TOPIC 33 COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

33.1 SECTION 33(a): CLAIMANT'S ABILITY TO BRING SUIT AGAINST A POTENTIALLY NEGLIGENT THIRD PARTY

An employee who may have a claim for damages against a third party (other than his employer) is not required to elect between receiving compensation from his employer (who is required to pay regardless of fault) and commencing a negligence action against the third party. He may pursue both remedies. 33 U.S.C. § 933(a). Specifically, Section 33(a) of the LHWCA provides:

> **If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.**

33 U.S.C. § 933(a).

Section 33(a) works in conjunction with Section 5. Section 5(a) of the LHWCA provides in part that:

> **The liability of an employer ... shall be exclusive and in place of all other liability of such employer to the employee ..., except that if an employer fails to secure payment of compensation ... an injured employee ... may elect ... to maintain an action at law or in admiralty for damages....**

33 U.S.C. § 905(a). See also Reichert v. Chemical Carriers, Inc., 794 F.2d 1557 (**11th Cir.** 1986). When Section 33 of the LHWCA was first enacted, Section 33(a) provided that a claimant could elect between receiving compensation under the LHWCA, or recovering damages in a civil suit against a third person. Mills v. Marine Repair Serv., 22 BRBS 335, 337 (1989).

There is some confusion as to whether there was an election required under the original 33(a). In Mills, 22 BRBS at 335, the Board cited to the **United States Supreme Court's** decision in Chapman v. Hoage, 296 **U.S.** 526 (1936), as holding that abandonment of a third-party action did not prejudice the employer so as to discharge the employer's liability. Chapman had been injured in a collision with a streetcar during his employment as a helper on a delivery van. Chapman then filed suit against the owner of the streetcar.

When the suit against the streetcar owner was later discontinued, Chapman filed for compensation. Compensation was denied on the basis of the prejudice caused to the employer as a result of Chapman's failure to pursue to final judgment the remedy against the third party. Mills, 22 BRBS at 334. The **Supreme Court** in Chapman, however, emphasized that "election [of pursuing a remedy against a third party] does not deprive [the employee] of his right to compensation." Chapman, 296 **U.S.** at 526 (citing American Lumberman's Mut. Casualty Co. v. Lowe, 70 F.2d 616 (**2d Cir.** 1934)); but see Mills, 22 BRBS at 337.

The **Supreme Court** erased the election of remedies prior to Congress doing so in 1959. Mills, 22 BRBS at 338 (citing Pub. L. No. 86-171, 73 Stat. 391 (1959)). The Board saw the 1959 Amendments as eliminating the statutory basis for the **Supreme Court's** holding in Chapman that a claimant must prosecute a third-party action in a manner not prejudicial to the employer's right of subrogation. Id. at 339 (holding that the claimant's failure to pursue a third-party malpractice case to final judgment may not bar the claimant's right to compensation under the LHWCA, unless employer establishes that claimant's failure prejudiced the employer or the carrier's right of subrogation).

One must compare Chapman, however, with Seas Shipping Co. v. Sieracki, 328 **U.S.** 85 (1946). In Sieracki, the **Supreme Court** specifically stated that the stevedore makes an election between proceeding against a third party and receiving compensation under Section 33(a). Sieracki, 328 **U.S.** at 101. As the Sieracki decision came after the Chapman decision, it is possible that the Board's reliance on Chapman in the Mills case was misplaced.

The **Third Circuit** has recently applied Sieracki in Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935 (**3d Cir.** 1990), cert. denied, 498 **U.S.** 1067 (1991). The **Third Circuit** relied on Sieracki for the proposition that "an injured longshoreman could both obtain a no fault LHWCA compensation award from his employer and pursue a strict liability unseaworthiness award against the vessel upon which he was injured." Id. at 947. The **Third Circuit** made no reference, however, to the longshoreman making an election, and implied that Sieracki reduced the importance of the LHWCA in compensating the injuries of longshoremen, thus lessening the exclusivity of the LHWCA. Id.

Nonetheless, Chapman and Sieracki came to the same result: once an election to pursue a third-party remedy is made, an employer is given the right of subrogation where a third party has been held liable after the employee has accepted compensation. Compare Chapman, 296 **U.S.** at 526, and Sieracki, 328 **U.S.** 85; see also The Etna, 138 F.2d 37, 40 (**3d Cir.** 1943).

By establishing the right of subrogation, the courts eliminated the problem of double recovery by claimants. The need to make an election is therefore alleviated. See Jones & Laughlin Steel Corp. v. Pfeiffer, 462 **U.S.** 523 (1983) (stating that an employer who has paid LHWCA benefits has a lien against any tort recovery from third parties in the amount of the benefits paid); Taylor v. Bunge Corp., 845 F.2d 1323, 1326 (**5th Cir.** 1988); The Etna, 138 F.2d at 40.

In the present context, Section 33(a) provides that a claimant may file suit against a third party who is potentially liable for damages "on account of a disability or death for which compensation is payable under this chapter in addition to [his] claim for benefits under the Act." Treto v. Great Lakes Dredge & Dock Co., 26 BRBS 193 (1993) (citing Castorina v. Lykes Bros. Steamship Co., Inc., 24 BRBS 193 (1991)); see also Estate of Cowart v. Nicklos Drilling Co., 505 **U.S.** 469 (1992) (Blackmun, J., dissenting).

If recovery is obtained from a third party, then the employer is entitled to offset its liability under the LHWCA against such recovery pursuant to 33 U.S.C. § 933(f). I.T.O. Corp. of Baltimore v. Sellman, 954 F.2d 239, 241, vacated in part, adhered to in part on reh'g, reh'g en banc denied, 967 F.2d 971 (**4th Cir.** 1992), cert. denied, 507 **U.S.** 984 (1993); Speaks v. Trikora Lloyd P.T., 838 F.2d 1436 (**5th Cir.** 1988); Chavez v. Todd Shipyards Corp., 27 BRBS 80 (1993), see 24 BRBS 71, aff'd in part, rev'd in part, 961 F.2d 1409 (**9th Cir.** 1992), 25 BRBS 134 (CRT) (Employer is entitled to lien for benefits paid.).

Although Section 33(a) provides that the LHWCA does not limit an injured worker's right to sue a third party, it does not create or establish the third party's negligence. See Vega-Mena v. United States, 990 F.2d 684, 691 (**1st Cir.** 1993); see also Goody v. Thames Valley Steel Corp., 25 BRBS 165 (ALJ) (1991). The ability to sue a potentially negligent third party, however, stops short of allowing one to sue the United States or the employer for civil remedies if the injury is covered under the LHWCA. Vilanova v. United States, 851 F.2d 1, 4 (**1st Cir.** 1988), cert. denied, 488 **U.S.** 1016 (1989).

Also, **Section 33(a) specifically refers not to an injury, but to suits resulting from disability for which compensation is payable under the LHWCA.** Uglesich v. Stevedoring Servs. of America, 24 BRBS 180 (1991) (citing O'Berry v. Jacksonville Shipyards, 22 BRBS 430 (1989)). Although Section 33(a) confers the advantage of not requiring an election of remedies, Section 33 does not apply in a case involving successive injuries covered under the LHWCA where a settlement of a compensation claim for one injury is reached with another longshore employer. Uglesich, 24 BRBS at 185. See United Brands Co. v. Melson, 594 F.2d 1068 (**5th Cir.** 1979) (holding in part that Section 33 was not applicable because the case did not involve a third party who caused an injury to an employee which arose during the employee's work for a covered employer); see also Castorina, 21 BRBS at 136.

[ED. NOTE: Query: *If a claimant does not suffer a disability, does the claimant need to make an election of remedies? At what point is one considered to have a disability which would allow for both longshore benefits and a third-party suit?*

*In practical measures, this section is merely the expression of the general proposition that the claimant has the ability to sue a third party without fearing that this alone will bar the claimant's rights to longshore benefits. Likewise, the employer has the right through subrogation to the return of any compensation already paid.**]***

In Goody v. Thomas Valley Steel Corp., 28 BRBS 167 (1994), a case involving **two separate LHWCA employers**, the Board remanded the case to determine whether the evidence supported a finding that there were **two separate and distinct injuries**, although the judge had determined that the **claim was for pulmonary injury and impairment**. The claimant had been employed, first by Electric Boat where he was exposed to asbestos, and then by Thames Valley Steel (TVS) where he was not exposed to asbestos, but rather, to welding smoke, grinding dust and paint fumes. Claims were filed under the LHWCA against both employers for a "pulmonary disability" and loss of hearing. This was followed by a third-party suit against the asbestos manufacturers and ultimate settlement after obtaining the approval of Electric Boat. One Board member, Judge McGranery, dissented from the remand and opined that Section 33(g)(1) could not bar the instant claim against the employer since the claims involved two separate and distinct injuries: asbestosis, a restrictive impairment resulting from asbestos exposure, and chronic obstructive pulmonary disease (COPD), an obstructive lung disease attributable to various lung irritants.

The Decision and Order - On Remand Awarding Benefits (90-LHC-2333) of the ALJ was appealed by TVS. The second time Goody was before the Board, TVS argued that, pursuant to Cowart, since claimant is a "person entitled to compensation," under the LHWCA, his claim for benefits against TVS must be barred pursuant to Section 33(g)(1). Goody, 31 BRBS 29 (1997). The Board, however, disagreed. In Cowart, the Court was not presented with the situation where the claimant suffered two separate injuries as a result of distinct exposures with two employers. In the instant case, whether claimant was a "person entitled to compensation" does not resolve the issue in dispute. The Board continued:

> Indeed, claimant, having been exposed to asbestos form 1953 to 1970, diagnosed with asbestosis and chronic obstructive pulmonary disease, and disabled since 1986, was a "person entitled to compensation" under Cowart and Yates at the time he settled his third-party suits in 1990. Thus, in the instant case, claimant did not comply with Section 33(g)(1) by obtaining written consent of his third-party settlements from Electric Boat, the employer that exposed him to asbestos. As claimant was not exposed to asbestos at employer's facility, the Court's holding in Cowart does not require that claimant also must obtain employer's written consent, and is this of no aid to employer.

Id.

The provisions of Section 33 apply where a third party is liable in damages for the same disability or death for which compensation is sought. Id. However, the fact that TVS is liable for the claimant's entire disability under the aggravation rule is not controlling where claimant suffers from a separate and distinct injury caused by his employment with Electric Boat, as the third parties are not potentially liable to both the claimant and TVS. Id.

[ED. NOTE: Query: *If Section 33(g) only applies in cases where an employee is injured by a third person during the course of his employment and is limited to the situation in which the third party is potentially responsible to both the claimant and the employer, why was this case remanded? In the instant case, the third parties, i.e., the asbestos manufacturers with whom the claimant entered into settlements, have no potential responsibility to TVS because they never sold asbestos to it, nor does TVS contend that it exposed claimant to asbestos.*

Query: *Should it make a difference that employer TVS is liable for all disability sustained by the claimant, even that which could be caused by his exposure with Electric Boat? (If the circumstances of a claimant's employment cause an injury that aggravates, accelerates or combines with an underlying condition, the entire resultant disability is compensable. See generally Independent Stevedore Co., v. O'Leary, 357 F.2d 812 (**9th Cir.** 1966); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989). See also Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (**2d Cir.**) cert. denied, 350 **U.S.** 913 (1955)).*

Query: *What if the asbestos was responsible for 90 percent of claimant's disability but claimant settled with the asbestos manufacturers/suppliers for a pittance?**]***

An employer is entitled to a Section 33(f) credit only when a claimant receives some form of compensation based upon the injury for which the employer would be liable under the LHWCA. Chavez v. Todd Shipyards Corp., 27 BRBS 80 (1993), aff'd on recon. en banc 28 BRBS 185 (1994), aff'd 139 F.3d 1309 (**9th Cir.** 1998). In Chavez, there were **two potentially work-related disabling conditions**, and the claimant filed suit against a third-party due to one of those conditions. The claimant received a LHWCA disability award for a combination of hypertension and work-related asbestosis. Pursuant to Section 33(a), the claimant sued third-parties for the disability caused by asbestosis. The Board held that if only the claimant's asbestosis is work-related, then the employer may offset its liability against the entire net recovery from third-party litigation. Chavez, 27 BRBS at 87. According to the Board, if the claimant's hypertension alone, or if both the hypertension and asbestosis are work-related, then the employer is not entitled to offset its liability under Section 33(f) because the claimant could have sought benefits for the hypertension alone and received permanent total disability based on the aggravation rule. Id.

Compare this with Sandridge v. Bethlehem Steel, 27 BRBS 579 (ALJ) (1993) (two respiratory injuries but one disability so unapproved settlement as to one third-party injury creates a Section 33(g) bar as to the disability) and O'Berry v. Jacksonsille Shipyards, Inc. (O'Berry I), 21 BRBS 355 (1988), on recons., 22 BRBS 430 (1989) (O'Berry II). In Sandridge, the decedent was found to have suffered from arc welder's pneumoconiosis. The claimant had entered into unauthorized third-party settlements for the decedent's alleged asbestosis, which the decedent was found not too have had. The judge barred the claim, citing O'Berry v. Jacksonville Shipyards, Inc. (O'Berry I), 21 BRBS 355 (1988), wherein the Board had declined to recognize any distinction between arc welder's pneumoconiosis and asbestosis when applying Section 33(g). The judge noted that the claimant's argument had a logical appeal, and that the medical experts of record distinguished arc welder's pneumoconiosis from asbestosis but felt his decision was controlled by

the Board's prior holding. In O'Berry I, 21 BRBS 355 (1988), the Board noted that Section 33(a) states that a claimant may file suit against a third person who is potentially liable in damages on account of a **disability** or death for which compensation is payable under this Act, in addition to his claim for benefits under the Act. O'Berry I, 21 BRBS at 361. The Board noted that Section 33(a) specifically refers not to injury, but to suits resulting from disability for which compensation is payable under the LHWCA. The Board stated:

> The two claims filed by claimant do relate to the same disability because both asbestosis and siderosis [arc welder's pneumoconiosis] involve occupational lung diseases resulting in respiratory impairment. Thus, because claimant settled third party suits resulting from his respiratory **disability**, **Section 33(g) is at issue with regard to claimant's unresolved siderosis claim.**

Id. (emphasis added).

However, the Board did not use Section 33(g) as a bar here because of historic pre-Cowart loop holes in the statute's implementation. O'Berry I, 21 BRBS at 362. On remand, O'Berry v. Jacksonville Shipyards Inc. (O'Berry II), 22 BRBS 430 (1989), the Board stated:

> Since the Board [in O'Berry I] ultimately concluded that claimant's third-party settlements would not eliminate entitlement to compensation for either the asbestosis or siderosis claim, the Director's assertion that the Board erred in finding that claimant's tort recovery against the third-party asbestos defendants related to the same disability as any disability compensable as a result of siderosis does not affect the result reached by the Board, and any error which may have been made is harmless.
>
> We note, however, that the Director argues that, if claimant's settlements of third-party suits for asbestosis can invoke Section 33(a) with regard to claimant's siderosis claim because Section 33(a) requires only that the tort suit be for the same "disability" for which compensation is payable, then Section 33(f) should apply as well and employer would be entitled to credit the net recovery in the asbestos lawsuit against its compensation liability in the siderosis claim. The Director contends that such a result is not consistent with law. The Directors arguments regarding the effect of the Board's construction of Section 33(a) on Section 33(b) and (f) may have merit. We therefore modify our prior opinion to direct the administrative law judge to consider these arguments in determining what credit, if any, should be allowed for the asbestosis settlements in the event benefits are awarded for siderosis.

22 BRBS at 433.

[ED. NOTE:** What does "Section 33 is at issue" specifically mean?**]

Third-party Malpractice Settlement

In White v. Peterson Boatbuilding Co., 29 BRBS 1 (1995), the Board addressed the issue of whether Section 33(g) applies where a claimant seeks LHWCA benefits for disability due to the primary injury alone, and the **claimant's third-party recovery is solely based on subsequent malpractice**. In White, the claimant injured his back and subsequently sustained incontinence and bladder problems during surgery.

The third-party settlement was solely for the malpractice elements. The judge had noted that the **settlement was not for the same disability**. The Board looked to the states for guidance and held that where compensation is sought only for disability due to the primary injury, and not for subsequent aggravations resulting from medical treatment, and the third-party settlement relates solely to the latter, Section 33 does not apply. White, 29 BRBS 1 at 7-8. Importantly, no claim was being made for aggravation of the claimant's pre-existing back condition.

[ED. NOTE: Query:** Had the malpractice consisted of the aggravating or the worsening of the back condition/disability, would the same result obtain? Look to whether or not the same disability is the subject of both the LHWCA claim and the third party settlement in order to determine if Section 33(g) is applicable.**]

33.2 ASSIGNMENT OF RIGHTS

Section 33(b) of the LHWCA provides:

> **Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such an action shall revert to the person entitled to compensation. For the purposes of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or the Board.**

33 U.S.C. § 933(b).

The historical aspects of Section 33(b) show a gradual refining of the concept of assignment of rights under the LHWCA. Originally, Section 33(a) forced the claimant to elect either to receive compensation, or to proceed against a potentially negligent third party. See Seas Shipping Co. v. Sieracki, 328 **U.S.** 85 (1946). As a result, a claimant's rights to proceed against a third party automatically transferred to the employer at the moment that the claimant received compensation. The payment of compensation did not have to be pursuant to a formal award. See Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037, 1043 (**4th Cir.** 1980); Toomey v. Waterman S.S. Corp., 123 F.2d 718, 721 (**2d Cir.** 1941); Hunt v. Bank Line, Ltd., 35 F.2d 136 (**4th Cir.** 1929).

It should be noted that, although the courts talked of Section 33(b) working in absolutes, certain exceptions began to develop. In Johnsen v. American-Hawaiian Steamship Co., 98 F.2d 847 (**9th Cir.** 1938), the **Ninth Circuit**, based on contract law of fraud and recission, voided the compensation election of a longshoreman. The facts of Johnsen are peculiar, however, and the holding is relatively fact-specific. The claimant operated a winch for American Company and he was injured when the cylinder head of the winch blew out. While the claimant was in the hospital, agents of California Stevedore & Ballast Company represented to him that he was eligible for longshore benefits from their company. They did not tell the claimant that, if he accepted the benefits, it constituted an election under the LHWCA and thus barred a suit against American-Hawaiian Steamship Company.

It was alleged that the agents knew of the claimant's ignorance of the law and intentionally deceived him. Once the claimant realized that an election was made, he rescinded the election and

offered to return all of the compensation to California Stevedore. In the meantime, California Stevedore opted not to pursue the third-party claim. Johnsen, 98 F.2d at 848-49. The court held that, once an employee has made a valid and binding election to accept compensation, he has no further control over the cause of action against the third person whose negligence caused the injury. Id. at 850.

The court saw no binding election, however, where the employee has acted in ignorance of his obligation to make an election, or where no other party's rights have been adversely affected. Id. at 851 (citations omitted).

In 1938, Section 33(b) was amended to provide that an assignment would occur only if the compensation was accepted "under award in a compensation order filed by the deputy commissioner." Caldwell, 618 F.2d at 1044. As a result, longshoremen who did not file a formal election, and who were receiving voluntary payments without an award, were allowed to pursue third-party claims. See American Stevedores v. Porello, 330 **U.S.** 446, 456 (1947); Caldwell, 618 F.2d at 1044.

Even with the 1938 Amendments, however, some problems still surrounded Section 33(b). The major problem involved a fact-pattern where the claimant accepted compensation, the right to pursue a claim transferred to the employer, and the employer failed to prosecute. This failure usually occurred because the employer and the third party were both insured by the same company. The claimants contested the lack of prosecution as the claimant should have received the excess of any recovery after the employer was reimbursed for the amount equal to the expenses incurred in enforcing the right. See Czaplicki v. The Hoegh Silvercloud, 351 **U.S.** 525 (1956); Johnsen, 98 F.2d at 847; Hunt v. Bank Line, Ltd., 35 F.2d 136 (**4th Cir.** 1929).

In Hunt, the **Fourth Circuit** made it clear that:

> As to the provision that the employee who has accepted compensation shall be entitled to any excess over reimbursement, which the employer may recover in his suit against a third person, ... this was not intended to give to the employee who has accepted compensation any right or interest in, or control over, the cause of action which is assigned by the act to the employer. It is the employer ... who is given the right of deciding whether he will hazard the costs and expenses of suit.

Hunt, 35 F.2d at 138. See also Johnsen, 98 F.2d at 850.

The **United States Supreme Court** addressed this fact pattern in Czaplicki. Czaplicki was injured on the stairs of a ship owned by Norwegian Shipping and Trade Mission. The stairs were constructed by Hamilton Marine Contracting Company. The ship was operated by the Kerr Steamship Company and Czaplicki was employed by Northern Dock Corporation. The Travellers

Insurance Company insured both Hamilton and Northern Dock Corporation. Czaplicki elected to receive compensation and, under Section 33(b), his rights to a third-party claim transferred to Northern Dock. Subsequently, Northern's rights to sue were subrogated to Travellers pursuant to Section 33(i). Czaplicki, 351 **U.S.** at 526-27.

The **Court** saw the inherent disadvantage of having the claimant's rights vest in the party who would be most hurt in a third-party suit. Therefore, the **Court** specifically held that "given the conflicts of interest and inaction by the assignee, the employee should not be relegated to any rights he might have against the assignee, but can maintain the third-party action himself." Id. at 950.

The **Court** did note, however, that the insurance company is to be made party to the suit and is entitled to reimbursement for amounts already paid out pursuant to Section 33(e). Id. The **Court's** rationale behind the holding was that allowing the claimant to be in a situation where there is a conflict of interest was the only means of protecting the claimant's statutory right to receive the excess award, if any. Id.

The Czaplicki decision spurred Congress to correct some of the inherent problems in situations where the employer does not follow through on suing the third party. In the 1959 Amendments, Congress ended the requirement that the claimant need elect a remedy. See Pub. L. No. 86-171, 73 Stat. 391 (1959). Instead, the subrogation rights of the employer with respect to the employee's third-party claim were delayed by six months. This delay gave the claimant six months in which to sue the third party himself. After the six months, the right to sue a third party was transferred to the employer.

In order to entice the employer to exercise the third-party suit rights after the six-month time period for the claimant to sue had elapsed, Section 33(e) was amended to allow an employer to retain one-fifth of the net proceeds of a successful third-party action. See Pallas Shipping Agency v. Duris, 461 **U.S.** 529, 537 n.5 (1983) (citing S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959), and H.R. Rep. No. 229, 86th Cong., 1st Sess. (1959)); Rodriguez v. Compass Shipping Co., 451 **U.S.** 596, 610 (1981); Bloomer v. Liberty Mut. Ins. Co., 445 **U.S.** 74, 80 (1980).

The problem that developed post-Czaplicki was that the circuits became split on the issue of when there was a conflict of interest which would allow the claimant to sue a third party after the six-month period had expired. In Johnson v. Sword Line, 257 F.2d 541 (**3d Cir.** 1958), the **Third Circuit** established a presumption of a conflict whenever the assignee of the right failed to pursue the claim, unless the claim was lacking. See also Potomac Elec. Power Co. v. Wynn, 343 F.2d 295 (**D.C. Cir.** 1964) (holding that the 1959 Amendments support the view that the employee may bring suit against a third party whenever it is evident that the employer-assignee, for whatever reason, does not intend to bring the suit). This rationale allowed claimants to circumvent the six-month statutory assignment. See also Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037 (**4th Cir.** 1980); Albert v. Paulo, 552 F.2d 1139 (**5th Cir.** 1977).

Section 33(b) was not amended in 1972. In Rodriguez v. Compass Shipping Ltd., 451 **U.S.** 596 (1981), the **United States Supreme Court** addressed the issue of whether a longshoreman may prosecute a personal injury action against a negligent shipowner after the right to recover damages has been assigned to the employer by operation of Section 33(b). 451 **U.S.** at 598. The **Court** held that the statutory language is unequivocal that acceptance of an award shall operate as an assignment. The only two conditions precedent to the assignment are the acceptance of compensation pursuant to an award and the passage of six months. 431 **U.S.** at 602-03.

Once the assignment is made, then there is nothing in the 1959 Amendments to preserve the employee's right to commence a third-party suit after the six-month period. The employer maintains complete control. 431 **U.S.** at 611-12. It should be noted that the **Court** did not overrule Czaplicki and did not address the issue of Czaplicki's continued validity. 431 **U.S.** 617-18. It appears that, at a maximum, the **Court** left Czaplicki to its "peculiar facts."

Cases subsequent to Rodriguez, however, have held that once the assignment is made, it is the employer's right to do as it pleases. The **Court** has never addressed the level of conflict of interest an employer must have. For examples of post-Rodriguez decisions dealing with the six-month assignment period, see Johnson v. Bechtel Associates Professional Corp., 717 F.2d 574 (**D.C. Cir.** 1983), rev'd sub nom. Washington Metro. Area Transit Auth. v. Johnson, 467 **U.S.** 925 (1984); Del Re v. Prudential Lines, Inc., 669 F.2d 93 (**2d Cir.**), cert. denied, 459 **U.S.** 836 (1982) (holding that Federal Rule of Civil Procedure 17(a) does not permit circumvention).

Once the avenue for circumventing the six-month assignment period was closed by the **Supreme Court**, the courts turned to what constitutes an award for the running of the six-month time period. In a dissent to a denial of certiorari, Justices White and O'Connor briefly set out the differences occurring in some of the circuits.

The **Fourth Circuit** had held that the period begins whenever an injured employee accepts compensation payments from his employer, even if he does not know at that time what would be the ultimate recovery. Simmons v. Sea-Land Servs., Inc., 676 F.2d 106 (**4th Cir.** 1982), vacated, remanded, 462 **U.S.** 1114 (1982).

The **Second Circuit** had held that the period begins only when the total amount of compensation benefits to be received by the injured employee is fixed by order, stipulation, or formal award. D'Amico v. Cia de Navigation Maritime Netumar, 677 F.2d 249 (**2d Cir.** 1982); Verderame v. Torm Lines, 670 F.2d 5, 7 (**2d Cir.** 1982).

The **Supreme Court** finally dealt with the issue of what constitutes an award in Pallas Shipping Agency v. Duris, 461 **U.S.** 529 (1983). In that case, petitioner argued that if an employee receives voluntary compensation in addition to filing forms with the Department of Labor, the employee has received an award. Relying on Section 919(e) of the LHWCA, the **Court** noted that the term "compensation order" in the LHWCA "refers specifically to an administrative award of compensation following a proceeding with respect to the claims." 461 **U.S.** at 534. As such, a memo

of informal conference was not an award and, therefore, not an assignment. See Costa v. Danais Shipping Co., 714 F.2d 1 (**3d Cir.** 1983). But see Brunetti v. Cape Canaveral Shipping Co., S.A., 572 F. Supp. 854 (**S.D.N.Y.** 1983).

A second problem under Section 33(b) developed in the area of identifying who was the "employer" to which the assignment right was given. In Washington Metropolitan Area Transit Authority v. Johnson, 467 **U.S.** 925 (1984), the **Court** stated that if an employer was making voluntary compensation payments, it was Congress' intent that the employer benefit from Section 33(b). Also, it is difficult to grant an assignment to an actual employer who may never have secured compensation insurance. Id. at 935.

In 1984, Section 33(b) was amended once more. This time, Congress added the following clause:

> **If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For purposes of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or the Board.**

33 U.S.C. § 933(b). This clause alleviates the harsh, absolute results of the Rodriguez decision. For **current Section 33(b) claims**, if there is a conflict of interest between an employer and the potentially liable third party, the employee will be able to proceed if the employer does not commence an action.

The **Fifth Circuit** has addressed the 1984 version of Section 33(b). In Newkirk v. Keyes Offshore, 782 F.2d 499 (**5th Cir.** 1986), an employee entered into a settlement with his employer following an incident involving his head and shoulders. A formal compensation order was then entered by the deputy commissioner; however, the order made no mention of the claimant's shoulder injury. Thirteen months later, the employee initiated a suit against the employer for his shoulder injury.

The **Fifth Circuit** held that Section 33(b) does not authorize partial assignment of an employee's claim arising out of an accident. Id. at 502. See Rodriguez, 451 **U.S.** at 603 (the statute explicitly states that the statutory assignment encompasses "all rights of the employee to recover damages. ... These words preclude the possibility that the assignment is only a partial one that does not entirely divest the employee of his right to sue...").

In Peters v. North River Ins. Co. of Morristown, NJ, 764 F.2d 306 (**5th Cir.** 1982), the **Fifth Circuit** concluded that a worker and a third-party tortfeasor may not settle their dispute independently of the employer's compensation lien. Id. at 321. The court stated that "33(b) leaves

little room for doubt: For purposes of prosecuting the claim, the worker's cause of action, although the employer has an interest in the outcome, remains a single, unitary cause of action which ... may be asserted by either the worker, or the employer, but not both." Id. at 317. This interpretation suggests that the party not asserting the claim is left out.

At least one ALJ has found that a "bad faith" settlement for $750,000, was not subject to the employer's right of subrogation under the LHWCA. Casciani v. St. John's Shipyard, 35 BRBS 583 (ALJ)(2001). In Casciani, the third-party tortfeasor stalled in finalizing a third-party settlement, causing the claimant to take further action. Eventually the third-party carrier settled the "bad faith" claim and the LHWCA employer argued that this constituted a punitive damage award, the proceeds of which are subject to the employer's right of subrogation under the LHWCA.

In finding that the employer is not entitled to subrogation, the ALJ noted that the recovery the employer wanted to attach was not payable by the third-party's carrier "for the covered occupational injury or death" but rather by the third-party's carrier pursuant to a cause of action arising out of its handling of the claim, *not* the underlying basis for the claim. The ALJ found that, while the LHWCA does not distinguish between different categories of damages arising from a covered injury, the employer cited no court or Board decisions holding it improper to distinguish damages which arise out of two distinct suits under circumstances in which one cause emanates from non-covered activity. The third-party carrier's alleged actions themselves gave rise to the bad faith suit apart from any negligence by the client it insured. The damages arose as a result of any bad faith by the third-party's carrier and thus arose separate from, and long after, the circumstances which caused the death of the claimant's husband.

33.3 SECTION 44 PAYMENT OPERATES AS ASSIGNMENT

Section 33(c) of the LHWCA provides:

> **The payment in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.**

33 U.S.C. § 933(c).

Section 33(c) "provides ... for the transfer to the employer of 'all rights of the legal representative' of the deceased employee to recover in wrongful death, where the [district director] determines that there is no person under the Compensation Act entitled to compensation and the employer makes the payment of [$5,000] into the special compensation fund, as prescribed by Section 44..." Doleman v. Levine, 295 **U.S.** 221, 224 (1935). For a later application of Section 33(c), see Christensen v. United States, 194 F.2d 978 (**2d Cir.** 1952).

There is no controversy surrounding Section 33(c). It operates similarly to Section 33(b), except that 33(c) deals with a deceased employee who is not survived by a person entitled to compensation. The $5,000 payment to the Special Fund acts as the award. At this point, the rights which resided in the deceased's claim are now assigned to the employer.

33.4 ASSIGNMENT EQUALS THIRD PARTY CONTROL

Section 33(d) of the LHWCA provides:

> **Such Employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings.**

33 U.S.C. § 933(d).

Section 33(d) gives the employer control over the third-party action in order to recover compensation already paid, and not necessarily to recover the excess amount for the person receiving compensation. See Section 33(b), supra.

Section 33(d) claims usually arise within wrongful death actions. In Doleman v. Levine, 73 F.2d 842 (**D.C. Cir.** 1934), rev'd, 295 **U.S.** 221 (1935), a power company worker was killed when he was hit by a car as he was exiting a manhole. The widow elected to receive compensation while the father, who was also the administrator of the estate, initiated a wrongful death action. Based on Section 33(d), the power company also initiated a wrongful death claim. The **District of Columbia Circuit** concluded that Congress intended to vest an actionable assignment in the employer, even when the claimant dies. They analogized a wrongful death claim to a regular worker's compensation claim where the employer is required to make specific payments.

The **District of Columbia Circuit** based this result on the **United States Supreme Court's** holding in Aetna Life Insurance Co. v. Moses, 287 **U.S.** 530 (1933). In Moses, the **Court** stated that "the employer, in the case of the wrongful death of his employee, would take nothing by the assignment which it purports to effect, since the person entitled to compensation has no right to recover for the death. But Section 33(d) authorizes for the employer to institute suit or to compromise the claim..." Id. at 539. The **Court** continued:

> [W]e see no escape from the conclusion that the employer is to have the same control over the institution of an action for wrongful death, the compromise and settlement of the claim, and the distribution of the proceeds, as he is given unambiguous language in the case where the injury results only in disability. What is made explicit by the statute with respect to the latter is implicit with respect to the former.

Id. at 539-40.

In Doleman v. Levine, 295 **U.S.** 221 (1935), the **Court** reversed the **District of Columbia Circuit**. Relying on the construction of Section 33 as a whole, the **Court** held that "where the right assigned to the employer is to receive a part only of the proceeds of recovery for the wrongful death,

the language falls short of conferring upon him authority to compromise or sue upon claims which 'such assignment' does not operate to transfer." 295 **U.S.** at 226-27.

The **Court** viewed Section 33(d) as permissive, allowing an employer to sue even if there was only an injury. This interpretation would nullify the function of Section 33(b). See also United States v. Hill, 171 F.2d 404, 408 n.4 (**5th Cir.** 1948), modified, 174 F.2d 61 (**5th Cir.** 1949) (stating that "Doleman ... held that where the indemnitor had a right to only a part of the recovery, he could not sue in his own name and thus split the cause of action. He is in the position of a partial assignee of the chose of action, and as such is entitled to his share of the proceeds of the action when recovered by a resort to equity"); Moore v. Hechinger, 127 F.2d 746, 749 (**D.C. Cir.** 1942).

It was argued that Doleman was overruled *sub silentio* in United States v. Aetna Casualty & Surety Co., 338 **U.S.** 366 (1949). Aetna Casualty stated that in cases of partial subrogation, the insurer or insured may sue, as each owned a portion. This conclusion was based on the fact that the defendant may join both as a necessary party. Liberty Mut. Ins. Co. v. United States, 290 F.2d 257, 260 (**2d Cir.** 1961).

33.5 DISTRIBUTION OF AMOUNT RECOVERED

Section 33(e) of the LHWCA provides:

> **Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:**
>
> **(1) The employer shall retain an amount equal to**
>
> **(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);**
>
> **(B) the cost of all benefits actually furnished by him to the employee under Section 7;**
>
> **(C) all amounts paid as compensation;**
>
> **(D) the present value of all amounts thereafter payable as compensation, such present value to be computed as in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished by section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the costs of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative.**
>
> **(2) The employer shall pay any excess to the person entitled to compensation or to the representative.**

33 U.S.C. § 933(e).

[ED. NOTE: *Section 33(e), unlike Section 33(f), speaks in terms of "present value." Section 33(e)'s "trust fund" mechanism imposes the risk of a reasonable return and of failed actuarial expectations on compensation insurers who are in the business of undertaking such risks and are able to spread them across many cases. For an example of a Section 33(f) case where both the Board and the* ***Fifth Circuit*** *rejected the "present value" approach in Section 33(f), see Maples v. Textports Stevedores Co., 23 BRBS 302, aff'd sub nom. Textports Stevedores Co. v. Director, OWCP, 931 F.2d 331, 28 BRBS 1 (CRT) (****5th*** ***Cir.*** *1991).****]***

Section 33(e) provides for distribution of the proceeds where the employer brings a successful third-party action pursuant to Section 33(b). See Taylor v. Bunge Corp., 845 F.2d 1323, 1326 n.13 (**5th Cir.** 1988). The purpose of Section 33(e) was to protect the employer's right of subrogation, thus preventing the longshore employee from receiving a double recovery. See, e.g., Jones & Laughlin Steel Corp. v. Pfeiffer, 462 **U.S.** 523, 530 n.5 (1983).

The LHWCA also needed, however, to grant the employee the ability to sue in tort for negligence. See Mitchell v. Scheepvaart Matschappij Trans-Ocean, 579 F.2d 1274 (**5th Cir.** 1978); 33 U.S.C. § 933(a). This need was met by granting the employer a 20 percent bounty on the remaining funds after distribution when the employee's right to pursue a third party had vested with the employer.

Pre-1984 Amendments

The distribution in Section 33(e) prior to the 1984 Amendments was articulated by the **Supreme Court** in Bloomer v. Liberty Mutual Insurance Co., 445 **U.S.** 74 (1980):

> The Act makes explicit provisions for the distribution of any amount obtained by the [employer] in a suit brought pursuant to that assignment. The [employer] is entitled to reimbursement of all compensation paid to the employee, and its costs, including attorney fees. Of the remainder, four-fifths is distributed to the longshoreman, and one-fifth "shall belong to the employer."

Id. at 927-28 (citing 33 U.S.C. § 933(e)).

Although the distribution appears to be a simple formula, Section 33(e) does not always fit the various fact-patterns, such as when a recovery is not large enough to fit the distribution pattern, or when a longshore worker exercises the right to sue a third person after having received compensation payments.

In Caldwell v. Odgen Sea Transport, Inc., 618 F.2d 1037 (**4th Cir.** 1980), the **Fourth Circuit** stated that the 1954 and 1972 Amendments gave the employer an incentive to sue. When the employee did not sue within six months, the right was turned over to the employer. The employer was given a 20 percent "bounty" to pursue the claim. Once this right reverted to the employer, it did not revert back to the claimant. This scheme was subsequently altered by the 1984 Amendments, which allowed the right to pursue a third-party claim to revert back to the employee if the employer did not exercise the right within the ninety days. See 33 U.S.C. § 933(b); see also Rodriguez v. Compass Shipping Co., 451 **U.S.** 596 (1981).

A problem arose when an employee opted to sue a third person prior to the employer's rights in the third-party suit vesting. If the claimant were successful, the employer would be entitled to an

offset pursuant to Section 33(f), no matter how the claimant's attorney recovered the money. In Nacirema Operating Co., Inc. v. Oosting, 456 F.2d 956 (**4th Cir.**), cert. denied, 409 **U.S.** 980 (1972), the **Fourth Circuit** held that, although Section 33(e) does not provide for the claimant's legal expenses, an employee's reasonable attorney fees and expenses must be deducted from the recovery.

In such third-party suits, the **Fifth Circuit** recognized a right of subrogation by the employer to the extent that payments were made, thus allowing the employer to intervene in the claimant's third-party suit. See Allen v. Texaco, Inc., 510 F.2d 977 (**5th Cir.** 1975) (citations omitted). "Absent a waiver of this subrogation, the effect of the settlement terms ... is simply to transfer the obligation automatically to reimburse the employer from the worker to the third party." Taylor v. Bunge Corp., 843 F.2d 498 (**5th Cir.**) (unpublished), cert. denied, 488 **U.S.** 910 (1988); see also Allen, 510 F.2d at 977.

A waiver of the subrogation rights may bar a lien against, and participation in, the proceeds of a settlement between the employee and the third party. LeBlanc v. Petco, Inc., 647 F.2d 617, 620 (**5th Cir.**), cert. denied, 454 **U.S.** 1085 (1981); Allen, 510 F.2d at 977.

In cases where the recovery in the third-party settlement is enough to permit the attorney's fee to be subtracted entirely from the longshore recovery, the employer was still obligated to pay some of the longshore employee's attorney fees. This obligation was due to the fact that the employer had benefitted by the employee's recovery. See Mitchell, 599 F.2d at 1276-77.

The **Ninth Circuit** adopted a "pro-rata" rule rather than a "fund" rule. See Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (**9th Cir.** 1979), vac'd, 451 **U.S.** 978 (1981). Under a **pro-rata rule** the stevedore/employer is taxed with a proportionate share of the reasonable fee of the longshore employee's attorney. Under the **fund rule**, attorney fees come off the top of the recovery, then the lien is paid in full and the injured party receives the residue.

In Bloomer v. Liberty Mutual Insurance Co., 445 **U.S.** 74, 75 (1980), the **Supreme Court** was faced with the question of whether a stevedore's lien must be reduced by a proportionate share of the longshoreman's expenses in obtaining recovery from the shipowner, or whether the stevedore is entitled to be reimbursed for the full amount of the compensation.

The **Supreme Court** needed to reconcile differing formulations of Section 33(e) among the circuits. The **Ninth** and **Fourth Circuits** had held that the employer should bear part of the legal expenses of the employee. The **First** and **Second Circuits** had determined that the employer should not bear any of the costs. Finally, the **Fifth Circuit** had held that liability for legal expenses should be determined on a case-by-case basis. 445 **U.S.** at 77 n.3 (citing Bachtel v. Mammoth Bulk Carriers, 605 F.2d 438 (**9th Cir.** 1979); Swift v. Bolten, 517 F.2d 368 (**4th Cir.** 1975); Cella v. Partenreederei MS Ravenna, 529 F.2d 15 (**1st Cir.** 1975), cert. denied, 425 **U.S.** 975 (1976); Mitchell, 599 F.2d 1274).

The **Court** determined that the claimant's attorney's fee cannot be extracted from the

employer's lien on claimant's third-party recovery. The **Court** noted that the LHWCA does not make provisions for the employee to pay a portion of the employer's legal fees, even though the employee is due to receive 80 percent of the remainder after the formula in Section 33(e) has been satisfied. Bloomer, 445 **U.S.** at 80-85.

The post-Bloomer cases dealt with the application of Bloomer to situations where the recovery was insufficient to cover both the attorney fee and the employer's lien. In Incorvaia v. Hellenic Lines, 668 F.2d 650 (**2d Cir.** 1982), cert. denied, 459 **U.S.** 967 (1982), the **Second Circuit** held that a reasonable attorney fee is given priority and the employer's lien is taken from the net amount.

The **Seventh Circuit**, in Johnson v. Sioux City & New Orleans Barge Lines, 629 F.2d 1244 (**7th Cir.**), cert. denied, 449 **U.S.** 987 (1980), held that the attorney fee is calculated based on the net remainder after the employer's compensation lien is satisfied. In Ochoa v. Employers National Insurance Co., 724 F.2d 1171 (**5th Cir.**), vacated, remanded, 469 **U.S.** 1082 (1984), on remand, 754 F.2d 1196 (**5th Cir.** 1985), the **Fifth Circuit**, siding with the **Second Circuit**, determined that Congress intended the compensation lien to come out of the net recovery.

The **Second Circuit** questioned whether the employer would sue if the likelihood of recovery were not large enough to cover legal fees and compensation already paid. See Del Re v. Prudential Lines, Inc., 669 F.2d 93 (**2d Cir.**), cert. denied, 459 **U.S.** 836 (1982). Using a "ratification theory," the **Second Circuit** envisions the employer allowing the longshore worker to sue. This view creates a situation where the employer cannot lose: if the longshore worker wins, the employer receives the compensation already paid; if the longshore worker loses, the employer loses nothing. In both cases, the employer does not bear the costs of litigation pursuant to Section 33(e).

Post-1984 Amendments

In 1984, the LHWCA was amended to exclude the 80/20 split in the excess profits on the remainder of the excess after the attorney fee and compensation liens are satisfied. The post-1984 application of Section 33(e) was set forth in Bartholomew v. CNG Producing Co., 862 F.2d 555 (**5th Cir.** 1989). In that case, the **Fifth Circuit** stated:

> First one must determine the net amount of recovery, which is defined under the statute as the total recovery ... minus ... legal expenses incurred. The net amount of recovery is then compared to the amount which was due as compensation. ... If the net amount of recovery exceeds the amount of compensation due to the employee ... the employer is not required to pay anything to the employee and any previous payments by the employer would have to be refunded by the employee from [his] recovery in accordance with 933(e).

Id. at 558. Also, the Bartholomew decision held that, pursuant to Section 33(f), the carrier is not

required to bear a portion of a successful longshore attorney fee. Id. at 556.

An **award of interest by a bankruptcy court** does not conflict with Section 16 or Section 33 of the LHWCA. Hudson v. Puerto Rico Marine, Inc., 27 BRBS 183 (1993). The Board, in Hudson, noted that the employer's lien under Section 33(f) was on the proceeds of the third party settlement. As Section 33(a) refers to third party suits for "damages," no part of the employer's lien or the interest awarded thereon can be considered "compensation" within the meaning of Section 16. Hudson, 27 BRBS at 186. The Board noted that although Section 33(e) does not mention interest, that section is not applicable because it addresses a situation where an award has been issued and the rights of the person entitled to compensation to pursue a remedy for damages against a third party is assigned to the employer under Section 33(b).

33.6 EMPLOYER CREDIT FOR NET RECOVERY BY "PERSON ENTITLED TO COMPENSATION"

[ED. NOTE:** This Section on 33(f) should be used in cooperation with Section 33.7 [which deals with Section 33(g) of the LHWCA]. Most of the jurisprudence dealt with in this section directly addresses Section 33(g) issues as well.**]

Section 33(f) of the LHWCA provides:

> **If the person entitled to compensation institutes proceedings within a period prescribed in Section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorney fees).**

33 U.S.C. § 933(f).

Under both **Sections 3(e) and 33(f)**, the statutory language provides that an employer's offset is limited to the net amount of the recovery from a settlement for the same injury, disability or death which is the subject of the claim under the LHWCA. See Bundens v. J.E. Brenneman Co., 46 F.3d 292, 29 BRBS 52 (CRT) (**3d Cir.** 1995); Lustig v. United States Department of Labor, 881 F.2d 593, 22 BRBS 159 (CRT) (**9th Cir.** 1989). Prior to the enactment of Section 3(e) and amendment to Section 33(f) in 1984, case law provided a net credit to employers. See Ochoa v. Employers National Ins. Co., 724 F.2d 1171 (**5th Cir.** 1984), reaff'd following remand, 754 F.2d 1196, 17 BRBS 49 (CRT) (**5th Cir.** 1985); Puget Sound Bridge & Dry Dock Co. v. O'Leary, 260 F. Supp. 260 (**D.C.Wash.** 1966); Luke v. Petro-Weld, Inc., 14 BRBS 269 (1981); Adams v. Parr Richmond Terminal Co., 2 BRBS 303 (1975). Similarly, Section 14(j) refers to a credit for advance payments of compensation, which contemplates amounts paid to claimant, and the credit doctrine allows a credit for the actual amount of benefits paid. See Director, OWCP v. Bethlehem Steel Corp. (Brown), 868 F.2d 759, 22 BRBS 47 (CRT) (**5th Cir.** 1989). An employer is entitled to credit from third party proceeds only when the injury for which benefits are paid under the LHWCA is the sole and same injury that gives rise to the third party recovery. Todd Shipyards Corp. v. Director, OWCP, 139 F.3d 1309 (**9th Cir.** 1998).

"Under Section 33(f), if the person entitled to compensation institutes proceedings against a **third party**, the employer is entitled to credit the net recovery from the third party settlement against the compensation owed to the claimant under the LHWCA. The net amount is the amount actually recovered minus the expenses reasonably incurred, including attorney fees." Jones v. U.S. Steel Corp., 25 BRBS 355, 356 n.2 (1992); see Jenkins v. Norfolk & Western Railway Co., 30

BRBS 109 (1996) ("Attorney's fees are excluded in calculating the amount of the offset pursuant to Section … 33(f) because, as Claimant was never in receipt of the funds designated as attorney's fees, there is no danger of double recovery for the disability in question") (citing Lustig v. United States Department of Labor, 881 F.2d 593, 595-96, 22 BRBS 159, 161 (CRT) (**9th Cir.** 1989)); see also Banks v. Chicago Grain Trimmers Ass'n, 390 **U.S.** 459 (1968); Taylor v. Plant Shipyards Corp., 30 BRBS 90 (1996) ("Section 33(f) allows the employer to offset only that portion of a third-party settlement attributable to the claimant." (citing Force v. Director, OWCP, 938 F.2d 981, 985, 25 BRBS 13, 18-19 (CRT) (**9th Cir.** 1991)).

According to the **Fifth Circuit**, if the claimant's third party recovery exceeds the amount of compensation due, the employer has no further compensation obligation. Bartholomew v. CNG Producing Co., 862 F.2d 555 (**5th Cir.** 1989).

Only the **Third Circuit** has addressed the issue of what constitutes a **"third person."** In Bundens v. J.E. Brenneman Co., 29 BRBS 52 (CRT) (1995), 46 F.3d 292 (**3d Cir.** 1995), the **Third Circuit** held that when an employer, acting in its capacity as a vessel owner, settles a negligence suit under Section 5(b) (commonly called a **"905(b) action"** in practice), the **employer is considered a third person**. The **Third Circuit** stated that the only meaningful interpretation of Section 33(f) is to treat the employer as a third party whenever the employee recovers funds from the employer in other legal proceedings. The **Third Circuit** stated:

> It seems clear that if an employer is able to offset his liability under the LHWCA with monies previously paid by others under a tort settlement, then there is even stronger reason to allow the employer to offset monies paid in a tort settlement when the employer is the one who previously paid the monies. Under Sec. 33(f), an employer who settles a tort suit as a vessel owner must be construed as a third party. To hold otherwise would create a perverse result: an employer would have to pay a double recovery simply because he is the owner of the vessel, whereas if another party is the owner of the vessel and the employee settles with that third party for a net sum which exceeds the amount to which he is entitled under the LHWCA, the employer would pay nothing.

29 BRBS at 69 (CRT), 46 F.2d at 303.

An employer is entitled to a Section 33(f) credit only when a claimant receives some form of compensation based upon the injury for which the employer would be liable under the LHWCA. Chavez v. Todd Shipyards Corp., 27 BRBS 80 (1993), aff'd on recon. en banc 28 BRBS 185 (1994), aff'd 139 F.3d 1309 (**9th Cir.** 1998).

In Chavez, the claimant received a LHWCA disability award for a combination of hypertension and work-related asbestosis. Pursuant to Section 33(a), the claimant sued third-parties

for the disability caused by asbestosis. The Board held that if only the claimant's asbestosis is work-related, then the employer may offset its liability against the entire net recovery from third-party litigation. Chavez, 27 BRBS at 87. According to the Board, if the claimant's hypertension alone, or if both the hypertension and asbestosis are work-related, then the employer is not entitled to offset its liability under Section 33(f) because the claimant could have sought benefits for the hypertension alone and received permanent total disability based on the aggravation rule. Id.

On reconsideration in Chavez, the Board acknowledged that no case law had been cited which interprets Section 33 where a claimant has **two potentially work-related disabling conditions and files suit against a third-party due to one of those conditions**. Under those circumstances, the Board deferred to the "reasonable interpretation of the Director, who is the administrator of the Act" and affirmed its earlier holding.

[ED. NOTE: *Compare the above with O'Berry v. Jacksonville Shipyards, Inc. (O'Berry I) , 21 BRBS 355 (1988), on recon. (O'Berry II), 22 BRBS 430 (1989), wherein the Board noted that* ***two claims filed by the claimant related to the same disability*** *because both asbestosis and siderosis (arc welder's disease) involve occupational lung disease resulting in respiratory impairment. The Board noted that Section 33(a) specifically refers not to injury but to suits resulting from disability but held that because the claimant was not receiving compensation at the time that he settled third-party suits resulting from his respiratory disability, Section 33(g) was not a bar. See supra, Topic 33.1 for a more thorough discussion of O'Berry.****]***

Judge McGranery strongly dissented, stating that the employer should be entitled to an offset for the entire net amount of the third-party settlements, as the settlements are for the "same disability" for which the claimant received compensation under the LHWCA. She further stated that the fact that the claimant may have another condition, work-related or not, is irrelevant to this inquiry.

