

BRB No. 94-4050

KAREN McLENDON	)	
(Widow of ROBERT E. McLENDON)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples and Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (93-LHC-184) of Administrative Law Judge James W. Kerr, Jr., dismissing 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant's husband (employee) was allegedly exposed to asbestos while in the employ of employer. He filed a claim under the Act for asbestosis on December 21, 1984. He died on July 13, 1991, from cancer allegedly related to his asbestos exposure. Claimant thereafter filed a claim for death benefits. Prior to his death, the employee and claimant filed third-party actions against asbestos manufacturers. It is uncontested that they settled these suits without employer's prior written approval.

The administrative law judge found that the employee and claimant entered into numerous

third-party settlements prior to the employee's death. The releases of four of the settlements were entered into evidence and they state that in exchange for payment, the employee and claimant release claims for, *inter alia*, injury, wrongful death and loss of consortium. The administrative law judge applied the decision of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2705 (1994), and determined that claimant was a "person entitled to compensation" within the meaning of Section 33(g)(1) at the time she entered into the third-party settlements as co-releasor. 33 U.S.C. §933(g)(1). Inasmuch as she did not obtain employer's written approval prior to entering into the settlements, the administrative law judge found that Section 33(g) bars her claim for death benefits. Accordingly, he dismissed claimant's claim.

On appeal, claimant contends that the administrative law judge erred in dismissing her claim, as the *Cretan* decision is not controlling in this case. Claimant states that the operative law in the Fifth Circuit, in whose jurisdiction this case arises, is *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), *pet. for cert. granted*, 64 U.S.L.W. 3762 (U.S. 1996) (No. 95-1081), in which the court expressly disavowed the holding in *Cretan*.

In determining when a claimant becomes "a person entitled to compensation" within the meaning of Section 33(g)(1),<sup>1</sup> the Supreme Court stated in *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), that one becomes a "person entitled to compensation" at the moment his right to recovery vests. *Id.*, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). In *Yates*, the United States Court of Appeals for the Fifth Circuit affirmed the Board's holding that a surviving spouse is not a "person entitled to compensation" within the meaning of Section 33(g)(1) until the death of the employee, as it is not until this time that a survivor's right to death benefits under the Act vests. 65 F.3d at 464, 29 BRBS at 116 (CRT). Thus, the survivor's failure to obtain employer's written approval of third-party settlements entered into prior to the employee's death cannot bar a claim by the survivor for death benefits. The court specifically rejected the contrary interpretation of the Ninth Circuit in *Cretan*. *Id.*

---

<sup>1</sup>Section 33(g)(1), 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). 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.

33 U.S.C. §933(g)(1)(1988)

In the instant case, it is uncontested that all third-party settlements were entered into prior to the death of the employee. Pursuant to *Yates*, therefore, we hold that claimant was not a "person entitled to compensation" at the time she entered into the pre-death settlements, and her failure to obtain employer's consent to the settlements cannot bar her claim for death benefits. We therefore vacate the administrative law judge's dismissal of the claim for death benefits, and we remand the case for disposition of the remaining issues raised by the parties.<sup>2</sup>

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

---

<sup>2</sup>Employer has filed a motion to hold this case in abeyance pending the Supreme Court's decision in *Yates*, which will resolve the conflict between the interpretations of the Ninth and Fifth Circuits. We deny this motion in light of Public Law No. 104-134, which provides that any appeal pending before the Board for more than one year on September 12, 1996, will be administratively affirmed on that date and contains no express exceptions for cases held in abeyance. Abeyance could result in affirmance of a decision contrary to the law of the circuit having appellate jurisdiction over the case, whereas on remand the administrative law judge may exercise his discretion to hold the case pending the court's decision.