

HARRIS F. AGENT, <i>et al.</i>)	
)	
Claimants-Petitioners)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	DATE ISSUED:_____
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeals 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.

Ransom P. Jones, III, Pascagoula, Mississippi, for claimants.¹

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, 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: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

¹In a letter dated June 7, 1995, counsel informed the Board he no longer represents eight of the 243 claimants herein, including the named claimant. Those eight claimants are now considered *pro se* petitioners, but that does not affect our analysis or decision in this case.

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-8421, *et al.*) of Administrative Law Judge A. A. Simpson, Jr., granting summary judgment on 243 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).² 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 243 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.

²By Order dated December 2, 1994, the Board consolidated these 243 appeals and designated the *Agent* case, BRB No. 95-127, 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 a purported application of 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 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 2-3. Additionally, the administrative law judge found that employer is entitled to summary judgment based on an 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 under the Act.³ 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. Consequently, the administrative law judge granted employer's motion for summary judgment. *Id.* at 4-5.

Claimants filed a Motion for Reconsideration, arguing that the administrative law judge improperly relied on the affidavit filed by employer and maintaining 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 responds, urging affirmance.

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 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 and contends 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), mandates that these cases be remanded for further fact-finding.

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

³The administrative law judge's decision refers to an affidavit of William Jordan; however, the affidavit attached to employer's Motion for Summary Decision reveals that George M. Simmerman, Jr., was the affiant in this case. See also Emp. Reply to Dir. Brief at 2. Mr. Simmerman testified that he is a Staff Attorney for Ingalls Shipbuilding, Inc., with legal responsibility for claims filed under the Act, and that he observed the reviewing process for each of the claims herein.

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 these 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.

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.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge