

BRB Nos. 93-152
and 93-152A

SAMUEL L. HILLMAN)
)
 Claimant-Petitioner)
)
 v.)
)
 INGALLS SHIPBUILDING,)
 INCORPORATED)
)
 and)
)
 AMERICAN MUTUAL LIABILITY) DATE ISSUED: _____
 INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
 and)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Respondent) DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Kenneth A. Jennings,
Administrative Law Judge, United States Department of Labor.

Harris Bell Williams (Barton & Williams), Pascagoula, Mississippi, for claimant.

Ruth Bennett Whitfield (Franke, Rainey & Salloum), Gulfport, Mississippi, for
employer/carrier.

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.

SMITH, Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (91-LHC-112) of Administrative Law Judge Kenneth A. Jennings rendered on a 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 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).

Claimant worked as a gouger for employer for approximately five or six years during the 1960s and was exposed to asbestos at this time. Emp. Ex. 14 at 14; Tr. at 20, 27, 39. Thereafter, he became a welder with Alabama Dry Dock & Shipbuilding Company (ADDSCO), where he used an asbestos blanket during the construction of the Mobile Tunnel. Tr. at 20-21. Following his employment with ADDSCO, claimant worked as a welder for other non-maritime companies and was exposed to asbestos. Emp. Ex. 14 at 21-35; Tr. at 33-38. In 1984, after surgeries related to his circulatory and heart problems, claimant retired from the work force. Emp. Ex. 14 at 5-9.

On April 8, 1989, claimant underwent an x-ray examination of his lungs which revealed "parenchymal changes consistent with asbestosis." Cl. Ex. A. Based on the diagnosis of asbestosis, claimant filed third-party claims as well as a claim for disability and medical benefits under the Act. Between October 1989 and December 1991, claimant settled seven third-party claims for a gross total of \$9,750. After each agreement, claimant filed an LS-33 notice with employer. Employer either disapproved or took no action on these requests. Emp. Exs. 9-11.

The administrative law judge held that Section 33(g)(1), 33 U.S.C. §933(g)(1), bars claimant from receiving benefits under the Act because of his failure to obtain written consent prior to entering into his third-party settlements. Decision and Order at 6. He found that claimant became a "person entitled to compensation" upon learning he has asbestosis. Further, he determined that because each of claimant's individual settlements was for an amount less than the amount he would be due under the Act, Section 33(g)(1) applies.¹ *Id.* at 8. The administrative law judge also concluded that medical benefits are considered "compensation" and recovery of them is precluded when Section 33(g)(1) applies. *Id.* Alternatively, he stated that claimant's failure to obtain employer's authorization prior to undergoing treatment bars his claim for medical benefits under Section 7, 33 U.S.C. §907. Finally, he stated that all other issues raised by the parties are moot in light of his decision.² *Id.* at 10-11.

¹The parties stipulated that claimant has a 10 percent impairment of the whole person and would be entitled to \$21.21 per week from August 8, 1989, and continuing. Jt. Ex. 2.

²According to the administrative law judge, the parties raised the following additional issues: causation; responsible employer/carrier; statute of limitations; and attorney's fee. Decision and

Claimant appeals the denial of benefits, and employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant and urging remand for consideration of related issues. BRB No. 93-152. Employer cross-appeals the decision, contending it should not be held liable as the responsible employer. BRB No. 93-152A. No party has responded to employer's cross-appeal.

Claimant first contends the administrative law judge erred in determining that claimant became a "person entitled to compensation" upon learning of the diagnosis of asbestosis on April 8, 1989. Pursuant to 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), the Board has held that a claimant who is a voluntary retiree does not sustain an "injury" under the Act until he is aware of the relationship between his disease, his employment, and a permanent physical impairment, and that a claimant who is not such a retiree must be aware of a work-related disease which has caused a loss in his wage-earning capacity.³ This awareness must occur before one can be considered a "person entitled to compensation," thereby potentially invoking the Section 33(g) bar. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Judges Brown and McGranery dissenting from majority's construction of the term "person entitled to compensation"); *see also Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in the result). As claimant is a voluntary retiree, *see* Tr. at 27, he must be aware of the relationship between his disease, his employment, and a permanent physical impairment before he can be considered a "person entitled to compensation." Because the administrative law judge held that claimant became a "person entitled to compensation" upon learning of a work-related disease, a standard specifically rejected by the majority in *Harris*, he applied incorrect law in determining whether claimant is a "person entitled to compensation." Therefore, we vacate his finding on this matter, and we remand the case to him for further consideration in light of the definition of "person entitled to compensation" as set forth in *Harris*. *Harris*, 30 BRBS at 8-9.

Order at 2.

³As the Board has held that retroactive application of *Cowart* is appropriate, *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994), we reject claimant's argument that *Cowart* should not be applied to this case.

Next, claimant contends the administrative law judge erred in determining that he settled his third-party claims for an amount less than that to which he is entitled under the Act, thereby invoking the Section 33(g)(1) bar. He contends his settlements should be compared to his entitlement under the Act in the aggregate instead of individually, and he asserts that interest should not be included in the computation. We agree with claimant's assertions.

In this case, the administrative law judge noted that claimant would be entitled to \$21.21 per week pursuant to the parties' stipulation, that he would be entitled to "back compensation" of \$2,750, and that *each* of his third-party agreements was for an amount less than this total. Contrary to the administrative law judge's analysis, in determining whether Section 33(g) bars a claimant's entitlement to benefits

a comparison must be made between the gross amount of 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, 30 BRBS at 27 (emphasis added); *Harris*, 30 BRBS at 15-16. Pursuant to the Board's decision in *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994), the administrative law judge must consider claimant's life-time entitlement to benefits under the Act and not just benefits which have accrued. Additionally, interest is not considered "compensation" under Section 2(12) of the Act, 33 U.S.C. §2(12). *Nelson v. Stevedoring Services of America*, 29 BRBS 99 (1995) (*en banc*); *Castronova v. General Dynamics Corp.*, 20 BRBS 139 (1987). Like medical benefits, which also are not considered compensation, *Harris*, 28 BRBS at 267, interest should not be included in the equation calculating a claimant's lifetime entitlement to benefits under the Act. Accordingly, on remand, if the administrative law judge concludes claimant is a "person entitled to compensation," then he must compute claimant's expected entitlement to benefits under the Act, excluding interest and medical benefits, and compare that figure with claimant's aggregate gross third-party settlement recoveries.⁴ *Gladney*, 30 BRBS at 27; *Harris*, 30 BRBS at 16; *Linton*, 28 BRBS at 288; *Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186 (decision on recon.), *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J., concurring).

In determining whether Section 33(g) applies to this case, the Director contends the administrative law judge erred in failing to discuss the cause of claimant's 10 percent impairment because, pursuant to *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (Decision on Remand)(McGranery, J., dissenting), *aff'd on recon. en banc*, 28 BRBS 185 (1994) (Brown and McGranery, JJ., dissenting), if claimant's pulmonary condition can be attributed to a work-related cause other than asbestos exposure, then Section 33(g) does not apply to the third-party asbestos settlements. The question addressed by the Board in *Chavez* was whether an employer's right to offset its liability for compensation against a claimant's net third-party recovery should be apportioned. See 33 U.S.C. §933(f). In a case where the claimant may have sustained more than

⁴In light of our decision to remand this case for further consideration of the applicability of Section 33(g), we need not address claimant's remaining Section 33(g) arguments.

one work-related injury, the Board adopted the Director's position and held that if the claimant's only work-related injury is asbestosis, then the employer is entitled to a full offset against the claimant's net recovery from his third-party asbestos settlements. If, however, the claimant's hypertension is his only work-related injury, or if both conditions are work-related, then the employer is not entitled to a Section 33(f) offset because the third-party suits would not be for the same disability compensable under the Act. *Chavez*, 27 BRBS at 85-87; *O'Berry v. Jacksonville Shipyards, Inc.*, 22 BRBS 430, 433 (1989), *modifying in pertinent part on recon.*, 21 BRBS 355 (1988). The Director argues that "by parity" the *Chavez* holding also controls the applicability of Section 33(g). In this case, although Dr. Douglas stated that claimant's pulmonary condition was not related entirely to his asbestosis, there is no evidence of record demonstrating that claimant's condition was caused by a work-related problem other than asbestosis. As the record contains no evidence of other work-related problems which might have been included in claimant's 10 percent impairment rating, or for which he may have filed a claim, *see* Emp. Exs. 13, 17 at 12-15, 25, 36-37, 39, 45, we reject the Director's argument that *Chavez* is applicable, and we need not decide the merits of his contention.⁵

Lastly, claimant contends the administrative law judge should not have barred his recovery of medical benefits because of his failure to receive authorization from employer prior to undergoing diagnostic treatment. Alternatively, he asserts that only the cost of the initial medical evaluation should be barred. Section 7(d) of the Act specifically provides that claimant cannot be reimbursed for medical expenses unless he first requests authorization from employer and employer refuses such authorization. 33 U.S.C. §907(d); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). Claimant did not seek authorization from employer prior to undergoing medical treatment with Dr. Lorino. Consequently, the administrative law judge correctly denied reimbursement of past medical

⁵The Director also asserts that the administrative law judge failed to determine whether claimant settled his third-party claims with employer's suppliers/manufacturers. He contends 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 record herein lacks evidence establishing whether the third-party exposure to asbestos occurred during the course of claimant's employment with employer. Specifically, he argues that if none of the third parties exposed claimant 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). Because we remand this case for other reasons, we need not address this argument. If necessary, the administrative law judge may consider it on remand.

As our dissenting colleague points out, *Melson* was overruled in part by the enactment of Section 3(e), 33 U.S.C. §903(e), in 1984. Said enactment, however, affected only that part of *Melson* which concerned whether the employer's liability under the Act should be offset by the claimant's receipt of state workers' compensation benefits for the same injury from a different employer. Section 3(e) in no way affects employer's entitlement to a Section 33(f) credit for third-party settlement recoveries, and its enactment has no bearing on the court's decision regarding Section 33(g) upon which Director relies.

expenses. See *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982) (no reimbursement for initial treatment if authorization is not requested, even if claimant was not aware of a work-related condition).⁶

Employer's cross-appeal concerns its liability as the responsible employer. Employer raised this issue before the administrative law judge; however, the administrative law judge concluded it was unnecessary to address it, given his determination that Section 33(g) bars the claim. Because it has not been determined whether Section 33 applies to this case, and because the record contains evidence that Ingalls may not be the responsible employer, the administrative law judge must address this issue on remand. See *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991) (subsequent employer liable even though exposure to asbestos was less than at previous employer's facility); see generally *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992).

Accordingly, the administrative law judge's denial of past medical expenses is affirmed. In all other respects, the Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

Although I concur in my colleagues' determinations 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, and that Section 7, 33 U.S.C. §907, bars claimant's entitlement to past medical

⁶Under Section 7, claimant is not forever barred from reimbursement of medical benefits for a work-related condition provided he complies with the provisions therein. *Ranks*, 22 BRBS at 308.

expenses, and in their rejection of the Director's speculation regarding other work-related conditions and the applicability of *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (Decision on Remand)(McGranery, J., dissenting), *aff'd on recon. en banc*, 28 BRBS 185 (1994) (Brown and McGranery, JJ., dissenting), I respectfully dissent from their decision to remand this case for further consideration of the applicability of Section 33(g), 33 U.S.C. §933(g) (1988). I would affirm the Decision and Order denying benefits for failure to comply with the provisions of Section 33(g).

I would hold that claimant herein is a "person entitled to compensation" for the reasons set forth in the dissenting opinions in *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5 (1996) (Judges Brown and McGranery dissenting from majority's construction of the term "person entitled to compensation"), *aff'g and modifying on recon. en banc* 28 BRBS 254 (1994). That is, claimant filed claims and entered into settlements precisely because he was aware of the relationship between his disease, his disability, and his employment. *Harris*, 30 BRBS at 19-24. After receiving a diagnosis of asbestosis, an undeniably incurable and progressive disease, claimant sued employer, which had exposed him to asbestos in the course of his employment, and he sued seven asbestos manufacturers and suppliers. Yet the majority holds that claimant is not a "person entitled to compensation" and subject to the requirements of Section 33(g) until his asbestosis has progressed to the point that it causes a permanent physical impairment; hence, the majority remands the case for the administrative law judge to make a determination of whether claimant was a "person entitled to compensation" at the time of his third party settlements. The legalistic gloss which the majority strains to put on "person entitled to compensation" is entirely inconsistent with the Supreme Court's straightforward discussion of the term in *Cowart, e.g.*, "both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated." *Cowart*, 112 S.Ct. at 2595, 26 BRBS at 51 (CRT). As claimant clearly is a "person entitled to compensation," Section 33(g) is applicable.

The Director contends that Section 33(g) may not bar claimant's right to benefits under the Act, notwithstanding claimant's failure to obtain employer's written consent to his third party settlements, because the record does not reveal whether claimant was exposed to the products of these manufacturers and suppliers during the course of his employment with employer. The Director relies upon *United Brands Co. v. Melson*, 594 F.2d 1068, 1074, 10 BRBS 494, 498 (5th Cir. 1979), for the proposition that the requirements of Section 33(g) apply only to settlements in which the third party "is potentially responsible to both the employee and the covered employer." In *Melson*, the Fifth Circuit held that a claimant who received total disability benefits from a covered employer and settled a disability claim under state law with a subsequent, non-covered employer, was not required by Section 33(g) to obtain employer's agreement to the settlement and Section 33(f) did not apply to offset his compensation by the amount of the settlement, despite the fact that the result was a double recovery for the same condition.

The Director's reliance upon *Melson* is misplaced. First, it is noteworthy that the Director is unable to cite a single case following *Melson*, on the point in question, although that decision was issued more than seventeen years ago. Second, in order to overrule *Melson*, Congress enacted

Section 3(e), 33 U.S.C. §903(e), which provides employer with a credit for any amount paid under any workman's compensation law, for the same injury, disability or death. *E.P. Paup v. Director*, 999 F.2d 1341, 1351, 27 BRBS 41, 49 (CRT) (9th Cir. 1993) (citing 130 Cong. Rec. 8326 (1984) (remarks of Rep. Erlenborn, stating "the court's decision on this point [employer's right to offset compensation] in *Melson* . . . is overruled.")). *Accord Brown v. Forest Oil Corp.*, 29 F.3d 966, 971, 28 BRBS 78, 82 (CRT) (5th Cir. 1994). In light of Section 3(e), employer in the instant case is entitled to a credit under Section 33(f) for the total of the net proceeds of all the third-party settlements because they all pertain to the injury for which claimant seeks compensation. It is undisputed that all of the settlements are with asbestos manufacturers or suppliers and claimant's injury is asbestosis.

In overruling the Fifth Circuit's decision on the application of Section 33(f), Congress effectively overturned the court's decision on the application of Section 33(g) because, as the Fifth Circuit recognized, these provisions must be construed *in pari materia*. The *Melson* court held that Section 33(g) did not apply because that section is intended to protect employer's interest in maximizing the amount by which third-party settlements would offset compensation under Section 33(f), and where there was no right to offset under Section 33(f), there was no interest to protect by application of Section 33(g). *Melson*, 594 F.2d at 1074, 10 BRBS at 499. The Supreme Court made the same point in *Cowart* in its discussion of the purposes and structure of Section 33:

Section 33(f) provides that the net amount of damages recovered from any third party for the injuries sustained reduces the compensation owed by the employer. So the employer is a real party in interest with respect to any settlement that might reduce but not extinguish the employer's liability. The written-approval requirement of §33(g) "protects the employer against his employee's accepting too little for his cause of action against a third party." *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968).

Cowart, 112 S.Ct. at 2598, 26 BRBS at 53 (CRT).

In *Cowart*, the Supreme Court also relied upon "the basic canon of statutory construction that identical terms within an Act bear the same meaning" (citation omitted), to hold that identical terms in Sections 33(f) and 33(g) must be given the same interpretation. *Id.*, 112 S.Ct. at 2596, 26 BRBS at 52 (CRT). Thus, the "third person" whose settlement is offset against compensation under Section 33(f), must be the same "third person" whose settlement requires approval under Section 33(g). Applying this rationale to the case at bar, it follows that because under Section 33(f), employer is entitled to the benefit of an offset of the net proceeds of all claimant's third party settlements, employer must be entitled to the protection provided by Section 33(g), requiring claimant to obtain approval of those settlements. The Director's argument to the contrary must be rejected.

Claimant erroneously contends that Section 33(g)(1) does not apply because the aggregate of

his settlements exceeds the amount of compensation due at the time of the hearing. The amount of compensation, however, is not measured as of the time of the hearing. Rather, the amount of "compensation to which the person . . . would be entitled . . ." is the total amount employer would have to pay claimant pursuant to an award. *Jones v. St. John Stevedoring Co., Inc.*, 18 BRBS 68 (1986), *rev'd on other grounds sub nom. St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987). It is clear that the \$9,750 which claimant received in settlements is less than any reasonable calculation of his lifetime award. *See Linton v. Container Stevedoring Co.*, 28 BRBS 282, 288 (1994).⁷

Hence, application of Section 33(g)(1) to the settlements in the instant case bars claimant's rights to compensation and medical benefits under the Act, because he failed to obtain employer's written approval and the total amount of the settlements is less than that to which he is entitled under the Act. Therefore, the administrative law judge's findings that claimant is a "person entitled to compensation" and that he is barred from receiving benefits under the Act should be affirmed. As claimant is not entitled to benefits due to his failure to comply with both Sections 7 and 33(g), employer has no liability under the Act. Thus, the administrative law judge was also correct in holding that the question of responsible employer is moot.

Accordingly, I would affirm the administrative law judge's Decision and Order.

REGINA C. McGRANERY
Administrative Appeals Judge

⁷Evidence in the record suggests that claimant's award would far exceed his settlement aggregate. Claimant was born in 1942. In 1989, he was 47 years old. He obtained \$9,750 in third-party settlements, and the parties stipulated he would be entitled to \$21.21 per week under the Act. To be entitled to an amount under the Act greater than his settlement recoveries, claimant would have to live until 1998 ($\$9,750 \div \$21.21 = 460$; $460 \div 52 \text{ weeks} = 9 \text{ years}$; $1989 + 9 = 1998$). As claimant is expected to live past age 56, his third-party settlements are for an amount less than the amount to which he is entitled under the Act.