JOE L. FRISON	)	BRB No. 96-538
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	
	)	
ODIS L. CLEMONS	)	BRB No. 96-539
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	
	)	
KERRY EVANS	)	BRB No. 96-540
	)	
Claimant-Respondent	)	
	)	

v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	
	)	
FRED C. BRAGG, JR.	)	BRB No. 96-541
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	
	)	
	)	
HENRY COLEMAN	)	BRB No. 96-542
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	

	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	
	)	
CHARLES W. NETTLES	)	BRB No. 96-543
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decisions and Orders Granting Motion for Judgment on the Pleadings or, Alternatively, for Summary Decision of Richard D. Mills and C. Richard Avery, Administrative Law Judges, United States Department of Labor.

Samuel J. Oshinsky, Counsel for Longshore (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decisions and Orders Granting Motion for Judgment on the Pleadings or, Alternatively, for Summary Decision (94-LHC-2684, 2530, 2577, 2496, 2282, 2896) of Administrative Law Judges Richard D. Mills and C. Richard Avery 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 judges' 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).

In each of these cases, the claimant was allegedly exposed to asbestos during the course of his 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 motions were based on claimants' failure to respond to employer's Request for Admissions; employer contended that by failing to respond, each claimant admitted he entered into third-party settlements without employer's prior written approval and that his claim for compensation and medical benefits is barred by Section 33(g). The Director responded to employer's motions for summary decision, arguing that there are issues of material fact which must be resolved before it can be determined whether Section 33(g) is invoked to bar claimants from obtaining benefits under the Act. The Director also argued that each claimant should be given the opportunity to withdraw his claim. Administrative Law Judge Mills granted five of the claimants time to respond to employer's motion or to petition to withdraw his claim. None of the claimants was represented by an attorney, and none responded to employer's motions or sought to withdraw his claim.

The administrative law judges granted employer's motions for summary decision based on employer's allegations of unapproved settlements with third-party defendants in violation of Section 33(g), finding the absence of genuine issues of fact. Specifically, the administrative law judges held that pursuant to the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992), and the decision of the United States Court of Appeals for the Fifth Circuit in *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), each claim is either barred by Section 33(g) or employer's liability for additional compensation is completely offset pursuant to Section 33(f), 33 U.S.C. §933(f). Thus, the administrative law judges dismissed each claim.[2]

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[1]By Order dated October 11, 1996, employer's motion to dismiss the Director's appeals was denied, and the Director's appeals in these cases were consolidated. 20 C.F.R. §802.104(a).

[2]Administrative Law Judge Mills did not specifically base his decision on claimants' failures to respond to employer's Requests for Admissions. In his decision in the *Clemons* case, Administrative Law Judge Avery found the absence of a genuine issue of fact due to Claimant Clemons' failure to

On appeal, the Director contends that the administrative law judges erred in dismissing these claims 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). Claimants have not responded to these appeals. Employer responds that the administrative law judges' decisions should be affirmed, contending that the dismissals should stand due to claimants' failure to pursue their claims in any way. Employer notes that none of the claimants has responded to any of employer's discovery requests or orders of the administrative law judges nor has any appealed the administrative law judge's dismissals.[3]

We agree with 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 judges to grant employer's motions for summary decision.[4] The Board addressed issues identical to the ones raised here in *Harris* and in *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. 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 is entitled under the Act. *Gladney*, 30 BRBS at 27; *Harris*, 30 BRBS at 18; *see also Cowart*, 505 U.S. at 469, 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

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respond to employer's request for an admission that he had settled third-party claims without employer's prior approval. Pursuant to 29 C.F.R. §18.20 the administrative law judge found this fact deemed admitted. It is not clear Claimant Clemons was represented by an attorney at the time the Request for Admissions was served on claimant. Moreover, as discussed, *infra*, the mere fact that claimant settles with a third party without employer's prior approval, standing alone, does not provide a basis for finding a claim barred pursuant to Section 33(g).

[3]For the reasons stated in our Order dated October 11, 1996, we reject employer's renewed contention that the Director lacks standing to appeal in these cases.

[4]Section 18.41(a) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §18.41(a), provides that an administrative law judge may issue a summary decision where there is no genuine issue of material fact raised. Where a genuine question of material fact is raised, the administrative law judge shall set the case for an evidentiary hearing. 29 C.F.R. §18.41(b).

decision 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).

Thus, for the reasons set forth in *Gladney* and *Harris*, we hold that the administrative law judges erred in granting employer's motions for summary decision in these cases because there are unresolved questions of material fact. These issues were timely raised by the Director in response to employer's motions, irrespective of the claimants' lack of response. Therefore, we vacate the administrative law judges' decisions herein, and we remand these cases for further action consistent with law. *Gladney*, 30 BRBS at 27.

Accordingly, the administrative law judges' Decisions and Orders Granting Motion for Judgment on the Pleadings or, Alternatively, for Summary Decision are 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

[5]Thus, for the reasons stated in *Gladney*, 30 BRBS at 28-29, we reject the administrative law judges' reliance on the decision in *Villanueva*, 868 F.2d at 688.