

LEWIS BARLOW, <i>et al.</i>)	
)	
Claimants-Petitioners)	
)	
v.)	
)	
ALABAMA DRY DOCK AND)	
SHIPBUILDING CORPORATION)	
)	
Self-Insured)	DATE ISSUED: _____
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order of Dismissal of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, P.C.), and J. Cecil Gardner (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimants.

Walter R. Meigs, Mobile, Alabama, for self-insured employer.

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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimants appeal the Order of Dismissal (92-LHC-894, *et al.*) of Administrative Law Judge James W. Kerr, Jr., dismissing 78 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 77 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, employer filed a motion to dismiss the consolidated cases, and claimants objected to the motion. Employer contended that claimants entered into third-party settlements without its prior approval in violation of Section 33(g), 33 U.S.C. §933(g). Claimants 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, 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.

The administrative law judge summarily dismissed the claims based on employer's allegations of unapproved settlements with third-party defendants in violation of Section 33(g), erroneously stating that claimants did not object to the dismissal. Claimants appeal the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the decision and remand the cases to the administrative law judge. Employer responds, urging affirmance.

¹By Order dated August 10, 1994, the Board consolidated these 78 appeals and designated the *Barlow* case, BRB No. 94-2722, as the lead case for purposes of briefing and decision. A list of all claimants and BRB Numbers is attached to this decision. By Order dated January 30, 1996, the Board severed the case of *Williams v. Alabama Dry Dock & Shipbuilding Corp.*, BRB No. 94-2794, from this consolidation of cases, and remanded the case to the district director for approval of a proposed settlement.

On appeal, claimants contend the administrative law judge erred in dismissing this consolidation of cases because questions of material fact remain unresolved.² Although claimants concede they did not obtain prior approval of the settlements from employer, they argue that the administrative law judge should have determined whether each claimant is a "person entitled to compensation" and whether each entered into third-party settlements for amounts less than the amount of compensation to which he is entitled under the Act before it can be determined whether 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, contending that the Board's decision in *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, ___ BRBS ___, BRB No. 93-2227 (January 25, 1996) (Brown and McGranery, JJ., concurring and dissenting), is dispositive of the issues raised in these appeals. Employer responds, maintaining that the administrative law judge correctly disposed of the cases before him.

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 and dismiss these cases. The Board recently addressed issues identical to the ones raised here 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 Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992) (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 summarily dismiss a case 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 to dismiss these cases because there are unresolved questions of material fact. Therefore, we vacate the administrative law

²We note claimants' assertion that the "true doubt" rule should have acted as a second level of proof which employer must overcome to have these cases dismissed. Contrary to claimants' contention, the "true doubt" rule is not applicable under the Act. *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

judge's decision herein, and we remand these cases for further action consistent with law.³ *Gladney*, slip op. at 4-5; *Harris*, slip op. at 21.

Accordingly, the administrative law judge's decision granting employer's motion to dismiss 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

NANCY S. DOLDER
Administrative Appeals Judge

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 each was exposed during the course of each claimant's 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). In light of our decision to remand these cases, we decline to address this argument. If necessary, the administrative law judge should consider it on remand.