

BRB No. 98-0537

GIE SIMPSON)	
)	
Claimant-Petitioner)	DATE ISSUED:
)	
v.)	
)	
LOCKHEED SHIPBUILDING COMPANY)	
)	
and)	
)	
HELMSMAN MANAGEMENT SERVICES)	
)	
Employer/Carrier- Respondents)	DECISION and ORDER

Appeal of the Decision and Order After Remand of Edward C. Burch,
Administrative Law Judge, United States Department of Labor.

William D. Hochberg, Edmonds, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for
employer/ carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order After Remand (91-LHC-2753) of
Administrative Law Judge Edward C. Burch rendered on a claim filed pursuant to the
provisions of the Longshore and Harbor Workers' Compensation Act, as amended,
33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions
of law of the administrative law judge which are rational, supported by substantial
evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls
Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time this case is before the Board. Claimant was employed

by employer as a scaler from 1952 to 1957, then as a painter from 1957 until his layoff in 1984. Claimant filed a claim for benefits under the Act on September 12, 1982 for a pulmonary impairment based on his work-related exposures to injurious substances, including asbestos.¹ In addition, claimant filed a third-party action against several asbestos manufacturers, two of which were settled prior to his layoff from employer; claimant entered into four separate third-party settlements subsequent to the layoff.

On October 14, 1992, the administrative law judge issued his initial Decision and Order in the instant case, awarding claimant permanent total disability compensation. 33 U.S.C. §908(a). The administrative law judge also found that employer was entitled to relief from continued compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Thereafter, on October 21, 1992, employer moved to set aside the Decision and Order for the acceptance of additional evidence pertaining to claimant's settlements from third-party actions, asserting, pursuant to the newly decided United States Supreme Court decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992), that this evidence implicated the forfeiture provisions set forth at Section 33(g) of the Act, 33 U.S.C. §933(g). The administrative law judge denied this motion, finding that by failing to raise the Section 33(g) bar issue at the hearing, employer had waived this defense.²

¹Claimant filed three claims for compensation under the Act. OWCP Nos. 14-69256, 14-80056 and 14-78478. The first and third claims were apparently deemed identical and were consolidated. Claimant has also received an award for a work-related hearing loss.

²The administrative law judge construed employer's motion to be a timely Motion for Reconsideration. In denying the motion, the administrative law judge

On appeal, the Board affirmed the administrative law judge's finding that claimant's pulmonary impairment was causally related to his employment with employer and his subsequent award of permanent total disability compensation to claimant. However, the Board agreed with employer's position that the administrative law judge abused his discretion in denying employer's motion to reopen the record, holding that despite not having pursued the Section 33(g) bar issue at the hearing, employer had timely raised this issue prior to the issuance of the administrative law judge's Decision and Order. Thus, the Board vacated the administrative law judge's Order denying employer's motion to reopen the record, and remanded the case to the administrative law judge for a determination of whether Section 33(g) was applicable to this claim. *Simpson v. Lockheed Shipbuilding Co.*, BRB No. 93-1001 (April 26, 1996)(unpublished).

In his Decision and Order After Remand, the administrative law judge determined that there was insufficient evidence to establish that claimant's chronic obstructive pulmonary disease was a condition distinct from his asbestos-related disease and, further, that claimant's hypertension was not work-related. Thus, the administrative law judge concluded that claimant has only one compensable disability and that Section 33(g) is applicable to the instant case. Having accepted the parties' stipulation that claimant became a "person entitled to compensation" within the meaning of Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), on September 4, 1984, the administrative law judge found that since claimant did not obtain employer's written approval of the third-party settlement entered into by claimant on November 19, 1984, claimant's right to compensation and medical benefits under the Act terminated as of November 19, 1984, pursuant to Section 33(g). The administrative law judge denied claimant's motion for reconsideration

noted that employer acknowledged that, at the hearing, "it did not introduce evidence of Claimant's third party settlements, or raise the issue of forfeiture under Section 33 of the Act, or assert entitlement to a credit against prospective compensation in an amount equal to the Claimant's total third party recoveries." Order Denying Employer's Motion to Set Aside Decision and Order and Reopen the Record at 1.

and his request that the record be reopened and a hearing held for the introduction of additional evidence.

On appeal, claimant contends that employer should not have been permitted to raise the applicability of Section 33(g) to this case, as employer failed to properly raise this issue prior to the issuance of the administrative law judge's Decision and Order. Alternatively, claimant argues that he suffers from two distinct respiratory impairments, asbestosis and chronic obstructive pulmonary disease related to non-asbestos irritants. Therefore, claimant contends, Section 33(g) cannot bar his claim for benefits under the Act as the third-party settlements related only to claimant's asbestos-related lung disease. Employer responds, urging affirmance of the administrative law judge's Decision and Order After Remand. Specifically, employer argues that the Board's previous holding that employer had not waived the issue of the Section 33(g) bar constitutes the law of the case and must be followed. Employer further argues that the administrative law judge's finding that claimant suffers from one compensable injury is rational and supported by substantial evidence. Claimant has filed a reply to employer's response, reiterating its assertions that the doctrine of the law of the case is inapplicable to the instant case.³

Claimant initially asserts that the Board's previous decision remanding the case for a determination of the applicability of Section 33(g) was based on the erroneous finding that employer had raised the Section 33(g) defense prior to the issuance of the administrative law judge's initial decision, and therefore, the law of the case doctrine should not be applied in the instant case. For the reasons that follow, we hold that, under the circumstances in the instant case, the law of the case doctrine does not bar further consideration by the Board of the issue of employer's attempt to raise the issue of the applicability of Section 33(g) to this case.

The Board has held that where a party appeals a Decision and Order on remand raising issues rejected by the Board in its prior decision, the first decision of the Board will be adhered to unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would result in a manifest injustice. See generally *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J.,

³Employer filed with the Board a motion to dismiss claimant's appeal, which the Board denied in an Order issued on May 7, 1998.

dissenting).

In its initial decision vacating the administrative law judge's Order denying employer's motion to reopen, the Board stated that employer raised the issue of offsets under Section 33(f) of the Act, 33 U.S.C. §933(f), in its pre-hearing statement, and that employer raised the Section 33(g) bar issue based on the decision of the Supreme Court in *Cowart*, prior to the issuance of the administrative law judge's Decision and Order. See *Simpson*, slip op. at 5. As claimant correctly asserts, however, employer did not raise the Section 33(g) issue until October 21, 1992, subsequent to the issuance of the administrative law judge's Decision and Order, when employer moved to set aside that decision.⁴

In the instant case, the initial hearing closed on April 7, 1992. The *Cowart* decision was issued by the Supreme Court on June 22, 1992. The administrative law judge issued his initial decision on October 1, 1992, and it was filed in the district director's office on October 14, 1992. Subsequent to the issuance of the administrative law judge's decision, employer filed its motion with the administrative law judge to set aside his decision on October 21, 1992, raising for the first time the issue of the applicability of Section 33(g). Although employer did list "Section 33 offsets" as an issue in its pre-hearing statement, and claimant agreed that the net amounts of his third-party settlements may offset employer's liability, see Hearing Transcript at 6-7 (Feb. 27, 1992), employer did not specifically raise the Section 33(g) bar issue prior to the issuance of the administrative law judge's order and, in fact, introduced no evidence with regard to claimant's third-party settlements. Indeed, in its previous brief before the Board, employer conceded that it had not raised the Section 33(g) forfeiture issue with the administrative law judge prior to its motion. See Employer's brief at 20 (March 22, 1993). Similarly, in its motion to the administrative law judge to set aside his initial decision, employer acknowledged that it did not raise the Section 33(g) defense at the hearing, seeking to justify this decision based on the state of law in the United States Court of Appeals for the Ninth Circuit, wherein this case arises. See *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980). In his order denying employer's motion to set aside, the administrative law judge rejected this contention, noting the split in the Circuit Courts of Appeals as to the applicability of the Section 33(g) defense. The administrative law judge further cited the well-settled principle

⁴The administrative law judge's decision, signed on October 1, 1992, was received in the district director's office on October 14, 1992.

that once closed, a hearing record may not be reopened for the hearing of new issues or the introduction of evidence which was readily discoverable at the time of hearing, and ultimately concluded that employer's failure to raise the Section 33(g) issue and preserve it for appeal prevented it from raising this issue for the first time post-hearing. See Order Denying Employer's Motion to Set Aside Decision and Order and Reopen the Record at 2.

Pursuant to Section 702.336(b), 20 C.F.R. §702.336(b), the administrative law judge has the discretion to consider a new issue at any time prior to the filing of the compensation order.⁵ In a similar case regarding an employer's attempt to raise the applicability of Section 33(g) subsequent to the issuance of an administrative law judge's decision, the Board held that where an employer waited more than three months after the issuance of *Cowart* and until after the issuance of the administrative law judge's adverse decision before attempting to raise the applicability of Section 33(g), employer's failure to preserve the Section 33(g) defense for appeal was not excusable; thus, the Board affirmed the administrative law judge's denial of employer's motion to reopen the record. *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).⁶ See also *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998)(where employer did not raise the issue of Section 8(f) relief before the administrative law judge until after a decision was issued, the Board affirmed the administrative law judge's refusal to address the issue on reconsideration). Like the situation in *Lewis*, employer herein had notice of the third-party settlements prior to the hearing, yet it did not raise the Section 33(g) issue despite the fact that a decision in *Cowart* was imminent; moreover, once the decision in *Cowart* was issued in June 1992, three months before the issuance of the administrative law judge's decision, employer did not take timely action to raise the issue prior to the issuance of the administrative law judge's decision.

Accordingly, as the Board's prior finding that employer raised the Section 33(g) bar issue prior to the issuance of the administrative law judge's decision was

⁵Although the record may be reopened and a new issue raised pursuant to a Section 22, 33 U.S.C. §922, modification proceeding where reopening is premised on a mistaken determination of fact or change in conditions, modification is not available where, as here, the basis for reopening is premised on a subsequent change in law. See *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988); *Ryan v. Lane & Co.*, 28 BRBS 132 (1994).

⁶In *Lewis*, the Board specifically distinguished *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996), wherein the Board held that it was an abuse of discretion for the administrative law judge to refuse to consider a Section 33(g) issue raised post-hearing, but *prior* to the issuance of his decision.

based on an erroneous finding of fact, allowing the Board's initial decision to stand would result in a manifest injustice. See *generally Jones*, 25 BRBS at 355; *Williams*, 22 BRBS at 234. The administrative law judge's initial determination that the Section 33(g) bar issue was not timely raised was proper and in accordance with 20 C.F.R. §702.336, which permits a new issue to be raised only prior to the issuance of the administrative law judge's decision. See *Lewis*, 30 BRBS at 159. Moreover, the administrative law judge's initial reasoning that employer could and should have raised this issue earlier in time is rational and supported by the record. In fact, employer did not raise the Section 33(g) bar issue until after the administrative law judge's decision was issued. We therefore hold that the administrative law judge's initial refusal to reopen the record and entertain employer's Section 33(g) arguments did not involve an abuse of his discretionary authority.⁷ See *generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 158 (1993); *Smith v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 22 BRBS 46, 50 (1989). As a result, we vacate our prior decision, as well as the administrative law judge's decision on remand, and we reinstate the administrative law judge's original decision and award of benefits in this case.

⁷Based on our decision herein, claimant's contention that the Board's previous decision is contrary to Rule 8(c) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 8(c), is moot.

Accordingly, the administrative law judge's Decision and Order After Remand is vacated, and the administrative law judge's initial Decision and Order Awarding Benefits and Order Denying Employer's Motion to Set Aside Decision and Order and Reopen the Record are reinstated.⁸

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁸In view of our holding herein, all remaining issues on appeal are moot.