

LILLIAN ROBINSON (mother of )  
CLEVELAND J. ROBINSON) )

Claimant-Respondent )

v. )

INGALLS SHIPBUILDING, )  
INCORPORATED )

Self-Insured )  
Employer-Respondent )

DATE ISSUED: \_\_\_\_\_

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )

Petitioner )

DECISION and ORDER

Appeal of the Decision and Order on Motion for Summary Decision of Lee J. Romero, Jr.,  
Administrative Law Judge, United States Department of Labor.

Lillian Robinson, St. Elmo, Alabama, *pro se*.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured  
employer.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo,  
Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C.,  
for the Director, Office of Workers' Compensation Programs, United States  
Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Motion for Summary Decision (92-LHC-1053) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Mr. Robinson (decedent) filed a claim on June 8, 1987, for disability benefits due to his work-related pulmonary disease allegedly caused by exposure to and ingestion of asbestos. Emp. Ex. 3. He died on December 2, 1988. Thereafter, his mother, claimant herein, filed a claim for death benefits on October 3, 1990. Emp. Ex. 5. Employer moved to dismiss the claims for failure to comply with Section 33(g) of the Act, 33 U.S.C. §933(g). The administrative law judge held a hearing on the motion.<sup>1</sup> He determined that both decedent and claimant violated Section 33(g), 33 U.S.C. §933(g) (1988), by failing to obtain employer's written approval prior to entering into third-party settlements. Consequently, he dismissed the claims. Decision and Order at 2-3. The Director appeals the denial of benefits, and employer responds, urging affirmance.

After filing his claim for benefits under the Act, decedent filed claims in federal court against third-party asbestos defendants. He settled claims against several third-party defendants, and after decedent's death, claimant also settled some third-party claims. After each settlement, decedent or claimant notified employer, and employer expressly disapproved the settlements. Emp. Exs. 4, 6, 9.

The Director contends the administrative law judge erred in dismissing the claims without determining whether the settlements are for amounts less than the compensation entitlement of decedent and claimant, in not determining whether decedent and claimant are "persons entitled to compensation," in allocating the burden of proof to claimant, in presuming the money disbursed to claimant was in her own right instead of money due decedent, and in counting the pre-death agreements against claimant. Employer responds, asserting that the administrative law judge applied correct law and that *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), and *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), control the outcome of this case.

The Board addressed issues identical to the primary ones raised here in *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring), and *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., concurring and dissenting). It held that the determination of whether a

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<sup>1</sup>Claimant was represented by her daughter (a lay representative) before the administrative law judge and is not represented before the Board.

claimant is a "person entitled to compensation" requires findings of fact. Specifically, the administrative law judge must determine whether the employee sustained an injury under the Act, and in occupational disease cases, this occurs when the employee is aware of the relationship between the disease, the disability, and the employment. Further, the Board held that before it is determined that a claim is barred by Section 33(g)(1), a comparison must be made between the gross amount of a claimant's aggregate third-party settlement recoveries and the amount of compensation, exclusive of medical benefits, to which he would be entitled under the Act. *Gladney*, 30 BRBS at 27; *Harris*, 30 BRBS at 11, 16; *see also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992) (Section 33(g)(1) is inapplicable if a claimant's third-party settlement is for an amount greater than the amount to which he is entitled under the Act). Thus, an administrative law judge's failure to ascertain these facts is erroneous. *Gladney*, 30 BRBS at 27; *Harris*, 28 BRBS at 262-263. The Board also determined that Section 33(f) does not necessarily extinguish an employer's total liability for benefits in every case, but rather provides the employer with a credit in the amount of the claimant's net third-party recovery against its liability for compensation and medical benefits. *Harris*, 28 BRBS at 269; *see also Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995). Further, the Board has determined that neither *Cretan* nor *Villanueva* controls the outcome of this type of case in the Fifth Circuit. *Gladney*, 30 BRBS at 27-28; *Harris*, 30 BRBS at 16-17.

The record contains evidence of six third-party settlements. These "Disclosure of Disbursements" indicate the dates and amounts of the settlements.<sup>2</sup> Emp. Exs. 4, 6, 9. Two of the settlements occurred prior to decedent's death for a total gross amount of \$2,500. The remaining agreements were made after decedent's death for a total gross amount of \$13,500. The record contains disapproved notices of three of the settlements. Emp. Exs. 4, 9. The administrative law judge found that this evidence "clearly shows" that decedent and claimant entered into third-party agreements without employer's prior approval. Decision and Order at 3. He noted that claimant may have sought prior approval of one agreement, but that one attempt does not rectify the previous omissions. *Id.* Further, the administrative law judge stated:

Claimant does not deny that the settlements were for an amount less than Employer's liability under the LHWCA; moreover, it is noted that third-party settlements in excess of Employer's liability would offset such liability entirely under the provisions of Section 33(f).

Decision and Order at 3. Based on this cursory analysis, we vacate the administrative law judge's dismissal and remand the case for further consideration under *Gladney* and *Harris*. The administrative law judge did not perform the requisite "less than" comparison, and he incorrectly concluded that Section 33(f) would automatically offset any remaining liability on employer's part if the settlements were for more than decedent's and claimant's entitlement under the Act. Moreover, he placed the burden of showing there is no factual dispute on claimant, who was not represented by

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<sup>2</sup>*See also* Emp. Ex. 8 (incomplete copy of a partial release of numerous third-party defendants for \$5,100, by claimant *et al.*).

an attorney, in rendering his decision on the motion for summary judgment, and, as the Director correctly argues, the initial burden is on employer as the moving party to prove there are no factual disputes. *See Gladney*, 30 BRBS at 27.

Additionally, the administrative law judge did not determine whether decedent and claimant are "persons entitled to compensation." Under *Cowart* and *Harris*, decedent is not a "person entitled to compensation" unless he became aware of the relationship between his disease, his disability, and his employment. *Cowart*, 505 U.S. at 469, 26 BRBS at 49 (CRT); *Harris*, 30 BRBS at 9. Moreover, in a similar case, the United States Court of Appeals for the Fifth Circuit concluded that a widow's right to death benefits does not vest before her husband's death; therefore, she is not a "person entitled to compensation" until after the death has occurred. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113 (CRT), *reh'g en banc denied*, 71 F.3d 880 (5th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3762 (U.S. 1996) (No. 95-1081). Consequently, Section 33(g) is inapplicable to any pre-death settlements into which she may have entered and cannot bar a claim for death benefits.<sup>3</sup> *Id.*, 65 F.3d at 464, 29 BRBS at 116 (CRT). The court also found that Section 33(f) applies to the post-death settlements but that employer is entitled only to an offset of the net proceeds received by the widow as opposed to an offset of the net amount due the widow and her adult children who are not entitled to death benefits under the Act. *Id.*, 65 F.3d at 465, 29 BRBS at 117 (CRT); *see also* 33 U.S.C. §909.

In the case presently before the Board, it is not clear whether claimant is entitled to death benefits under the Act, as there has been no determination of whether she was dependent on decedent. *See* 33 U.S.C. §§902(15), 909. Further, there were both pre- and post-death settlements, and the record indicates there were disbursements made on each which may have been received by claimant. As the administrative law judge did not ascertain the amount of benefits to which decedent and claimant, individually, would be entitled under the Act and compare those figures to their respective recoveries under the third-party settlement agreements, there are significant facts which remain unresolved, and it was improper for him to grant employer's motion for summary judgment. Therefore, we vacate the dismissal of the claims and remand the case for further consideration pursuant to *Gladney*, *Harris* and *Yates*.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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<sup>3</sup>Section 33(g) would be applicable to any post-death settlements into which the widow may have entered; however, in *Yates*, the widow obtained the proper approval. *Yates*, 65 F.3d at 462, 29 BRBS at 114 (CRT).

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge