PRUDENCIO CHAVEZ Claimant-Respondent Cross-Petitioner v. TODD SHIPYARDS CORPORATION and AETNA CASUALTY & SURETY COMPANY Employer/Carrier-Petitioners Cross-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Cross-Respondent	BRB Nos. 86-2456 and 86-2456A DATE ISSUED:
PRUDENCIO CHAVEZ Claimant-Respondent v. TODD SHIPYARDS CORPORATION and AETNA CASUALTY & SURETY COMPANY Employer/Carrier-Petitioners Cross-Respondents	BRB No. 94-0844

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

Party-in-Interest

DECISION and ORDER on RECONSIDERATION *EN BANC*

On remand from the United States Court of Appeals for the Ninth Circuit.

Diane L. Middleton, San Pedro, California, for claimant.

N. R. Samuelson and Yvette A. Boehnke (Samuelson, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

Samuel J. Oshinsky, Counsel for Longshore (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration *en banc* of the Board's Decision and Order on Remand in the captioned case, *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993)(McGranery, J., dissenting). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(d). Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, seeking affirmance of the Board's decision. In addition, employer has filed an appeal of the administrative law judge's Decision and Order on Remand, which was issued while the motion for reconsideration was pending at the Board. We grant employer's motion for reconsideration *en banc*, but deny the relief requested. As two members of the Board have voted to affirm the Board's decision and two members dissent, the Board's prior decision is affirmed. 20 C.F.R. §801.301(c).

It is necessary to briefly restate the facts and procedural history of this case. Claimant developed asbestosis and hypertension and retired from employer's employ in 1980 because of an inability to perform his job. Claimant filed a claim seeking permanent total disability benefits. In the first Decision and Order issued in this case, Administrative Law Judge John V. Evans determined that claimant is permanently totally disabled as a result of "his combined pulmonary and hypertension problems[.]" Evans Decision and Order at 3. Judge Evans' decision was not appealed. Subsequent to the hearing before Judge Evans, claimant filed approximately 15 third-party suits against asbestos manufacturers, suppliers, and distributors. Employer later contended that two of the cases were settled without its consent. Claimant denied the occurrence of any settlements, and the

parties requested a hearing to determine the effect of the possible third-party settlements on the compensation awarded under the Act.

The second hearing was held on June 19, 1986 before Administrative Law Judge Henry B. Lasky. Judge Lasky found that no third-party settlements had been consummated and, accordingly, found that claimant was not barred from receiving compensation and medical benefits by Section 33(g), 33 U.S.C. §933(g) (1988). Lasky Decision and Order at 4. Further, he determined that the Section 33(f), 33 U.S.C. §933(f) (1988), credit issue was ripe for decision because settlements in the third-party actions have been prevented due to the pending Longshore claim and determination of claimant's rights therein. The administrative law judge approved a full lien pursuant to Section 33(f) against the third-party recovery. *Id.* at 4-6. The Board affirmed Judge Lasky's finding that no settlements had occurred but vacated his findings concerning the Section 33(f) credit, stating that, as there had not been any settlements, his method of calculating the credit was wholly speculative and the issue was not ripe for decision. *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71, 76-77 (1990), *aff'd in part and rev'd in part sub nom.*, *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992).

On appeal to the United States Court of Appeals for the Ninth Circuit, employer again challenged the administrative law judge's finding that claimant had not entered into any settlements with third parties. Denying employer's parol evidence and collateral estoppel arguments, the Ninth Circuit agreed with the Board and held that the record contains substantial evidence to support the administrative law judge's finding that no settlements had occurred. *Chavez*, 961 F.2d at 1413-1414, 25 BRBS at 139-141 (CRT). However, the Ninth Circuit reversed the Board's determination that the Section 33(f) issue is not ripe and held that, under the traditional analysis, the issue is ripe.[1] *Id.*, 961 F.2d at 1415-1416, 25 BRBS at 143 (CRT). The court declined to resolve the issue on its merits and remanded the case for the Board to consider the positions presented by claimant, employer and the Director, and to determine whether the administrative law judge erred in finding that employer is entitled to an offset against the entire net proceeds from any third-party settlements. *Id.*, 961 F.2d at 1416, 25 BRBS at 144 (CRT).

On remand, the Board addressed the various parties' contentions regarding Section 33(f), and adopted the Director's interpretation. *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993).[2]

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[1]Citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), the court defined the traditional analysis as one which "consists of two prongs: the fitness of the issue for review and the hardship to the parties if review is withheld." *Chavez*, 961 F.2d at 1414, 25 BRBS at 141-142 (CRT). The court determined that the Section 33(f) credit issue is ripe for review because it is purely a question of law whose facts have been developed significantly (the only remaining fact is how much claimant will receive), and it determined that withholding review would cause "immediate financial hardship and . . . possible financial loss." *Id.*, 961 F.2d at 1415, 25 BRBS at 142 (CRT).

[2]See *Chavez*, 27 BRBS at 83-84, for a full discussion of each party's contention.

Specifically, the Board held that employer is entitled to a credit under Section 33(f) only if the injury involved in the third-party claims is the only work-related injury for which employer is liable under the Act. *Id*. at 87. Thus, employer's entitlement to an offset is dependent on whether each of claimant's disabilities is work-related and not on the asbestosis-related fraction of his entire disability.

The Board accordingly remanded the case to the administrative law judge to determine the cause of each of claimant's disabilities. The Board held that if only claimant's asbestosis is work-related, then employer may offset its liability against the entire net recovery from third-party litigation. *Id.* at 87. If claimant's hypertension alone or if both the hypertension and asbestosis are work-related, then employer is not entitled to offset its liability under Section 33(f) because claimant could have sought benefits for the hypertension alone and received permanent total disability based on the aggravation rule. *Id.* The Board noted that the record contains evidence concerning the cause of claimant's disabilities but that neither administrative law judge specifically found that claimant's employment caused his conditions.[3] *Id.*

In its motion for reconsideration, employer contends that Judge Evans found that claimant's asbestosis is work-related, and that it combined with claimant's hypertension rendering him permanently totally disabled. Employer states that the cause of the hypertension was not determined. Employer states that this Decision and Order became final when it was not appealed. Employer contends that the Board's decision in this case requires "reopening" Judges Evans' decision in violation of the principles of collateral estoppel and *res judicata*; employer contends that neither the Board nor the administrative law judge has the authority to do so. Employer also contends that the Board's decision resurrects a discredited theory of apportionment based on the types of "injury" suffered rather than on the type of "disability" sustained. Since the disability is due in part to a work-related condition, employer maintains that under Section 33(a), 33 U.S.C. §933(a), the third-party suit was for the "same disability" and that therefore it is entitled to a full credit under Section 33(f).

Claimant responds, urging denial of employer's motion. Claimant states that the Board did not instruct the administrative law judge to "reopen" old findings regarding claimant's claims, but to make new findings. Claimant also states the employer "misreads" the Board's decision, noting that the Board specifically stated there was to be no apportionment. Rather, employer was to get a full credit under one scenario, and no credit under two other scenarios.

The Director responds, also stating employer "misreads" the holding on apportionment. The Director further states that the principles of collateral estoppel and *res judicata* have no application here because, under the Board's legal interpretation, the necessary findings of fact have never been finally adjudicated. Alternatively, the Director notes that because the Section 33(f) issue arose

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[3]In his Decision and Order on Remand, the administrative law judge found that both the asbestosis and the hypertension are work-related conditions. Consistent with the Board's holding, the administrative law judge denied employer an offset under Section 33(f).

through employer's motion for modification, the case was reopened based on "mistake in fact," and that *res judicata* is superseded by Section 22, 33 U.S.C. §922.

We reject employer's contentions.[4] With regard to employer's collateral estoppel (issue preclusion) and *res judicata* (claim preclusion) arguments,[5] the Director is correct that the relevant findings of fact have never been made because it was not previously necessary to determine whether claimant's hypertension was work-related, given application of the aggravation rule. One of the prerequisites to the invocation of collateral estoppel is that the issue must previously have been necessarily and actually litigated. *See, e.g., Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). Moreover, as the Director notes, the case was reopened by employer under Section 22 for a determination of issues arising under Section 33(f) and (g), and the need to determine the work-relatedness of each of claimant's conditions falls within the scope of modification. *See generally Williams v. Jones*, 11 F.3d 247, 27 BRBS 142 (CRT) (1st Cir. 1993).

With regard to the apportionment issue, the Board specifically rejected claimant's contention that employer's offset should be limited to that fraction of the whole disability caused by asbestosis and thus rejected the apportment argument. *Chavez*, 27 BRBS at 84; *see also Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991). Depending upon the administrative law judge's findings on remand, employer is entitled either to a full credit or to none.

Employer also reiterates the argument it previously made regarding the fact that the third-party suit is for the "same disability" that is being compensated under the Act through application of the aggravation rule. As employer has not raised any issue in this regard not considered by the Board in its previous decision, this argument is rejected.

We note that our dissenting colleagues would grant employer the relief it requests through adoption of the position espoused by Judge McGranery in her dissent in the Board's prior decision in this case. We disagree with our colleagues' conclusion that the proper interpretation of the statute on the facts presented by this case is clear. *Chavez*, 27 BRBS at 84-85. No case law has been cited which interprets Section 33 where claimant has two potentially work-related disabling conditions and files suit against a third party due to one of those conditions. Under such circumstances, we believe it is appropriate to defer to the reasonable interpretation of the Director, who is the administrator of the Act. *See generally Estate of Cowart v. Nicklos Drilling Co.,* U.S. , 112 S.Ct. 2589, 2594, 26 BRBS 49, 51 (CRT)(1992); *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Force*, 938 F.2d at 983, 25 BRBS at 16 (CRT).

Claimant's counsel has filed a petition for an attorney's fee for work performed before the

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[4]Employer's motion for oral argument is denied. 20 C.F.R. §802.306.

[5]*Res judicata* is inapplicable because no party is trying to bring the same claim in a second forum. If applicable, collateral estoppel would be the operative principle.

Board, requesting $10,631.25 representing 60.75 hours at $175 per hour.[6] Employer has filed objections to the fee petition. Employer contends that an award of a fee is premature because it has appealed the administrative law judge's Decision and Order on Remand. Employer also contends that 12 hours of services should be disallowed, although it objects to only 10 hours of entries.[7]

Claimant's counsel is entitled to a fee for work performed before the Board as claimant successfully defended against employer's appeal of the Section 33(g) issue. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Although the Ninth Circuit reversed the Board's initial holding that the Section 33(f) issue was not ripe for adjudication, the administrative law judge on remand from the Board has determined that employer is not entitled to any offset under Section 33(f) and thus claimant has succeeded on this issue as well. *See* discussion, *infra*. We reject employer's contention that a fee award is premature, as a fee award may be issued prior to the time that an award becomes final, but the award is not enforceable until such time as all appeals are exhausted. *See generally Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).

After consideration of counsel's fee petition and employer's objections thereto, we disallow all entries itemized in footnote 7, except for item 6, representing 9.75 hours. We also disallow 1.25 hours for five similar entries.[8] The correspondence with the doctors and pharmacy relate to claimant's ongoing medical treatment, and counsel should seek reimbursement for these services from the district director, who oversees the medical care of claimants. *See generally* 33 U.S.C. §907; 20 C.F.R. §702.407. The items designated as correspondence with Department of Labor similarly are not related to work before the Board, as correspondence with the Board is specifically

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[6]Counsel requests a fee for 59.75 hours of services performed between September 8, 1986 and October 25, 1990 in the initial appeal in this case, and 1 hour of service performed between April 18, 1992 and June 30, 1993, while the case was before the Board pursuant to the remand order of the Ninth Circuit.

[7]Employer objects to the following entries on the grounds either that the entries appear to be duplicative of other services or that the relevancy of the entries to the proceedings before the Board cannot be ascertained, or both: (1) telephone calls to the Department of Labor (DOL) on October 1 and 2, 1986 and on July 20, 1988; (2) telephone calls to and from an unnamed doctor on November 5 and 25, 1986, March 12 and 19, 1987, October 8, 1987, November 2, 1988, February 23, 1989, September 28, 1989, April 4, 1990 and April 5, 1990; (3) letter to an unnamed doctor on December 2, 1986 and April 8, 1987; (4) letters to DOL on December 3 and 12, 1986, and on April 13, 1987; (5) telephone call from a pharmacy on January 30, 1987; (6) one of two calls to claimant on February 26, 1987; (7) review of medical bills on August 27, 1987, February 18, 1988, March 22 and 31, 1988, June 8 and 16, 1988, December 8, 1988, June 30, 1990, September 14, 1990, July 20, 1992 and July 22, 1992.

[8]Two .25 hour entries on March 26, 1987, .25 hour on February 27, 1987, .25 hour on March 23, 1989 and .25 hour on June 30, 1990.

designated as such. Lastly, we disallow .75 hour for telephone calls to and from the administrative law judge as these services were not necessary to the proceedings before the Board. In sum, we disallow 11.75 hours of the 60.75 hours requested.

With regard to the hourly rate, the Board finds that $175 per hour is excessive and reduces the hourly rate to $150. Counsel is therefore awarded a fee of $7350, representing 49 hours at $150 per hour for work performed before the Board, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

We turn our attention to employer's timely appeal of the administrative law judge's Decision and Order on Remand issued on January 13, 1994, and filed in the office of the district director on January 19, 1994. This appeal is assigned BRB No. 94-0844. All future correspondence filed with the Board concerning this appeal must include this number. Although the administrative law judge decided the case on remand while employer's motion for reconsideration was pending before the Board, we hold that any error in this regard is harmless on the facts presented. By virtue of the Board's denial of employer's motion for reconsideration, the posture of the parties is unchanged from what it was at the times the Board remanded the case and the administrative law judge issued his decision. The procedural irregularity thus has no substantive effect on the course of the proceedings.

Accordingly, we acknowledge employer's appeal. Employer must file a Petition for Review and brief which conforms to the requirements set forth in 20 C.F.R. §§802.211, 802.216. The pleading and two (2) copies must be filed with the Benefits Review Board within thirty (30) days of receipt of this acknowledgement. Service must also be made upon all parties and the Solicitor of Labor. Absent exceptional circumstances, no more than one enlargement of time in which to file a pleading will be granted to each party.

In summary, employer's motion for reconsideration in BRB Nos. 86-2456/A is denied, and the Board's decision in *Chavez v. Todd Shipyards Corp.,* 27 BRBS 80 (1993), is affirmed. 20 C.F.R. §§801.301(c), 802.409. Claimant's counsel is awarded an attorney's fee of $7350 for work performed before the Board to be paid directly to counsel by employer. Employer's appeal of the administrative law judge's Decision and Order on Remand is acknowledged and the briefing schedule shall commence in BRB No. 94-0844. Employer's Petition for Review and Brief are therefore due within 30 days of receipt of this Order.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision and would grant reconsideration and hold that employer is entitled to an offset for the entire net amount of third-party settlements, for the reasons stated in my dissent in *Chavez*, 27 BRBS 80.

In this case, claimant received a disability award under the Act for a combination of hypertension and work-related asbestosis. Pursuant to Section 33(a), 33 U.S.C. §933(a), claimant sued third-parties for the disability caused by asbestosis. Pursuant to Section 33(f), employer is entitled to a full credit for the entire net amount of the settlements, as the settlements are for the "same disability" for which claimant received compensation under the Act. *See Chavez v. Todd Shipyards Corp.*, 21 BRBS 272 (1988); 33 U.S.C. §933(a). The fact that claimant may have another condition, work-related or not, is irrelevant to this inquiry.

This analysis reflects straight-forward statutory construction. By contrast, my two colleagues who vote to affirm the Board's prior decision, appear to acknowledge the lack of statutory authority for their interpretation by asserting that the statute is unclear and so they must rely upon the Director's interpretation. They bootstrap their position to that of the Director because the statute is not unclear; it is very clear. Employer is plainly entitled to a credit for a third-party settlement for a work-related injury causing disability to claimant. My two affirming colleagues have carved out an exception to the credit authorized in Section 33(f), which is not only without statutory foundation,

it is also devoid of support in reason. Given the fact that employer is liable for the entire disability under the aggravation rule, whenever the disability is caused by a combination of disabilities, it makes no sense to deny employer a credit if both injuries are work-related. Consistency mandates that employer is always entitled to a credit for third-party settlements for a work-related injury whether or not that injury combined with another work-related injury to create the compensable disability.

The crux of the Director's argument is the purely speculative argument that claimant's hypertension *might be* work-related and that the hypertension alone might be sufficiently severe to be totally disabling. Claimant *could* then have sought benefits from employer for total disability resulting from hypertension and *could* have gone on to sue the asbestos manufacturers, depriving employer of its credit because claimant would not have alleged that his asbestosis was a work-related injury. It must first be pointed out that claimant did not seek benefits from employer under the Act for his hypertension, but for his asbestosis. Nevertheless, employer must pay claimant for total disability resulting from both injuries, regardless of whether employer bears any responsibility for the hypertension. Those are the facts. It is incumbent upon a judicial tribunal to apply the law to the facts, not to fanciful arguments concocted in the course of litigation. Hence, the established law of Section 33(f), applied to the facts of the case at bar supports employer's claim that it is entitled to a credit for the net amount of third-party settlement.

Second, the Director's argument reflects an attitude to employers which is inconsistent with the Act. The Director suggests that by artful pleading a claimant could deny employer its rightful credit under Section 33(f). While the Director acknowledges that claimant's asbestosis is work-related, the Director contends that by specifying only hypertension in his longshore claim, and receiving an award for compensation from employer, claimant could keep all the proceeds from his third-party settlements for his work-related asbestosis.

Given the clear mandate of the Act that employers are entitled to credit for third-party settlements for injuries resulting in a compensable disability, I am doubtful that the Director's strategy would be successful. In short, I believe that in the instant case, the Director has taken the time of the Court, the Board and the parties by proposing an argument based upon a series of speculations (claimant's hypertension is work-related; claimant's work-related hypertension is in and of itself totally disabling; claimant *might* have sought compensation for hypertension alone) for the sole purpose of depriving a party of its clear, unqualified statutory right. In view of the plain language of Section 33(f), the Director's argument must ultimately fail. Thus, I would grant employer's motion for reconsideration.

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

I respectfully dissent from our colleagues' decision to deny employer's motion for

reconsideration and to affirm the Board's decision in *Chavez,* 27 BRBS 80 (1993). I concur in the dissenting opinion of Judge McGranery, would grant reconsideration, and would hold that employer is entitled to an offset for the entire net amount of any third-party settlements.

Claimant worked for employer and was employed from 1954 to 1980 in conditions that exposed him to asbestos, dust, smoke and fumes. He developed asbestosis and hypertension and retired in 1980. He filed a claim against employer under the Longshore Act. Administrative Law Judge John V. Evans determined that he was permanently totally disabled as a result of combined pulmonary and hypertension problems. Subsequently, claimant filed approximately 15 third-party suits against asbestos manufacturers, suppliers and distributors. These suits were filed pursuant to Section 33(a) of the Act which provides that if on account of a disability for which compensation is payable under the Act the injured person entitled to compensation determines that some person other than the employer is liable in damages, he may receive compensation from the employer and also sue to recover damages from such third person.

Section 33(f) of the Act provides that if the person entitled to compensation is successful in recovering from the third parties, the employer shall still be required to pay as compensation a sum equal to the excess of the amount the Secretary determines is payable on account of such injury and disability over the net amount recovered against such third persons (reasonable expenses and attorney's fees are deducted to arrive at the net recovery).

In this case claimant was injured and disabled as a result of being exposed to asbestos fibers during the course of his employment. Clearly employer had a liability under the Longshore Act. Claimant then pursued suits against the third-party asbestos manufacturers and suppliers pursuant to his right under Section 33(a) of the Act. The suit was bottomed upon the fact that he was injured and disabled due to asbestos resulting from the exposures he endured while working for employer. The fact that he also had hypertension was not the basis for the third-party suits, although the extent of his injuries and disability may have been increased as a result of the combination of conditions. Any recovery he might receive and any monies paid by the third parties will be based upon their recognition and determination of a potential liability as the manufacturers and suppliers of the asbestos that caused claimant's injuries and disability during his employment. From the point of view of the third parties, that is the only basis upon which they would enter into a settlement.

The question presented is to what extent should employer receive credit under Section 33(f). Claimant was the person injured. He was disabled. He was the person entitled to compensation. As such, he brought suit against the manufacturers and suppliers under Section 33(a). This then brings us to Section 33(f) which provides that if the person entitled to compensation makes a third-party recovery, employer is to receive a credit to the extent of the net recovery and has a potential liability for excess compensation that may be determined to be due. Employer contends that it is entitled to a full offset of the net recovery from the third-party suits. The Director is contending, since claimant is suffering from both asbestosis and hypertension, three scenarios are possible. She submits that if only the asbestosis is work-related, employer is entitled to claimant's net recovery in the third-party litigation. This, of course, logically follows from the provisions of Section 33(a) and

(f). The Director further contends that if the hypertension is the only work-related disability, employer would not be entitled to any offset in the third-party settlements since disability from the hypertension was not a basis for the third-party actions against the asbestos manufacturers and supplies. This again logically follows from Section 33(a) since the suits would not be "on account of a disability" from the hypertension. The Director also contends that if both the hypertension and the asbestos are work-related, then employer is not entitled to any offset. This submission does not logically follow any reading of the statutory language of Section 33(a) and (f). In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished. *Estate of Cowart v. Nicklos Drilling Co.,* U.S. , 112 S.Ct. 2589, 2594, 26 BRBS 49, 51 (CRT) (1993).

Sections 33(a) and (f) simply provide, in effect, that if the person entitled to compensation brings a third-party action, which was done in this case based upon disability due to asbestosis, the employer is entitled to a credit for the net recovery on account of the injury, in this case the asbestosis and its resulting disability. There is nothing in either Section 33(a) and (f) that says the employer does not get a credit because claimant may have had another work-related disability. The Director is attempting to re-write the statute. There is nothing in the Act to deny an employer a credit under Section 33(f) if claimant has one work-related disability that is the basis for a third-party action and also has another disability, either work-related or not work-related. Whether claimant has another disability is not relevant.

Under the Director's view, which was adopted by two of my colleagues in the case which is now under reconsideration, and which they are following again, if a claimant had work-related mesothelioma, a most serious condition resulting from asbestos exposure, and also had a concurring minor work-related disability due to chronic bronchitis from exposure to welding fumes, and obtained a substantial recovery in a third-party suit against the asbestos manufacturers due to the mesothelioma, employer would not receive any credit whatsoever. This would be an incredible outcome, completely contrary to the wording of the Act.

The logic of the Director's position is puzzling. As stated in *Cowart*, *supra,* the suffering of an injury gives an employee a right to compensation under the Act from the employer. He became a person entitled to compensation at the moment his right to recovery vested, referring back to the time of injury, whether the right be inchoate or immediate. This right in the employee creates a correlative liability on the employer. This right also allows the employee the option of suing a third party under Section 33(a) of the Act but it also gives the employer a right to receive credit under Section 33(f). Those rights and liabilities have their inception and they vest at the time of injury. Under the Director's view if the disabling injury of the employee is due solely to one condition, such as asbestosis, the employer may receive compensation from the employer, sue a third party under Section 33(a), and the employer has a vested right to receive a credit under Section 33(f). But under the Director's view, if the employee also has an additional concurrent work-related disability, such as hypertension, then somehow the employer's correlative vested right to a credit under Section 33(f) disappears. It simply does not follow and there is nothing in the wording of the statute to suggest it.

I question what the Director's view would be if the third-party suit is instituted by the employer under Section 33(b) of the Act, rather than by the employee. Under Section 33(e), as the Act clearly states, the employer could retain an amount equal to its expenses, the cost of all benefits and compensation paid and the present value of all future benefits and compensation to be paid as determined by the Director. Any balance would be paid to the employee. All of this is perfectly clear from the wording of the statute. Does all of this disappear if the employee has two work-related disabilities and the third-party suit brought by the employer, under assignment of a right of the employee, is based upon one of the work-related disabling injuries? The Director's view is not compatible with the statute.

What is unusual is that the Director's original position in this case was that the employer was entitled to a full credit, citing *Chavez (Margarito) v. Todd Shipyards Corp.*, 21 BRBS 272 (1988). Director's Letter of October 20, 1988. The Director changed her position at oral argument before the Board in 1990. Despite this, two of my colleagues chose to defer to the Director's current view. As the Supreme Court has pointed out, however, the controlling principle is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written. *Cowart,* 112 S.Ct. at 2594, 26 BRBS at 51 (CRT). Although the Supreme Court also noted that there are times when judicial deference may be given to a *reasonable* statutory interpretation by an administering agency, this is not to be done if the intent of Congress is in unambiguous terms. Furthermore, it is questionable under what circumstances deference is due to an interpretation formulated *during litigation. Id.* A year after *Cowart* the Supreme Court again expressed doubt about extending deference, stating that "[a]n agency's interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held view." *Good Samaritan Hospital v. Shalala*, 113 S.Ct. 2151, 2161 (1993). Here we have a view asserted by the Director, changed during the course of litigation in this case, and never previously asserted since the adoption of the Longshore Act in 1927.

For the reasons stated herein, I join in the dissent of Judge McGranery and would grant employer a Section 33(f) credit for the net amount of any recovery the claimant may have from the third-party litigation.

JAMES F. BROWN
Administrative Appeals Judge