Judge McGranery opined that, given the fact that the employer is liable for the entire disability under the aggravation rule, whenever the disability is caused by a combination of disabilities, it makes no sense to deny the employer a credit if both injuries are work-related. She further stated that consistency mandates that the employer is always entitled to a credit for third-party settlements for a work-related injury whether or not that injury combined with another injury to create the compensable disability.

Calculating the Section 33(f) credit

In order to calculate the Section 33(f) credit, one must break down a claimant's recovery to its net amount. This amount is calculated by taking a claimant's total recovery and subtracting the legal expenses incurred by the claimant. This net amount is then compared to the amount which is due as compensation. If the net amount of recovery exceeds the amount of compensation due, then the employer is not required to pay anything to the claimant. Any previous payments by the employer would be refunded from the claimant's recovery. Bartholomew v. CNG Producing Co.,

862 F.2d 555, 22 BRBS 42 (CRT) (**5th Cir.** 1989); see also Naciema Operating Co. v. Oosting, 456 F.2d 956 (**4th Cir.**), cert. denied, 409 **U.S.** 980 (1972); Chavez, 27 BRBS at 81; 33 U.S.C. § 933(e).

If the claimant's third-party recovery is less than what the employer would be required to pay, the employer only pays the difference between the third-party recovery and the compensation, see Inscoe v. Acton Corp., 19 BRBS 97 (1986), provide that the provisions of Section 33(g) are complied with. Regardless of whether the recovery is more than or less than the compensation due, the employer is entitled to set off any net recovery from a third party. Jackson v. Land & Offshore Servs., Inc., 855 F.2d 244, 21 BRBS 163 (CRT) (**5th Cir.** 1988); Treto v. Great Lakes Dredge & Dock Co., 26 BRBS 193 (1993) (employer may waive its lien but this does not prejudice its right to the Section 33(f) offset).

In Henderson v. Ingalls Shipbuilding, Inc., 30 BRBS 150 (1996), the Board, relying upon the **Fifth Circuit's** opinion in Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 65 F.3d 460 (**5th Cir.** 1995) (affirmed by the Supreme Court on February 18, 1997, 519 **U.S.** 248 (1997)), stated that under Section 33(f), **"the employer is entitled to credit only the net amount received from post-death third-party settlements by the non-dependent children."** Id. Moreover, the Board maintained that the employer bears the burden of proof regarding apportionment of third party settlements. First, the Board determined, notwithstanding the fact that "provisions contained in the post-death settlement releases provide a contractual basis for allowing employer to offset the net amount of the recoveries of both claimant and the non-dependent children," that the provisions did "not clearly indicate an intent to grant employer a credit against any larger portion of the settlement amount than would be subject to a compensation lien." Id. Second, "a compensation lien would be imposed on only the settlement proceeds received by the widow inasmuch as she was the only party to the settlement who was entitled to compensation." Id. With regard to pre-death settlements entered into by the claimant and decedent, the Board again cited to the **Fifth Circuit's** Yates decision and found that the claimant's right to death benefits had not, at that time, vested such that she was not "a person entitled to compensation" under the LHWCA for purposes of Section 33(f) and, therefore, employer was not entitled to "an offset against claimant's death benefits for the pre-death settlement recoveries." Id.

In dealing with the Section 33(f) credit, the credit is not limited to the claimant's economic loss. The credit is also applied to such items as pain and suffering and death benefits. The employer's credit also includes payments for any future medical benefits for which the employer would be liable. Inscoe v. Acton Corp., 19 BRBS 97 (1986).

However, contrast this with the situation where a claimant's medical expenses are paid by a third party insurer, but the claimant, nevertheless, has the right to recover these from his employer and, thus, has the right to use the full amount of medical expenses to exhaust his third-party tort recovery credit. Texports Stevedores v. Director, OWCP, 28 BRBS 1 (CRT) (1991), 931 F.2d 331 (**5th Cir.** 1991).

In Texports, the **Fifth Circuit** noted that general workers' compensation law gives little weight to a double recovery argument. See 2A Larson, The Law of Workmen's Compensation § 61.12(l) at 10-852 (1989). The **Fifth Circuit** noted that in Turner v. New Orleans (Gulfwide) Stevedores, 5 BRBS 418, 424-25 (1977), rev'd on other grounds, 661 F.2d 1031 (**5th Cir. Unit A.** 1981), the Board held that although an injured worker receives payment from a self-procured source for injury-related medical expenses, the employee is nevertheless entitled to recover these expenses from the compensation carrier. The **Fifth Circuit** reasoned that although Turner was a Section 7 case in which there was no tort recovery and the employer directly provided medical services, Section 33(f) dictates the same result: "Section 33(f) focuses on what the employer would have had to pay but for the tort recovery.... Those same reimbursed medical expenses should be included in the Section 33(f) computation of credit from...tort recovery....[T]he full amount of ...medical expenses may be used to exhaust...tort recovery credit." Texports, 931 F.2d at 334, 28 BRBS at 4(CRT).

The computation of the Section 33(f) credit is not predicated on discounting accrued compensation to present value. Texports Stevedores v. Director, OWCP, 28 BRBS 1(CRT) (1991). 931 F.2d 331 (**5th Cir.** 1991); Gilliland v. E.J Bartells Co., Inc., 270 F.3d 1259 (**9th Cir.** 2001), upholding, 34 BRBS 21 (2000); Cretan v. Bethlehem Steel Corp., 24 BRBS 35 (1990), aff'd in part and rev'd in part, 1 F.3d 843, 27 BRBS 93 (CRT)(**9th Cir.** 1993), cert denied, 512 **U.S.** 1219 (1994)(Employer was entitled to an offset in the amount of the lump sum payment, plus a "continuing credit" based on the actual payments made each month to the claimant.); Gilliland.

[ED. NOTE: *In Gilliland, the Board noted that although the* ***Ninth Circuit's*** *decision in Cretan was overruled by Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates], 519* ***U.S.*** *248, 31 BRBS 5 (CRT)(1997), neither court addressed the portion of the Board's decision relevant to the value issue. The Board's decision was based on its decision in Maples v. Textports Stevedores Co., 23 BRBS 302, aff'd sub nom. Textports Stevedores Co. v. Director, OWCP, 931 F.2d 331, 28 BRBS 1 (CRT) (****5th Cir.*** *1991). The* ***Ninth Circuit*** *in Gilliand deferred to the Director's method (which supported the employer's position). The* ***Ninth Circuit*** *reasoned that Congress' failure to mandate a present-value computation in Section 33(f) suggests that it did not intend an award of a stream of payments to be discounted to present value.*

*The most compelling reason for not using the present value method of credit is to protect claimants. If the credit is taken only as the money is actually received, the risk for non-payment by the annuity company is placed on the employers and not on the claimants: i.e., if the credit is taken from the purchase price, the employer is free from liability from that point until the credit is expended, whereas, if the credit is taken against each payment, non-payment by the annuity company acts to reinstate the employer's liability sooner. Thus, claimants are protected from risk of loss and there will be no under compensation.****]***

In Texports, the **Fifth Circuit** noted that, unlike Section 33(e), Section 33(f) does not provide for discounting accrued compensation to present value. In fact, the **Fifth Circuit** noted that a present value discount factor was proposed as an amendment to Section 33(f) but was not included in the

final amended version. See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings Before the Subcomm. on Labor and Human Resources, 97th Cong., 1st Sess. at 12 (1981), cited in Texports, 931 F.2d at 333 n. 1, 28 BRBS at 3 n.1 (CRT).

The Statutory distinction between Section 33(e)'s "trust fund" mechanism which imposes the risk of a reasonable return on compensation insurers and the absence of such a feature in Section 33(f) is rational. Section 33(e) places the risks of investment and of failed actuarial expectations upon the workers' compensation insurer which is in the business of undertaking such risks and is able to spread them across many cases. Conversely, the LHWCA, like workers' compensation laws generally, favors periodic payments precisely to avoid having a disabled worker's source of support dependent on managing a lump sum productively. See generally 3 A. Larson, The Law of Workmen's Compensation § 82.72, at 15-1243 (1989).

The **Fifth Circuit** further noted that the consistent administrative practice under the LHWCA has always been to compute deficiency compensation by allowing only a dollar-for-dollar credit. The **Fifth Circuit** noted that, according to the **Supreme Court**, "[c]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 **U.S.** 837, 844 (1984).

33.6.1 "Person Entitled to Compensation" Pursuant to Section 33(f)

Historically, the term "person entitled to compensation" represented **two different interpretations pursuant to Section 33(f) and 33(g)**. (This might still be true. See Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 **U.S.** 248 (1997), discussed infra.) As to Section 33(f), a claimant did not have to be receiving payments at the time the third-party dispute was resolved in order to qualify as a "person entitled to compensation." Armand v. American Marine Corp., 21 BRBS 305 (1988); but see Castorina v. Lykes Bros. Steamship Co., 21 BRBS 136 (1988). This determination that a claimant was a "person entitled to compensation" could be made at any particular time. The **most important aspect** is to determine if the claimant will recover twice from the same injury. See Force v. Director, OWCP, 938 F.2d 981 (**9th Cir.** 1991).

Therefore, if a claimant makes a settlement with a third party two years prior to bringing a claim, assuming no Section 33(g) problems, the employer may nonetheless request a set off. Again, if a claimant enters into a settlement two years after receiving a compensation order, at that point the employer may request a credit and, for Section 33(f) purposes, the claimant has become a "person entitled to compensation."

Compare this reading to that of Section 33(g) prior to Estate of Cowart v. Nicklos Drilling Co., 505 **U.S.** 469 (1992). The Board, for purposes of Section 33(g), had held that "one must be receiving benefits either voluntarily or pursuant to an award" in order to be a "person entitled to compensation." See O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977). Subsequently, the **Supreme Court defined the term "person entitled to compensation"** as a person whose right to

compensation vests upon injury. Cowart, 505 **U.S.** at 477. Importantly, the **Supreme Court**, in Cowart, stated that similar terms must be read the same within the LHWCA and, therefore, Section 33(g) and Section 33(f) must be read similarly. However, the **Ninth Circuit**, as noted below, decided that this standard was *dicta*.

The **Ninth Circuit** dealt with the post-Cowart definition of "person entitled to compensation" in Cretan v. Bethlehem Steel Corp., 1 F.3d 843 (**9th Cir.** 1993), cert. denied, 512 **U.S.** 1219 (1994).

[ED. NOTE:** However, as previously noted, the **Supreme Court** has since **overruled** Cretan. Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates], 519 **U.S.** 248, 31 BRBS 5 (CRT)(1997).**]

In that case, the wife and daughter of the deceased claimant contended that they were not "persons entitled to compensation" pursuant to Cowart. The survivors claimed that when they settled their third-party claim, the claimant was still alive and, therefore, their rights to compensation had not vested. This argument was based on the **Supreme Court's** statement that similar terms must be read the same within the LHWCA and, therefore, Section 33(g) and Section 33(f) must be read similarly. Accordingly, the employer was not entitled to a set off.

The **Ninth Circuit** decided that this statement was *dicta* because it would read out the purpose of Section 33(f). The court opined that the **Supreme Court** had not contemplated this situation when it decided Cowart. As a result, the **Ninth Circuit** upheld Force v. Director, OWCP, 938 F.2d 981 (**9th Cir.** 1991). Therefore, a widow signing third-party settlements while her husband was alive, was a "person entitled to compensation." Id.

Following **Ninth Circuit** precedent, the Board in Force v. Kaiser Aluminum and Chemical Corp., 30 BRBS 128 (1996) reiterated that "an injured employee's spouse and daughter were persons 'entitled to compensation' under both Sections 33(g)(1) and 33(f) of the [LHWCA] … at the time they settled their potential wrongful death actions prior to the death of the employee." Kaiser, 30 BRBS 128 (1996). Thus, Section 33(f) could be "applied to provide employer with any offset [of the settlement proceeds] against [the Claimant's] death benefits." Id.

But, the **Fifth Circuit** (and now the **Supreme Court**) disagrees with the **Ninth Circuit**. See Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 65 F.3d 460 (**5th Cir.** 1995), aff'd 519 **U.S.** 248 (1997). In noting this circuit court conflict, the **U.S. Supreme Court** granted certiorari to hear the issue and made their ruling on February 18, 1997 in Yates.

The Yates Decision

***[ED. NOTE:** The issue of whether the "sins" of the employee/claimant can be transferred to the spouse (widow/widower) was initially raised in Kaye v. California Stevedore & Ballast, 28 BRBS 240, 251 (1994). In Kaye, the Board, in noting that some of the third-party settlements in question had been entered into solely with the now-deceased employee/husband, stated: "[I]t is questionable whether these settlements have any bearing on whether claimant's claim is subject to the provisions*

of Section 33(g)(1). We need not enter this thicket today, however..." Id. But, this "thicket" was entered into recently by the United States Supreme Court in Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 ***U.S.*** *248 (1997).]*

On February 18, 1997, the **Supreme Court** resolved the conflict between the **Ninth Circuit** in Cretan v. Bethlehem Steel Corp., 1 F.3d 643, 27 BRBS 93 (CRT) (**9th Cir.** 1993), cert. denied, 512 **U.S.** 1219 (1994) and the **Fifth Circuit** in Ingalls Shipbuilding, Inc. v. Director, OWCP, 65 F.3d 460, 29 BRBS 113 (CRT) (**5th Cir.** 1995) when it entered its decision in Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 **U.S.** 248 (1997). In Yates, the wife of the living employee/claimant entered into pre-death settlements of her husband's third party lawsuits without obtaining the employer's approval. Affirming the **Fifth Circuit's** decision, the **Supreme Court** concluded that **Section 33(g) did not bar the respondent's death benefits claim because she was not "a person entitled to compensation" at the time of the pre-death settlements.** See Travelers Ins. Co. v. Marshall, 634 F.2d 843, 846 (**5th Cir.** 1981) ("a cause of action for death benefits certainly does not arise until death.").

The Yates **Court** determined that, in conformance with Cowart and with the plain language of the statute, one must be a "person entitled to compensation" at the time of the third party settlement. Yates, 519 **U.S.** at 255. Thereafter, the **Court** held that in order to be a "person entitled to compensation" under 33(g), the wife must be able to satisfy the prerequisites for obtaining death benefits at the time of the settlement. Therefore, since a death claim does not arise until the death of the employee, the widow was not yet "a person entitled to compensation" when she entered into the third party settlement and, thus, had no duty to obtain her husband's employer's consent to the third party settlement pursuant to Section 33(g). Id. In so holding, the **Court** stated that the **"relevant time for examining whether a person is 'entitled to compensation' is the time of the settlement."** Id.

In addition, the Yates **Court** inferred that its decision is not necessarily **limited to 33(g)** and that **the phrase "person entitled to compensation" could, in fact, be interpreted differently for purposes of Section 33(f).** Id. at 255. ("This entire argument, however, presupposes that the definition we today give to 'person entitled to compensation' under § 33(g) applies without qualification to § 33(f) as well. This is a question we have yet to decide, and is one we leave for another day." Id.)

[ED. NOTE: *The* ***Supreme Court*** *in Yates also considered a conflict between the* ***Fourth*** *and* ***Fifth Circuits*** *regarding whether the Director of the OWCP is entitled to participate as a* ***respondent*** *in a case arising under the LHWCA in which it has no financial or statutory interest. The Court held that, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, the Director is entitled to appear before the Court of Appeals as a respondent,* ***and*** *is "free to argue on behalf of the petitioner [in his capacity as a respondent]." Id. at 250. (citing Director, OWCP v. Perini N. River Assoc., 459* ***U.S.*** *297, 301 (1983)). For a detailed discussion of standing before the U.S. Court of Appeals, see supra at Topic 21.3.6.]*

When a claimant enters into third-party settlements wherein he agrees to release the third party "on my behalf and also on behalf of my administrators, assigns, executors, heirs and representative from any and all claims including,...," after he passes away, his widow is not barred by Section 33(g) for failure to obtain the Longshore Employer's approval despite the fact that the third-party settlement money is paid to her by her now deceased husband's attorney out of an escrow fund. Doucet v. Avondale Industries, Inc., 34 BRBS 62 (2000). In Doucet, the widow's receipt of proceeds from the escrow account was the result only of the distribution of her husband's estate, not the receipt of the proceeds of any of her rights. The Board noted that the claimant [widow] was not a signatory to the third-party settlement, nor had she read its contents before her husband signed it. The Board rejected the employer's argument that the settlement was not fully executed until the third party paid the settlement amount to the claimant at which point the employer argues that she was a "person entitled to compensation." Similarly, the employer was not entitled to a credit for any of the money which the claimant received pursuant to Section 33(f) since he was not a "person entitled to compensation."

In Wyknenko v. Todd Pacific Shipyards Corp., 32 BRBS 16 (1998), the Board had to determine whether the claimant, a longshoreman's widow, was "entitled to the death and funeral benefits that accrued prior to the date of the 1995 third-party settlement, despite the fact that the claimant failed to obtain the employer's written approval of that settlement as required by Section 33(g)." The Board concluded that "Section 33(g)(2) requires the termination of a claimant's right to all compensation, including compensation which has accrued, once the claimant fails to obtain written approval of a third-party settlement after becoming a person entitled to compensation." Under the facts, the claimant became a "persona entitled to compensation" on the date of her husband's death in 1992. Therefore, because she failed to obtain the employer's written approval of a third-party settlement executed in 1995, the claimant "forfeited her right to collect all death benefits, both accrued and future ..." This forfeiture included an award for funeral benefits pursuant to Section 2(12) of the Act."

"Person Entitled to Compensation" as it Applies to "Retirees" in Occupational Disease Claims

In accordance with the employers Motion for Reconsideration of the Board's Decision and Order of Harris v. Todd Pacific Shipyards Corp. (Harris I), **28 BRBS 254 (1994)**, the Board (en banc) in Harris v. Todd Pacific Shipyards Corp. (Harris II), **30 BRBS 5 (1996)**, liberally construed the phrase "person entitled to compensation" as it applies to "retirees" in occupational disease claims. In two consolidated cases (Harris v. Todd Pacific Shipyards Corp. and Hendrickson v. Lake Union Dry Dock Company), the facts indicated that the claimants either voluntarily retired or retired due to reasons unrelated to their asbestos exposure. Thereafter, they were diagnosed with asbestos-related conditions and filed claims as a result. However, the evidence was unclear as to whether the retirees had been assigned percentages of permanent impairment due to their asbestos exposure. The employees entered into **third party settlements without the employers' consent** and the employers asserted that since the employees had been diagnosed with asbestos-related conditions, and filed claims alleging disability, they were "persons entitled to compensation" who had **forfeited** their rights under the LHWCA. However, drawing upon the 1984 Amendments and subsequent case law

which interprets "time of injury" in occupational disease cases, the Board held that a retiree **does not become a "person entitled to compensation" until he is aware of the relationship between the employment, the disease, and the permanent physical impairment; for a claimant who is not a retiree**, he must be aware of a work-related disease which has caused a loss in his wage-earning capacity.

[ED. NOTE: *On reconsideration en banc, the issue of "person entitled to compensation" was decided in a three to two split by the permanent Board. The dissenting judges favored the approach taken in Cretan v. Bethlehem Steel Corp., 1 F.3d 843, 27 BRBS 93 (CRT) (**9th Cir.** 1993), cert. denied, 512 **U.S.** 1219 (1994). Judge Brown noted that there is no time limit imposed by the LHWCA as to when a person becomes a "person entitled to compensation" and that the classification can be made immediately. Brown dissent, slip op. at 22. Judge McGranery noted that according to Cretan, a wife or daughter who settles a survivor's claim prior to the injured employee's death is a "person entitled to compensation" although their rights to compensation had not vested because, to hold otherwise would contradict the policy of employer protection that is evident on the face of Section s 33(f) and (g).**]*

The Board, in Harris I, stated that "in occupational disease cases, the employee does not sustain an injury under the [LHWCA] until he is aware of the relationship between the disease, the disability, and the employment. In order to be "aware" of his disability, the employee must be aware that his work-related disease has caused a loss in wage-earning capacity...or if he is a voluntary retiree, a permanent physical impairment." Harris I, 28 BRBS at 262.

In Glenn v. Todd Pac. Shipyards Corp., 27 BRBS 112 (1993), the Board applied the manifestation approach in an occupational disease case in considering when a claimant's rights vested under Cowart. In Glenn, the parties stipulated to a date of injury, and the claimant entered into third-party settlements after this date without employer's consent. The Director had argued that the important factor in determining when a person entitled to compensation is "when the claimant's impairment became compensable, and if it did not become compensable until after she settled her third-party claims, then Section 33(f) and (g) is inapplicable and can not foreclose or decrease a right to compensation which arose thereafter." Glenn, 27 BRBS at 114.

The Board, in Glenn, found that to hold that an adjudication would be necessary to determine whether a claimant is a "person entitled to compensation" is contrary to the **Supreme Court's** holding in Cowart. 27 BRBS at 115.

The Board noted that in an occupational disease case the "time of injury" occurs when the employee is aware of the relationship between the disease, the disability and the employment. See Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989); 33 U.S.C. § 910(i). In the case of a retiree, "disability" is equated with "permanent impairment." See Barlow v. Western Asbestos Co., 20 BRBS 179 (1988); 33 U.S.C. § 902(10). The Board reasoned that "because a claimant in an occupational disease case must have a disability or impairment before the "time of injury" can occur, under Cowart the right to compensation vests at the "time of injury," thereby

making the claimant a "person entitled to compensation." 27 BRBS at 115.

The Board, after noting that Sections 33(f) and (g) applied in this case, stated that "[F]or the purposes of defining each party's rights under Section 33(f) and (g), the date of onset of the disability is irrelevant." Id.

The Board, in Glenn, held that the time of injury occurred when the disease became manifest, which in the case of a retiree, is the date of awareness of the relationship between the disease, the employment and the permanent impairment, and in Glenn itself, was the date stipulated to by the parties.

Using Glenn as a base, the Board in Harris I, stated that claimants who are voluntary retirees are not persons entitled to compensation under Section 33(g)(1) if they do not have a permanent physical impairment under the AMA Guides and are not aware of the relationship between their impairments and their employment. Harris I, 28 BRBS at 263.

In upholding its prior ruling on this point, the Board in Harris II, en banc, stated that "application of a manifest rule provides the best method of determining when claimant has an injury so that his rights vest and he is a 'person entitled to compensation,' inasmuch as it is at this point that he must file his claim, his compensation is calculated, coverage is determined and his rights attach." Harris II, en banc, 30 BRBS at 6, (1996). The Board, en banc, went on to state that "as use of a manifestation date requires findings of fact, the Board properly remanded the cases for the administrative law judges to hold hearings and admit evidence, ant to determine whether the claimants are aware of a work-related permanent physical impairment such that they are "persons entitled to compensation" within the meaning of Section 33(g) and Cowart. Id., citing Harris I, 28 BRBS at 263. According to the Board, resolution of this issue requires finding of fact; therefore, the judge must hold a hearing.

Responding to Judge Brown's dissent, the Board majority stated:

> [M]erely because one is exposed to injurious stimuli does not mean one has suffered an "injury" potentially entitling his to compensation under the Act, as we have strived to explain...The existence of an impairment is not an additional "technical requirement."...Rather it is a prerequisite to the right to compensation which must exist before the right vests. Thus, the Board's decision on this point is consistent with Cowart.
>
> ***
>
> Consequently, we hold that **establishing that claimant has merely filed a claim is not sufficient to establish that claimant is "entitled to compensation" under the Act**; rather, in order to prevail, **employer must demonstrate** that, as a voluntary retiree, claimant was aware of the relationship between her asbestos-related

> disease, her employment and a permanent physical impairment before she can be found to have an "injury" and thus a vested right to compensation under Cowart. Unlike our dissenting colleague, we are not persuaded by employer's argument that claimant would not have filed third-party suits unless they were aware of a work-related physical impairment. Tort suits are filed for a variety of asserted damages, including potential disability and death, and not limited to the grounds of a workers' compensation claim.

Harris II, 30 BRBS at 10 (1996) (en banc) (emphasis added).

Additionally, the Board found that a claimant who is entitled to only **medical benefits** does not qualify as a "person entitled to compensation," as **medical benefits are not compensation.** Thus, the claimant's failure to comply with Section 33(g)(1) cannot bar the claim. Harris II, 30 BRBS at 12 (1996) (en banc).

But see Lazarus v. Chevron U.S.A., Inc., 958 F.2d 1297, 25 BRBS 145 (CRT) (**5th Cir.** 1992) (holding that if employer refuses or neglects to furnish medical services to longshoreman, and longshoreman incurs expense or debt in obtaining services, award of medical expenses obtained by the longshoreman in his suit against employer is "compensation" for purposes accelerated enforcement).

[ED. NOTE: *Harris II was appealed to the* ***Ninth Circuit****, but on* ***August 2, 1996****, the* ***Ninth Circuit*** *dismissed the employer's appeal stating that the employer was not allowed to appeal from a* ***non-final order*** *(as the Board in its original D&O of* ***1994*** *[Harris I, 28 BRBS 254 (1994)] had remanded to the ALJ, and the Board in Harris II, 30 BRBS 5 (1996) (en banc), had reinstated that remand.). Thus, in accordance with the Board's original decision and in accordance with their reinstatement of the same, the case was remanded to the ALJ level.* ***On April 3, 1997*** *the Board sent the file/record to the OALJ. Subsequently on June 2, 1998 a Decision and Order Approving Settlement was issued in this matter.****]***

Waiving subrogation rights/waiving off-set rights

Where employers waive only their subrogation rights, not their offset rights under Section 33(f), the claimant is still required to obtain the employers' written approval of her third-party settlements pursuant to Section 33(g)(1). Kaye v. California Stevedore & Ballast, 28 BRBS 240 (1994). See also Treto v. Great Lakes Dredge & Dock Co., 26 BRBS 193 (1993) (employer may waive its lien, but this does not prejudice its right to Section 33(f) offset.). In Kaye, the Board reasoned that where employers do not waive their right to an offset against a claimant's net third-party recovery, they retain an interest in the third-party settlements entered into by the claimant. Kaye, 28 BRBS at 252. Thus, the claimant is still subject to the provisions contained in Section 33(g)(1). Id. See also Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 645-46 (**5th Cir.** 1986) (held that because an employer has an interest in protecting statutory right to set-off even when

employer has waived subrogation rights, worker's failure to seek employer's/carrier's approval of settlement precludes employer's liability for future compensation benefits).

33.6.2 Apportionment

33.6.2.1 Apportionment of Settlement Proceeds

In dealing with third-party settlements, the claimant, whether the longshore worker or survivor, is not necessarily the only party involved in the settlement. This situation becomes a problem when the claimant attempts to obtain longshore benefits or the employer requests a set off or credit for compensation paid. See 33 U.S.C. § 933(f), 933(g).

Two things need to be determined in order to apportion a settlement when a claimant is seeking benefits. First, it must be determined whether the claimant (or claimants) is a "person entitled to compensation." For purposes of Section 33(g), a plain reading of the statute and Estate of Cowart v. Nicklos Drilling Co., 505 **U.S.** 469 (1992), require that the claimant be a "person entitled to compensation" at the time of the third-party settlement. Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 **U.S.** 248 (1997). **Secondly**, it must be determined if the amount of the settlement is greater or less than the compensation to which the claimant is entitled pursuant to Section 33(g) of the LHWCA.

In Force v. Director, OWCP, 938 F.2d 981 (**9th Cir.** 1991), the claimant-longshoreman and his wife sued various asbestos manufacturers for his personal injuries, loss of consortium, and punitive damages. The suit resulted in a settlement of $480,360. Subsequently, Mrs. Force sued for widow's benefits. The question before the **Ninth Circuit** was "whether, and to what extent, funds recovered in settlements with third parties may offset against benefits recovered under [the LHWCA]." Id. at 983. The circuit court found that the LHWCA does not call for apportionment among different types of damages. See also Brandt v. Stidham Tire Co., 785 F.2d 329 (**D.C. Cir.** 1986).

Although the LHWCA may not call for apportionment of damages when an employer attempts to offset benefits pursuant to Section 33(f), the settlement amount is apportioned among the participants. **The portion that is attributable to the "persons entitled to compensation" may be set off**. Force, 938 F.2d at 985. See I.T.O Corp. of Baltimore v. Sellman, 967 F.2d 971 (**4th Cir.** 1992), cert. denied, 507 **U.S.** 984 (1993) ("Employer's offset rights [under Section 33(g)] are limited to the portion intended for the claimant since the claimant is the 'person entitled to compensation.'"); see also Brown v. Forest Oil Corp., 29 F.3d 966, 972 (**5th Cir.** 1994) (in the context of an employer's lien, [e]mployer's offset rights are limited to the portion of the recovery for the employee"); Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 **U.S.** 248 (1997) (where respondent's post-death third party settlements were apportioned among respondent and her children, employer was only entitled to a credit for the amounts received by respondent since the language of the third party settlements was not clear and unambiguous).

[ED. NOTE: *In Yates, Ingalls did not argue that it is entitled to a set-off under Section 33(f) for the pre-death settlements.**]***

In Bundens v. Brenneman Co., 29 BRBS 52 (CRT), 46 F.3d 292 (**3d Cir.** 1995), the **Third Circuit** also noted that, notwithstanding the applicability of Sections 3(e) and 33(f), these provisions must be applied to the claimants (here, a widow and son) separately, since both the widow and son are persons entitled to compensation (PETC) under Section 5(a) which lists separately "wife" and dependents. Thus, applying both Sections 3(e) and 33(f) for credit, one must compare what **each** person entitled to compensation got under the tort settlement with what each gets, or is entitled to, under the LHWCA. The **Third Circuit** explained that while employer was entitled to claim a credit for the full amount it paid to the widow and son irrespective of the apportionment of the settlement between the Jones Act and LHWCA claims, the remaining liability to the son stemmed from the allocation of the settlement between the widow and son and the operation of that allocation in Section 33(f). Bundens, 29 BRBS at 71 n.27(CRT), 46 F.3d at 305 n. 27. See also, Gilliland v. E.J. Bartells Co., Inc., 34 BRBS 21(2000) (Individualized apportionment method is to be used to determine an employer's credit under § 33(f); if an employer fails to take its § 33(f) credit during a period when it is liable for compensation to that claimant [i.e., when then-dependent daughters were receiving benefits], it may not seek reimbursement retroactively out of benefits due another claimant.); Valdez v. Crosby & Overton, 34 BRBS 69 (2000) (Employer may be entitled to a credit for the overpayment it made to one child against the additional compensation owed to the other.).

[ED. NOTE: *Apportioning settlements where there is more than one "person entitled to compensation" should not be confused with determining whether multi-settlements should be aggregated or not. See "Calculations" at Topic 33.10, infra.**]***

The Board, in Krause v. Bethlehem Steel Corp., 29 BRBS 65 (1994) has followed the Force/Sellman/Yates line by specially citing Force. Therefore, if a settlement is between a widow and the emancipated children of a covered employee, the employer may only offset the widow's apportionment.

It is the **employer's burden** to prove the apportionment of the settlement amount. See Sellman, 954 F.2d 239 (**4th Cir.**), vacated, in part, adhered to, in part, on reh'g, reh'g, en banc, denied, 967 F.2d 971 (**4th Cir.** 1992), cert. denied, 507 **U.S.** 984 (1993); Force, 938 F.2d at 981; Valdez v. Crosby & Overton, 34 BRBS 69 (2000) (ALJ is permitted by law to establish an apportionment other than that contained in documentary evidence.). Placing the burden of proof on the employer is particularly appropriate in the context of Section 33(f) because the employer remains liable for the full amount of statutory compensation absent a showing that the claimant has been compensated by a third-party. Krause, 29 BRBS 65 (1994) (citing Force v. Director, 938 F.2d 981, 25 BRBS 13 (CRT) (**9th Cir.** 1991)).

With regard to apportionment and offset under Section 33(f), the Board in Force v. Kaiser Aluminum and Chemical Corp., 30 BRBS 128 (1996) held that:

> Section 33(f) mandates that employer's liability for decedent's disability benefits should be offset by the net amount **decedent** received in settlement, and employer's liability for claimant's death benefits should be offset by the net amount **claimant** received in the settlement of her wrongful death action.

30 BRBS at 132 (emphasis in original).

The Board further noted that the "employer bears the burden of establishing apportionment pursuant to [**Ninth Circuit** precedent], [and] the Act does not prohibit an employer from relying on evidence submitted by claimant in pursuit of establishing apportionment." 30 BRBS at 133.

Ultimately, the Board in Kaiser Aluminum concluded that the Section 33(f) offset provisions are directed at the "net amount of recovery" in the wrongful death action as opposed to recovery based upon separate injuries. Specifically, the Board rejected the claimant's contention that the "employer is not entitled to offset [its] recovery for loss of consortium," as that injury does not arise from decedent's death. 30 BRBS at 133. Rather, employer was entitled to an offset of "the entire amount, regardless of the type of damages involved." Id.

In Force v. Director, OWCP, 938 F.2d 981 (**9th Cir.** 1991), the **Ninth Circuit** noted that the apportionment may be difficult, and thus counseled the judge on remand to look to objective factors in the evidence to determine apportionment. Those factors include, but are not necessarily limited to, (1) how the settlement was actually distributed and (2) the going rate for settlements. Force, 938 F.2d at 985-86. (It should be noted that the Force settlement was apportioned **after** the widow filed for survivor benefits.)

[ED. NOTE: *Apportionment does not exclude funds for non-economic harm such as pain and suffering. See Jones v. U.S. Steel Corp., 25 BRBS 355 (1992).]*

33.6.2.2 Apportionment amongst various claims

"Apportionment" has also been used in reference to how a settlement fund is apportioned among various claims being settled (i.e., Jones Act versus §905(b)). Bundens v. J.E. Brenneman Co., 29 BRBS 52 (CRT), 46 F.3d 292 (**3d Cir.** 1995). In Bundens, a ship owner/employer was sued in an admiralty/§905(b) negligence claim. The matter was settled with the claimant's right to pursue the LHWCA claim for death benefits that had been filed earlier. The Board held that when the record is unclear as to how the settlement fund is apportioned among the various claims being settled (here, Jones Act versus 905(b)), the employer is entitled to offset the net amount against its liability under the LHWCA.

Under Section 33(f), an employer/vessel owner is entitled to a credit for the net amount of its tort settlement. Under Section 33(g)(1), the gross settlement is to be considered. Bundens, 29 BRBS 52 (CRT), 46 F.3d 292. In Bundens, the **Third Circuit** specifically noted that Section 3(e)

provides an employer with a credit for payments made under the Jones Act and Section 33(f) states that an employer is required to pay under the LHWCA only the difference between its LHWCA liability and the net amount recovered by the employee in suits against third parties for damages. Bundens, 29 BRBS at 69 (CRT), 46 F.3d 304. The **Third Circuit** stated that the amount of the settlement that is attributable to settlement of the Jones Act claim will be credited against the shipowner's LHWCA liability under Section 3(e). Likewise, the **Third Circuit** stated that the amount of the settlement that is attributable to settlement of the Section 5(b) claim offsets the shipowner's liability in accordance with Section 33(f). "Thus, no matter how the parties could have apportioned the settlement between the claims under the Jones Act and under Section 905(b), and no matter who bears the burden of proving apportionment," Bundens, 29 BRBS at 70 (CRT), 46 F.3d at 304, the **Third Circuit** gave the shipowner/employer a credit for the net settlement amount by virtue of the combined applications of Sections 3(e) and 33(f).

Lien rights/credit rights

In Perry v. Bath Iron Works Corp., 29 BRBS 57 (1995), the Board held that the Special Fund is entitled to have its lien right satisfied prior to the satisfaction of the employer's offset credit rights. The Claimants entered into third party settlements from which the Special Fund received $17,530.50 in partial satisfaction of benefits already paid under Section 8(f) of the LHWCA. The employer sought reimbursement of this amount form the Fund for medical and funeral expenses which accrued and which were paid by the employer after the parties entered into the settlement agreements. 29 BRBS at 58. Specifically, Section 33(f) requires that, upon entry of an award of benefits, "the employer shall be required to pay compensation under [the LHWCA] a sum equal to the excess amount which the Secretary determines is payable on account of such injury or death over the **net** amount recovered against such third person." Id. at 59, n. 1 (quoting 33 U.S.C. § 933(f)). Therefore, the crux of the dispute in Perry was whether the payments created "lien rights" or "credit rights" and the priority of payment of these rights.

The Board noted that Section 33(f) does not define **"lien"** and **"credit"**:

> Nonetheless, the concept of a "lien" as addressed in cases arising under Section 33(f) of the [LHWCA] is as a claim to **reimbursement** for payments made while credit rights under Section 33(f) address liability for **future compensation**.

29 BRBS at 59 (emphasis added).

The Board reasoned that to hold otherwise would render the Special Fund's lien rights under Section 33(g)(3) virtually meaningless as an employer's continued liability for medical and funeral expenses could create future obligations subject to offset at any time. 29 BRBS at 60. In Perry, the Board set up a ranking order. First, the lien rights of the Special Fund are satisfied. Second, those of the employer are satisfied. Third, the credit rights of the employer are satisfied. Fourth, the credit rights of the Special Fund are satisfied. But see Lindsay v. Bethlehem Steel Corp., 22 BRBS 206 (1989)

(implication that employer's lien must be satisfied before the Special Fund's lien).

[ED. NOTE: *Perry was remanded for admission of the settlement agreement. The employer had argued that the Special Fund and carrier agreed on settlement terms that define the carrier's "lien" as the sum of all amounts paid and to be paid by the carrier in indemnity and medical expenses pursuant to the LHWCA. The employer asserted that by agreeing to the language, the Director waived the lien rights of the Special Fund.****]***

33.7 ENSURING EMPLOYER'S RIGHTS--WRITTEN APPROVAL OF SETTLEMENT

[ED. NOTE: *This Section on 33(g) should be considered in tandem with Section 33.6 [which deals with Section 33(f) of the LHWCA]. Much of the jurisprudence dealt with in this section directly addresses Section 33(f) issues as well.****]***

Section 33(g) of the LHWCA provides:

> **(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.**
>
> **(g)(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.**
>
> **(g)(3) Any payments by the special fund established under Section 44 shall be a lien upon the proceeds of any settlement obtained from a judgment rendered against a third person referred to under subsection (a). Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.**
>
> **(g)(4) Any payments by a trust fund described in section 17 shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under**

subsection (a). Such lien shall have priority over a lien under paragraph (3) of this subsection.

33 U.S.C. § 933(g).

Purpose

Section 33(g) is intended to ensure that an employer's rights are protected in a third-party settlement and to prevent a claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. § 933(b)-(f). See Estate of Cowart v. Nicklos Drilling Co., 505 **U.S.** 469 (1992); Banks v. Chicago Grain Trimmers Ass'n, 390 **U.S.** 459, 467 (1968); I.T.O. Corp. of Baltimore v. Sellman, 954 F.2d 239, vacated in part, adhered to in part on reh'g, reh'g en banc denied, 967 F.2d 971 (**4th Cir.** 1992), cert. denied, 507 **U.S.** 984 (1993); Collier v. Petroleum Helicopters, 17 BRBS 80 (1985), rev'd on other grounds, 784 F.2d 644, 18 BRBS 67 (CRT) (**5th Cir.** 1986).

[ED. NOTE: *This section raises several questions that the jurisprudence is only beginning to address. For example: How is the term "settlement" defined; who is a person entitled to compensation (PETC), and when; how is the formula under 33(g)(1) calculated; and are "net" or "gross" third party settlements used?****]***

History

Other than the purpose of Section 33(g), nothing involving this section has remained constant since the 1984 Amendments to the LHWCA. In 1984, the LHWCA was amended to divide Section 33(g) into two major subsections. Section 33(g) became subsection 33(g)(1) with some minor language modifications, and Congress added 33(g)(2). See Estate of Cowart, 505 **U.S.** at 473. As a result of the 1984 Amendments, Section 33(g) has become one of the most litigated sections of the LHWCA.

Pre-Cowart Board Interpretations

The Board's interpretation of the amended Section 33(g) was originally set forth in Dorsey v. Cooper Stevedoring Co., 18 BRBS 25 (1986). According to the Board, subsection 33(g)(1) required that an employer's prior written approval of settlement be obtained where the employer is paying compensation. Id. at 29. Payment of compensation need only be voluntary, or pursuant to an award. See Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988); O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977).

Under subsection 33(g)(2), which was added by the 1984 Amendments, regardless of whether the employer has made payments voluntarily or acknowledged the claimant's entitlement to benefits, the employer at a minimum must be given notice of the settlement. Dorsey, 18 BRBS at 29-30. Notice was only required when an injured employee was not considered a "person entitled to

compensation" and written approval was only required when a claimant was considered a "person entitled to compensation." Id.

Therefore, it was the receipt of some form of compensation that made a claimant a "person entitled to compensation" for purposes of Section 33(g). For examples of the Board's application of Section 33(g), see Chavez v. Todd Shipyards Corp., 21 BRBS 272 (1988) (finding that, for purposes of Section 33(g)(2), notice is sufficient if given on the date of the hearing); Quinn v. Washington Metropolitan Area Transit Authority, 20 BRBS 65 (1986); and Mobley, 20 BRBS at 239.

Post-Cowart Board Decisions

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., dissenting), the Board held that Section 33(g) bars claims for compensation and medical benefits where the employee has settled with a third party for less than the amount he would be entitled to under the LHWCA, without the employer's prior written approval. As a result, two administrative law judges applied the Supreme Court's holding in Estate of Cowart v. Nicklos Drilling Co., 112 S.Ct. 2589 (1992), to grant summary judgment in favor of the employers on the grounds that the claimants settled third party claims without the employers' written approval.. However, neither administrative law judge made findings as to whether the settlement amounts were less than the employers respective liabilities under the LHWCA, reasoning that such liabilities would either be precluded by Section 33(g), or completely offset under Section 33(f).

In assessing the propriety of the judges' decisions, the Board initially noted that the forfeiture provisions of Section 33(g) apply only to the person entitled to compensation (or the person's representative). 33 U.S.C. § 933(g)(1). Consequently, on reconsideration, the Board reaffirmed its holding that in occupational disease cases, a claimant is not injured and thus not a person entitled to compensation until he is aware of the relationship between the disease, the disability, and his employment. In order to be aware of his disability, the Board held that the employee must be aware that his work-related disease has caused a loss in wage-earning capacity, or if a voluntary retiree, a permanent physical impairment. Thus, the **Board adopted a manifestation rule** as the best method of determining when a claimant is injured at which point his rights under the LHWCA vest and he is a person entitled to compensation. From this, the Board found that the "manifestation rule" requires a fact finding and, therefore, summary judgment was inappropriate.

With regard to **applying the "manifestation rule"** in the case of a voluntary retiree, the Board instructed that the employer must establish that the claimant was aware of the relationship between his or her asbestos-related disease, the employment, and a permanent physical impairment, before he or she has a vested right under Cowart. Significantly, the Board determined that the fact that "claimant has merely filed a claim is not sufficient to establish that claimant is entitled to compensation under the LHWCA. Similarly, the Board was not persuaded by employers' arguments that claimants would not have filed third-party suits unless they were aware of a work-related

physical impairment, since the reasons for filing tort suits are not limited to the grounds of a worker's compensation claim. Id.

Further, the Board held that the forfeiture provision of Section 33(g) applies only if the third-party settlement obtained without employer's prior written approval is for an amount less than the compensation to which the person . . . would be entitled under the LHWCA. 33 U.S.C. § 933(g)(1)." In this vein, the Board reaffirmed its holding that the term compensation, *as used in Section 33(g),* does not include medical benefits. The Board also reaffirmed its prior holding that the **aggregate** third-party settlements should be used in making the less than comparison.

However, the Board vacated its prior holding that the less than determination is a comparison between the net amount of the third-party settlement recoveries and the amount of compensation to which the claimant would be entitled. Instead, the Board adopted the **Third Circuit's** reasoning in Bundens v. J.E. Brenneman, 46 F.3d 292, 305 (**3d Cir.** 1995), that the LHWCA specifies net amount in Section 33(f), but not in Section 33(g), and therefore the **gross** amount of the aggregate third-party settlement recoveries should be used for comparison under Section 33(g). This implies the comparing of the gross amount of the settlement to the compensation benefits for purposes of Section 33(g) while using the net amount for purposes of the offset provision of Section 33(f)).

The Board also affirmed its holding that, where the forfeiture provision of Section 33(g) does not apply, the offset provision of Section 33(f) does not extinguish the employer's total statutory liability. Instead, Section 33(f) merely provides an employer with a credit in the amount of the net third-party recovery against its liability for both compensation and medical benefits. While this may have the practical effect of extinguishing the employer's liability in many cases, if there is ongoing liability for medical benefits, it may not.

Effect of Filing a Claim

There have been instances where workers allegedly exposed to asbestos have filed LHWCA claims, filed third-party actions, and entered into "unauthorized" [as per Section 33(g)] third-party settlements. What effect these filings and third-party settlements have on their outstanding LHWCA claims became an issue in the mid 1990s. In what has become know as the "Gladney group" of cases there were approximately 3,000 cases filed by claimants who were allegedly exposed to asbestos during the course of their employment with Ingalls Shipyard. After the cases were transferred to OALJ, the employer filed a motion for summary judgment for the consolidated cases, and the claimants were ordered to show cause why the motion should not be granted. Ingalls contended that the claimants entered into third-party settlements without its prior approval and that, therefore, all were barred from seeking compensation under the LHWCA pursuant to Section 33(g).

The Director and claimants argued that there were issues of fact which needed to be resolved before it could be determined whether Section 33(g) could be invoked to bar the claimants from seeking benefits under the LHWCA. Specifically, they asserted that the ALJ needed to determine

whether each claimant was a "person entitled to compensation" under Section 33(g) and wether each claimant received third-party settlement proceeds in amounts more or less than the amount to which each is entitled under the LHWCA. The Gladney group was subsequently classified into four groups: 1) those who have been diagnosed with a pulmonary disease but who have no disability; those who have a disability; those who died from causes relating to their pulmonary conditions; and those who died from causes unrelated to their pulmonary condition. The ALJ granted Ingalls motion for summary judgment and this was subsequently appealed.

On appeal, the Board, relying on its decision in Harris v. Todd Pacific Shipyards Corp.[Harris II], 28 BRBS 254 (1994), aff'd and modified on recon. en banc, 30 BRBS 5 (1996), held that it was improper for the ALJ to grant Ingall's summary judgment motion, as there were unresolved issues of material fact in the cases before the Board. Gladney v. Ingalls Shipbuilding, Inc., [Gladney I], 30 BRBS 25 (1996)(McGranery, J., concurring). Specifically, the Board held that there were questions as to whether each claimant was a "person entitled to compensation" under Section 33(g) and whether each settled a third-party claim for less than or more than the amount of compensation to which he is entitled under the LHWCA. The Board remanded the case for factual determinations as to whether each claimant was a "person entitled to compensation" under Section 33(g), and computations of the amount for which each claimant settled his third-party cases as compared with the workers' compensation entitlement for each claimant, exclusive of medical benefits, in order to determine the applicability of the Section 33(g)(1) bar.

Subsequent to the Board's decision, a pre-hearing conference was held where the ALJ decided, with the consent of the parties, that Gladney, along with 16 other cases, would proceed with a bifurcated hearing with the fundamental issue of whether the claimants were "persons entitled to compensation" under Section 33(g) to be decided prior to all other issues. At the hearing, the ALJ accepted the parties' stipulations that the claimant worked for the employer as a painter for a certain period of years, that he was diagnosed with an asbestos-related lung disorder, that he has not been assigned a permanent impairment rating for this disorder, and that he does not at this time suffer from a loss of wage-earning capacity due to his occupational disease. In his Decision and Order, the ALJ found that the claimant was not a "person entitled to compensation" as he has not suffered a disability as a result of his work-related exposure to asbestos, and therefore, the Section 33(g)(1) bar is not applicable to his claim for benefits. The ALJ granted claimant's request that his claim be withdrawn without prejudice, finding that the claimant's request had met the criteria set forth in 20 C.F.R. § 702.225. The ALJ's findings were appealed but upheld by the Board in Gladney II.

In Gladney II, first the Board held that a claimant does not become a "person entitled to compensation" at the time of his alleged exposure to harmful materials at the employer's facility; he must sustain a disability. Further, the Board rejected the employer's contention that the claimant's entitlement to medical benefits makes the claimant a "person entitled to compensation." Furthermore, the Board found that the mere diagnosis of an occupational disease does not entitle the claimant to a nominal award [which would open the door to consider the claimant a person entitled to compensation]. Lastly, the Board rejected the employer's "equity" argument that since the purpose of Section 33(g) is to protect the employer, equity dictates that the claimant be deemed a

"person entitled to compensation." A plea to equity is insufficient to override the principle that courts must give effect to the plain meaning of Section 33(g).

[ED. NOTE:** The claimants in Gladney originally filed claims for disability. Subsequently they sought to have these claims withdrawn without prejudice, alleging that they were not persons entitled to compensation under the LHWCA. What effect, if any, does Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999)(A claimant can not change his story during litigation without a sufficient explanation for his inconsistent assertions.) have here?**]

33.7.1 Significant Circuit Developments Within 33(g)

[ED. NOTE: The circuit courts' treatments of 33(g) are addressed in the order of most circuit activity first, rather than by numerical circuit numbering. As of this point, only the Fifth, Ninth, Fourth and Third Circuits merit notation.]

33.7.1.1 Fifth Circuit

The **Fifth Circuit** has been the most active, and the most successful, of the circuit courts in defining the scope of Section 33(g). The court addressed the problem of the amended Section 33(g) in Petroleum Helicopter v. Collier, 784 F.2d 644 (**5th Cir.** 1986). In Collier, the respondent, who was working for Petroleum Helicopter (PHI), had been injured on August 27, 1976, while attempting to land his helicopter on a drilling platform owned by Conoco. The respondent had applied for, and received, benefits from PHI's insurance carrier. Respondent then brought suit against Conoco in Federal District Court seeking $750,000.00. The third-party claim was ultimately settled on April 17, 1979, for $50,000.00, of which the net amount recovered was $23,020.94.

The settlement was not approved by PHI or its carrier and, as a result, the compensation was terminated. The respondent subsequently filed for compensation benefits and was awarded such by both the judge and the Board. Id. at 645.

The **Fifth Circuit** disagreed with both the judge and the Board. The court held that the failure by an injured employee to obtain the prior consent of the employer/carrier to the settlement of the employee's claim against a third party bars the employee's right to future benefits under the LHWCA. The court did not recognize any exceptions for cases when the employer/carrier has contractually waived its right to subrogation against the third-party tortfeasors. Id.

The **Fifth Circuit** reasoned that Section 33(g) contained **no exception to the written approval requirements** and, as such, in the Fifth Circuit, written approval is required whenever a third-party settlement is entered into. See also Jackson v. Land & Offshore Servs., Inc., 855 F.2d 244 (**5th Cir.** 1988) (holding that the protections provided by Section 33(g) are not necessary when the settlement exceeds the employer's obligation to pay and, when the settlement is less than the amount of benefits provided, lack of notice terminates the right to receive those benefits); Peters v. North River Ins. Co., 764 F.2d 306 (**5th Cir.** 1985) (holding that although a worker and a third party

may allocate responsibility for reimbursement among themselves, settlement of a worker's compensation claim necessarily settles the employer's subrogation claim and entitles the employer to reimbursement of the funds that the third party has agreed to pay in settlement).

It should be noted that in Collier, Peters, and Jackson, all three claimants were receiving voluntary compensation payments and would be considered "persons entitled to compensation" pursuant to the Board's historical standard. This voluntary pay status would require them to obtain their employers' written approval for a third-party settlement under Section 33(g)(1) even before the Board.

[ED. NOTE: *The Board's definition of a "person entitled to compensation" has changed. See Harris v. Todd Pac. Shipyards Corp. (Harris I), 28 BRBS 254 (1994), aff'd and modified on recon. en banc. (Harris II), 30 BRBS 5 (1996) (Brown and McGranery, J.J. concurring and dissenting); Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519* ***U.S.*** *248 (1997); see also Topic 33.6.1., supra.* ***]***

To this point, the **Fifth Circuit** had been defining Section 33(g) through situations dealing with the action of the employer, namely the employer waiving the right of subrogation and not opting to collect the previously paid compensation. As claimants attempted to argue that this waived the employer's right to written approval, the **Fifth Circuit** noted that the employer had other means of getting its compensation back besides the use of Section 33(g).

Waiver of subrogation rights does not exhaust an employer's interest in the settlement. The employer has a right to set off the amount of the settlement against future payments which is independent of employer's subrogation rights. See Jackson, 855 F.2d at 246. See also supra, Topic 33.6.1 "Waiving Subrogation rights/waiving off-set rights".

In United Brands Co. v. Melson, 594 F.2d 1068, 1074 (**5th Cir.** 1979), the **Fifth Circuit** gave the following example:

> [Assume] that the injured worker is entitled to $10,000 in compensation benefits. If the employee were to unilaterally settle his claim against a third party for $1.00, the covered employer would be liable for the remaining $9,999. By giving the employer the right to approve compromises, the Act eliminates this potential prejudice. ... [T]he employer would not approve the proposed $1.00 settlement and would insist on a larger one. If the third party would then settle the claim against it for $5,000, the employer's ultimate liability would then be reduced to $5,000.

Id. See also Jackson, 855 F.2d at 246.

At this point, the **Fifth Circuit** had yet to reach such issues as what is required before a

claimant is considered a "person entitled to compensation" for purposes of Section 33(g), the retroactivity of Section 33(g), what constitutes proper notice, and whether medical benefits are "compensation." The **Fifth Circuit**, in an unpublished case, did hold that Section 33's approval requirement applies only if the employer or carrier were paying longshore benefits at the time of the settlement. See Kahny v. OWCP, 729 F.2d 777 (**5th Cir.** 1984), overruled by Nicklos Drilling Co. v. Cowart, 927 F.2d 828 (**5th Cir.** 1991). Until the time of the Kahny decision the **Fifth Circuit** had only dealt with claimants who were receiving voluntary compensation payments.

The **Fifth Circuit** ultimately held that "there are no exceptions **whatever** to the unqualified language of § 933." Rather, said the court, "the employer shall be liable for compensation ... only if written approval of the settlement is obtained from the Employer and the employer's carrier..." Nicklos Drilling Co. v. Cowart, 907 F.2d 1552, 1554 (**5th Cir.** 1990), aff'd, on reh'g en banc, 927 F.2d 828 (**5th Cir.** 1991), aff'd, 505 **U.S.** 469 (1992) (emphasis added). See also Petroleum Helicopters v. Barger, 910 F.2d 276 (**5th Cir.** 1990), aff'd, on reh'g en banc sub nom. Nicklos Drilling Co. v. Cowart, 927 F.2d 828 (**5th Cir.** 1991), aff'd, 505 **U.S.** 469 (1992) (holding that a settlement between a third-party helicopter manufacturer and a person entitled to compensation made in pursuit of a Jones Act claim violated Section 33(g) when the decedent was determined not to be a Jones Act "seaman" and when the decedent's widow then pursued a longshore claim against the employer).

As such, the **Fifth Circuit** required written approval for almost all of the third-party settlements entered into, and notice for only those situations that resulted in a judgment against a third party. Also, the exact role that medical benefits play within the scheme of Section 33(g) was never addressed.

On February 18, 1997, the **Supreme Court** affirmed the **Fifth Circuit's** decision in Ingalls Shipbuilding, Inc., v. Director, OWCP (Yates), 519 **U.S.** 248 (1997), holding that before an injured person's death, the worker's spouse is not a "person entitled to compensation" for death benefits within the meaning of Section 33(g)) and, therefore, does not forfeit the right to collect death benefits under the LHWCA for failure to obtain the employer's approval of settlements entered into before the worker's death. (discussed in detail, infra Section 33.7.2)

33.7.1.2 Ninth Circuit

Permitting recovery under state law does not create an obstacle to the purpose of the LHWCA because "[b]enefits under the LHWCA generally are far greater than the corresponding benefits under state law." Service Engineering Co. v. Emery, 100 F.3d 659, 661 (**9th Cir.** 1996). Section 33(g)(2) states that an unapproved third party settlement terminates "all rights to compensation and medical benefits under this chapter…" Id. (emphasis in original). Had Congress intended to terminate rights to all workers' compensation benefits, it could have expressed that intent clearly. By limiting the forfeiture of benefits to those "under this chapter," Congress intended to protect employers only by terminating the "generous" LHWCA benefits. Id.

The **Ninth Circuit** interpreted Section 33(g) in Bethlehem Steel Corp. v. Mobley, 920 F.2d 558 (**9th Cir.** 1990). Mobley filed a claim for both longshore compensation and medical benefits. While he instituted the longshore proceedings, Mobley entered into a series of third-party settlements with various asbestos manufacturers. Mobley's employer, Bethlehem Steel, was notified of these settlements prior to the longshore hearing. Mobley was found not to be disabled by the judge and, therefore, not entitled to compensation. The judge did, however, order the employer to continue paying medical benefits. Id. at 560.

The **Ninth Circuit**, affirming the Board and the judge, reasoned that Mobley's settlements were for an amount that exceeded compensation as he was found not to be entitled to compensation. Id. Therefore, a settlement for $1.00 would have been greater than the compensation to which Mobley was entitled.

In this respect, the **Ninth Circuit's** pre-Cowart holding placed it at odds with the **Fifth Circuit**. The **Ninth Circuit's** position was that an employee-claimant was a "person entitled to compensation" only after a court awarded the employee-claimant benefits, or the employer voluntarily pays benefits. The **Fifth Circuit**, on the other hand, took the position that an employee-claimant was a "person entitled to compensation" at the time the injury occurs, regardless of whether the employee-claimant ever receives compensation.

Under either approach, if a claimant received written approval of a settlement and was later determined not to be disabled, the employer would pay nothing. Similarly, if a claimant had written approval, and was found to be disabled, the employer would either owe nothing if the third-party settlements exceeded employer's liability, or, at a minimum, the employer would receive a credit for previously paid compensation and, therefore, would owe much less than if the claimant had not entered into a third-party settlement, provided of course, he had received the employer's written approval of the settlement.

This is accomplished largely through court cases, and through provisions in the LHWCA, when the employer has already discharged its compensation liability. See Villanueva v. CNA Ins. Cos., 868 F.2d 684 (**5th Cir.** 1989); Peters v. North River Ins. Co., 764 F.2d 306, 312 (**5th Cir.** 1985); Allen v. Texaco, Inc., 510 F.2d 977, 979-80 (**5th Cir.** 1975).

Using Marshall v. Pletz, 317 **U.S.** 383 (1943), the **Ninth Circuit** stated that **medical benefits were not compensation**, as the LHWCA sets out a definition of compensation that does not include medical benefits. The court also pointed to the fact that, although Section 33(g)(2) mentions medical benefits, Section 33(g)(1) does not. According to the **Ninth Circuit**, if Congress had wanted medical benefits to be attributable to 33(g)(1), Congress could have included the phrase in both subsections. Mobley, 920 F.2d at 560-61.

[ED. NOTE: *The Board's position is in accord with this. See Harris I, 28 BRBS at 264 (1994), aff'd and modified on recon. en banc, Harris II, 30 BRBS at 16 (1996). In fact, in Harris II, the en*

banc Board stated that if at the time of third-party settlements a claimant was entitled only to medical benefits, the claimant's failure to comply with Section 33(g)(1) cannot bar the claim as the claimant was not a "person entitled to compensation." Harris II, 30 BRBS at 16 (1996) (en banc).]

In determining whether proper notice was given, the **Ninth Circuit** adopted the position of the Board that "[s]o long as the employer has notice of the settlement before it has made any payments and before the Agency orders it to make payments, the purposes of the statute are satisfied." Id. at 561. This notice requirement will not result in prejudice to the employer. See Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988). It enables the employer to protect its right to a set-off of future obligations and to protect its right to reimbursement from proceeds already paid. Mobley, 920 F.2d at 561 (citing Bloomer v. Liberty Mut. Ins. Co., 445 **U.S.** 74 (1980)); Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669 (**9th Cir.** 1975), cert. denied, 425 **U.S.** 944 (1976).

The **Ninth Circuit** had also held that a claimant who files a civil suit against a third party, which suit is later consolidated and settled as a whole, is not barred under Section 33(g)(1). This holding, however, was based on the particular facts of the case: there was no evidence that the agreement was signed by any of the parties; the claimant had not accepted any settlement amounts; his attorney did not approve; and any check received was returned. Chavez v. Director, OWCP, 961 F.2d 1409, 1413 (**9th Cir.** 1992), aff'd 139 F.3d 1309 (**9th Cir.** 1998).

In Taylor v. Director, OWCP, 201 F.3d 1234 (**9th Cir.** 2000), a credit off-set case, the **Ninth Circuit** held that "person entitled to compensation" under Sections 33(g) and 33(f) should have the same meaning in both sections absent an absurd or glaringly unjust result. Employer had argued that if the phrase has the same meaning, then the effect would be alarmingly unjust and absurd because claimants would be allowed to recover twice for the same claims so long as they settle before their injured spouses die. The **Ninth Circuit** concluded that "an interpretation of Section 33 of the LHWCA that permits double recovery is not an absurd result so as to influence us to depart from the plain meaning of the statute." The **Ninth Circuit** noted that the Yates **Court** explained that double recoveries are not strictly prohibited under the LHWCA. The **Ninth Circuit** emphasized that "we will not look beyond the plain meaning of the statute simply because under some scenarios a claimant may recover twice under the same claim.

33.7.1.3 Fourth Circuit

The **Fourth Circuit's** contribution to Section 33(g) begins with I.T.O. Corp. of Baltimore v. Sellman, 954 F.2d 239, vacated in part, adhered to in part on reh'g, reh'g en banc denied, 967 F.2d 971 (**4th Cir.** 1992), cert. denied, 507 **U.S.** 984 (1993). In Sellman, the claimant suffered a fall while working on a ship owned by I.T.O.'s predecessor, resulting in a fractured skull and paralysis. The employer voluntarily paid compensation and medical benefits from July 11, 1979, until July 21, 1984. The employer terminated payments when the claimant failed to turn over third-party funds received in a settlement of the third-party claims. 954 F.2d at 240.

The two settlement agreements were a result of a suit brought by I.T.O., Sellman, and his wife and children. The first settlement was with I.T.O. for $250,000, contingent upon the Sellman settlement being approved by the Circuit Court of Baltimore County. This settlement was signed by Mrs. Sellman, Mr. Sellman's attorney, I.T.O.'s attorney, and the defendant's attorney. Id.

The second agreement was to the Sellmans in satisfaction of any claims brought against the defendants. The amount here was for $250,000. One of the actions was initiated by Mrs. Sellman for loss of consortium. The same parties signed this agreement with the exception of I.T.O. Corporation. Both settlements integrated sections of the other. Id.

A petition for approval by the Baltimore Circuit Court was drafted containing provisions that differed from the settlement agreements. The settlements were silent as to whether I.T.O. could suspend compensation, or receive an offset from the proceeds of the settlement, yet the petition agreement stated that I.T.O. would not terminate compensation and medical benefits, and would not receive an offset as the proceeds of the settlement were for Mrs. Sellman's loss of consortium. Id.

The judge determined that the petition was incorporated into the settlement agreement and relied on documentary and testimonial evidence that I.T.O. intended to continue payments. The judge also found that Mr. Sellman was excused from filing the government form of third-party approval (LS-33) and that the funds were for Mrs. Sellman's loss of consortium and thus not subject to offset. The Board affirmed. I.T.O. appealed the finding that it could not terminate compensation and medical benefits, or that it was not entitled to an offset. Id. at 240-41.

The broad purpose of Section 33(g) is to protect the employer from an employee accepting too little for the cause of action against the third party. Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 **U.S.** 459 (1968). The **Fourth Circuit** saw that this purpose would be ill-served if the employer were able to participate in and help negotiate the settlement, then refuse to approve the settlement and terminate benefit payments, especially when the **employer's settlement was intermeshed with the claimant's**. Sellman, 954 F.2d at 242. The court appeared to limit this denial of Section 33(g) relief, however, to those instances where the employer participates in the settlement.

In Brown & Root, Inc. v. Sain, 162 F.3d 813 (**4th Cir.** 1998), the **Fourth Circuit** considered when a claimant who had suffered an occupational disease became a "person entitled to compensation." In Sain, the employee was exposed to asbestos during the course of his employment with the employer. In 1988, he was diagnosed with asbestosis and filed a civil suit against several asbestos manufacturers, but continued to work full time until his retirement in 1993 and part-time thereafter. In 1994, the employee was diagnosed with advanced mesothelioma and died later that year. Between 1988 and 1994, the employee and his wife entered into several third-party settlements without the written approval of the employer. The court rejected the employer's contention that the employee became a "person entitled to compensation" either at the time of his last exposure to asbestos in 1976, or at the time of his asbestosis in 1998.

First, the **Fourth Circuit**, citing 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., dissenting), held that the LHWCA provides a right of recovery not for mere exposure to a potentially harmful stimulus, but only for an actual disability arising from such exposure. Since the employee had suffered no injury at the time of his last exposure in 1976, his right to recovery had not vested and thus, he could not have become a "person entitled to compensation" in 1976. Sain, 162 F.3d at 816. Second, the Fourth Circuit rejected the employer's assertion that the employee became a "person entitled to compensation" at the time he was diagnosed with asbestosis in 1988, holding that the employee's *mesothelioma was distinct from his asbestosis*. Thus, the court rejected the employer's contention that the claimant became a "person entitled to compensation" at the time of his exposure to injurious stimuli .

The **Fourth Circuit**, in Sain, also held that medical benefits are not to be taken into account in the Section 33(g)(1) calculation, since the term "medical benefits" is used in Section 33(g)(2) but not in Section 33(g)(1). The court, in Sain, also rejected the employer's contention that the net amount of the third-party settlements, not the gross amount, should be used in the Section 33(g)(1) calculation.

The **Fourth Circuit** also held that Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 **U.S.** 121 (1997)(Although employee's injuries had not diminished his present wage-earning capacity, he could be entitled to a nominal award if there is evidence of a significant potential that the injury will cause diminished earning capacity under future conditions.), was unavailable to the employer as it had failed to establish that, at the time of the diagnosis of the employee's asbestosis, there was a significant potential that the injury would cause diminished wage-earning capacity in the future, as required by Rambo II. Sain, 162 F.3d at 817. Because the employee was not entitled even to a nominal award under the LHWCA at the time of his asbestosis diagnosis, the court held that the employee did not become a "person entitled to compensation " until his diagnosis of mesothelioma in 1994.

33.7.1.4 Third Circuit

In Bundens v. J.E. Brenneman Co., 29 BRBS 52(CRT) (1995), 46 F.3d 292 (3d Cir. 1995), the **Third Circuit** held that it is the **gross not net, settlement amount**, to which to look when determining whether claimants had to obtain written approval of settlements under Section 33(g). The court noted that while there was the inclusion of "net" and its definition in Section 33(f) as part of the comprehensive 1984 overhaul of Section 33, Congress, though rewriting Section 33(g), did not elect to include the "net" language that it carefully place in Section 33(f). The **Third Circuit** noted several compelling arguments for reading Section 33(g) to mean "net." See Bundens, 29 BRBS at 72 n. 28(CRT), 46 F.3d at 305, n. 28. However, since its task was to interpret and not to create law, the **Third Circuit** felt compelled to conclude that **in applying Section 33(g) one should consider the gross, and not the net amount**.

From a practical standpoint, the court noted that a claimant may not be able to calculate the net settlement before accepting it, and, thus, may not know whether he needs to obtain the employer's consent. Bundens, 29 BRBS at 73 n. 29(CRT), 46 F.3d at 306 n. 29. In Harris v. Todd Pacific Shipyards Corp. (Harris I), 28 BRBS at 266 (1994), the Board specifically rejected the concept of comparing the "gross amount" of the third party settlement(s) with the amount of compensation to which the claimant would be entitled for Section 33(g)(1) purposes. See also Glenn v. Todd Pac. Shipyards Corp., 26 BRBS 186 (1993). However, on rehearing en banc, the Board vacated Harris I on this issue and now holds that the Section 33(g) "less than" comparison is between the gross amount of the aggregate third-party settlement recoveries and the amount of compensation to which the claimant would be entitled. Harris II, 30 BRBS at 18 (1996) (en banc). The Board noted Bundens' reasoning that in the comprehensive 1984 overhaul of Section 33, Congress demonstrated its ability to specify "net amount" in Section 33(f). Additionally, the en banc Board noted that the use of gross settlement amounts for comparison purposes under Section 33(g)(1) "is in agreement with the Director's interpretation of that section. Id.

In Ingalls Shipbuilding Inc., Director, OWCP (Yates), 519 **U.S.** 248 (1997), **references are made to "net" third-party settlement recovery,** although this was not litigated.

33.7.2 The Supreme Court and Section 33(g)

In light of the differing interpretations of Section 33(g), it was inevitable that the matter would reach the **Supreme Court**. In Estate of Cowart v. Nicklos Drilling Co., 505 **U.S.** 469 (1992), the **Court** decided "whether the forfeiture provision [of Section 33(g)] applies to a worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor is yet subject to an order to pay under the Act." Cowart, 505 **U.S.** at 471.

In Cowart, the claimant suffered a work-related injury for which the employer's carrier paid him temporary total disability until May 21, 1984, when the claimant was released to return to work. On July 1, 1985, without the written approval of the employer or its carrier, claimant settled his third-party claim against Transco for $45,000. The third-party settlement occurred at a time when the claimant was not receiving longshore benefits. Also, the third-party settlement amounted to less than the compensation to which the claimant was entitled. After settling his third-party claim, Cowart filed a longshore claim seeking disability compensation from his employer, Nicklos. 505 **U.S.** at 472.

The judge in Cowart determined that Section 33(g) did not apply as the claimant was not a "person entitled to compensation" at the time of the third-party settlement. In so holding, the judge relied on the Board's decision in O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977) (holding that "person entitled to compensation" refers only to injured employees whose employers are paying compensation, either voluntarily or pursuant to an award).

[ED. NOTE: *Interestingly, the Board reaffirmed its position following the 1984 Amendments in*

Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986) (relying on the principle that, even though Congress added subsection 33(g)(2), since Congress did not alter the existing language of the section, Congress implicitly adopted the Board's previous interpretation).]

The judge awarded the claimant $35,592.77, less the net recovery from Transco of $29,350.60, for a total award of $6,242.17, not including interest, attorney fees, and future medical benefits. The Board affirmed.

The **Fifth Circuit** held that Section 33(g) contains no exceptions to its written approval requirement. Nicklos Drilling Co. v. Cowart, 907 F.2d 1552 (**5th Cir.** 1990). On rehearing en banc, a majority of the **Fifth Circuit** affirmed the holding of the panel, stating that the plain language of the statute is unambiguous. Nicklos Drilling Co. v. Estate of Cowart, 927 F.2d 828 (**5th Cir.** 1991).

Upon examining the statute, the **Supreme Court** focused on the plain language enacted by Congress, as well as the decision of the **Fifth Circuit**, in order to overturn the Board's definition of a "person entitled to compensation." The **Court** reasoned that longshore benefits are an entitlement. Therefore, to be a "person entitled to compensation," a longshore worker need only satisfy the prerequisites attached to the right. In other words, one becomes a "person entitled to compensation" the moment that the right to recovery vests, not when an employer admits liability. Cowart, 505 **U.S.** at 474. Accordingly, one needs only to be injured while working in covered employment in order to satisfy the **Supreme Court's** definition of a "person entitled to compensation." Indeed, Cowart was a case wherein the injured employee, who suffered a work-related traumatic injury, settled his own third-party case without securing a formal written approval of the settlement from his employer and was denied permanent compensation benefits.

The **Court** also relied on the 1984 Amendments to Section 33(g) in order to illustrate how Section 33(g) has been narrowed for claimants. Although acknowledging that Section 33(g)(1) remained essentially what Section 33(g) had been, the **Court** found that Section 33(g)(2) altered the meaning of the section. The addition of the phrase "regardless of whether the employer or the employer's insurer has made payments or acknowledges entitlement to benefits under this chapter," altered Section 33(g)(1) in such a way as to rule out the Board's interpretation of "person entitled to compensation" as stated in Dorsey and O'Leary. Cowart, 505 **U.S.** at 478.

***[ED. NOTE:** The **Supreme Court** acknowledged that an employer does not have to admit liability, and may even use Section 33(g) to avoid liability. (The LHWCA does not require the employer/carrier to provide any justification for a refusal to consent to a settlement under Section 33(g).) This acknowledgment creates a dilemma in light of the humanitarian goals of the LHWCA. Although the **Court** noted that Section 33(g) is designed to protect the employer, the **Court** failed to recognize that Section 33(g) is premised, at least in part, on the employer voluntarily paying compensation. An employer that is not voluntarily paying compensation will not receive any funds to offset what it has paid the claimant since it has paid nothing. In addition, what if an administrative law judge decides that the person is not entitled to benefits under the LHWCA? Prior to an award, it is impossible to determine whether a claimant is entitled to compensation since there*

*may be unresolved issues involving covered employer, fraud, or other credibility issues. The **Court's** decision encourages employers not to pay compensation. This encouragement may force claimants to settle claims for less than they otherwise would have, since they may have no other source of income.]*

"Qualifying" for Benefits

The **Court** analyzed "person entitled to compensation" using the phrase's context in other sections of the LHWCA. Applying Cowart's and the Board's interpretation of the phrase to other sections of the LHWCA, the **Court** determined that this interpretation would not make sense. See 33 U.S.C. §§ 914(h), 933(f). The Board had previously rejected applying the Section 33(g) interpretation of the phrase to Section 33(f). See Cowart, 505 **U.S.** at 480; Force v. Kaiser Aluminum & Chem. Corp., 23 BRBS 1, 4-5 (1989). The **Court** would, however, bend their position when they determined that the drafters of the LHWCA used the terms "employee" and "person entitled to compensation" synonymously. Cowart, 505 **U.S.** at 480.

***[ED. NOTE:** In oral argument before the **Supreme Court**, the Department of Labor altered its interpretation of the phrase "person entitled to compensation." Until the **Fifth Circuit** issued its decision in this case, the Director had interpreted this phrase to limit the provisions of Section 33(g) to only those claimants who were receiving longshore benefits at the time of the third-party settlement. Subsequent to the **Fifth Circuit's** en banc decision, the Director changed his position in support of extending the forfeiture clause to all employees regardless of whether they were receiving benefits at the time of the settlement. In Cowart, the **Supreme Court** stated that it could not, under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 **U.S.** 837 (1984), give deference to the agency's interpretation of this statute because the Director had changed his earlier position of 14 years. (The Board had also interpreted this phrase to mean a person receiving benefits at the time of the third-party settlement.) The **Supreme Court** went on to state that a reviewing court should not defer to an agency position which is contrary to the intent of Congress expressed in unambiguous terms, implying that, even if the Director had not changed his position, the outcome would have been the same.]*

***[ED. NOTE:** Query: If the **Court** believes that words have a plain meaning, and that one has to read terms consistently throughout the LHWCA, how would **this Court** decide the question of whether medical benefits are compensation? The LHWCA contains a definition of the word "compensation" and compensation is mentioned in both Section 33(g)(1) and Section 33(g)(2), but medical benefits are only mentioned in 33(g)(2) in addition to compensation. For an older **Supreme Court** decision discussing medical benefits, see Marshall v. Pletz, 317 **U.S.** 383 (1943) (term "compensation" in Section 13 does not include medical benefits).]*

Claimant Cowart argued that the **Fifth Circuit**'s interpretation of Section 33(g) would read out any meaning in 33(g). Nonetheless, the **Court** carved out two exceptions where only notification is required: 1) where the employee obtains a judgment, rather than a settlement, against a third party; and 2) where the employee settles for an amount greater than or equal to the employer's total

liability. This is because the employer's rights are protected in these two situations.

Therefore, in order for the Section 33(g)(1) bar to take place:

1) One must be considered a "person entitled to compensation;"

2) One must **not** have received the prior written permission of the employer to enter into the third-party settlement; and

3) The third-party settlement must be for **less** than the compensation to which the person entitled to compensation is entitled under the LHWCA.

Under Section 33(g)(2), if no written approval is obtained, or if the employee fails to notify the employer of the settlement, all rights to compensation and medical benefits are terminated. If the claimant is receiving a third-party settlement in an amount equal to, or more than, the longshore claim, or pursuant to a third-party judgment, the claimant need only give the employer notification and need not secure the employer's written approval.

The ruling in Cowart is entitled to retroactive effect. Kaye v. California Stevedore & Ballast, 28 BRBS 240, 251 (1994); see also Monette v. Chevron USA, Inc., 29 BRBS 112, 115 (1995) (Brown, J., concurring), aff'g on recon. en banc. 25 BRBS 267 (1992). In Clark v. National Steel and Shipbuilding Co., BRB Nos. 95-1703, 95-1703A, 95-1703S (Dec. 23, 1996) (not published), the Board referred to Kaye, finding that the "ruling in Kaye makes clear that Cowart would be consistently applied and its application would not vary according to the particular equities of the parties, as controlling precedent clearly requires that the law of Section 33(g) 'not shift and spring' on such basis." Id. The Cowart rule, the Board continued, "must be applied 'with respect to all others not barred by procedural requirements of *res judicata*.'" Id. (citing James B. Beam Distilling Co. v. Georgia, 501 **U.S.** 529, 543 (1991)).

Who qualifies as a "Person Entitled To Compensation" (PETC) ?

Since the Cowart decision, the **Ninth Circuit** has addressed the issue of who qualifies as a "person entitled to compensation" in Cretan v. Bethlehem Steel Corp., 1 F.3d 843 (**9th Cir.** 1993), cert. denied, 512 **U.S.** 1219 (1994). Cretan involved the claim of a widow and daughter of a longshore worker who died from mesothelioma, a terminal occupational disease. The decedent filed a claim under the LHWCA, and had instituted a products liability action against numerous asbestos manufacturers. After the longshore worker's death, the widow and daughter filed decedent's and survivor's claims under the LHWCA.

Before the **Ninth Circuit**, the survivors claimed that they were not "persons entitled to compensation" when they settled the third-party claims, as the longshore worker had not yet died. The court distinguished Cowart because Cowart did not address the question of whether a claimant

whose entitlement will mature upon a death that has not yet happened is a "person entitled to compensation." Id. Although some isolated language supported the claimants' view, the **Ninth Circuit** viewed this language as *dicta* and, if the reading of the language was as the claimant argued, it would defeat the purpose of Section 33(g). As such, the **Ninth Circuit** reaffirmed its decision in Force that claimants who settle before death, thus giving rise to benefits, are subject to set off, and the entitlement does not have to become vested. Therefore, parties who settle a claim and foreseeable become "persons entitled to compensation" due to the death of the longshore worker are held to the standards of Section 33.

The **Ninth Circuit** has rendered several recent decisions contrary to its earlier strict interpretations of Section 33(g). In Mallot & Peterson v. Director, OWCP, 30 BRBS 87 (CRT), 98 F.3d 1170 (**9th Cir.** 1996), the claimant's attorney entered into an agreement with a third party to settle the third party suit. However, the widow refused to sign a release or accept the settlement proceeds. The employer asserted that the actions of the attorney were binding on the widow, and that she was therefore barred under Section 33(g) because her **representative** had entered into an agreement. However, the **Ninth Circuit** interpreted the word "**representative**," in the Section 33(g) phase "person entitled to compensation (or the person's **representative**)," to mean a **legal representative of the deceased**, thus excluding legal counsel acting within an attorney/client relationship. In consequence, the **Ninth Circuit** held that the widow was not barred from bringing a suit for benefits and denied the employer's petition to set aside the Board's order. Mallot, 98 F.3d at 1174, 30 BRBS at 90.

Supreme Court: Widow not "a person entitled to compensation" at the time of the pre-death settlements

[ED. NOTE: *The issue of whether the "sins" of the employee/claimant can be transferred to the spouse (widow/widower) was initially raised in Kaye v. California Stevedore & Ballast, 28 BRBS 240, 251 (1994). In Kaye, the Board, in noting that some of the third-party settlements in question had been entered into solely with the now-deceased employee/husband, stated: "[I]t is questionable whether these settlements have any bearing on whether claimant's claim is subject to the provisions of Section 33(g)(1). We need not enter this thicket today, however..." Id. But, this "thicket" was entered into recently by the* ***United States Supreme Court*** *in Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519* ***U.S.*** *248 (1997).**]***

The **Supreme Court** recently affirmed the **Fifth Circuit's** decision in Ingalls Shipbuilding, Inc., v. Director, OWCP (Yates), 519 **U.S.** 248 (1997). In Yates, the wife of the living employee/claimant entered into pre-death settlements of her husband's third party lawsuits without obtaining the employer's approval. The **Court** concluded that Section 33(g) did not bar the respondent's death benefits claim because she was not "a person entitled to compensation" at the time of the pre-death settlements. See Travelers Ins. Co. v. Marshall, 634 F.2d 843, 846 (**5th Cir.** 1981) ("a cause of action for death benefits certainly does not arise until death").

A federal district law suit had been filed by the worker/claimant in 1981. In 1983, Ingalls

and the worker/claimant executed a settlement agreement pursuant to Section 8(i) under which Ingalls agreed to pay him a lump sum, give him open medical benefits and pay his attorney's fees. Between 1981 and 1984, the employee/claimant consummated settlement agreements with eight defendants in the federal court suit. Ingalls was not a party to the pre-death settlements, and the employee/claimant did not obtain its approval before he made these settlements.

While Mrs. Yates was not named a party plaintiff in the federal court suit, she signed releases in each of the pre-death settlements. Although some of the earlier settlements limited Mrs. Yates release to loss of consortium, other settlements foreclosed her from bringing any future tort claim for her husband's wrongful death.

After the employee/claimant's death, Mrs. Yates and her six non-dependent children converted the federal action into a wrongful death action and entered into post death settlements. In accordance with Section 33(g), Mrs. Yates obtained Ingalls written approval for the three post-death settlements. The widow also filed a claim for death benefits under Section 9 of the LHWCA against Ingalls. Ingalls defended the claim on two grounds.

First, Ingalls argued that the widow's claim for death benefits under the LHWCA was barred because her pre-death settlement with the asbestos defendants was without its approval and, therefore, barred under Section 33(g)(1). (Subsequently, the Board affirmed the judge's holding that at the time of the pre-death settlements, the wife was not a "person entitled to compensation".)

Second, Ingalls argued that once it took credit for all the net proceeds of the post-death settlements against its potential liability to the widow for death benefits under the LHWCA, it was mathematically impossible that Ingalls would be required to pay death benefits to the widow. The judge determined that, based on the Mississippi wrongful death statute, the post-death settlements were apportioned one-seventh of the net amount to claimant and 6/7's to her non-dependent children. However, the judge held that based on the terms of the post-death settlement agreements, Ingalls was contractually entitled to receive credit under Section 33(f) for the entire net amount of the post-death settlements to offset its statutory liability for death benefits. (A Board majority ultimately held that no contractual basis existed for allowing the offset of the entire net amount.)

It is worth reiterating: In affirming the Fifth Circuit's decision, the Yates **Court** concluded that **Section 33(g) did not bar the respondent's death benefits claim because she was not "a person entitled to compensation" at the time of the pre-death settlements.** See Travelers Ins. Co. v. Marshall, 634 F.2d 843, 846 (**5th Cir.** 1981) ("a cause of action for death benefits certainly does not arise until death"). The **Court** determined that, in conformance with Cowart and with the plain language of the statute, one must be a "person entitled to compensation" at the time of the third party settlement. Yates, 519 **U.S.** 248. Thereafter, the **Court** held that in order to be a "person entitled to compensation" under 33(g), the wife must be able to satisfy the prerequisites for obtaining death benefits at the time of the settlement. Therefore, since a death claim does not arise until the death of the employee, the widow was not yet "a person entitled to compensation" when she entered into the third party settlement and, thus, had no duty to obtain her husband's employer's consent to

the third party settlement pursuant to Section 33(g). Id. In so holding, the **Court** stated that the **"relevant time for examining whether a person is 'entitled to compensation' is the time of the settlement."** Id.

In addition, the Yates **Court** inferred that its decision is not necessarily **limited to 33(g)** and that **the phrase "person entitled to compensation" could, in fact, be interpreted differently for purposes of Section 33(f).** Id. ("This entire argument, however, presupposes that the definition we today give to 'person entitled to compensation' under § 33(g) applies without qualification to § 33(f) as well. This is a question we have yet to decide, and is one we leave for another day." Id.).

[ED. NOTE:** The **Supreme Court** in Yates also considered a conflict between the **Fourth** and **Fifth Circuits** regarding whether the Director of the OWCP is entitled to participate as a **respondent** in a case arising under the LHWCA in which it has no financial or statutory interest. The Court held that, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, the Director is entitled to appear before the Court of Appeals as a respondent, **and** is "free to argue on behalf of the petitioner [in his capacity as a respondent]." Id. (citing Director, OWCP v. Perini N. River Assoc., 459 **U.S.** 297, 301 (1983)). For a detailed discussion of standing before the U.S. Court of Appeals, see supra, Topic 21.3.6.**]

***[ED. NOTE: Can Cowart be distinguished?** At least one claimant has argued, to no avail, that Cowart can be distinguished in that there was only one employer in Cowart, but with many occupational disease cases, there are several potentially liable employers, and it is impossible to know which of the employers is the responsible employer prior to an evidentiary hearing. See Kaye v. California Stevedore & Ballast, 28 BRBS 240, 253 (1994).*

Query:** Can Cowart be distinguished as applying only to traumatic cases involving only the actions/inactions of the worker/claimant himself? Should it? Should occupational disease cases be treated differently? What is the overall purpose of Section 33 or of the LHWCA generally?**]

"Person Entitled to Compensation" as it Applies to "Retirees" in Occupational Disease Claims

In accordance with the employers Motion for Reconsideration of the Board's Decision and Order of Harris v. Todd Pacific Shipyards Corp. (Harris I), **28 BRBS 254 (1994)**, the en banc Board in Harris v. Todd Pacific Shipyards Corp. (Harris II), **30 BRBS 5 (1996)**, liberally construed the phrase "person entitled to compensation" as it applies to "retirees" in occupational disease claims. In two consolidated cases (Harris v. Todd Pacific Shipyards Corp. and Hendrickson v. Lake Union Dry Dock Company), the facts indicated that the claimants either voluntarily retired or retired due to reasons unrelated to their asbestos exposure. Thereafter, they were diagnosed with asbestos-related conditions and filed claims as a result. However, the evidence was unclear as to whether the retirees had been assigned percentages of permanent impairment due to their asbestos exposure. The employees entered into **third party settlements without the employers' consent** and the employers asserted that since the employees had been diagnosed with asbestos-related conditions, and filed claims alleging disability, they were "persons entitled to compensation" who had **forfeited** their

rights under the LHWCA. However, drawing upon the 1984 Amendments and subsequent case law which interprets "time of injury" in occupational disease cases, the Board held that a retiree **does not become a "person entitled to compensation" until he is aware of the relationship between the employment, the disease, and the permanent physical impairment; for a claimant who is not a retiree**, he must be aware of a work-related disease which has caused a loss in his wage-earning capacity.

[ED. NOTE: *On reconsideration en banc, the issue of "person entitled to compensation" was decided in a three to two split by the permanent Board. The dissenting judges favored the approach taken in Cretan v. Bethlehem Steel Corp., 1 F.3d 843, 27 BRBS 93 (CRT) (**9th Cir.** 1993), cert. denied, 512 **U.S.** 1219 (1994). Judge Brown noted that there is no time limit imposed by the LHWCA as to when a person becomes a "person entitled to compensation" and that the classification can be made immediately. Brown dissent, slip op. at 22. Judge McGranery noted that according to Cretan, a wife or daughter who settles a survivor's claim prior to the injured employee's death is a "person entitled to compensation" although their rights to compensation had not vested because, to hold otherwise would contradict the policy of employer protection that is evident on the face of Section s 33(f) and (g).**]*

Retroactivity

The **Supreme Court** recently announced a new standard for the retroactivity of case law. In Harper v. Virginia Department of Taxation, 509 **U.S.** 86 (1993), the **Court** stated:

> When this Court applies a rule of federal law to the parties before it, the rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Thus, Cowart is to be applied to all cases dealing with Section 33(g) (with the exception of remands). See James B. Beam Distilling Co. v. Georgia, 501 **U.S.** 529 (1991); Melton v. Moore, 964 F.2d 880 (**9th Cir.** 1992); See Wyknenko v. Todd Pacific Shipyards Corp., 32 BRBS 16 (1998) (9th Circuit and Board have held that in as much as the Supreme Court in Cowart applied the ruling to the parties before it, that decision is applicable to all cases.); Kaye v. California Stevedore & Ballast, 28 BRBS 240 (1994); Linton v. Container Stevedoring Co., 28 BRBS 282 (1994); Monette v. Chevron USA Inc., 29 BRBS 112 (1995); Hintz v. Todd Pac. Shipyards Corp., 27 BRBS 305 (ALJ) (1993).

33.7.3 Involvement of the Employer in Third-Party Settlements

The **Supreme Court** has not addressed the issue of whether an employer's participation in a settlement agreement nullifies the forfeiture provision of Section 33(g)(1). Estate of Cowart v. Nicklos Drilling Co., 505 **U.S.** 469 (1992). The issue has arisen, however, in the circuit courts and

the Board.

In I.T.O. Corp. of Baltimore v. Sellman, 954 F.2d 239, vacated in part, adhered to in part on reh'g, reh'g en banc denied, 967 F.2d 971 (**4th Cir.** 1992), cert. denied, 507 **U.S.** 984 (1993), the employer initiated its own third party suit and thus was a co-plaintiff with claimant. It participated in the settlement negotiations and recovered directly from the defendants, but refused to give claimant written approval of his settlement with the third party. The **Fourth Circuit**, affirming the Board on this issue, held that **Section 33(g) is not applicable where the employer also reaches a settlement with the third party**. Specifically, the court relying on the purpose of Section 33(g), determined that Section 33(g) would be ill-served if benefits could be terminated where an employer has directly insured its offset rights. Id. at 242; see Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 **U.S.** 459, 467 (1968) If employer participates in the settlement process and assents to its terms, it has assured, by its own actions, the protection of its offset rights under Section 33(f). Id. at 243. The **Fourth Circuit** also looked at the fact that the employer participated in the settlement agreement and that each agreement referenced the other so as to make them one. Sellman, 954 F.2d at 940.

[ED NOTE: *Sellman is very fact-specific. The court noted that their decision was not grounded in estoppel principles. The two agreements were seen as interdependent and, as such, the employer had given its tacit approval by making their agreement dependent on the circuit court's holding on the Sellman's agreement.**]***

The **Fourth Circuit** had upheld the Board's, and the judge's, position with respect to employer participation. See Sellman v. I.T.O. Corp. of Baltimore, 24 BRBS 11 (1990). The Board restated this position in Deville v. Oilfield Industries, 26 BRBS 123 (1992). The Board did note that, when the employer actively participates in a third-party suit, the employer adequately protects its interest of offset under Section 33(f). Id. at 131 (citing Petroleum Helicopters v. Collier, 784 F.2d 644 (**5th Cir**. 1986), for setting forth what are an employer's interests). In Deville, the Board, citing Sellman, held that Section 33(g) is inapplicable because the employer intervened in the third party suit on the side of the claimant, appeared at the hearing, and contributed to the settlement agreement which provided for its offset. Further, the Board held that even if Section 33(g)(1) did apply, the employer gave written approval prior to the execution of the settlement being an actual signatory to the agreement. 22 BRBS at 131-32; see also Pinell v. Patterson Service, 22 BRBS 61 (1989), aff'd on other grounds mem., 20 F.3d 465 (**5th Cir.** 1994).

This holding does **not** apply in the **Fifth Circuit** pursuant to Nicklos Drilling v. Estate of Cowart, 927 F.2d 828 (**5th Cir.** 1991), aff'd, 505 **U.S.** 469 (1992). The **Fifth Circuit's** decision in Cowart states that there are no exceptions to Section 33(g). As the **Supreme Court** did not address this issue in Cowart (as it was not included in the question on which certiorari was granted), it is still applicable within the **Fifth Circuit**. See Deville, 26 BRBS at 131 n.10; Monette v. Chevron U.S.A., Inc., 25 BRBS 267 (1992), aff'd on rehearing en banc, 29 BRBS 112 (1995).

The Board in Pool v. General American Oil Co., 30 BRBS 183 (1996), distinguished between the Sellman/Deville decisions and the case at bar, maintaining that the employer's participation in

the third party claim is insufficient to render Section 33(g)(1) inapplicable or to constitute constructive approval of the settlement. The Board held that the compromise satisfaction of a jury verdict constituted a settlement which required the employer's consent. Specifically, the Board stated that **"[i]t is the substance of the parties' actions rather than the title of the document ending the litigation that controls the applicability of Section 33(g)(1)."** 30 BRBS at 187. "Because the 'judgment' herein was not final, and because claimant thereafter negotiated an agreement with the third parties," the Board affirmed the ALJ's "determination that the 'satisfaction of judgment' in this case is actually a 'compromise' or 'settlement' within the meaning of Section 33(g)." Id.

Additionally, the Board in Pool held that **mere intervention by the employer in the third party case is not tantamount to implied consent to the third party settlement** where the facts indicated that the employer did not join in or agree to the settlement. Specifically, the Board stated that although the "[e]mployer, through its carrier, intervened in the third-party case and participated, to some degree, in the settlement process," **employer did not "appear on the side of the claimant, did not sign the actual settlement and in fact specifically declined to do so."** Thus, the Board affirmed the ALJ's finding that the employer's participation was "insufficient to preclude application of Section 33(g)(1)." 30 BRBS at 188.

In Taylor v. Marine Insulation Corp., 29 BRBS 556 (ALJ) (1995), the **Form LS-33 was not obtained and filed contemporaneously with the third-party settlement**. Both the **employer and the carrier were defunct** and therefore incapable of signing the Form LS-33. The state guaranty fund actively participated in the settlement negotiations and formally approved the settlement on a Form LS-33, albeit somewhat late. The judge found that the guaranty association occupied the same position that is ordinarily occupied by the employer or carrier. Additionally, it was noted that the employer and carrier were insolvent and had no rights that could have been protected by Section 33(g).

[ED. NOTE: *To have held otherwise in this case could leave broad implications. Would it mean that no claimant who is an employee of a defunct employer and carrier could settle a third-party claim without being barred from obtaining LHWCA compensation from a guaranty association even it the guaranty association actively participates in the third-party negotiations? Would the outcome be different if the guaranty association had not participated in the settlement negotiations nor eventually signed the Form LS-33?****]***

Where the employer actually approved the settlement agreement prior to the third-party suit's dismissal by the district judge, agreed to waive its lien, and acknowledged its approval on the proper form, the failure to timely file the Form LS-33 did not bar additional recovery. Valdez v. Crosby & Overton, 34 BRBS 69 (2000). In Valdez, the Board noted that the filing of the Form LS-33 is a ministerial act, as no further action was required of the district director thereafter.

In Gremillion v. Gulf Coast Catering Co., 31 BRBS 163 (1997), the Board held that the employer's participation in third-party litigation rendered Section 33(g) inapplicable. The Board

noted that "Employer, through its carrier in this case, participated in the third-party litigation both as a party-defendant and intervener." Moreover, the Board stated that the claimant and his spouse signed a Release in the third-party suit and, importantly, the employer joined in the Joint Motion for Partial Dismissal with Prejudice based upon the Release. The Board noted that the Release executed by the claimant states, in pertinent part, the following:

> It is agreed *among the parties* that Liberty Mutual Insurance Company and Gulf Coast Catering Company waive their rights to reimbursement ... in connection with the settlement herein, and to dismiss its intervention in the aforementioned lawsuit. (italics in original).

The Board affirmed the ALJ's finding that the employer's participation in the third-party suit was tantamount to a constructive approval of the settlement. It further noted that, in the Release, the employer's offset rights under the LHWCA were protected and this constituted further evidence of its approval of the settlement.

The Board then vacated the ALJ's finding that the employer's credit, as set forth in the Release, is limited "to the net amount of claimant's settlement recovery." Specifically, the Board determined that the terms of the Release "appear ... to grant employer an offset which exceeds claimant's net settlement recovery." It concluded that such a provision is permissible "if the administrative law judge finds it clearly and unambiguously demonstrates such an intent."

The Board has held that it was error for an ALJ to apply the Section 33(g) bar where there was "no third-party defendant or civil suit for damages involved" in the claim for state workers' compensation benefits. The Board concluded that "[t]he state compensation claim does not fall within the provisions of Section 33 as it was not brought against a third-party in a civil suit for tort damages." See Redmond v. Sea Ray Boats, Inc., 32 BRBS 1 (1998).

Employer's Execution of LS-33 (Section 33(g) Waiver) Inextricably Intertwined with Section 8(i) Settlement

In Casciani v. St. John's Shipyard, 35 BRBS 583 (ALJ)(2001), the ALJ found that the employer's execution of the LS-33 (Section 33(g) waiver) was inextricably intertwined with a Section 8(i) settlement. Although the waiver itself contained no contingency, he found that the parties mutually intended to enter into a settlement which embodied the employer's waiver of its lien against the proceeds of the third-party settlement ($500,000) along with a payment to the claimant in the amount of $45,000. For the reasons noted below, the ALJ found that the Section 8(i) settlement was a binding agreement which was not, under the circumstances, subject to disapproval by the District Director or an ALJ, and therefore, must be reinstated. The LS-33 was found to also remain in full force and effect with respect to the proceeds of the third party settlement.

When both parties are represented by counsel, the statutory time limit for disapproving a

settlement is 30 days from the date of submission. The ALJ found the District Director was free to reconsider her own approval within the statutory 30-day time limit, but, having failed to disapprove the settlement within the 30-days of its submission, the District Director's disapproval was untimely and unauthorized. The ALJ found that under the applicable statutory provision, a compensation order approving a settlement is not like any other order, the binding effect of which is, by regulation, stayed for 30 days. [The ALJ specifically noted that, "Whether or not orders approving a settlement are reviewable need not here be decided, although it may be noted that Section 8(i)(1) and (2) suggest that only orders disapproving a settlement are reviewable."] The ALJ noted that Congress directed both the Director and ALJs to either disapprove an agreement in 30 days or stand aside. "To be timely and consistent with the statutory time limit, the administrative process of review, approval, reconsideration, and disapproval or deficiency notice issued in respect to a settlement agreement filed by parties represented by counsel must be complete within 30 days of submission or the option for administrative action to disapprove it expires."

33.7.4 Medical Benefits

One of the many issues that was not addressed in the Cowart decision is the role that medical benefits play in the forfeiture provisions of Section 33(g). The basic question that must be addressed is whether medical benefits are compensation or a separate category altogether. This question usually arises in two situations under Section 33:

1) when a claimant requests only medical benefits (without compensation) after the claimant has entered into an unapproved third-party settlement; or

2) when the claimant is receiving medical benefits (with or without compensation) and has entered into a third-party settlement, and an employer requests forfeiture of medical benefits as well as future compensation.

The problem arises due to the wording of the section. Section 33(g)(1) only uses the term "compensation." Compensation refers to whom the section applies (a person entitled to compensation), to what the third-party settlement is to be compared (an amount less than the compensation to which the person would have been entitled), and to the amount for which the employer will be held liable if the provisions are followed (the employer shall be liable for compensation ... only if written approval is obtained). See 33 U.S.C. § 933(g)(1). Nowhere in this subsection are medical benefits mentioned.

In contrast, subsection 33(g)(2) uses both terms. If there is no written approval, or if the employee fails to notify the employer, the employee loses all rights to compensation and medical benefits. See 33 U.S.C. § 933(g)(2).

The confusion between the terms "compensation" and "medical benefits" is compounded by

Section 2(12) of the LHWCA, which defines compensation as "the money allowance payable to an employee or to his dependents as provided for in this LHWCA, and includes funeral benefits provided therein." 33 U.S.C. § 902(12). Nowhere in Section 2 are medical benefits mentioned even though it expressly sets forth funeral expenses as compensation. Problems still arise since medical benefits and compensation can be either separate or synonymous, depending on the interpretation. Generally, interest and penalties are added to past due compensation at appropriate times, but not past due medical benefits. But see Hunt v. Director, OWCP, 999 F.2d 419, 27 BRBS 84 (CRT) (**9th Cir.** 1993)

[ED. NOTE:** At the **Supreme Court** level, several questions remain unanswered: Are medical benefits included in determining whether a settlement is less than or greater that the compensation?**]

The **United States Supreme Court** dealt with the problem of medical benefits in Marshall v. Pletz, 317 **U.S.** 383 (1943). In the context of Section 13(a), the **Court** determined that medical benefits are not payment of compensation. The **Court** based this determination, in part, on the definition of compensation in Section 2(12) which does not equate compensation with medical benefits. The **Court** also went on to discuss the differences between compensation and medical benefits within the LHWCA. Marshall, 317 **U.S.** at 390-91. See 33 U.S.C. §§ 906(a), 907, 908, 910, 914. See, e.g., Bethlehem Steel Corp. v. Mobley, 912 F.2d 1084, amended, 920 F.2d 558 (**9th Cir.** 1990) ("The fact that the ALJ and the Board awarded ... medical expenses is not material. ... [C]ompensation and medical benefits are distinct terms under the Act." citing Marshall v. Pletz, 317 **U.S.** at 390). The **Court** has never expressly overruled this case.

The Board's position is in accord with this. See Harris I, 28 BRBS at 264 (1994), aff'd and modified on recon. en banc, Harris II, 30 BRBS at 16 (1996). In fact, in Harris II, the en banc Board stated that if at the time of third-party settlements a claimant was entitled only to medical benefits, the claimant's failure to comply with Section 33(g)(1) cannot bar the claim as the claimant was not a "person entitled to compensation." Harris II, 30 BRBS at 16 (1996) (en banc); see also Hillman v. Ingalls Shipbuilding, Inc., BRB Nos. 93-152 (not published) (July 29, 1996) ("… medical benefits … are not considered compensation …")

In Estate of Cowart v. Nicklos Drilling Co., 505 **U.S.** 469 (1992), the **Court** mentioned that, if a third-party claim is settled without the employer's written approval, all future benefits, including medical benefits, are forfeited. Id. Although the **Court** does not address the issue of whether medical benefits are included in the term "compensation," Cowart is notable for two reasons. The first is that the **Court**, when setting forth what Section 33(g) does, sets medical benefits apart from compensation. Secondly, the **Court** in Cowart affirmed the **Fifth Circuit's** conclusion that "a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor."

However, whether medical benefits are "compensation" was not at issue in Cowart. The Board has concluded that, "given the precedent on this issue, the issue cannot be said to be resolved based on a few words [in Cowart] with no discussion of the issue or caselaw." Harris I , 28 BRBS

at 264, recon. and modified en banc Harris II, 30 BRBS at 12 (1996).

[ED. NOTE: *Cowart's seemingly "off-the-cuff" conclusion could have a devastating effect on claimants receiving benefits. If medical benefits and compensation are separate, a claimant may apply for future medical benefits. If "compensation" includes medical benefits, however, then the moment that one is injured and settles a third-party claim without the employer's written approval, all future benefits, medical or otherwise, are forfeited.****]***

[ED. NOTE: *If compensation and medical benefits are distinct and one is not entitled to compensation at that time, as with an occupational disease, will a claimant still be entitled to future medical benefits as the amount of compensation is zero, and the medical benefits have no value? As such, any settlement would be for more than the "compensation" due under the LHWCA. What if the claimant requires present medical treatment but is not entitled to compensation because he does not presently suffer a disability? Could he enter into a third-party settlement without his employer's consent with the assurance that he would suffer no future Section 33(9) bar?****]***

Prior to Cowart, the Board had held that Section 33(g)(1) cannot relieve an employer from medical benefits, only Section 33(g)(2) can be used for this purpose. See Sellman v. I.T.O. Corp. of Baltimore, 24 BRBS 11 (1990); Pinnell v. Patterson Serv., 22 BRBS 61 (1989). But see Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988).

In Beesley v. Alabama Dry Dock, 27 BRBS 269 (ALJ) (1993), the ALJ relied on the plain meaning of the statute to determine that medical benefits and compensation are two totally separate recoveries when a claimant who has entered into a third-party settlement only requests future medical benefits. The key to this determination is that Section 2(12) does not include medical benefits within its definition of compensation. Although some sections do incorporate medical benefits as compensation as the **Fifth Circuit** did in Lazarus v. Chevron USA, Inc., 958 F.2d 1297 (**5th Cir.** 1992), some sections do not. See also Hunt v. Director, OWCP, 999 F.2d 419 (**9th Cir.** 1993). The judge analogized Beesley to Lazarus, however, because the **Fifth Circuit** read medical benefits into the term "compensation" in order to compel payment of a medical bill.

[ED. NOTE: *Public policy considerations involving health care reform may ultimately statutorily effect whether future medical benefits will be considered compensation.****]***

The Beesley order also relied on basic statutory construction. The fact that medical benefits are mentioned in Section 33(g)(2) and not in 33(g)(1), although compensation is mentioned in both subsections, lends credence to the notion that compensation does not include medical benefits.

The concept of compensation including medical benefits was discussed in the context of Section 33(e) and 33(f) in Hintz v. Todd Pacific Shipyards Corp., 27 BRBS 305 (ALJ) (1993). Unlike Beesley, the Hintz decision relied mainly on case law. Bloomer v. Liberty Mut. Ins. Co., 445 **U.S.** 74 (1980); Inscoe v. Acton Corp., 19 BRBS 97 (1986); Webb v. Santa Fe Drilling Co., 2 BRBS 367 (1975); Fontana v. Pennsylvania R. Co., 106 F. Supp. 461 (**D.N.Y.** 1952), aff'd sub nom.

Fontana v. Grace Line, 205 F.2d 151 (**2d Cir.**), cert. denied, 346 **U.S.** 886 (1953). Beesley relied on the fact that Section 2(12) does not mention medical benefits, nor does Section 33(e), but Section 33(e) separately mentions Section 7 medical benefits.

[ED. NOTE: *The Hintz order mentions that the courts have lumped compensation and medical benefits together under the title "compensation benefits." Section 33(g) speaks only in terms of compensation and uses medical benefits separately. As such, it can be argued that compensation and medical benefits may only be categorized together under compensation benefits. When only compensation is mentioned, it refers to the LHWCA's definition of "compensation" in Section 2(12). However, note Texports Stevedores below, wherein the* ***Fifth Circuit*** *discussed medical benefits under Section 33(f) without any explanation.****]***

In Texports Stevedores v. Director, OWCP, 28 BRBS 1 (CRT) (1991), 931 F.2d 331, (**5th Cir.** 1991), the **Fifth Circuit** held that medical expenses reimbursed by a third party insurance carrier could be used **by a claimant to offset his tort recovery** even though he would receive a double recovery. Relying on Turner v. New Orleans (Gulfwide) Stevedores, 5 BRBS (1977), rev'd on other grounds, 661 F.2d 1031 (**5th Cir. Unit A** 1981), a Section 7 case in which there was no tort recovery and the employer directly provided medical services, the **Fifth Circuit** opined that Section 33(f) dictates the same result: "Section 33(f) focuses on what the employer would have had to pay but for the tort recovery." Turner, 28 BRBS at 4 (CRT), 931 F.2d at 335.

33.7.5 What Constitutes Notice under Section 33(g)(2)

The Cowart decision did not address the Board's holding as to what constitutes proper notice under Section 33(g)(2). Therefore, for the Board's purposes, notice is good if made prior to the employer making any voluntary payments or prior to the announcement of the judgment when a claimant has entered into a settlement for more than the compensation to which the claimant is entitled. See, e.g., Cowart v. Nicklos Drilling Co., 23 BRBS 42 (1989), rev'd on other grounds, 907 F.2d 1552 (**5th Cir.** 1990), aff'd, on reh'g, en banc, 927 F.2d 828 (**5th Cir.** 1991), aff'd, 505 **U.S.** 469 (1992); Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988); Chavez v. Todd Shipyards Corp., 21 BRBS 272 (1988). Also, in a related issue, **estoppel does not apply to Section 33**. See Nesmith v. Farrell American Station, 19 BRBS 176 (1986) (affirming the ALJ's rejection of oral approval of settlement from employer's claims adjuster).

33.8 SECTION 33(h)

Section 33(h) of the LHWCA provides:

> **Where the employer is insured and the insurance carrier assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.**

33 U.S.C. § 933(h).

For mention of Section 33(h), see Peters v. North River Insurance Co. of Morristown, NJ, 764 F.2d 306 (**5th Cir.** 1985).

33.9 EXCLUSIVE REMEDY AGAINST OFFICERS OR FELLOW SERVANTS OF EMPLOYER

Section 33(i) of the LHWCA provides:

> **The right to compensation or benefits under the Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other that an officer or employee of the employer.**

33 U.S.C. § 933(i).

The constitutionality of the provision immunizing the officers and employees from suit was challenged in Keller v. Dravo Corp., 441 F.2d 1239 (**5th Cir.** 1971), cert. denied, 404 **U.S.** (1972). The claimant contended that Section 33(i) denied him a property right to sue a fellow servant. The **Fifth Circuit** noted that he was injured after the enactment of Section 33(i) and therefore had no vested right.

33.10 MISCELLANEOUS AREAS WITHIN SECTION 33

33.10.1 When can a Section 33(g) issue be raised?

A **successor employer or carrier may raise the issue of Section 33(g) in a subsequent proceeding when it did not know of its liability until after the initial hearing** because a formal hearing must be conducted in order to allow all parties a reasonable opportunity to be heard. Deville v. Oilfield Indus., 26 BRBS 123 (1992) (citing Sans v. Todd Shipyards Corp., 19 BRBS 24 (1986)).

33.10.2 When is a settlement a settlement for purposes of Section 33(g)?

An **"agreement to settle"** is not a settlement. Shoop v. Waterman Steamship Corp., 28 BRBS 370 (ALJ) (1994).

In Barkley v. J.T. Thorpe & Sons, Inc., 29 BRBS 448(ALJ) (1995), a **rescinded third-party settlement was found to restore the claimant to the same position she was in before the agreements** were entered into, namely she was a person entitled to compensation who had not entered into any third-party settlement that could bar her LHWCA claim. The judge acknowledged that it was very likely that the claimant engaged in an *ex post facto* recission of the third-party settlements for the purpose of avoiding the operation of Section 33(g). However, he explained:

> [T]his forum is not the appropriate one in which to raise those contentions. This court has no jurisdiction to determine the validity of the recission or to dictate to the California Superior Court how it ought to rule on a matter of California contract law. This court only has the authority to recognize that a California court has rescinded the settlement and to determine how that recission affects [claimant's] longshore case.

29 BRBS at 455 (ALJ).

The judge further noted that to rule that the provision of Section 33(g) immediately took effect would be a harsh interpretation of Section 33(g) and goes against the purpose of the section and the liberal interpretation of the LHWCA. The judge emphasized that the respondents have not suffered any material loss and retained all of the rights and defenses that they originally had at their disposal.

Good Faith Settlement Orders set forth by a court do not terminate a claimant's right to compensation under Section 33(g), as there is no actual settlement agreement. In order to determine if there is a settlement, one can use testimony of the participants to the action. Chavez v. Director, OWCP, 961 F.2d 1409 (**9th Cir.** 1992).

In Formoso v. Tracor Marine, Inc., 29 BRBS 105 (1995), a **state court judge, *sui sponte*, issued a Final Order of Dismissal finding that there has been a settlement** and stating that "the

Court having been notified that the matter was amicably resolved, ...this matter...is...dismissed with prejudice." The Board found that the plain language of this statement, however, indicates only a finding that the court received notice of a settlement and is not unambiguous evidence that the parties actually executed a settlement. 29 BRBS at 107. The Board went on to state:

> Moreover, the Florida Circuit Court's order does not indicate that the issue of the existence of a third-party settlement was actually litigated and decided before it, nor does that order affirmatively state that there was an executed settlement. The record contains contradictory evidence that the parties to this third-party action argued against dismissal with prejudice before the circuit court judge prior to issuance of the Final Order of Dismissal.

29 BRBS at 107.

In Banks v. Chicago Grain Trimmers Association, 340 **U.S.** 459 (1968), the **Supreme Court** determined that an **order of remittitur is not the equivalent of a settlement**. In Banks, the claimant had consented to a remittitur of his third-party wrongful death judgement in lieu of a new trial order. The **Court** stated:

> An order of remittitur is a judicial determination of recoverable damages; it is not an agreement among the parties involving mutual concessions. Section 33(g) protects the employer against his employee's accepting too little for his cause of action against a third party. That danger is not present when damages are determined, not by negotiations between the employee and the third party, but rather by the independent evaluation of a trial judge.

Id. at 467.

A fixed payment under a **reorganization** plan–similar to a judgment and remittitur–is not a "settlement" for Section 33(g) purposes. Williams v. Ingalls Shipbuilding, Inc., 35 BRBS 92 (2001).

In contrast to an order of remittitur, a judgement obtained under Federal Rule of Civil Procedure 68 (**offer of judgement**) does not result from a "judicial determination of recoverable damages," nor from the "independent evaluation of a trial judge." Under Rule 68, the party defending a claim dictates the terms of the offer, and no evaluation by the trial judge is involved.

Also in contrast to an order of remittitur, a judgment under Rule 68 does result from "an agreement among the parties involving mutual concessions." The **Supreme Court** has held that "[t]he purpose of Rule 68 is to encourage the settlement of litigation. ... [T]he adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. ... Rule 68

imposes a special burden on the plaintiff to whom a formal settlement offer is made." Delta Airlines v. August, 450 **U.S.** 346, 352 (1981), as cited in Broussard v. Houma Land & Offshore, 91-LHC-2260 (December 31, 1991) (unpublished).

In Broussard v. Houma Land & Offshore, 30 BRBS 53 (1996), the Board held that a Rule 68 Offer of Judgment is tantamount to a formal settlement and, thus, is a "compromise" for purposes of Section 33(g)(1). The Board noted that the claimant clearly had the option to reject the defendant's offer and have his case heard on its merits. The Board also noted that a key factor in determining the applicability of Section 33(g)(1) is the relevant involvement of the parties and the district court judge in the resolution of the third-party claim.

Thus, the Board has loosely stated a **two criteria analysis to determine whether a "settlement" is a settlement for purposes of Section 33(g)**:

> (1) Can the claimant "opt out" of the contract? Is there an objective manifestation of mutual assent for offer and acceptance to create a binding judgment?
>
> (2) What is the relevant involvement of the parties and the district court judge in the resolution of the third-party claim. Does the objective manifestation of mutual assent occur between the parties completely independent of any tribunal officers, reflecting the nature of a settlement?

In Broussard, the Board also held that the claimant is not being penalized for following the procedures of the court by entering into the Offer of Judgment. (Possible sanctions = an "additional inducement" for claimant to settle rather than litigate.) The Board reasoned that the claimant's denial of additional compensation benefits under the LHWCA is not immediately due to his execution of the Offer of Judgment. According to the Board, the claimant could have entered into such an agreement and remained eligible for additional compensation under the LHWCA by obtaining employer/carrier's approval of the agreement.

[ED. NOTE: *What are the practicalities involved in obtaining the employer/carrier's written approval of a third-party agreement? A claimant may argue that he may be subjected to possible liability for costs under Rule 68 if the offer is refused and a lesser amount is later awarded to the claimant. However, while Rule 68 gives a plaintiff an added incentive to accept the defendant's offer, this statutory penalty does not change the nature of a judgment under Rule 68 from a settlement to a judicial determination.****]***

Likewise, in Pool v. General American Oil Co., 30 BRBS 183 (1996), the Board held that the compromise satisfaction of a jury verdict constituted a settlement which required the employer's consent. Specifically, the Board stated that **"[i]t is the substance of the parties' actions rather than the title of the document ending the litigation that controls the applicability of Section**

33(g)(1)." 30 BRBS at 187. "Because the 'judgment' herein was not final, and because claimant thereafter negotiated an agreement with the third parties," the Board affirmed the ALJ's "determination that the 'satisfaction of judgment' in this case is actually a 'compromise' or 'settlement' within the meaning of Section 33(g)." Id.

Additionally, the Board held that **mere intervention by the employer in the third party case is not tantamount to implied consent to the third party settlement** where the facts indicated that the employer did not join in or agree to the settlement. Specifically, the Board stated that although the "[e]mployer, through its carrier, intervened in the third-party case and participated, to some degree, in the settlement process," carrier did not "appear on the side of the claimant, did not sign the actual settlement and in fact specifically declined to do so." Thus, the Board affirmed the ALJ's finding that the employer's participation was "insufficient to preclude application of Section 33(g)(1)." 30 BRBS at 188.

In Gremillion v. Gulf Coast Catering Co., 31 BRBS 163 (1997), the Board held that the employer's participation in third-party litigation rendered Section 33(g) inapplicable. The Board noted that "Employer, through its carrier in this case, participated in the third-party litigation both as a party-defendant and intervener." Moreover, the Board stated that the claimant and his spouse signed a Release in the third party suit and, importantly, the employer joined in the Joint Motion for Partial Dismissal with Prejudice based upon the Release. The Board noted that the Release executed by the claimant states, in part, the following:

> It is agreed *among the parties* that Liberty Mutual Insurance Company and Gulf Coast Catering Company waive their rights to reimbursement...in connections with the settlement herein, and to dismiss its intervention in the aforementioned lawsuit.

(Italics in original). The Board affirmed the ALJ's finding that the employer's participation in the third-party suit amounted to a constructive approval of the settlement. It further noted that, in the Release, the employer's offset rights under the LHWCA were protected and this constituted further evidence of its approval of the settlement. The Board then vacated the ALJ's finding that the employer's credit as set forth in the Release is limited "to the net amount of clamant's settlement recovery." Specifically, the Board determined that the terms of the Release "appear to grant employer an offset which exceeds claimant's net settlement recovery." It concluded that such a provision is permissible "if the administrative law judge finds it clearly and unambiguously demonstrates such an intent."

Even **incentive provided by a trial judge who encourages settlement at the pre-trial stage of litigation** does not change the nature of that settlement into a judicial determination for purposes of Section 33(g). Morauer & Hartzell, Inc. v. Woodworth, 439 F.2d 550, 553 (**D.C. Cir.** 1970), cert. denied, 404 **U.S.** 16 (1971) (**consent judgment** was not a judicial determination but rather a **"compromise"** within the meaning of Section 33(g)); Gibson v. ITO Corp. of Ameriport, 18 BRBS 162, 164 (1986); Zamarripa v. Bilco Tools, Inc., 27 BRBS 586 (ALJ) (1994) ("Entry of a consent judgement on agreement or stipulation of the parties...constitutes a settlement under the

provisions of 33 U.S.C. §933(g).”). The judge reasoned that to hold otherwise would provide a simple way for claimants to avoid the intended application of Section 33(g) by having their settlements memorialized in a settlement judgment entered by a court. Entry of such settlement judgments are a common practice and do not reflect a decision by the court.

Where a claimant’s third-party attorney received funds as a proposed settlement but the claimant had not been informed of the offer and had neither accepted nor rejected it, the Board held that the claimant was not barred by Section 33(g) from further LHWCA compensations. Stadtmiller v. Mallott & Peterson, 28 BRBS 304 (1994). In Stadtmiller, the claimant’s third-party suit had been consolidated with other similar actions. Subsequent to the third-party attorney receiving the funds, the monies were returned and the dismissal of the claim was ultimately vacated by the California Superior Court.

The Board found that the **third-party attorney was not claimant’s “legal representative” as that term is used in Section 33(g)(1)**. Furthermore, the Board found that a claimant as principal, is only bound by acts of the attorney-agent within the scope of the agent’s actual authority (expressed or implied); apparent or ostensible authority; or by unauthorized acts ratified by the client-principal. Since an attorney must be specifically authorized to settle and compromise a claim (at least in California), and this one was not, the claimant’s third-party attorney did not enter into a settlement agreement with the third-party.

Compare Stadtmiller with the California case of Barnes v. General Ship Service, 30 BRBS 193 (1996) where the Board found that the claimant’s counsel had express authority to enter into a third-party agreement and to accept settlement funds on the claimant’s behalf, and thereby bind the claimant.

In Smith v. Jones Oregon Stevedoring Co., 33 BRBS 155(1999), the third party settlement was conditioned upon carrier [employer] approval. After the claimant’s acceptance of the monies and consenting to dismiss the civil action with prejudice, the employer refused to give its approval. The claimant returned the money and argued that the agreements were voided when the employer withheld approval and that the lack of approval by the state probate court made the agreements incapable of being fully executed. The Board held that the employer had not satisfied its burden of proving that the settlement agreements into which the claimant had been fully executed prior to gaining the approval of the employer in violation of Section 33(g).

In Flanagan v. McAllister Brothers, Inc., 33 BRBS 209 (1999), the Board also held that the burden of proving a prior written approval of settlement agreement was on the employer rather than the claimant. See also, Barnes v. Liberty Mutual Ins. Co., 30 BRBS 193 (1996)(Employer bears the burden of proving that claimant entered into fully executed settlements without its prior written approval in order to bar claimant’s receipt of future benefits as § 33(g) is an affirmative defense.).

[ED. NOTE: *One would normally argue that the employer was being made to prove a “negative fact” in this burden of proof scheme. However, a close examination reveals the Board’s position*

as much more reasonable than it appears at first glance. In Flanagan, for instance, the sole evidence of record on this issue was the claimant's testimony; when asked whether employer's written approval was obtained, the claimant testified that he had "no knowledge" of that issue. The employer submitted no other evidence to establish that it did not give written approval of the settlement agreement. Thus, there was a complete lack of evidence that the claimant did not obtain employer's written approval of the third-party settlement. The ***Board specifically found that the employer failed to utilize routine discovery tools on the approval issue, or to produce its own witnesses to testify that approval was not sought or given.]***

[ED. NOTE: *Care should be taken not to apply the Stadtmiller agency-principal theory indiscriminately. For example, in Villaneuva v. CNA Insurance Companies, 868 F.2d 684 (**5th Cir.** 1989), the **Fifth Circuit**, while dealing with a Section 33(g) issue, looked to Louisiana law for a definition/description of **"transactions"** or **"compromises."** The **Fifth Circuit** noted that, "in Louisiana, attorneys are presumed to have authority to negotiate settlement agreements for their clients." Villanueva, 868 F.2d at 686. (citations omitted.) "Absent evidence that the client's consent was not clear and express, the agreement is binding." Id.**]**

Mere termination of a third-party action is not a settlement within the meaning of Section 33(g). Mills v. Marine Repair Serv., 22 BRBS 335 (1989); Rosario v. M.I. Stevedores, 17 BRBS 150 (1985).

Simply because a claimant has **"retained money" as "consideration"** for an agreement in the third-party sphere, does not necessarily imply that there has been a settlement for purposes of Section 33(g). In Casey v. Georgetown University Medical Center, 31 BRBS 147(1997), the claimants did not succeed in district court as summary judgment was granted in favor of the defendants and $12,000 in court costs was assessed against the claimants. Thereafter the claimants elected to forego their appeal of the unfavorable verdict in return for a waiver of the defendants' right to reimbursement of court costs. The Board found that, although the claimants "retained money," which is "consideration" for the purposes of their agreement with the defendants, the parties did not compromise the tort suit and the claimants did not receive any settlement proceeds for the purposes of Section 33(g). The Board found that the employer's rights under the LHWCA were not affected by the agreement to withdraw the appeal in the wrongful death claim, and the funds which the defendants waived, were not settlement funds to which the employer would be entitled to credit.

33.10.3 Ripeness

Ripeness concerns should be given less weight in an agency adjudication than in a judicial one. Chavez, 961 F.2d at 1409 (citing Central Freight Lines v. ICC, 899 F.2d 413, 417-19 (**5th Cir.** 1990)). Therefore, it is possible that an employer may come into a "claim" seeking a declaratory judgment that any potential claim that an employee has is barred by Section 33(g), even before a claim is actually filed. But see Parker v. Ingalls Shipbuilding, Inc., 28 BRBS 339 (1994), where the Board found that "common sense dictates that where a claimant has settled his claim for compensation and has not requested medical benefits, there is no claim pending; there can be no

issues to decide." Parker, 28 BRBS at 341. In Parker, subsequent to the LHWCA settlement for compensation, the claimant entered into unapproved third-party settlements. The Board found that since medicals had not been requested, the issue as to whether Section 33(g) bars a potential claim for medical benefits, is premature. See also Garrett v. Ingalls Shipbuilding, Inc., 26 BRBS 478 (ALJ) (1992); Deakle v. Ingalls Shipbuilding, Inc., 28 BRBS 343 (1994).

33.10.4 Once a Party Requests a Formal Hearing, the District Director is Without Jurisdiction to Rule on Motions to Withdraw

In Boone v. Ingalls Shipbuilding, Inc., 28 BRBS 119 (1994) (Brown, J., concurring) aff'g on recon. en banc 27 BRBS 250 (1993) (Brown, J., concurring) [reversed by **Fifth Circuit** on December 19, 1996, Ingalls Shipbuilding, Inc. v. Director, OWCP (Boone), 102 F.3d 1385 (**5th Cir.** 1996)), see infra], the Board held that the district director properly addressed and approved a claimant's motion to withdraw his claim, instead of transferring the case to the OALJ. The Board further found that the employer was not prejudiced by such action in that the claim was not ripe. The Employer had argued that the claimant's "admission" that he had failed to comply with Section 33(g) provisions should bar any further claims related to asbestos exposure. The employer also argued that it was aggrieved in that it would suffer financial loss.

In Boone, the claimant had filed a claim for compensation under the LHWCA in 1987 alleging work-related asbestos exposure resulting in asbestosis and asbestos-related lung disease. Subsequently, he entered into multiple third-party settlements with asbestos manufacturers and distributors.

In November of 1990, the employer filed a pre-hearing statement with the district director, requesting referral of the case to OALJ for hearing. The employer also filed a Motion for Summary Decision and Brief in Support with OALJ. On February 19, 1993, claimant filed a Motion to Withdraw his claim with the district director. On March 18, 1993, the district director issued an Order approving the withdrawal as being for a proper purpose and in the claimant's best interest. The district director found that the claimant does not have a disability or permanent impairment and has not suffered a diminution of his wage-earning capacity. The approved withdrawal was without prejudice but subject to Section 13 time limitations in accord with 20 C.F.R. § 702.225. The employer appealed, challenging approval of the withdrawal as an abuse of discretion. The Board determined that there was no controversy ripe for adjudication, stating that "[E]mployer will not be adversely affected or aggrieved unless or until a new claim is filed." Boone, 102 F.3d 1385 (quoting Boone, 27 BRBS 250, 251 (1993)). The employer moved for reconsideration.

Subsequent to the Board's first decision in Boone, the **Fifth Circuit** issued its decision in Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (**5th Cir.** 1994), wherein it held that Section 19 of the LHWCA imposes a mandatory duty on the district director to transfer the case to OALJ upon the request of a party.

On rehearing en banc, the Board in Boone declined to grant the employer's requested relief, finding that the district director's failure to refer the case was harmless. The Board again concluded that the "employer has not been adversely affected by the claimant's withdrawal of the claim, and that employer has not shown that it would suffer more than a possible financial loss." Boone, 102 F.3d 1385 (citing Boone, 28 BRBS 119, 122 (1994)).

The Board stated that the employer in Boone can not be aggrieved by the district director's action until a new claim is filed. Boone, 102 F.3d 1385 (citing Boone, 27 BRBS at 251). The Board went on to state:

> As claimant in this case is not entitled to compensation under the Act, because he withdrew his claim and has no compensation disability, he clearly could not settle his third-party claims for less than what he is entitled to under the Act, thus, if the previously filed claim were adjudicated, Section 33(g)(1) would not bar claimant's recovery.

28 BRBS at 124.

On December 19, 1996, the **Fifth Circuit**, however, the court reversed the decision of the Board. Ingalls Shipbuilding, Inc. v. Director, OWCP (Boone), 102 F.3d 1385 (**5th Cir.** 1996). Reiterating the fact that the district director was obligated by the LHWCA to transfer the claim to the OALJ, and that the failure to do so denies the employer a procedural right to which it is entitled, the court found that Ingalls is "adversely affected or aggrieved" by the order and thus has standing under Section 921(c) of the LHWCA to seek review of the Board's decision. Id. at 1388. The **Fifth Circuit** emphasized that "procedure is the essential safeguard that protects substantive rights," and that, therefore, the district director denied Ingalls (employer) that protection by approving the claimant's motion for withdrawal. Id. at 1390.

See also W.G. McLeod v. Ingalls Shipbuilding, Inc., BRB No. 94-3786 (April 1, 1997) (In light of Boone, Board's prior Order vacating the district director's approval of claimant's motion to withdraw and remanding to OALJ is correct); Milton E. Lamb, Sr. v. Ingalls Shipbuilding, Inc., BRB No. 94-2842 (unpublished) (Sep. 5, 1996) ("… [Boone] … is dispositive of employer's appeal"); William J. Gore v. Ingalls Shipbuilding, Inc., BRB No. 94-2633 (unpublished) (Aug. 1, 1996) ("… [Boone] … is dispositive of employer's appeal").

[ED. NOTE: The rule of Boone is defined as follows: *While a case is pending before the OWCP, and the respondent subsequently files a pre-hearing motion, a motion for withdrawal may not be acted upon until such time as the claim is transferred to the OALJ. In other words,* ***once a party requests a formal hearing, the district director is without jurisdiction to rule on motions to withdraw.]***

In Downs v. Ingalls Shipbuilding, Inc., 30 BRBS 99 (1996), the claim was transferred to the OALJ for consideration of the employer's motion for summary decision seeking to have the claim

barred by Section 33(g). Prior to the hearing, claimant filed a motion to withdraw his claim pursuant to 20 C.F.R. § 702.225(a) as "he has no present disability and is not seeking medical benefits under the Act." Id. Employer opposed the motion for withdrawal alleging that it is improper in light of its motion for summary decision. Citing Ingalls Shipbuilding v. Asbestos Health Claimants, 17 F.3d 130, 28 BRBS 12 (CRT), the Director, OWCP, supported claimant's withdrawal motion. The ALJ found that claimant had complied with Section 702.225(a) and permitted claimant to withdraw his claim without prejudice, citing the Board's decision in Boone v. Ingalls Shipbuilding, Inc., 28 BRBS 119 (1994) (Decision and Order on Recon. en banc) (Brown, J., concurring). Downs v. Ingalls Shipbuilding, Inc., 94-LHC-2274 (Romero, ALJ).

The ALJ in Downs then remanded the case to the district director "for further appropriate action consistent with this order to permit claimant to withdraw his claim pursuant to 20 C.F.R. § 702.225(a)." Id. On appeal, the Board affirmed the ALJ's ruling. **The Board distinguished this case from Boone**, 81 F.3d 561 (**5th Cir.** 1994), **stating that Boone specifically held that once a party requests a formal hearing, the district director is without jurisdiction to rule on motions to withdraw.** The employer was aggrieved by the district director's action because it lost the procedural right to have the motion to withdraw considered in an adjudicative forum. Boone, 81 F.3d 561. In Downs, however, the motion to withdrawal was considered by the ALJ "as intended by the district court." Downs, 30 BRBS at 100. **"Employer's procedural right to a decision in an adjudicative forum, which formed the basis for the court's finding that employer was aggrieved in Boone, was fully protected by the consideration of claimant's motion in the proper forum."** Id. (citing Boone, 81 F.3d at 566-67). Thus, the ALJ's finding was affirmed as within the scope of the district court's mandamus order and the ALJ's discretion. Id. at 101 (citing Boone, 81 F.3d at 566; Asbestos Health Claimants, 17 F.3d at 135-36, n.14, 28 BRBS at 17, n.14 (CRT) (noting that withdrawal "would be an unsurprising choice, particularly for those who suffer no current disability and thus only made protective filings").).

[ED. NOTE:** When Boone was before the Board, the Board determined that the issues presented by the employer were not ripe for adjudication. The Board in Boone cited and relied upon Chavez v. Director, OWCP, 961 F.2d 1409, 25 BRBS 134 (CRT) (**9th Cir.** 1992) (doctrine of ripeness has a justifiable place in longshore cases). Chavez discussed the "traditional ripeness test." The first prong of this test (fitness issue) is determined by whether the issues are "purely legal" and "sufficiently developed factually." The second prong of the test (hardship on the parties) is determined by whether there is a "direct and immediate hardship [which] would entail more than possible financial loss. Chavez, 961 F.2d at 1414, 25 BRBS at 141. However, on appeal, the **Fifth Circuit** determined that because "the District Director's violation of Ingalls' procedural right to have the claim decided by an ALJ constitutes an injury that provides standing, it is unnecessary for us to consider… whether allowing Boone to withdraw his claim is an issue ripe for adjudication." 102 F.3d at 1390, n. 8.**]

33.10.4 CALCULATIONS

Multiple settlements: To aggregate or not

As to whether the amount of **multiple settlements** is for greater or less than the amount of compensation, a judge will need to determine whether all of the settlements should be aggregated or taken separately. In Harris, the Board noted that the employer is entitled to offset the entire net amount of the third-party recoveries under Section 33(f) in the aggregate and is liable for deficiency compensation in the event that the aggregate recovery is less that its liability. Furthermore, the Board noted that, although not specifically addressed, the recent cases discussing Section 33(g) do not distinguish between fact patterns where there is one third-party settlement and when there are multiple third-party settlements.

For **aggregated settlements**, see Harris I, 28 BRBS at 266, Harris II, 30 BRBS at 17 (en banc), Beesley v. Alabama Dry Dock, 92-LHC-1220 (unpublished). For **separate settlements**, see Patton v. Ingalls Shipbuilding, Inc., 25 BRBS 247 (ALJ) (1992). In Hintz v. Todd Pac. Shipyards Corp., 27 BRBS 305 (ALJ) (1993), the judge rejected the contention that it is the aggregate of all third-party settlements entered into that should be considered rather than any one settlement, since to do otherwise, the power to determine the adequacy of any particular third-party settlement would be vested in the employee rather than the employer, contrary to the purpose for which Section 33(g) was designed.

Turning Third-Party Recoveries and Lifetime Compensation Awards into Numerical Calculations for the Section 33(g) Formula

The Board requires third-party settlement amounts to be stated in precise factual amounts. Gladney v. Ingalls Shipbuilding, Inc., 30 BRBS 25 (1996), 33 BRBS 103 (1999)(Appeal of Order of Clarification and Denial of Employer's Petition for Reconsideration), (citing Glenn v. Todd Pac. Shipyards Corp., 26 BRBS 186, 190-91), aff'd on recon., 27 BRBS 112 (1993) (Smith, J., concurring), subsequently reaffirmed in Harris v. Todd Pac. Shipyards Corp. (Harris I), 28 BRBS 254 at 265-266 (1994), aff'd and modified on recon. en banc Harris II, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring and dissenting.); Linton v. Container Stevedoring Co., 28 BRBS 282, 289-90 (1994).

According to the Board, the **United States Supreme Court** altered the outcome of Villanueva v. CNA Ins. Companies, 868 F.2d 684 (**5th Cir.** 1989) ("if an employee settles with a third-party for more than the compensation benefits to which he is entitled, section 933(f) extinguishes the employer's liability for any unpaid benefits...[I]f the worker settles for less, section 933(g) precludes further liability on the part of the employer unless the employee has obtained the employer's and the carrier's prior approval.").

In Villanueva, the **Fifth Circuit** noted that while the lack of findings make it impossible to tell whether the settlement agreement was for more or less than the amount of compensation to

which the claimant was entitled, there can be but one result: no further liability for compensation benefits.

The Board reasoned that Section 33(f) does not necessarily "wipe out" or extinguish an employer's total liability in every case, although this may be the practical effect in many cases. Harris I, 28 BRBS at 268. Compensation and medical benefits are suspended until the net recovery is exhausted. Maples v. Texports Stevedores Co., 23 BRBS 302 (1990), aff'd sub nom. Texports Stevedores Co. v. Director, OWCP, 931 F.2d 331, 28 BRBS 1 (CRT) (**5th Cir.** 1991).

In Harris I, the Board specifically stated that it disagreed with the view that Cowart and Cretan stand for the proposition that Section 33(f) extinguishes an employer's total liability in all cases. Harris I, 28 BRBS at 268. According to the Board, the facts of those cases did not present the issue nor do they lead to that result. Id. In Cowart, the claimant was deceased by the time the case reached the **Supreme Court** and the claim was for a scheduled injury. Id. Therefore, according to the Board, the discussion on this topic is *dicta* because the **Supreme Court** did not have to consider the long-term effect of medical treatment or worsening disability in an occupational disease case in discussing the applicability of an offset pursuant to Section 33(f). In Cretan, the employee was also deceased, and therefore the court did not have to consider the effect of the employer's liability for ongoing medical benefits which could exhaust the employer's credit against the third-party recovery.

Under Section 33(f), the employer is required to pay as compensation under the LHWCA "a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third-person." 33 U.S.C. § 933(f). The Board felt that the language of Section 33(f) indicates that Congress has provided for the eventuality of a deficiency judgment to be paid by the employer. Harris II, 30 BRBS at 20 (en banc).

In Harris II, 30 BRBS at 20 (en banc), the Board reaffirmed its Harris I holding that where the forfeiture provisions of Section 33(g) does not apply, the offset provision under Section 33(f) does not "extinguish" employer's total statutory liability, but rather provides employer a credit in the amount of the net third-party recovery against both employer's liability for both compensation and medical benefits under the LHWCA.

[ED. NOTE: *Harris was appealed to the* ***Ninth Circuit****, but on* ***August 2, 1996****, the* ***Ninth Circuit*** *dismissed the employer's appeal stating that the employer was not allowed to appeal from a* ***non-final order*** *(as the Board in its original D&O of* ***1994*** *[Harris I, 28 BRBS 254 (1994)] had remanded to the ALJ, and the Board in Harris II, 30 BRBS 5 (1996), had reinstated that remand.). Thus, in accordance with the Board's original decision and in accordance with their reinstatement of the same, the case was remanded to the ALJ level.* ***On April 3, 1997*** *the Board sent the file/record to the OALJ. Another Decision and Order has yet to be issued by the OALJ.*

Cowart does not specifically overrule Villanueva. In fact, some of Cowart's language itself indicates that the premise of Villanueva remains. For instance, the ***Supreme Court*** *in Cowart*

states: "And in cases where the employee settles for greater than the employer's liability, the employer is protected ***regardless of the precise amount of the settlement*** *because his liability for compensation is wiped out."* Cowart*, 26 BRBS at 53 (CRT), 505* ***U.S.*** *at 482 (emphasis added). It should be noted that in* Villanueva*, there seemed to be a finite amount of medical benefits. In fact, the claimant, by cross-claim against the carrier for reimbursement of unpaid medical expenses, raised the Section 33(g)(1) bar.**]***

In Linton v. Container Stevedoring Co., 28 BRBS 282 (1994), the Board determined how the amount of compensation due is to be calculated where the award is for continuing disability benefits. The Board held that the **total amount of compensation to which a claimant would be entitled over his lifetime is the relevant figure** to be compared with the amount of the claimant's third-party settlement. Linton, 28 BRBS at 287. The Board opined that any interpretation of Section 33(g)(1) which limits consideration of compensation entitlement under the LHWCA only to accrued compensation would undercut the purpose behind the Section 33(g)(1) forfeiture provision. Linton, 28 BRBS at 288.

In arriving at an amount determinative of a claimant's lifetime entitlement, the ALJ, as factfinder, may **"use any reasonable method" to calculate** the amount of compensation to which the claimant would be entitled over his lifetime. Linton, 28 BRBS at 288. To that end, the ALJ may consider medical testimony, reports regarding the claimant's physical condition, actuarial tables, and any other probative evidence to project the claimant's lifetime compensation. Additionally, to make the comparison, the **judge must calculate the amount of the claimant's third-party recovery**.

Linton also held that the necessary comparison entails consideration of the third-party **settlements in the aggregate**. See also Harris I and II as noted above. Furthermore, the Board noted that in arriving at the amount of the claimant's third-party recovery for Section 33(g)(1) purposes, the **net** amounts of claimant's multiple third-party settlements, in the aggregate, must be compared to the amount of compensation to which the claimant would be entitled. Linton, 28 BRBS at 289. See also Harris I and II.

In Glenn v. Todd Pac. Shipyards, 26 BRBS 186 (1993), the Board held that the claimant settled with third-parties for an amount greater than the amount to which she is entitled under the LHWCA where claimant would be nearly 109 years old before her disability benefits would exceed the net third-party settlement recovery.

In Moriarty v. Todd Pac. Shipyards Corp., 28 BRBS 410 (ALJ) (1994) the claimant had argued that at the time of the unapproved third-party settlements, the liability of the employer/carrier had not been determined. The judge, however, found the argument to be unpersuasive and ruled in favor of the employer.

33.10.5 Claims Pending on the Effective date of the 1984 Amendments

The amended version of Section 33(g) applies to a claim that was **pending** before the judge on September 28, 1984--the effective date of the 1984 Amendments to the LHWCA--or later. Pinnell v. Patterson Serv., 22 BRBS 61 (1989). The outcome is not altered by the fact that the claimant relied on statutory and case law at the time the settlement was entered into prior to the effective date of the 1984 amendments. Monette v. Chevron U.S.A., Inc., 29 BRBS 112 (1995). A claimant who entered into third-party settlements pre-Cowart can not argue equity as a Section 33(9) defense. Clark v. National Steel & Shipbuilding Co., 29 BRBS 281 (ALJ) (1995) ("This is a harsh result considering the history of this case but it is an obligatory one which I am mandated to find.")

Section 33(g) applies prospectively to terminate a claimant's right to additional compensation as of the date of the settlement. See Shoemaker v. Schiavone & Sons, Inc., 20 BRBS 166 (1988).

33.11 SECTION 33 CHECKLIST

Keep in mind:

(1) While Sections 33(f) and (g) should be read together, they do pertain to different issues--one to set-off (equity) and the other as a bar to compensation recovery (security).

(2) The LHWCA itself should be liberally construed in favor of the claimant, but the *purpose of Section 33 is to insure that the Employer/Carrier's rights are protected.*

QUESTIONS

I. IS THERE A THIRD-PARTY (3rd-P) SETTLEMENT ?

(Two part analysis: 1) Can Claimant (CL) opt out? Offer and acceptance? 2) Relevant involvement of parties and 3rd-P judge?

1. An **"agreement to settle"** is not a settlement. Shoop v. Waterman Steamship Corp., 28 BRBS 370 (ALJ) (1994).

2. A **rescinded 3rd-P settlement** is not a settlement. Barkley v. J.T. Thorpe & Sons, Inc., 29 BRBS 448 (ALJ) (1995).

3. **Good faith settlement orders set forth by a court** do not equal an actual settlement agreement. Chavez v. Director, OWCP, 961 F.2d 1409 (**9th Cir**. 1992).

4. ***Sua sponte* final order of dismissal holding that there has been a settlement**, is not a settlement. Formoso v. Tracor Marine, Inc., 29 BRBS 105 (1995).

5. An **order of remittitur** is not a settlement. Banks v. Chicago Grain Trimmers Assoc., 390 **U.S.** 459 (1968).

6. Acceptance of an **offer of judgment** is a settlement. Broussard v. Houma Land & Offshore, 30 BRBS 53 (1996).

7. An **incentive provided by a trial judge** does not change the nature of a settlement into a judicial determination. (**consent judgment** = **compromise** = settlement) Morauer & Hartzell, Inc. v. Woodworth, 439 F. 2d 550, 553 (**D.C. Cir.** 1970), cert. denied, 404 **U.S.** 16 (1971).

8. An **attorney must be specifically authorized to settle** and compromise a claim in California. Stadtmiller v. Mallott & Peterson, 28 BRBS 304 (1994). But see Barnes v. General Ship Service, 30 BRBS 193 (1996) (Board specifically found express authorization) and Villanueva v. CNA Insurance Companies, 868 F.2d 684 (**5th Cir.** 1989) (La. attorneys presumed to have

authority).

9. **Terminating a 3rd-P action** is not a "settlement." Rosario v. M.I. Stevedores, 17 BRBS 150 (1985).

10. **Retaining money as consideration.** Casey v. Georgetown University Medical Center, 31 BRBS 147 (1997).

II. IS THERE A THIRD PARTY ?

Employer (ER) acting in its capacity as a vessel owner and settling a §905(b) Action is a "third person." Bundens v. J.E. Brenneman Co., 29 BRBS 52 (CRT) (1995), 46 F.3d. 292 (**3d Cir.** 1995).

III. DO YOU HAVE A PERSON ENTITLED TO COMPENSATION (PETC) ?

Estate of Cowart v. Nicklos Drilling Co., 505 **U.S.** 469 (1992) (a person whose right to compensation vests upon injury).

Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 **U.S.** 248 (1997) (wife who settled 3rd-P claim while husband-employee was still alive is **not** PETC at time of the pre-death settlements).

Cretan v. Bethlehem Steel Corp., 1 F.3d 843 (**9th Cir.** 1993), cert denied, 512 **U.S.** 1219 (1994) (Wife and daughter who settled 3rd-P claim while husband-employee was still alive were PETC), **overruled by** Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 **U.S.** 248, 31 BRBS 5 (CRT) (1997).

Bethlehem Steel Corp. v. Mobley, 920 F.2d 558 (**9th Cir.** 1990) (only have PETC after a court awards a CL benefits, or ER voluntarily pays benefits).

Harris v. Todd Pac. Shipyards Corp. (Harris I), 28 BRBS 254 (1994), aff'd and modified on recon. en banc Harris II, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring and dissenting) (**for a voluntary retiree** to be a PETC, he must be aware of the relationship between his disease, his employment and his permanent physical impairment; **for a CL who is not a retiree**, he must be aware of a work-related disease which has caused a loss in his wage-earning capacity).

Harris, en banc: "We hold that establishing that claimant has merely filed a claim is not sufficient to establish that claimant is 'entitled to compensation' under the Act; rather, in order to prevail, employer must demonstrate that, as a voluntary retiree, claimant was aware of the relationship..."

Harris, en banc: Since medical treatment is not compensation, a CL entitled only to med. benefits at the time of the 3rd-P settlement can not be a PETC.

Mallot & Peterson v. Director, OWCP, 30 BRBS 87 (CRT), 98 F.3d 1170 (**9th Cir.** 1996) (**Ninth**

Circuit interpreted the word "**representative**," in the Section 33(g) phase "person entitled to compensation (or the person's **representative**)," to mean a **legal representative of the deceased**, thus excluding legal counsel acting within an attorney/client relationship).

Brown & Root, Inc. v. Sain, 162 F.3d 813 (**4th Cir.** 1998) Addresses when a person becomes "a person entitled to compensation."

IV. IS THE 3RD-PARTY SETTLEMENT FOR THE SAME DISABILITY (NOT INJURY) AS THE LHWCA CLAIM ?

See White v. Peterson Boatbuilding Co., 29 BRBS 1 (1995) (medical malpractice). See also Goody v. Thomas Valley Steel Corp., 28 BRBS 167 (1994); O'Berry v. Jacksonville Shipyards, Inc. (O'Berry I), 21 BRBS 355 (1988), on recon. O'Berry II, 22 BRBS 430 (1989); Chavez v. Todd Shipyards Corp., 27 BRBS 80 (1993), aff'd on recon. en banc 28 BRBS 185 (1994). **Similarly, is the settlement for the same cause of action?** Casciani v. St. John's Shipyard, 35 BRBS 583 (ALJ) (2001) (Settlement was for "bad faith" claim; not for the covered occupational injury or death, but rather by the third-party's carrier pursuant to a cause of action arising out of its handling of the claim, not the underlying basis for the claim.).

V. IS THIS THE RIGHT EMPLOYER (ER) ?

See Kaye v. California Stevedore & Ballast, 28 BRBS 240, 253 (1994) (CL unsuccessfully argued in occupational disease case that there are several potentially liable ERs and it is impossible to know which is the responsible ER).

VI. CAN ER WAIVE RIGHTS ?

Yes, but waiving subrogation rights does not waive offset rights. Kaye v. California Stevedore & Ballast, 28 BRBS 240 (1994). See also Treto v. Great Lakes Dredge & Dock Co., 26 BRBS 193 (1993).

VII. DID ER PARTICIPATE IN & HELP NEGOTIATE THE 3RD-P SETTLEMENT ?

ITO Corp. of Baltimore v. Sellman, 954 F.2d 239, vacated in part, adhered to in part on reh'g, reh'g en banc denied, 967 F.2d 971 (**4th Cir.** 1992), cert. denied, 507 **U.S.** 984 (1993) (33(g) relief denied where ER participated in settlement). See also, Valdez v. Crosby & Overton, 34 BRBS 69 (2000); Gremillion v. Gulf Coast Catering Co., 31 BRBS 163 (1997); Smith v. Jones Oregon Stevedoring Co., 33 BRBS 155 (1999); Flanagan v. McAllister Brothers, Ins., 33 BRBS 209 (1999).

VIII. THE 33(g) FORMULA

1. "Gross" or "net" amount compared to compensation to which claimant is entitled ?

   a) Gross amount was used by Bundens (**3rd Cir.**) and Board (Harris I, en banc).

   b) Net amount is referred to in Yates (**Supreme Court**) but this issue was not litigated.

2. Calculations in multi settlement situation--to aggregate or not to aggregate ?

   a) **Board** says to aggregate. Harris I and II, en banc.

3. Numerical calculations: precise or not?

   a) **Board**: 3rd-P settlements must be in precise factual amount. Harris I and II, en banc. Total amount of comp to which CL is entitled over lifetime is relevant figure. Linton v. Container Stevedoring Co., 28 BRBS 282 (1994). Fact finder may use any reasonable method to calculate. Id.

   b) **Fifth Circuit**: Villanueva v. CNA Ins. Companies, 868 F.2d 684 (**5th Cir.** 1989) ("if an employee settles with a third-party for more than the compensation benefits to which he is entitled, §33(f) extinguishes the ER's liability for any unpaid benefits...if the worker settles for less, §33(g) precludes further liability on the part of the ER unless the employee has obtained the ER's and carrier's prior approval").

   c) **Board**: No, Cowart altered Villanueva and §33(f) doesn't wipe out ER's total liability in every case; compensation and medicals are suspended until net recovery is exhausted.

4. Present or actual value?

   Section 33(e), unlike Section 33(f), speaks in terms of "present value." Section 33(e)'s "trust fund" mechanism imposes the risk of a reasonable return and of failed actuarial expectations on compensation insurers who are in the business of undertaking such risks and are able to spread them across many cases. For an example of a Section 33(f) case where both the Board and the **Fifth Circuit** rejected the "present value" approach in Section 33(f), see Maples v. Textports Stevedores Co., 23 BRBS 302, aff'd sub nom. Textports Stevedores Co. v. Director, OWCP, 931 F.2d 331, 28 BRBS 1

(CRT) (**5th Cir.** 1991). The computation of the Section 33(f) credit is not predicated on discounting accrued compensation to present value. Texports; Gilliland v. E.J Bartells Co., Inc., 270 F.3d 1259 (**9th Cir.** 2001), upholding, 34 BRBS 21 (2000); Cretan v. Bethlehem Steel Corp., 24 BRBS 35 (1990), aff'd in part and rev'd in part, 1 F.3d 843, 27 BRBS 93 (CRT)(**9th Cir.** 1993), cert denied, 512 **U.S.** 1219 (1994)(Employer was entitled to an offset in the amount of the lump sum payment, plus a "continuing credit" based on the actual payments made each month to the claimant.); Gilliland (See Topic 33.6 for more on present and actual value.)

IX. EXCEPTIONS TO IMPLEMENTATION OF 33(g) BAR.

1. CL gets a 3rd-P judgment.

2. CL settles for an amount greater than or equal to ER's total liability.

X. CAN CLAIMANT WITHDRAW THE LHWCA CLAIM ?

1. **Board**, Yes: Boone v. Ingalls Shipbuilding, Inc., 28 BRBS 119 (1994) (Brown, J., concurring on recons.) (en banc) 27 BRBS 250 (1993) (Brown, J., concurring) [rev'd by **Fifth Circuit** on December 19, 1996 Ingalls Shipbuilding v. Director, OWCP (Boone), 102 F.3d 1385 (**5th Cir.** 1996), see infra] (district director properly addressed and approved a claimant's motion to withdraw his claim, instead of transferring the case to the OALJ; as claimant in this case is not entitled to compensation under the LHWCA, because he withdrew his claim and has no compensation disability, he clearly could not settle his third-party claims for less than what he is entitled to under the LHWCA; thus, if the previously filed claim were adjudicated, Section 33(g)(1) would not bar claimant's recovery).

2. **Fifth Circuit**, No: Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (**5th Cir.** 1994), wherein it held that Section 19 of the LHWCA imposes a mandatory duty on the district director to transfer the case to OALJ upon the request of a party. See also Ingalls Shipbuilding v. Director, OWCP (Boone), 102 F.3d 1385 (**5th Cir.** 1996) (**once a party requests a formal hearing, the district director is without jurisdiction to rule on motions to withdraw**; district director was obligated by the LHWCA to transfer the claim to the OALJ, and the failure to do so denies the employer a procedural right to which it is entitled; employer is "adversely affected or aggrieved" by the order and thus has standing under Section 921(c) of the LHWCA to seek review of the Board's decision).

XI. WHAT CONSTITUTES NOTICE UNDER 33(g)(2) ?

1. **Board**: Good if made prior to ER making any voluntary payments or good if prior to announcement of judgment. Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988).

2. No estoppel under §33. Nesmith v. Farrell American Station, 19 BRBS 176 (1986).