrative law judge finds the amount of the third-party settlements exceeded employer's liability under the Act, then Section 33(g)(1) does not apply and the right to compensation is not barred inasmuch as it is undisputed that employer received notice of the third party settlements as is required under Section 33(g)(2). *Cowart*, 112 S.Ct. at 2597-2598. In that event, employer's liability may be offset by Section 33(f), 33 U.S.C. §933(f).

³Moreover, under *Cowart*, the employee, Robert Weir, became a "person entitled to compensation" by January 16, 1989, the date he claimed he was first permanently totally disabled.

Accordingly, the Decision and Order - Denying Employer's Motion for Summary Judgment is vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge