

EDITH PATTON)	
(Widow of WOODROW PATTON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
AMERICAN MUTUAL LIBERTY)	
INSURANCE COMPANY, BY AND)	
THROUGH THE MISSISSIPPI)	
INSURANCE GUARANTY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant, the widow of Woodrow Patton, appeals the Decision and Order (90-LHC-0463) of Administrative Law Judge A. A. Simpson, Jr., denying benefits 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 if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent, who was allegedly exposed to asbestos while working for employer, filed a civil lawsuit against several asbestos manufacturers on February 4, 1987, and subsequently died of

asbestosis-related cancer on November 10, 1987. Thereafter, on December 10, 1987, his widow, the claimant in the present case, filed a claim for death benefits under the Act. Additionally, the third-party civil lawsuit filed by decedent was amended to a wrongful death action on behalf of claimant and decedent's heirs. Employer filed a controversion on February 3, 1988, and paid no benefits on the claim. It is uncontested that between 1988 and 1991, claimant, along with decedent's non-dependent children, entered into settlement agreements with seven third-party defendants without employer's prior written approval, the aggregate gross total of which amounted to \$38,900.

While the case was before the administrative law judge, claimant and the employer filed cross-motions for summary judgment. Employer argued that claimant's right to death benefits under the Act was barred pursuant to Section 33(g)(1), 33 U.S.C. §933(g)(1) (1988), based on her failure to obtain employer's prior written approval of the third-party settlements. Claimant argued that Section 33(g)(1) was inapplicable because she was not a "person entitled to compensation," and that as employer paid no benefits under the Act and denied liability, it had no lien rights and no right of consent. Moreover, claimant argued that consideration of the Section 33(g) issue was, in any event, premature because the third-party litigation was not yet completed.

Citing the decision of the United States Court of Appeals for the Fifth Circuit in *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT)(5th Cir. 1991)(*en banc*), the administrative law judge found that inasmuch as claimant had entered into the third-party settlements without obtaining employer's prior written approval, her right to compensation under the Act was barred by application of Section 33(g). In so concluding, the administrative law judge rejected claimant's argument that Section 33(g) was inapplicable because the totality of the third-party settlements may have exceeded employer's liability under the Act, characterizing it as speculative, at best. The administrative law judge found that inasmuch as the claimant had entered into several separate settlements with the various third-party defendants for amounts which were less than she would have been entitled to under the Act, *see* 33 U.S.C. §§906(b), 909(b), the prior written approval requirement of Section 33(g) was clearly applicable. Claimant appeals the administrative law judge's finding that her right to compensation is barred pursuant to Section 33(g)(1). Citing the United States Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), employer responds, urging affirmance.

On appeal, claimant relies upon the decisions in *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49 (CRT) (9th Cir. 1990), *O'Leary v. Southwest Stevedoring Co.*, 622 F.2d 595 (9th Cir. 1980); *Kahny v. Arrow Constructors, Inc.*, 729 F.2d 757 (5th Cir. 1984), and *Dorsey v. Cooper Stevedore Co.*, 18 BRBS 25 (1986), *appeal dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27 (CRT)(11th Cir. 1987). Based on this precedent, claimant contends that Section 33(g)(1) is inapplicable on the facts presented because she was not a "person entitled to compensation" at the time she entered into the third-party settlements inasmuch as employer was not paying claimant compensation voluntarily or pursuant to an award. While conceding that the Fifth Circuit overturned *Kahny* in its *en banc* decision in *Nicklos Drilling*, claimant argues that this action was erroneous because the question of a "person entitled to compensation" was not before the court in that case and asserts that the Fifth Circuit's holding in

Nicklos Drilling should be limited to those situations where the employer voluntarily pays compensation and claimant subsequently finally settles a third-party cause of action without obtaining employer's prior written approval. Claimant further asserts that the Fifth Circuit's decision in *Nicklos Drilling* should not be retroactively applied to deny her claim for death benefits because she relied in good faith on the then-controlling opinion of the Fifth Circuit in *Kahny*. Moreover, claimant asserts that because employer disputed entitlement and paid no benefits, no lien was created and employer's right to consent under Section 33(g) did not attach.

The administrative law judge's finding that claimant's right to compensation under the Act was barred pursuant to Section 33(g)(1) is affirmed. We need not address claimant's specific arguments that she was not a "person entitled to compensation," because the United States Supreme Court's decision in *Cowart*, decided after the filing of claimant's brief, is dispositive. In *Cowart*, the United States Supreme Court affirmed the Fifth Circuit's decision in *Nicklos Drilling*, holding that under the plain language of Section 33(g)(1), an injured employee forfeits his right to compensation benefits under the Act by failing to obtain the employer's written approval of a third-party settlement for an amount less than the compensation due under the Act. In *Cowart*, the Supreme Court held that the claimant "became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability...." *Id.*, 505 U.S. at 477, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). Thus, the claimant in that case became a person entitled to compensation at the time he suffered his work-related traumatic injury to his hand on July 20, 1983, prior to his entering into a third-party settlement. Despite the employer's conceded knowledge of the settlement, the Court held that the claimant was required to obtain the employer's written approval of the settlement pursuant to Section 33(g)(1). The Court further held that a claimant is required to provide notice of a settlement under Section 33(g)(2) of the Act, 33 U.S.C. §933(g)(2), but not to obtain written approval, 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." *Id.*, 505 U.S. 482, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT).

The Board has subsequently held that pursuant to the holdings in *Harper v. Virginia Dept. of Taxation*, 609 U.S. 86, 113 S.Ct. 2510 (1993), and *Landgraf v. USI Film Products*, U.S. , 114 S.Ct. 1483 (1994), the Supreme Court's decision in *Cowart* is to be afforded retroactive effect. *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994). In determining that *Cowart* is afforded retroactive effect, the Board specifically addressed arguments regarding a claimant's reliance on the Fifth Circuit's opinion in *Kahny* in *Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995) (Brown, J., concurring), *aff'g on recon. en banc* 25 BRBS 267 (1992), holding that *Cowart* applies notwithstanding the fact that claimant entered into settlements after *Kahny* was decided but before it was overruled. In applying *Cowart*, moreover, in order to determine whether Section 33(g)(1) applies, the Board has held that the administrative law judge must compare the amount of compensation due claimant to the gross amount of the third party settlements and that the term "compensation" in this context refers only to weekly disability benefits. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5, (1996)(Brown and McGranery, JJ., concurring and dissenting).

In the present case, it is clear that, pursuant to *Cowart*, claimant was a "person entitled to compensation" under Section 33(g)(1) at the time she entered into the third-party settlement agreements. See *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1994); *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994) (Brown J., concurring) (Smith, J., dissenting on other grounds), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 29 BRBS 113 (CRT), *petition for reh'g en banc denied*, 71 F.3d 880 (5th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3762 (U.S. 1996) (No. 95-1081). Furthermore, it is undisputed by the parties that claimant did not obtain written approval of her third-party settlement agreements. Thus, the claimant's claim for death benefits is barred by Section 33(g)(1) if her share of the aggregate gross amount of the third-party settlements is less than the amount of compensation to which she is entitled under the Act over her lifetime. See *Harris*, 30 BRBS at 16; *Linton v. Container Stevedore Co.*, 28 BRBS 282, 287-289 (1994). Although the administrative law judge denied the claim without making the comparison between the gross amount of the aggregate third party settlement proceeds and the amount of compensation to which the claimant would be entitled under the Act as is required under Section 33(g)(1), we need not remand for him to do so on the facts presented. Remand here would serve no judicial purpose, since the determination as to whether the gross aggregate amount of the third-party settlements is greater than employer's potential liability under the Act is readily calculable based upon the statute and uncontroverted evidence of record. See, e.g., *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT)(3d Cir. 1995), *aff'g and rev'g* 28 BRBS 20 (1994); *Glenn v. Todd Shipyards Corp.*, 26 BRBS 186 (1993), *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J., concurring).

Claimant's potential entitlement to compensation derives from Section 9 of the Act, 33 U.S.C. §909, which provides that, during widowhood, a widow of a deceased employee without dependent children of the deceased, is entitled to 50 percent of the employee's average wages. 33 U.S.C. §909(b). The parties stipulated that the decedent's average weekly wage was \$301.77. As claimant's entitlement to death benefits vested upon the date of decedent's death, November 10, 1987, it is a mathematical certainty that claimant's third-party settlement recovery is less than the amounts due her during her lifetime under the Act.¹

Thus, as Section 33(g)(1) is applicable to the instant case, and claimant failed to obtain employer's written approval of the third-party settlement agreements, we affirm the administrative law judge's determination that her claim for death benefits is barred by Section 33(g)(1) of the Act. See *Monette*, 29 BRBS at 116.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

¹Even though claimant's actual proportioned share of the third-party settlements is not in the record, the entire unapportioned \$38,900 in third-party settlement proceeds is less than claimant's lifetime entitlement under the Act. Based upon the stipulated average weekly wage of \$301.77, claimant would have been entitled to benefits in the amount of \$7,846.28 per year under the Act. Thus, benefits under the Act would have exceeded the aggregate gross amount of the settlements within five years of her spouse's death. 33 U.S.C. §909(b). We note that as of the time of the hearing on January 9, 1991, approximately four of the five years necessary to exceed the aggregate gross settlement amount had passed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge