

DAVID B. BONNER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TODD PACIFIC SHIPYARDS)	
CORPORATION)	DATE ISSUED:
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order - Summary Judgment of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Ronald R. Ward (Levinson, Friedman, Vhugen, Duggan & Bland), Seattle, Washington, for claimant.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Summary Judgment (93-LHC-0613) of Administrative Law Judge Henry B. Lasky 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a sheetmetal worker for employer from 1959 until 1964. In April 1989, claimant filed a claim under the Act, alleging work-related asbestosis as a result of his employment. Claimant also filed a civil action against certain third-party defendants,

alleging that he was exposed to those defendants' asbestos or asbestos products during his employment at the shipyard. Claimant settled the various civil actions without the prior written approval of employer or carrier. While the claim was pending before the administrative law judge, employer moved for summary judgment, asserting that claimant either forfeited any compensation under the Act as a result of his unauthorized settlements,¹ or that the recovery from the settlements exceeded any benefits that would accrue as a result of his claim under the Act and offset any compensation obligation pursuant to Section 33(f). 29 C.F.R. §§18.40-18.41; *see* 33 U.S.C. §933(f), (g).

The administrative law judge agreed with employer and granted summary judgment. The administrative law judge found that Sections 33(g)(1) and 33(f) interacted to preclude benefits in this case, stating that "the employer's obligations to [claimant] are terminated by this interplay between §33(f) and §33(g)." Decision and Order at 4. He specifically concluded as well that "[m]edical benefits do not survive violations of §33(g)(1)." *Id.* Citing *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 26 BRBS 49 (CRT)(1993) and *Cretan v. Bethlehem Steel Corporation*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), the administrative law judge determined that summary disposition was appropriate in this instance, granted employer's motion, and denied the claim.

On appeal, claimant contests the administrative law judge's summary disposition of his claim, arguing that because the record does not establish at this juncture the amount of compensation to which he may be entitled, there exists a genuine issue of material fact regarding whether claimant settled his third-party claims for an amount which would be less than his putative recovery under the Act. Claimant also contends that the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 26 BRBS 49 (CRT)(1993), should not be applied retroactively to this claim.

We agree with claimant that there exist unresolved issues of material fact in this case. We therefore hold that the administrative law judge erred in granting employer's motion for summary judgment.

Section 33(g)(1) provides for the forfeiture of compensation benefits where an employee, who is a "person entitled to compensation," settles a third-party action for an amount less than his putative compensation under the Act without obtaining prior written approval from his employer and its carrier. *Broussard v. Houma Land & Offshore*, __ BRBS __, BRB No. 92-0971, slip op. at 4 (Feb. 28, 1996). In *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, BRBS __, BRB No. 93-2227 (Jan. 25, 1996)(Brown and McGranery, JJ., concurring and dissenting), the Board held that the determination of whether each claimant is a "person entitled to compensation" requires findings of fact, and, before it is determined that a claim is barred by Section 33(g)(1), the trier-of-fact must also compare the gross amount of a claimant's aggregate third-party settlement recoveries with the amount of compensation, exclusive of medical benefits, to which he would be

¹Employer attached to its Motion an Affidavit of Robert H. Madden which details facts about the settlements as well as the amounts of the third-party recoveries.

entitled under the Act. *Harris*, slip op. at 17-18, 21; *see Gladney v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB No. 94-1427, slip op. at 4 (Jan. 31, 1996)(McGranery, J., concurring). The administrative law judge's failure to ascertain these facts and, instead, grant employer/carrier's Motion for summary judgment is in error. We also conclude that the administrative law judge erred in effectively ruling that Section 33(f) would foreclose an employer's liability in every instance as a matter of law. This provision does not necessarily extinguish an employer's total liability in every case, but instead provides employer with a credit in the amount of claimant's net third-party recovery against its liability for compensation and medical benefits. *Harris*, 28 BRBS at 269.

For the reasons set forth in *Harris* and *Gladney*, we hold that the administrative law judge erred in granting employer's motion for summary judgment because there are unresolved questions of material fact and the summary disposition does not accord with applicable law. We therefore vacate the Decision and Order - Summary Disposition, and remand this case for the administrative law judge to render findings of fact in accordance with law.²

Accordingly, the administrative law judge's Decision and Order granting summary disposition is vacated, and the case is remanded for consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

²We reject claimant's assertion that *Cowart* should not be applied retroactively for the reasons stated in *Kaye v. California Stevedore & Ballast*, 28 BRBS 240, 245-50 (1994).