BRB No. 96-1502

FRANK UZDAVINES	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order of Dismissal of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order of Dismissal (92-LHC-3383) of Administrative Law Judge Ralph A. Romano dismissing his claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a welder in construction, shipyards, and factories for 35 years where he was exposed to asbestos. He alleged he was last exposed to asbestos while working for employer as an oiler in 1990 in the engine room of a dredge. Claimant retired in December 1990 due to his second heart attack. Claimant filed his claim against employer in May 1991 seeking benefits for asbestosis. At the hearing, claimant admitted that he had entered into third-party settlements with asbestos manufacturers since 1991 without informing employer, and employer moved to dismiss the claim under Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1). The administrative law judge did not rule on employer's motion to dismiss at the hearing but instead left the record open for the parties to submit documentation relevant to the Section 33(g)(1) issue.

Post-hearing, claimant admitted as Claimant's Exhibit 3 a letter from claimant's counsel to the administrative law judge dated June 25, 1996, which purported to enclose letters dated May 25, 1996, and June 11, 1996, from claimant's third-party attorney. The June 25, 1996, letter outlined the fact that claimant has commenced actions against numerous defendants, but that settlements have been made with only six of the defendants. The two letters from claimant's third-party attorney apparently were not enclosed with the exhibit.

Additionally, employer admitted post-hearing the affidavit of Thomas F. Langan, employer's corporate risk manager. EX 8. Mr. Langan stated that employer was never advised of any civil action instituted by claimant, was never advised of any settlements entered into by claimant, was never presented with or asked to sign a Form LS-33 approving a civil action settlement, and had never approved any settlement entered into by claimant and any third party. Subsequently, employer filed with its closing argument a written motion to dismiss claimant's claim asserting that claimant was barred from receiving benefits under Section 33(g)(1) as he had not obtained consent or informed employer prior to entering into the third-party settlements.

Upon employer's motion to dismiss under Section 33(g)(1), the administrative law judge dismissed the claim. The administrative law judge summarily concluded that claimant admitted to these settlements and employer established that no written approval was given to claimant.

On appeal, claimant contends that the administrative law judge prematurely granted employer's motion to dismiss as all third-party cases have not yet been finalized. Employer responds in support of the administrative law judge's dismissal order.

Section 33(g)(1) requires that a "person entitled to compensation" obtain employer's prior written consent for third-party settlements that are less than the compensation to which he would be entitled under the Act. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992). Before dismissing a claim under the Act under Section 33(g)(1), the administrative law judge must determine whether the claimant is a "person entitled to compensation."[1] *See Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5 (1996)(Brown and McGranery, JJ., concurring in part and dissenting in part)(decision on recon. *en banc)*, *aff'g and modifying*, 28 BRBS 254 (1994). He then must make a comparison between the gross amount of claimant's aggregate third-party settlement recoveries and the amount of compensation, excluding medical benefits, to which claimant would be entitled under the Act. *Bundens v. J.E. Brenneman Co.,* 46 F.3d 292, 29 BRBS 52 (CRT)(3d Cir. 1995); *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996)(McGranery, J., concurring in the result only); *Harris*, 30 BRBS at 5; *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). The administrative law judge's failure to ascertain these facts and instead summarily dismiss this case was erroneous. *Gladney*, 30 BRBS at 25; *Harris*, 30 BRBS at 5. We, therefore, vacate the administrative law judge's decision dismissing this claim and remand this case to the administrative law judge to determine if claimant's claim is barred under Section 33(g) after consideration of the proper factors. *Gladney*, 30 BRBS at 25; *Harris*, 30 BRBS at 5.

Contrary to claimant's specific contention, the fact that all third-party cases have not yet been finalized does not mean that the administrative law judge cannot make a determination under Section 33(g)(1).[2] In order to determine if the Section 33(g)(1) bar

[1]As a voluntary retiree with regard to the claim for benefits for asbestosis, claimant would be limited to recovering benefits for permanent partial disability under Sections 8(c)(23), 2(10) and 10(d)(2) of the Act, 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2). *See Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989); *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986).

[2]Contrary to claimant's contention that Section 33(g) is inapplicable because he was unaware that employer was involved in a joint venture which could have been his formal employer, the identity of the proper employer was resolved at the hearing. Weeks Marine is the employer by the agreement of all parties to dismiss the other two employers at the hearing. Tr. at 7-9. Furthermore, even if the other two employers had not been dismissed at the hearing, there is no support for claimant's contention that he is not subject to the provisions under Section 33(g)(1) simply because the responsible employer is one of several employers. *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994).

applies, the administrative law judge should use the amount of the aggregate third-party settlements entered into by the time of the formal hearing in comparison to the amount of compensation to which claimant is entitled over his lifetime. *See Harris*, 30 BRBS at 16; *Linton*, 28 BRBS at 282.

Accordingly, the administrative law judge's decision granting employer's motion to dismiss is vacated, and the case is 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