

BRB Nos. 95-604 - 95-612, 95-615,
95-618 - 95-631, 95-633 - 95-660, 95-662,
95-664 - 95-687, 95-689 - 95-691

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

Appeal of the Decision and Order Granting Motion for Summary Decision of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, 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, DOLDER and McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimants appeal the Decision and Order Granting Motion for Summary Decision (92-LHC-1228, *et al.*) of Administrative Law Judge Lee J. Romero, Jr., dismissing 88 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 80 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 or, alternatively, for summary judgment of 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 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, 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 dismissed the claims based on employer's allegations of unapproved settlements with third-party defendants in violation of Section 33. He stated that claimants and the Director did not file supporting affidavits; consequently, their allegations fail to demonstrate a genuine issue of fact and are not sufficient to oppose summary judgment. Decision and Order at 7. The administrative law judge concluded that claimants are required to prove that their third-party settlements reimbursed them for asbestos exposure at work sites other than employer's facility or that their respective settlements were for more than their entitlement under the Act, thereby establishing the inapplicability of Section 33(g)(1), and as they failed to present facts to support their allegations, these "affirmative defenses" lack merit. Decision and Order at 7, 11. Further, the administrative law judge rejected claimants' remaining contentions and held that the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), applies to this case, that all claimants are "person[s] entitled to compensation" under Section 33(g) because they filed claims for asbestos-related disease, and that medical benefits are considered "compensation" under Section 33(g)(1), 33 U.S.C. §933(g)(1)

¹By Order dated January 13, 1995, the Board consolidated these 88 appeals and designated the *Abrams* case, BRB No. 95-604, as the lead case for purposes of briefing and decision. A list of all claimants and BRB Numbers is attached to this decision. By Orders dated September 28, 1995, the Board severed eight cases from this consolidation of claims, and remanded them to the district director for approval of proposed settlements.

(1988). Decision and Order at 8-11.

Claimants appeal the administrative law judge's decision. The Director responds, urging the Board to vacate the decision and remand the cases to the administrative law judge. Employer responds, urging affirmance.

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 incorrectly determined that each claimant is a "person entitled to compensation." They also contend that the administrative law judge should have determined whether each claimant was exposed to asbestos at employer's facility 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. Contrary to the administrative law judge's statement, claimants sufficiently alleged issues of genuine fact. 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). The Board held that the determination of whether each claimant is a "person entitled to compensation" requires findings of fact. Specifically, the administrative law judge must determine whether each claimant sustained an injury under the Act, and in occupational disease cases, this occurs when the employee is aware of the relationship between the disease, the disability, and the employment. Further, the Board held that 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 7, 16, 18; *see also Cowart*, 112 S.Ct. at 2589, 26 BRBS at 49 (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 a motion for summary judgment is

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).

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 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 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

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur reluctantly in the result reached by my colleagues because I believe that I am obliged to follow the precedent established 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).

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.

REGINA C. McGRANERY
Administrative Appeals Judge