

ANNIE LIDDELL)	
(Widow of PENNIE L. LIDDELL))	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Quentin P. McColgin,
Administrative Law Judge, United States Department of Labor.

Wynn E. Clark (Owen, Galloway & Clark), Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured
employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (94-LHC-1465) of Administrative Law Judge Quentin P. McColgin 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, the widow of Pennie Liddell (the decedent), filed a claim for death benefits on September 28, 1993, asserting a causal relationship between decedent's death and his asbestosis, which she further alleges was contracted through decedent's exposure to asbestos over the course of his work for employer.¹

¹Among the stipulations agreed upon by the parties at the hearing are that: the decedent was exposed to asbestos during the course of his employment with Ingalls; decedent was diagnosed with asbestosis on July 20, 1982; decedent's compensation claim was settled pursuant to Section 8(i), 33

U.S.C. §908(i), of the Act on October 21, 1983, in exchange for \$10,000; and that decedent died on May 14, 1993.

Noting that the sole issue in this case involved the applicability of Section 33(g), 33 U.S.C. §933(g), the administrative law judge applied the Board's holding in *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994) (Brown, J., concurring)(Smith, J., dissenting on other grounds), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113 (CRT) (5th Cir. 1995), *pet. for reh'g en banc denied*, 71 F.3d 880 (5th Cir 1995), *cert. granted*, 116 S.Ct. 1671 (May 13, 1996), to the relevant facts in this case² and found that claimant is not "a person entitled to compensation" under Section 33(g)(1), 33 U.S.C. §933(g)(1), so as to bar her claim for death benefits pursuant to Section 9(b), 33 U.S.C. §909(b). *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992). Consequently, the administrative law judge concluded that claimant is entitled to death benefits under Section 9(b), based on the stipulated average weekly wage of \$248.35. Additionally, the administrative law judge awarded claimant \$3,000 for funeral expenses pursuant to Section 9(a), 33 U.S.C. §909(a). On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance.

Employer asserts that the administrative law judge erred by declining to apply Section 33(g) to the instant claim to bar claimant's entitlement to death benefits, as she consummated an unapproved third-party settlement and released that third-party defendant from any further claims or causes of action. Employer avers that the administrative law judge erroneously relied on the Board's decision in *Yates* in holding that claimant was not a "person entitled to compensation" under Section 33(g).

The Board's decision in *Yates* was affirmed by the United States Court of Appeals for the Fifth Circuit, which held that the right to recovery in a death benefits claim does not vest until the death of the employee and, thus, that claimants in such instances do not become "persons entitled to compensation" for death benefits until that time. Inasmuch as the instant case arises within the appellate jurisdiction of the Fifth Circuit,³ *see* 33 U.S.C. §921(c), the holding in *Yates* is applicable. In this case, it is undisputed that the decedent was alive at the time he and claimant settled the third-party action in question, notably a release instrument executed in favor of Babcock and Wilcox, on or about February 12, 1991, whereby decedent and claimant were jointly paid the sum of \$2,500 in exchange for their agreement to release their claims, including future causes of action, against

²The record reflects that decedent and claimant accepted several third-party settlements as a result of the decedent's exposure to asbestos and that they obtained employer's prior written approval for all but one, which is the subject of the dispute in this case.

³In light of this fact, we reject employer's assertion that the contrary decision of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), is applicable to the instant case. Moreover, we decline to address employer's contention that the Fifth Circuit's holding in *Yates* is wrong. We note that the Supreme Court has granted *certiorari* in *Yates* to resolve the conflict in law between the Fifth and Ninth Circuits, and oral argument in the case is scheduled for November 12, 1996.

Babcock and Wilcox. *See* Employer's Brief in Support of Petition for Review at 2 (unpaginated). Pursuant to *Yates*, claimant's right to death benefits did not vest until May 14, 1993, the date upon which decedent passed away. Thus, as the present claimant's right to death benefits had not vested when the pre-death settlement in question was made, her failure to obtain employer's written approval of the pre-death settlement does not bar her claim for death benefits. *Yates*, 65 F.3d at 460, 29 BRBS at 113 (CRT). We therefore reject employer's contentions and affirm the administrative law judge's determination that Section 33(g)(1) does not bar claimant's claim for death benefits. Consequently, we affirm the administrative law judge's Decision and Order Awarding Benefits as it is in accordance with applicable law.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge