BRB Nos. 94-933 - 94-1409

CLIFFORD D. ALLSUP, SR., *et al.*	)	
	)	
Claimants-Petitioners	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DATE ISSUED:_____
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision and the Decision and Order Denying Claimant's Motion for Reconsideration of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimants.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimants appeal the Decision and Order Granting Employer's Motion for Summary Decision and the Decision and Order Denying Claimant's Motion for Reconsideration (93-LHC-6865, *et al.*) of Administrative Law Judge A. A. Simpson, Jr., granting summary judgment on 477 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] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case represents a consolidation of 477 cases filed by claimants who were allegedly exposed to asbestos during the course of their employment with employer. After the cases were transferred to the Office of Administrative Law Judges (OALJ), employer filed a motion for summary judgment for the consolidated cases, and claimants were ordered to show cause why the motion should not be granted. Employer contended that claimants entered into third-party settlements without its prior approval and that, therefore, all are barred from seeking compensation under the Act pursuant to Section 33(g), 33 U.S.C. §933(g). Claimants and the Director, Office of Workers' Compensation Programs (the Director), responded to the motion, arguing that there are issues of fact which must be resolved before it can be determined whether Section 33(g) can be invoked to bar claimants from seeking benefits under the Act. Specifically, although conceding that they did not obtain prior approval of the settlements from employer, they asserted that the administrative law judge must determine whether each claimant is a "person entitled to compensation" under Section 33(g) and whether each claimant received third-party settlement proceeds in amounts more or less than the amount to which each is entitled under the Act.

[1]By Order dated April 13, 1994, the Board consolidated these 477 appeals and designated the *Allsup* case, BRB No. 94-933, as the lead case for purposes of briefing and decision. A list of all claimants and BRB Numbers is attached to this decision.

The administrative law judge disagreed with claimants and the Director and rendered his summary judgment based on William Jordan's affidavit which was submitted by employer and averred that, without prior approval, each claimant entered into third-party settlements for less than the amount of compensation to which he would be entitled to under the Act.[2] Although claimants and the Director responded to employer's motion, they filed no rebuttal affidavits, and the administrative law judge concluded that the facts of each case were as employer averred. Decision and Order at 4. He then purported to apply the law as set forth in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2705 (1994), and *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), and he determined that each claimant forfeited his right to compensation and medical benefits under the Act by virtue of the failure to comply with the requirements of Section 33(g)(1). Decision and Order at 3. Consequently, the administrative law judge granted employer's motion for summary judgment. *Id.* at 4-5.

Claimants filed a Motion for Reconsideration, arguing that there are unresolved issues of fact affecting the applicability of Section 33(g) to each claimant. The administrative law judge denied the motion. Claimants appeal the administrative law judge's decisions. The Director responds, urging the Board to vacate the decisions and remand the cases to the administrative law judge. Employer has not responded to these appeals.

On appeal, claimants contend the administrative law judge erred in granting summary judgment in this consolidation of cases because questions of material fact remain unresolved. They argue that he should have determined whether each claimant is a "person entitled to compensation," as the claimants herein can be categorized into four different groups: those who have been diagnosed with a pulmonary disease but who have no disability; those who have a disability; those who died from causes relating to their pulmonary condition; and those who died from causes unrelated to their pulmonary condition.[3] Additionally, although they concede they did not obtain employer's prior approval of the third-party settlements, claimants argue that the administrative law judge must ascertain whether each claimant entered into third-party settlements for amounts less than the amount of compensation to which he is entitled under the Act before he can conclude that Section 33(f) and/or (g), 33 U.S.C. §933(f), (g), applies to extinguish employer's liability for benefits under the Act. The Director agrees and contends the administrative law judge erroneously failed to follow the Board's decision in *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd*

[2]William Jordan is the Senior Staff Attorney for Ingalls Shipbuilding, Inc., and he testified that he has legal responsibility for all claims filed under the Act and that he observed the reviewing process for each of the claims herein.

[3]The claims of 42 claimants in this last category were dismissed, with their attorney's consent, by the administrative law judge in an order dated August 25, 1993. Counsel conceded that the third-party settlement amounts received by these claimants exceeded their entitlement under the Act. The administrative law judge's order was not appealed by any party.

and modified on recon. en banc, ___ BRBS ___, BRB No. 93-2227 (January 25, 1996) (Brown and McGranery, JJ., concurring and dissenting). Claimants and the Director also contend that the administrative law judge erred in failing to address the motions to withdraw their claims filed by some of the claimants herein.

We agree with claimants and the Director that there are unresolved issues of material fact in the cases presently before the Board; therefore, we hold that it was improper for the administrative law judge to grant employer's motion for summary judgment. The Board recently addressed issues identical to the ones raised in these cases in *Harris* and *Gladney v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB No. 94-1427 (January 31, 1996) (McGranery, J., concurring). Specifically, 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) a comparison must be made between the gross amount of a claimant's aggregate third-party settlement recoveries and the amount of compensation, exclusive of medical benefits, to which he would be entitled under the Act. *Gladney*, slip op. at 4; *Harris*, slip op. at 16, 18; *see also Cowart*, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT) (Section 33(g)(1) is inapplicable if a claimant's third-party settlement is for an amount greater than the amount to which he is entitled under the Act). Thus, an administrative law judge's failure to ascertain these facts and instead grant an employer's motion for summary judgment is erroneous. *Gladney*, slip op. at 4; *Harris*, 28 BRBS at 262-263. The Board also determined that Section 33(f) does not necessarily extinguish an employer's total liability for benefits in every case, but rather provides the employer with a credit in the amount of the claimant's net third-party recovery against its liability for compensation and medical benefits. *Harris*, 28 BRBS at 269; *see also Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995).

As the Board previously has addressed the Section 33(g) issues presented in this consolidation of cases, we decline to revisit them. For the reasons set forth in *Gladney* and *Harris*, we hold that the administrative law judge erred in granting employer's motion for summary judgment in theses cases because there are unresolved questions of material fact. Therefore, we vacate the administrative law judge's decisions herein, and we remand these cases for further action consistent with law. *Gladney*, slip op. at 4-5; *Harris*, slip op. at 21; *Harris*, 28 BRBS at 270.

Claimants and the Director also contend that the administrative law judge erred in failing to address the motions of certain claimants to withdraw their claims. Specifically, the Director argues that it was improper for the administrative law judge to fail to consider the motions to withdraw and instead to require these particular claimants to show cause why their claims should not be dismissed with prejudice. The Director relies on the decision in *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT) (5th Cir. 1994). In that case, the United States Court of Appeals for the Fifth Circuit affirmed the district court's mandate ordering the district director to refer a group of cases to the OALJ for hearings, per employer's request. The court also remanded the cases to the district court to address the Director's contention that claimants should be permitted to withdraw their claims prior to referral if the requirements of 20 C.F.R. §702.225 are satisfied. The Fifth Circuit noted that withdrawal would be an "unsurprising choice" for those claimants who

suffer no current disability so as to prevent a premature "administrative battle." *Asbestos Health Claimants*, 17 F.3d at 135-136 n.14, 28 BRBS at 17 n.14 (CRT). The Board discussed this issue in its decision in *Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (Brown, J., concurring), *aff'g on recon. en banc* 27 BRBS 250 (1993) (Brown, J., concurring). In *Boone*, the Board held that the district director properly addressed and approved claimant's motion to withdraw his claim, instead of transferring the case to the OALJ, and that employer was not prejudiced by such action. *Boone*, 28 BRBS at 122-124. As the administrative law judge has the authority to consider the motions to withdraw, *see Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); *Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155 (1978), we hold, for the reasons set forth in *Boone*, that he erred in failing to do so in this case. On remand, the administrative law judge must address the motions to withdraw in accordance with the applicable regulation, 20 C.F.R. §702.225.

Accordingly, the administrative law judge's decision granting employer's motion for summary judgment is vacated, and the cases are remanded for consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge