

EMMET C. ABLES, <i>et al.</i>)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	DATE ISSUED:_____
)	
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 Employer's Motion for Summary Judgment and Order Denying Claimant's Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Hayden S. Dent (Scruggs, Millette, Lawson, Bozeman & Dent, P.A.), Pascagoula, Mississippi, for claimants.

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

PER CURIAM:

Claimants appeal the Decision and Order Granting Employer's Motion for Summary Judgment and Order Denying Claimant's Motion for Reconsideration (93-LHC-8892, *et al.*) of Administrative Law Judge Richard D. Mills rendered on 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 749 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 for summary decision, contending that claimants entered into third-party settlements without its prior approval in violation of Section 33(g), 33 U.S.C. §933(g). Employer's motion was based on William Jordan's affidavit which 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.² 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. The administrative law judge noted that claimants did not originally file an opposing affidavit, and when claimants' counsel attempted to do so, the administrative law judge disallowed it as untimely. Decision and Order at 2.

The administrative law judge granted employer's motion for summary judgment based on employer's allegations of unapproved settlements with third-party defendants in violation of Section 33(g), finding that claimants and the Director failed to demonstrate the existence of a genuine issue of fact. Decision and Order at 6. Specifically, the administrative law judge 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" for purposes of determining the applicability of Section 33(g)(1), 33 U.S.C. §933(g)(1) (1988). Decision and Order at 5. Further, citing *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), the administrative law judge stated he need not determine if the proceeds of the third-party settlements exceed each claimant's entitlement under the Act. Decision and Order at 4-5.

¹This case represents a consolidation of 749 claims. A list of all claimants is attached to this decision. The Board did not assign a separate BRB Number to each claimant.

²William 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.

Claimants filed a motion for reconsideration, contending that since some of them are seeking only medical benefits they are not "persons entitled to compensation." Claimants also sought reconsideration of the administrative law judge's refusal to allow the filing of the untimely affidavit opposing employer's affidavit. The administrative law judge denied the motion for reconsideration.

On appeal, claimants contend the administrative law judge erred in dismissing this consolidation of cases because questions of material fact remain unresolved, citing the Board's decision in *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring and dissenting). 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 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 his claim. The Director agrees with claimant's contentions. 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 for summary judgment. Contrary to the administrative law judge's statement, claimants sufficiently alleged issues of genuine fact.³ The Board recently addressed issues identical to the ones raised here in *Harris* and *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in the result only). 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.⁴ Further, the Board held

³Claimants also contend that the administrative law judge erred in relying on Mr. Jordan's affidavit and in refusing to allow them to file an opposing affidavit out of time. The administrative law judge did not err in relying on Mr. Jordan's affidavit. *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25, 27 n. 4 (1996) (McGranery, J., concurring in the result only). Contrary to the administrative law judge's statement, however, claimants' response to employer's motion for summary judgment sufficiently raises genuine issues of fact, and thus we need not address claimants' contention that the administrative law judge erred in not allowing counsel to file an opposing affidavit out of time. *See id.*

⁴We reject employer's argument that the administrative law judge properly relied on *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), to find that each claimant is a "person entitled to compensation." In *Cretan*, the United States Court of Appeals for the Ninth Circuit determined that the Supreme Court's discussion of a "person entitled to compensation" in *Cowart* is *dicta* and it held that an employee's

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 is entitled under the Act. *Gladney*, 30 BRBS at 27; *Harris*, 30 BRBS at 18; *see also Cowart*, 505 U.S. at 469, 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); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). Thus, an administrative law judge's failure to ascertain these facts and instead grant a motion for summary judgment is erroneous. *Gladney*, 30 BRBS at 27. 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.⁵ *Harris*, 30 BRBS at 17-18; *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.⁶ *Gladney*, 30 BRBS at 27; *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 81 F.3d 561 (5th Cir. 1996).

Accordingly, the administrative law judge's Decision Granting Employer's Motion for Summary Judgment and Order Denying Claimant's Motion for Reconsideration are vacated, and the cases are remanded for consideration consistent with this opinion.

SO ORDERED.

wife and daughter were "persons entitled to compensation" at the time they entered into third-party settlements prior to the employee's death. The Fifth Circuit recently disavowed *Cretan* in its decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113 (CRT), *pet. for reh'g en banc denied*, 71 F.3d 880 (5th Cir. 1995), *pet. for cert. granted*, 64 U.S.L.W. 3762 (U.S. 1996)(No. 95-1081), stating that the Supreme Court's definition of when a person becomes a "person entitled to compensation" is the "core" of its holding in *Cowart*. The court held that a widow was not a "person entitled to compensation" at the time she entered into pre-death settlements as her right to seek death benefits did not vest until the employee's death. As the case at bar arises within the jurisdiction of the Fifth Circuit, *Yates*, and not *Cretan*, is controlling.

⁵Thus, for the reasons stated in *Gladney*, 30 BRBS at 28-29, we reject employer's contention that the administrative law judge properly relied on the decision in *Villanueva*, 868 F.2d at 688.

⁶In light of our decision to remand the cases herein for appropriate adjudication, we decline to address claimants' challenge to the constitutionality of Section 33(g) at this time. Claimants' arguments may be presented to the administrative law judge when their cases are heard.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge