



BRB No. 17-0349

JENNIFER GOFF)	
(survivor of JACK GOFF, deceased))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: <u>Nov. 2, 2017</u>
HUNTINGTON INGALLS INDUSTRIES,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order Granting Employer’s Motion for Summary Decision of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Charles F. Herd, Jr. (The Lanier Law Firm), Houston, Texas, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Employer’s Motion for Summary Decision (2015-LHC-01649) of Administrative Law Judge Drew A. Swank 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent, Jack Goff, worked for employer and was exposed to asbestos during the course of his employment. On June 14, 2013, he was diagnosed with mesothelioma. He and his wife, Amelia, filed a civil tort claim in West Virginia against multiple asbestos

manufacturers, suppliers, installers, and distributors in September 2013. *Goff v. A.W. Chesterton Co. et al.*, Civil Action No. 13-C-1675. Decedent died on June 7, 2014, as a result of his asbestos-related disease. He is survived by his wife and their adult daughter, Jennifer.¹

On July 1, 2014, Amelia signed, individually and in her capacity as executrix of Jack's estate, an agreement with Ford Motor Company, one of the defendants, releasing it from further liability in the civil action. On that same date, she also signed, as executrix, a confidential agreement with Genuine Parts Company, releasing it from further liability. On January 16, 2015, Amelia signed, individually and in her capacity as executrix, an agreement to release McJunkin Red Man Corporation from further liability.²

On July 29, 2014, Amelia and Jennifer filed a claim for death benefits under the Act. 33 U.S.C. §909. Unaware of the third-party settlements, employer accepted Amelia's claim, but not Jennifer's, and paid her funeral expenses and death benefits commencing June 8, 2014. Upon learning of the third-party settlements, employer controverted Amelia's claim.³ In February 2017, employer filed its motion for summary decision with the administrative law judge. It asserted that Amelia, as representative of Jack's estate, bound herself and all heirs of Jack's estate to the third-party settlements, and by accepting proceeds therefrom, Jennifer "effectively ratified" the settlements. Employer also asserted that the third-party settlements are for "far less than the compensation entitlement" and that Amelia did not obtain its prior written approval of the third-party settlements. Therefore, employer asserted, there were no disputed facts, and Section 33(g), 33 U.S.C. §933(g), bars the claim for death benefits.⁴ Motion at 3, 5-6.

¹ Jennifer is the claimant in this case.

² Employer, in its motion for summary decision, noted: "[o]n information and belief other settlements were negotiated and disbursed to the estate that have not been disclosed and are not known to the Employer." Motion at 2 n.1.

³ As of July 13, 2015, employer had paid Amelia over \$22,000 in death benefits. Emp. Br. at exh. 2.

⁴ Section 33(g) 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

In response, the attorney representing Amelia and Jennifer acknowledged that Amelia settled some third-party claims without obtaining employer's prior written approval and conceded that Amelia is not entitled to benefits, pursuant to Section 33(g) of the Act. Nevertheless, Jennifer would continue her claim, as she asserted she did not sign, or receive any benefits from, the third-party settlements. In reply, employer averred that Jennifer is an heir to Jack's estate and a beneficiary of the actions taken by her mother as representative of the estate. Moreover, employer stated that claimant "is alleged to have been an adult who was wholly dependent upon her father and her mother at the time of death," Emp. Reply at 1, and as Amelia signed the settlements on behalf of the estate, employer asserted she was indisputably Jennifer's "representative" pursuant to Section 33(g). Additionally, employer contended that as there is only one death benefit under Section 9 of the Act, 33 U.S.C. §909, Jennifer's entitlement to death benefits is derivative of Amelia's entitlement (because payment goes to the widow); therefore, as the widow's claim is barred, so is the child's.

After setting forth the parties' positions, the administrative law judge found that the capacity in which Amelia signed the third-party settlements is irrelevant because Section 9 precludes Jennifer from receiving benefits. He found that Section 9 provides for only one death benefit, though it may be payable to more than one survivor, and where there is a surviving widow, the death benefit is paid to her. If there are also surviving dependent children, the widow receives an additional amount for each child. The administrative law judge concluded:

Although, as claimant concedes, Amelia Goff can no longer pursue her claim for survivor's benefits pursuant to Section 33(g), she is still the decedent's widow as defined by the Act. Thus, there is no provision that

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.

(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 has made payments or acknowledged entitlement to benefits under this chapter.

would allow Claimant to independently establish her entitlement to benefits under the Act.

Order at 3. Stating that he considered facts in the light most favorable to claimant, he found no genuine dispute as to any material facts, and he granted employer's motion for summary decision. *Id.* Claimant appeals the administrative law judge's Order. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends the administrative law judge erred in granting employer's motion for summary decision. She contends the administrative law judge committed a procedural error by granting employer's motion on grounds that were not raised in the initial motion without giving her a chance to respond. On the merits, claimant contends the administrative law judge improperly applied the law. She asserts: (1) she is a "person entitled to compensation" separate from Amelia; (2) employer has not shown that she settled any third-party claims; (3) employer has not shown that one adult may unilaterally extinguish the rights of another adult or that Amelia was her "representative;" and (4) employer has not shown that she benefited from the third-party settlements such that she would be barred from receiving death benefits under the Act. Employer, in response, states that its reply brief, addressing Section 9 entitlement, was written in response to the concession that Amelia would not be pursuing her claim due to the Section 33(g) bar, so it was not erroneous for the administrative law judge to grant the motion on those grounds. Employer also asserts, assuming *arguendo*, that claimant is a wholly-dependent adult child, she is not entitled to death benefits under Section 9 for the reasons stated by the administrative law judge, and her claim for death benefits is precluded by Section 33(g) for the reasons employer previously put forth. Claimant filed a reply brief.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72. An administrative law judge may grant summary decision independent of a party's motion "[a]fter giving [the parties] notice and a reasonable time to respond[.]" 29 C.F.R. §18.72(f); *see Maglione v. APM Terminals*, 50 BRBS 29 (2016). The administrative law judge here found that employer is entitled to summary decision because claimant's Section 9 claim is derivative of Amelia's Section 9 claim, and Amelia has conceded her claim is barred by Section 33(g).

We agree with claimant that there are disputed facts to be resolved and that the administrative law judge misapplied the law. Thus, we hold that the administrative law judge erred in granting employer's motion for summary decision. For the reasons that follow, we reverse his Order and remand the case for further proceeding in accordance with this opinion.⁵ *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015), *modified in part on recon.*, 50 BRBS 7 (2016); *Morgan*, 40 BRBS 9.

Section 9 provides in part:

If the injury causes death, the compensation therefore [sic] shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding \$3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16^{2/3} per centum of such wages for each child;

33 U.S.C. §909(a), (b). The term "child" is defined in Section 2(14), 33 U.S.C. §902(14). The definition generally includes only persons under 18. Relevant to this case, if a "child" is over 18, she must be "(1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability." 33 U.S.C. §902(14); *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994); *Lucero v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 261 (1990), *aff'd mem. sub nom. Kaiser Aluminum & Chemical Corp. v. Director, OWCP*, 951 F.2d 360 (9th Cir. 1991); *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

⁵ It appears claimant was not given an adequate opportunity to respond to the Section 9 issue first raised in employer's reply in support of its motion. Employer's reply was mailed on February 27, 2017. The administrative law judge's Order Granting Employer's Motion for Summary Decision is dated March 7, 2017, and was filed and served by the district director on March 9, 2017, before claimant had the opportunity to respond. *See generally* 20 C.F.R. §702.336; *Maglione v. APM Terminals*, 50 BRBS 29 (2016); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987); 29 C.F.R. §18.72(f); *see n.9, infra*.

While the Act provides for only one “death benefit,” Section 9(b) makes it apparent that both a surviving spouse and eligible children may receive a portion of the “death benefit.” 33 U.S.C. §909(b); *Hawkins v. Harbert Int’l, Inc.*, 33 BRBS 198 (1999); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). In this respect, the administrative law judge’s interpretation that Jennifer’s entitlement as a “child” is derivative of Amelia’s entitlement as a widow is not supported by the Act. Section 9(b) does not condition a child’s entitlement on the surviving spouse’s entitlement.⁶ The statute merely sets forth the recovery percentages for a surviving spouse and eligible children. Therefore, the administrative law judge incorrectly concluded that, because there is a widow who is not entitled to death benefits, Jennifer cannot “independently establish” her entitlement to benefits. Order at 3.

A child’s entitlement to death benefits is based on the child’s relationship with the decedent and whether she satisfies the Act’s criteria and is not derivative of anyone else’s entitlement.⁷ If both a widow and a child survive the decedent, and the widow dies or remarries, the child’s entitlement is not extinguished. 33 U.S.C. §909(b). If a decedent does not have a widow/widower but does leave a surviving child who meets the criteria, that child is entitled to benefits. 33 U.S.C. §909(c). The same holds true if there is no widow/widower and no child: a brother, sister, or any other named dependent may be entitled to benefits in his or her own right based on satisfaction of the statutory criteria.

⁶ To the extent the administrative law judge’s analysis rests on to whom the employer would pay the benefits, the recipient could change depending on the facts. For example, if a decedent died while married to his second wife, but had produced a child who was still a minor with his first wife, both the second wife (the widow) and the minor child from the first marriage would be entitled to benefits. It is not apparent that, under such circumstances, the widow would be the recipient of the child’s benefits. *See, e.g., St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397, 399 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987) (child not the offspring of the widow); *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010) (children from different relationships). Indeed, Section 9(b) states that the district director can appoint a guardian to receive the compensation of a minor child. 33 U.S.C. §909(b).

⁷ A survivor’s entitlement, whether based on marital status, age, or dependency is to be determined at the time of injury, which is generally the date of death. 33 U.S.C. §§902(2), (14), (16), 909(f); *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012); *Henderson v. Kiewit Shea*, 39 BRBS 119 (2006); *Hawkins v. Harbert Int’l, Inc.*, 33 BRBS 198 (1999); *Jordan v. Virginia Int’l Terminals*, 32 BRBS 32 (1998).

33 U.S.C. §909(d).⁸ Contrary to the administrative law judge’s conclusion, a survivor’s *entitlement* to a portion of the death benefit is not derivative of another survivor’s entitlement; only the *amount* of the benefit each survivor receives may be affected by the existence of another eligible survivor.

In this case, there is no dispute that Amelia is Jack’s widow, and she has relinquished her claim to death benefits under the Act. *See, e.g., Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998) (Smith, J., dissenting). There is also no dispute that Jennifer is Jack’s adult child. However, it is unknown, because it has not been determined, whether Jennifer was wholly dependent upon decedent and incapable of self-support by reason of mental or physical disability at the time of his death and whether she is entitled to any part of the death benefit. As Jennifer’s entitlement is to be ascertained on its own merits, based on her satisfaction of the statutory criteria, the administrative law judge erred in precluding her claim based on Amelia’s concession that she, Amelia, is barred from receiving benefits under the Act by Section 33(g). *See Welch*, 44 BRBS 89; *see also Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995) (an employer’s entitlement to a credit under Section 33(f) must be separately calculated with respect to the separate claims of the widow and her son, as each is a person entitled to compensation).

On remand, the administrative law judge must address the parties’ arguments and make a determination regarding whether Jennifer is entitled to benefits under Section 9.⁹ If the administrative law judge finds that claimant does not meet the criteria of Section 2(14) at the time of decedent’s death, she is not entitled to any portion of the death benefit, the third-party settlements are irrelevant, and Jennifer’s claim may be denied. *Smith v. Mt. Mitchell, LLC*, 48 BRBS 1 (2014); *Doe*, 21 BRBS 142. If, however, the administrative law judge finds that Jennifer is entitled to death benefits, he must determine whether Section 33(g) applies to bar her entitlement under the Act.

Section 33(g) is an affirmative defense, and the employer bears the burden of proving that the claimant entered into a fully-executed settlement with a third party without complying with Section 33(g). *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015); *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004);

⁸ Section 9(d) also provides for benefits to other dependents in the event payments to a widow/child “are less in the aggregate than 66 2/3 per centum of the average wages of the deceased. . . .” 33 U.S.C. §909(d).

⁹ The parties should be given an opportunity to address the substantive Section 9 issues before the administrative law judge renders a decision on them. *See Maglione*, 50 BRBS 29; *see generally Niazy*, 19 BRBS 266.

Flanagan v. McAllister Brothers, Inc., 33 BRBS 209 (1999). In order to ascertain whether Section 33(g) applies, the administrative law judge must determine whether Jennifer entered into any third-party settlements after Jack's death.¹⁰ *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997). If she did not, her claim for benefits under Section 9 is not barred. See *Newton-Sealey*, 49 BRBS 17 (there were no third-party settlements); *Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000) (where the claimant was not a signatory to the settlement, she did not "enter into" the agreement). If he finds Jennifer entered into third-party settlements, he must next determine whether she obtained any proceeds from the third-party settlements,¹¹ whether the third-party settlements in the aggregate are greater or less than Jennifer's entitlement under the Act,¹² and whether she was required to obtain prior written approval or to give employer notice of the settlements.¹³

¹⁰ The Board has held that the term "representative," as that term is used in Section 33(g)(1), pursuant to Section 33(c), means "legal representative of the deceased" and does not refer to an attorney. 33 U.S.C. §933(c), (g)(1); *Stadtmiller v. Mallott & Peterson*, 28 BRBS 304 (1994), *aff'd sub nom. Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997).

¹¹ An employer bears the burden of establishing apportionment of a settlement among multiple "persons entitled to compensation." *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); *Gilliland v. E. J. Bartells Co., Inc.*, 34 BRBS 21 (2000), *aff'd*, 270 F.3d 1259, 35 BRBS 103(CRT) (9th Cir. 2001).

¹² In this case, the appropriate comparison would be between the amount of Jennifer's compensation entitlement and the aggregate gross amount of the third-party settlements apportioned to her. See *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Bundens*, 46 F.3d 292, 29 BRBS 52(CRT); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994).

¹³ Prior written approval is necessary when the person entitled to compensation enters into a settlement with a third party for less than the amount of the employer's liability under the Act. 33 U.S.C. §933(g)(1); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482, 26 BRBS 49, 53(CRT) (1992); see *Bundens*, 46 F.3d 292, 29 BRBS 52(CRT); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002); 20 C.F.R. §702.281; n.12, *supra*. Failure to obtain prior written approval, where required, results in the forfeiture of benefits under the Act. 33 U.S.C. §933(g)(2); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b).

Accordingly, the administrative law judge's Order Granting Employer's Motion for Summary Decision is reversed, and the case is remanded for further proceedings.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge