

BRB Nos. 92-1730
and 92-1730A

ELFREDA MARTIN)	
(Widow of Sylvester Martin))	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
KAISER COMPANY)	
)	
and)	DATE ISSUED:
)	
TRANSAMERICA INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
Cross-Respondents)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Victoria Edises (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Herman Ng (Hanna, Brophy, MacLean, McAleer and Jensen), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order on Remand (86-LHC-1266) of Administrative Law Judge Thomas Schneider 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is on appeal to the Board for the second time. Decedent, claimant's husband, died

of lung cancer in July 1982 due to asbestos exposure incurred during his employment at various shipyards in the 1940's and in subsequent employment as a roofer. During his life, decedent filed a claim for disability benefits under the Act. After decedent's death, claimant filed a claim for death benefits under the Act. Claimant received \$34,000 in death benefits under the state workers' compensation act, \$400 in settlement with Industrial Indemnity Company, and \$116,341.30 as a result of decedent's malpractice claim against his former attorney.

In the original Decision and Order, issued in January 1988, the administrative law judge addressed issues involving coverage under the Act, the cause of decedent's death, responsible carrier, average weekly wage, the timeliness of decedent's *inter vivos* claim, the applicability of Section 14(e), 33 U.S.C. §914(e), and attorney's fees. The administrative law judge denied decedent disability benefits, finding his claim to be time-barred, but he awarded claimant death benefits pursuant to Section 9, 33 U.S.C. §909. The administrative law judge awarded employer an offset pursuant to Section 33(f), 33 U.S.C. §933(f), against its liability for death benefits for the malpractice recovery.

Following the entry of the award of death benefits, claimant entered into settlements of her wrongful death suits against several third-party civil defendants for a net sum of \$29,588.43.¹ Claimant did not obtain employer's written approval of these settlements prior to executing them.

The administrative law judge's Decision and Order was appealed to the Board. In *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1991) (Dolder, J., concurring in the result only), the Board, *inter alia*, reversed the administrative law judge's finding that decedent's claim was time-barred and remanded the case for consideration of entitlement to a disability award. *Id.* at 124. The Board also reversed the administrative law judge's finding that employer is entitled to a credit pursuant to Section 33(f) for the malpractice recovery against its liability for death benefits.² *Id.* at 125.

In the Decision and Order on Remand, the administrative law judge awarded decedent disability benefits pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), subject to employer's offset for the malpractice recovery. Further, relying on the Board's decision in *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986), *appeal dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27 (CRT)(11th Cir. 1987), the administrative law judge found that claimant was not a "person entitled to compensation" within the meaning of Section 33(g), 33 U.S.C. §933(g), at the time she entered into her third-party settlements because she was not actually receiving death benefits at the time she entered into them due to the previously awarded

¹Claimant entered into third-party settlements against Crown, Cork and Seal, Babcock & Wilcox, Garlock, Raymark, Western MacArthur, Uniroyal, OCF, H.K. Porter, CCR, Combustion Engineering, Eagle-Pitcher Industries, Celotex, Fibreboard Corp., and Western MacArthur which netted \$29,588.43. *See* Emp. Ex. A.

²The Board noted that claimant did not contest employer's right to credit this recovery against its liability for disability benefits. 24 BRBS at 124 n.7.

Section 33(f) credit.³ Decision and Order on Remand at 9. The administrative law judge therefore concluded that claimant's claim for death benefits is not barred by Section 33(g).

On appeal, employer contends that the administrative law judge erred in finding that claimant is not a "person entitled to compensation" within the meaning of Section 33(g) and therefore erred in finding that her claim for death benefits is not barred. Claimant responds, urging affirmance of this finding. BRB No. 92-1730. On cross-appeal, claimant challenges the offsets the administrative law judge awarded employer pursuant to Section 33(f). Employer responds in support of the administrative law judge's decision in this regard. BRB No. 92-1730A.

Employer contends that the administrative law judge erred in finding that claimant is not a "person entitled to compensation" within the meaning of Section 33(g). Employer contends that inasmuch as an award of death benefits was in effect at the time claimant entered into the third-party settlements claimant is such a person under the reasoning of *Dorsey*, 18 BRBS at 25, and, moreover, that claimant clearly is such a person under the holding of the Supreme Court in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992), which was issued subsequent to the administrative law judge's decision in this case. Claimant responds in support of the administrative law judge's interpretation of *Dorsey* and contends that the decision in *Cowart* should not be applied to settlements entered into prior to its issuance.

Section 33(g), as amended in 1984, states:

- (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) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section 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). . .
- (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 chapter shall be terminated, regardless of whether the employer or the employer's insurer had made payments or acknowledged entitlement to benefits under this chapter.

³In *Dorsey*, 18 BRBS at 28, the Board restated its prior interpretation that one is a "person entitled to compensation" when employer is actually paying compensation pursuant to an award or voluntarily at the time claimant enters into the third-party settlement. See *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980).

33 U.S.C. §933(g)(1988). We need not address the parties' arguments concerning the propriety of the administrative law judge's interpretation of *Dorsey*, as the Supreme Court's decision in *Cowart* is dispositive of the issue raised on appeal. The Supreme Court has held that under Section 33(g), a claimant is a "person entitled to compensation" at the moment his or her right to recovery vests. *Cowart*, 505 U.S. at 477, 26 BRBS at 52 (CRT). The Court stated that the normal meaning of entitlement includes a right or benefits for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated, but only upon the person's satisfying the prerequisites attached to the right. *Id.*, 505 U.S. at 477, 26 BRBS at 51 (CRT). The Court further stated that a "person entitled to compensation" must obtain employer's prior written approval of the third-party recovery unless the recovery is in the form of a judgment or if the settlement recovery exceeds employer's liability to claimant under the Act, in which case claimant must give notice to the employer. *Id.*, 505 U.S. at 482, 26 BRBS at 53 (CRT). The Board has held that *Cowart* applies to settlements entered into prior to the time *Cowart* was decided. *Kaye v. California Stevedore & Ballast*, 28 BRBS 241 (1994); *see also Monette v. Chevron, U.S.A., Inc.*, 29 BRBS 112 (1995).

In the instant case, it is clear that claimant was a "person entitled to compensation" within the meaning of *Cowart* at the time she entered into the third-party settlements between August 1988 and October 1990, as an award of death benefits was entered by an administrative law judge in January 1988.⁴ The fact that employer was awarded a credit pursuant to Section 33(f) does not negate the fact that claimant's entitlement had vested. Furthermore, claimant's net third-party recovery of \$29,588.43 is less than claimant's entitlement to death benefits under the Act.⁵ *See generally Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1984). As it is undisputed that claimant did not obtain employer's written approval prior to entering into the third-party settlements, Section 33(g)(1) bars claimant from obtaining death benefits under the Act. We therefore reverse the administrative law judge's finding that claimant was not a person entitled to compensation at the

⁴We need not determine at what point claimant became a "person entitled to compensation" as she clearly was one by the time she entered into the third-party settlements. Under the interpretation of the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2705 (1994), a surviving spouse may be a "person entitled to compensation" prior to the death of the employee. The Board rejected this interpretation in *Yates v. Ingalls Shipbuilding, Inc.*, 27 BRBS 137 (1994) (Smith, J., dissenting on other grounds), holding that under *Cowart*, a widow's right to death benefits does not vest until the death of the employee. The United States Court of Appeals for the Fifth Circuit affirmed the Board's holding in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113 (CRT), *pet. for reh'g en banc denied*, 71 F.3d 880 (5th Cir. 1995), and the Supreme Court has granted *certiorari* to resolve the split in the circuits. 64 U.S.L.W. 3762 (U.S. 1996) (No. 95-1081).

⁵Claimant was awarded death benefits from July 25, 1982, at a rate of \$124.18 per week, plus adjustments pursuant to Section 10(f), 33 U.S.C. §910(f). At the time the administrative law judge issued his decision on remand in March 1992, the award had been in effect for almost 10 years, with a recovery of at least \$64,573.60 [(10 x 52) x \$124.18].

time she entered into the third-party settlements, and we hold that claimant's claim for death benefits is barred by Section 33(g). In view of this holding, we need not address claimant's challenge to the administrative law judge's finding regarding employer's entitlement to a Section 33(f) offset against its liability for death benefits.

Accordingly, the administrative law judge's finding that claimant's claim for death benefits is not barred by Section 33(g) is reversed. The administrative law judge Decision and Order on Remand is otherwise affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge