

ELIZABETH TAYLOR)	BRB No. 93-1975
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	
)	
ELMER J. BRIGANCE)	
)	
Claimant-Petitioner)	BRB No. 93-2005
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeals of the Order Granting Summary Judgment and Dismissing Claim of Richard D. Mills, Administrative Law Judge, United States Department of Labor, and the Order Dismissing Claim on Summary Decision of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimants.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for the self-insured employer.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant Taylor appeals the Order Granting Summary Judgment and Dismissing Claim (93-LHC-483) of Administrative Law Judge Richard D. Mills, BRB No. 93-1975, and Claimant Brigance appeals the Order Dismissing Claim on Summary Decision (93-LHC-707) of Administrative Law Judge Quentin P. McColgin, BRB No. 93-2005, rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).¹ Relying in part on the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992), the administrative law judges found that claimants' claims are barred by Section 33(g) of the Act, 33 U.S.C. §933(g)(1988), for failure to obtain employer's prior written approval of third-party settlements. The administrative law judges also found, based on their interpretation of *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), that they did not need to determine whether the third-party settlements were for more or less than claimants' entitlement to compensation under the Act as the claims are either barred by Section 33(g) or employer's total liability is offset under Section 33(f), 33 U.S.C. §933(f).

For the reasons stated in *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994) *aff'd in part and modified in part on recon. en banc*, BRBS , BRB No. 93-2227 (Jan. 25, 1996)(Brown and McGranery, JJ., concurring and dissenting) and *Gladney v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 94-1427 (Jan. 31, 1996)(McGranery, J., concurring), we hold that the administrative law judges erred in granting employer's motions

¹By Order dated May 17, 1994, the Board consolidated these cases pursuant to 20 C.F.R. §802.104.

for summary judgment, as there are unresolved issues of material fact affecting the applicability of Section 33(g).²

Accordingly, we vacate the administrative law judges decisions and remand these cases for further action consistent with law.³ *Id.*; see also *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT)(3d Cir. 1995); *Linton v. Container Stevedore Co.*, 28 BRBS 282 (1994); *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

²Relying on allegations made by claimants in their application for benefits (LS-203 form), the administrative law judges found that each claimant is a "person entitled to compensation." Inasmuch as these allegations are not tantamount to evidence, particularly since both claimants recanted and disputed the allegations made in their LS-203 forms, and there is no other evidence in either case to support the administrative law judges' findings that claimants are "persons entitled to compensation," see generally *Hahan v. Sergeant*, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976), a controversy exists on this issue requiring the presentation of evidence and findings of fact. Consequently, the issue as to whether claimants are "person[s] entitled to compensation" remains unresolved. Moreover, neither administrative law judge made a finding as to whether the settlements were for an amount less than the employer's liability for compensation under the Act.

³Claimants contend that under *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979), Section 33(g)(1) may not be applicable, as the records herein lack evidence establishing whether the third parties with whom they settled supplied the asbestos to which they were exposed during the course of their employment with employer. Specifically, they argue that if none of the third parties exposed claimants to asbestos at employer's facility, and thus are not potentially liable to employer, then the Section 33(g)(1) provision requiring prior written approval of third-party settlements does not apply. See *Castorina v. Lykes Brothers Steamship Co., Inc.*, 24 BRBS 193 (1991); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). If necessary, the administrative law judges should consider this argument on remand.