

GLENN TAYLOR) BRB No. 89-1328A
)
Claimant-Respondent)

v.)

PLANT SHIPYARDS)
CORPORATION)

and)

INDUSTRIAL INDEMNITY)
COMPANY)

Employer/Carrier-)
Petitioners)

BETHLEHEM STEEL)
CORPORATION)

DATE ISSUED:

Employer-Respondent)

LOIS TAYLOR)
(Widow of GLENN TAYLOR))

BRB Nos. 94-0363 and
94-0363A

Claimant-Respondent)
Cross-Petitioner)

v.)

PLANT SHIPYARD CORPORATION)

and)

INDUSTRIAL INDEMNITY)
COMPANY)

Employer/Carrier-)

Petitioners)	
Cross-Respondents)	
)	
BETHLEHEM STEEL CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor, and the Decision and Order Awarding Benefits and Order Denying Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

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

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for Plant Shipyard Corporation and Industrial Indemnity Company.

Bill Parrish, San Francisco, California, for Bethlehem Steel Corporation.

Mark Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol 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:

Employer appeals the Decision and Order Awarding Benefits (87-LHC-2183) of Administrative Law Judge Alexander Karst. Additionally, employer appeals, and claimant

cross-appeals, the Decision and Order Awarding Benefits and Order Denying Reconsideration (93-LHC-3517) of Administrative Law Judge Thomas Schneider rendered on claims 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).

Glenn Taylor (decedent) worked as a shipfitter in the 1950's at the shipyards of both Bethlehem Steel Corporation (Bethlehem) and Plant Shipyard Corporation (Plant), where he was exposed to asbestos. Decedent retired from his subsequent non-maritime employment in 1980 due to poor health, and filed a state workers' compensation claim in 1981. Decedent was diagnosed with cancer in 1983; asbestos fibers were discovered in decedent's left lung after it was removed in January 1984. Thereafter, in October 1984, decedent filed a third-party action against several asbestos manufacturers. Decedent filed his initial claim for benefits under the Act on December 28, 1984, wherein two different employers were named. He amended his claim on March 17, 1986, and again on December 10, 1986, to name Bethlehem and Plant as potential responsible employers.

On October 21, 1987, decedent entered into three separate third-party settlements, the gross total of which was \$266,500, with defendants Fiberboard Corporation (\$250,000), Babcock & Wilcox Company (\$15,000), and Garlock, Incorporated (\$1,500). Decedent also entered into a third-party settlement on April 11, 1988, with Combustion Engineering, Incorporated, for \$17,500. Decedent's wife, Lois Taylor, co-signed each of these settlements as a co-releasor, thereby settling her loss of consortium and potential wrongful death actions. Plant contends, and Bethlehem contended, that these settlements were entered into without the written approval of either Bethlehem or Plant pursuant to Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1)(1988).

¹In an Order dated December 8, 1993, the Board consolidated for purposes of decision employer's appeal of Judge Karst's Decision and Order Awarding Benefits, BRB No. 89-1328A, with its appeal and claimant's cross-appeal of Judge Schneider's Decision and Order Awarding Benefits, and employer's appeal of Judge Schneider's Order Denying Reconsideration, BRB Nos. 94-0363/A. 20 C.F.R. §802.104.

²Decedent's son also signed the settlement with Fiberboard as a co-releasor. Under the terms of this settlement, decedent received \$100,000 for his personal injury action, Lois Taylor received \$50,000 for loss of consortium, and Mrs. Taylor and decedent's son received \$100,000 for any potential wrongful death action. Dec. Ex. 20 at 146. The other two settlements did not contain provisions for the apportionment of the settlement proceeds.

In his February 14, 1989, Decision and Order, Administrative Law Judge Alexander Karst relied on the Social Security Administration records entered into evidence and found that Plant was the last responsible employer. Next, Judge Karst found that decedent suffered from a 70 percent whole man impairment and awarded decedent permanent partial disability benefits pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Lastly, Judge Karst found Plant entitled to receive a credit pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e), for the amounts decedent received from his state workers' compensation claim, as well as a credit under Section 33(f) of the Act, 33 U.S.C. §933(f), for the entire amount of the net proceeds of the third-party settlements entered into by decedent, rather than the amount decedent alone received for his personal injury action. Judge Karst denied decedent's request for reconsideration on March 16, 1989. On March 21, 1989, Judge Karst denied employer's motion for reconsideration.

Subsequent to Judge Karst's decision, decedent and his wife entered into another third-party settlement on November 17, 1990, with Manville Corporation for \$150,000. Plant asserts that its written approval of this settlement was not obtained. Decedent died of lung cancer on February 13, 1991. Thereafter, decedent's widow Lois Taylor (claimant) filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. In his September 3, 1993, Decision and Order, Administrative Law Judge Thomas Schneider granted Bethlehem's motion to be dismissed as a party, inasmuch as Judge Karst previously ruled that Plant (employer) was the last responsible employer. Judge Schneider also found that, based on the holdings of the United States Court of Appeals for the Ninth Circuit in *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991), and *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), employer was entitled to a credit under Section 33(f) for the net amounts claimant received in the third-party settlements entered into by her and decedent. In so finding, Judge Schneider rejected claimant's contention that the doctrine of collateral estoppel prevented him from considering the issue of employer's credit since employer already received a credit for the entire net amount of the third-party settlements entered into by her and decedent. Judge Schneider denied employer's request for reconsideration on October 4, 1993.

Employer appeals Judge Karst's finding that it, not Bethlehem, is the last responsible employer. BRB No. 89-1328A. Specifically, employer contends that Judge Karst erred in relying on the Social Security Administration records, rather than decedent's own testimony, when deciding the responsible employer issue. Decedent responds, urging affirmance of Judge Karst's decision.

³At the hearing before Judge Schneider and in her brief to the Board, claimant's counsel did not contest the assertion that the third-party settlements entered into by decedent and claimant were done so without written approval pursuant to Section 33(g). See March 23, 1993 Transcript at 14-15; Claimant's Brief at 2-9.

⁴Decedent's attorney filed an appeal of Judge Karst's decision with regard to his

Employer also appeals Judge Schneider's Decision and Order, and his Order Denying Reconsideration, contending that pursuant to the Ninth Circuit's holding in *Cretan*, which was issued after the hearing in this matter but before the issuance of the administrative law judge's decision, claimant's claim for death benefits should have been barred under Section 33(g)(1) of the Act. BRB No. 94-0363. In response, claimant asserts that employer failed to raise Section 33(g) as an issue at the hearing even though *Force* had been decided prior to the hearing, and therefore, Judge Schneider properly denied employer's request to raise Section 33(g) as a new issue.

Claimant cross-appeals Judge Schneider's Decision and Order, contending that Judge Schneider erred in finding employer entitled to a credit for the net amounts claimant received in the third-party settlements addressed in Judge Karst's decision. BRB No. 94-0363A. Specifically, claimant first argues that she was not a "person entitled to compensation" pursuant to Section 33(f) when she signed these settlements. Claimant further contends that based on the doctrine of collateral estoppel, Judge Schneider erred in considering the issue of a credit under Section 33(f) since employer had already received a credit for the entire net amount of the pre-1990 third-party settlements pursuant to Judge Karst's 1989 decision with regard to decedent's *inter vivos* claim. Employer responds, urging affirmance of Judge Schneider's decision. In a reply brief, claimant contends that other estoppel principles, such as equitable and judicial estoppel, should have precluded relitigation of the Section 33(f) issue. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in this matter, supporting claimant's position that Judge Schneider erred in failing to preclude relitigation of the Section 33(f) credit issue, since Judge Karst had previously decided this issue in his 1989 decision.

I. Last Responsible Employer

We first address employer's appeal of Judge Karst's Decision and Order, wherein employer challenges Judge Karst's determination that it is the last responsible employer. BRB No. 89-1328A. The responsible employer rule is set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Under the Act, the employer responsible for a claimant's disability benefits is the last employer to expose the claimant to injurious stimuli prior to the date on which the claimant became aware of the fact that he was suffering from an occupational disease. *Travelers Insurance*, 225 F.2d at 145; *see also General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Susoeff v. The San Francisco Stevedoring Co.*, 19

Section 33(f) finding, but later withdrew the appeal and raised the collateral estoppel argument in the subsequent case. BRB No. 89-1328.

BRBS 149 (1986).

In the instant case, Judge Karst determined that employer, not Bethlehem, is the last covered employer to expose decedent to asbestos. In so finding, Judge Karst relied upon the Social Security Administration records entered into evidence, which indicate that decedent earned \$780.80 in the middle two quarters of 1953 at employer, \$181.94 at Bethlehem in the last quarter of 1953, and \$14.05 at employer in the first quarter of 1954. Dec. Ex. 3 at 73-74. Although decedent testified at his 1987 deposition that he did not remember working for employer in 1954, Dec. Ex. 2 at 60, the administrative law judge discredited this testimony since decedent had trouble remembering other noteworthy events from this period. *See* Karst Decision and Order at 3. Thus, in the absence of persuasive evidence rebutting the Social Security Administration records, Judge Karst found that employer was the last responsible employer.

On appeal, employer contends that Judge Karst erred in crediting decedent's Social Security records over decedent's testimony. Specifically, employer argues that the Social Security Administration records are proof of earnings, not of employment; in this regard employer asserts that it is the policy of the Social Security Administration to credit a worker's records with earnings in the quarter they were paid, not necessarily the quarter the worker was employed. Thus, employer maintains that, as the Social Security records herein establish only that decedent was paid \$14.05 in 1954, not that he actually worked for employer in 1954, Judge Karst should have credited decedent's testimony that he did not recall working for employer in 1954.

It is well-settled that the purpose of the last responsible employer rule is to avoid the complexities of assigning joint liability and ensure that a worker will recover for his injuries. *See General Ship Service*, 938 F.2d at 962, 25 BRBS at 25 (CRT). In the instant case, Judge Karst rationally relied on the Social Security Administration records and discredited decedent's testimony. Accordingly, we hereby affirm Judge Karst's finding that employer was the last responsible employer as it is rational and supported by substantial evidence. *See O'Keefe*, 380 U.S. at 359; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

II. Section 33(g) / Consideration of New Issue

⁵In support of this finding, Judge Karst cited decedent's testimony at a 1981 deposition, given in connection with his state workers' compensation claim, that between 1952 and 1954 he worked only at the Independent Shipyard, Dec. Ex. 1 at 5-6, that he could not remember missing time from work due to breathing problems during this period, *id.* at 23-24, and that he could not recall exactly when his nose was broken on three separate times while serving in the Coast Guard, *id.* at 45. *See* Karst Decision and Order at 3.

We next address employer's appeal of Judge Schneider's Decision and Order wherein employer challenges Judge Schneider's decision to deny its request to address as a new issue whether claimant satisfied the written approval requirements contained in Section 33(g) of the Act. BRB No. 94-0363. At the hearing before Judge Schneider, held on March 25, 1993, employer conceded that the failure of claimant to obtain its written approval of the third-party settlements under Section 33(g) did not act as a bar to claimant's claim for death benefits, citing the United States Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992). 1993 Tr. at 30. Bethlehem also appeared at the hearing and argued alternatively that if Judge Karst's finding regarding last responsible employer was not upheld, Section 33(g) does in fact act as a bar to

⁶Employer reserved the right to raise Section 33(g) as an issue, if it was discovered that claimant entered into any post-death third-party settlements. 1993 Tr. at 30.

claimant's death benefits claim. 1993 Tr. at 52-57. Subsequent to the hearing, on July 28, 1993, the United States Court of Appeals for the Ninth Circuit issued its decision in *Cretan*, 1 F.3d at 843, 27 BRBS at 93 (CRT), wherein the court held that an injured employee's spouse and daughter were persons "entitled to compensation" at the time pre-death settlements were entered into and were therefore subject to the provisions of Sections 33(f) and (g) of the Act. In a letter dated July 30, 1993, employer notified Judge Schneider that it had changed its position with regard to Section 33(g) based on the Ninth Circuit's interpretation of that subsection in *Cretan*; pursuant to Section 702.336(b) of the regulations, 20 C.F.R. §702.336(b), employer requested that the administrative law judge consider Section 33(g) as

⁷ 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).

a new issue and rule that Section 33(g) acted as a bar to claimant's claim. Claimant responded in a letter dated August 3, 1993, maintaining, *inter alia*, that employer failed to raise the issue of Section 33(g) at the hearing.

Having dismissed Bethlehem from the proceedings based on Judge Karst's 1989 decision, Judge Schneider stated in his decision that he need not consider Section 33(g) as an issue. *See* Schneider Decision and Order at 2. Employer filed a motion for reconsideration seeking a denial of claimant's death benefits claim pursuant to *Cretan*, which Judge Schneider denied on October 4, 1993.

On appeal, employer contends that in initially conceding the Section 33(g) issue at the hearing, it relied on the United States Supreme Court's interpretation that a "person entitled to compensation" means a person who "satisfies the prerequisites attached to the right" to compensation. *See Cowart*, 112 S.Ct. at 2595, 26 BRBS at 51 (CRT). Employer contends that the subsequent holding by the Ninth Circuit in *Cretan* is controlling with regard to the Section 33(g) issue and must be retroactively applied to the case at bar. Asserting that its written approval of the third-party settlements entered into by decedent and claimant was never obtained, employer argues that the Board must dismiss claimant's death benefits claim pursuant to Section 33(g). In response, claimant maintains that the administrative law judge properly denied employer's request to raise Section 33(g) as a new issue, arguing that *Cretan* did not represent a change in law inasmuch as the Ninth Circuit had already issued its decision in *Force*. In support of her argument that employer should be bound by its stipulation that Section 33(g) does not bar her claim, claimant points out that unlike employer, Bethlehem never conceded the Section 33(g) issue at the hearing. In the alternative, claimant contends that since the aggregate net amount of the third-party settlements at issue is greater than employer's liability under Section 9 of the Act, Section 33(g) does not apply.

Under Section 702.336(b) of the regulations, at any time prior to the filing of a compensation order, an administrative law judge may in his discretion, upon the application of a party or upon his own motion, consider a new issue raised by one of the parties. 20 C.F.R. §702.336(b). In the instant case, employer argues that in conceding the Section 33(g) issue at the formal hearing, it relied upon the Supreme Court's holding in *Cowart*, but then reversed itself based on new law as established by the Ninth Circuit in *Cretan*. In *Cowart*, the Supreme Court did not consider the issue of whether a potential widow is a "person entitled to compensation" under Section 33(g)(1) prior to the death of her spouse. In *Cretan*, however, the Ninth Circuit specifically interpreted the term "person entitled to compensation" with regard to a potential widow, holding that at the time pre-death third-party settlements

⁸In his May 2, 1994, letter to the Board, the Director voiced no position with regard to employer's appeal of this issue.

are executed, potential widows are "persons entitled to compensation" under Section 33(g)(1). *Cretan*, 1 F.3d at 847-848, 27 BRBS at 98 (CRT). Thus, while the Ninth Circuit in *Cretan* did not, and could not, change precedent established by the Supreme Court in *Cowart*, it did represent a new interpretation of the language of Section 33(g)(1) that the Supreme Court has yet to define. It was therefore reasonable for employer to raise the issue of Section 33(g) post-hearing based on the Ninth Circuit's holding in *Cretan*.

In the instant case, employer's letter seeking application of the Ninth Circuit's holding in *Cretan* to the instant case is dated two days after that case's issuance, and was received by the administrative law judge prior to the filing of his compensation order. Moreover, the court's decision in *Cretan* addresses the situation presented in the instant case.

Accordingly, we hold that Judge Schneider's failure to consider the Section 33(g) issue post-hearing constituted an abuse of discretion under Section 702.336(b) of the regulations. We therefore vacate Judge Schneider's implicit determination that employer conceded the Section 33(g) issue at the hearing and remand the case for further findings. In *Cretan*, the Ninth Circuit held that a potential widow is considered a "person entitled to compensation" at the time pre-death third-party settlements are entered into. On remand, in order to resolve the issue of whether Section 33(g)(1) acts as a bar to claimant's claim under Section 9, the administrative law judge must determine whether the third-party settlements entered into by claimant subsequent to Judge Karst's decision were for an amount less than employer's liability for death benefits. The Board has recently held that Section 33(g)(1) requires that the gross amount of the third-party settlements to be compared with the total amount of compensation to which a claimant would be entitled to over his or her lifetime. *See Harris v. Todd Pacific Shipyards Corp.*, BRBS , BRB No. 93-2227 (January 25, 1996)(Brown and McGranery, JJ., concurring and dissenting), *aff'g and modifying on recon. en banc* 28 BRBS 254 (1994). If the gross amount from the third-party settlements executed subsequent to Judge Karst's decision exceeds employer's liability for death benefits under the Act, Section 33(g)(1) would not act as a bar to claimant's claim for death benefits. *See*

⁹In *Force*, the Ninth Circuit previously held that a potential widow, prior to the death of the injured employee, is considered a "person entitled to compensation" under Section 33(f). *Force*, 938 F.2d at 984-985, 25 BRBS at 18 (CRT).

¹⁰The Supreme Court will have this opportunity in its next term, as it has granted a petition for *certiorari* in a case decided subsequent to *Cretan* on the same issue. The United States Court of Appeals for the Fifth Circuit rejected the Ninth Circuit's interpretation of Section 33(g)(1), holding that, pursuant to *Cowart*, potential widows cannot be considered "persons entitled to compensation" under Section 33(g)(1). *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113 (CRT)(5th Cir.), *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. May 13, 1996) (No. 95-1081).

discussion, *infra*.

III. Section 33(f)

Lastly, we address claimant's cross-appeal of Judge Schneider's decision wherein claimant asserts that Judge Schneider erred by awarding employer a credit under Section 33(f) of the Act for the net amount she received from the third-party settlements. BRB No. 94-0363A. Section 33(f) provides that if "the person entitled to compensation" files a third-party lawsuit, the employer is required to pay the excess of the amount which the Secretary determines is payable under the Act, "over the net amount recovered against such a third person." 33 U.S.C. §933(f). In *Force*, the Ninth Circuit held that the offset provision under Section 33(f) applies to the third-party recovery obtained by "the person entitled to compensation" under that section; thus, Section 33(f) allows the employer to offset only that portion of a third-party settlement attributable to the claimant. *Force*, 938 F.2d at 985, 25 BRBS at 18-19 (CRT). In the instant case, Judge Schneider found that pursuant to *Force*, employer is entitled to offset against its liability the net amount of the third-party settlements apportioned to claimant's wrongful death claim. *See* Schneider Decision and Order at 8. In so finding, Judge Schneider rejected claimant's argument that the doctrine of collateral estoppel precluded consideration of employer's entitlement to an offset under Section 33(f).

In her cross-appeal, claimant asserts that the doctrine of collateral estoppel should have barred employer from relitigating the issue of a Section 33(f) credit since Judge Karst had previously decided this issue in this 1989 decision with regard to the pre-1990 settlements entered into by decedent and claimant. Employer responds, urging affirmance of

¹¹ Section 33(f) of the Act states:

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f)(1988).

¹²Inasmuch as this case arises within the Ninth Circuit, the holding in *Cretan* must be followed. We therefore reject claimant's contention that at the time the third-party settlements were entered into, she, as a potential widow, was not a "person entitled to compensation" under Section 33(f).

Judge Schneider's Section 33(f) findings. In a reply brief, claimant asserts that additional estoppel principles, such as judicial and equitable estoppel, should have precluded relitigation of the Section 33(f) credit issue. Alternatively, claimant argues that if the Board allows employer a credit against its liability for claimant's death benefits, it should only apply to the amounts apportioned to her in the settlements entered into subsequent to Judge Karst's decision. The Director has filed a response brief supporting claimant's position that Judge Schneider erred in failing to preclude relitigation of the Section 33(f) issue based on the doctrines of collateral, judicial and equitable estoppel.

Under the principle of collateral estoppel, a party is barred from relitigating an issue if (1) the issue at stake is identical to the one alleged in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995); *see generally Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). An exception to the principle of issue preclusion is when the issue is one of law and "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." Restatement (Second) of Judgments §28(2)(b)(1982); *see O'Leary v. Liberty Mutual Insurance Co.*, 923 F.2d 1062, 1067 (3d Cir. 1991).

We hold that, in finding that the issues in decedent's and claimant's cases were different, and thereby rejecting claimant's collateral estoppel contention, Judge Schneider applied an incorrect standard. Specifically, Judge Schneider initially determined that one of the essential elements needed for the application of collateral estoppel, identity of issues, was not met, since decedent's case was a disability case and claimant's case concerned death benefits. Moreover, citing to *Force*, Judge Schneider determined that the law had significantly changed since the issuance of Judge Karst's decision in 1989. However, the issue of an offset raised by employer in both decedents' claim for compensation benefits and claimant's claim for death benefits concerns the net amount to which employer is entitled to offset against its compensation liability, based on the *same* third-party settlements entered into by claimant and decedent. Thus, all three elements for the application of collateral estoppel are met: (1) the issue at stake in the prior litigation is identical to the one in the present case; (2) it was actually litigated in the prior case, and; (3) the determination in the prior case was clearly a critical and necessary part of the judgment in the earlier action.

Moreover, Judge Schneider improperly based his denial of claimant's application of collateral estoppel on a change in law subsequent to Judge Karst's decision, as established by *Force*. Although *Force* changed the method by which an offset under Section 33(f) is calculated, specifically by providing for apportionment among the parties to third-party settlements, it did not change employer's underlying entitlement to offset the third-party recovery. In the instant case, employer asserted two inconsistent legal arguments in urging

the administrative law judge to award a Section 33(f) offset. In decedent's case, it argued that it was entitled to an offset for the entire net amount of the third-party settlements entered into by both decedent and claimant; thereafter, in claimant's case, it argued that it is entitled to an offset for the amount of those same third-party settlements apportioned for claimant's wrongful death action - *in addition to* the entire net offset it previously received in decedent's case. Pursuant to Judge Schneider's decision, employer has received an offset for the net amount of all of the pre-1989 third-party settlements to be applied against compensation due decedent *and* an apportioned offset for net amounts from the same settlements with regard to claimant's potential wrongful death actions to be applied against claimant's death benefits claim. *See* Schneider Decision and Order at 7. Thus, Judge Schneider's decision has created an inequitable windfall for employer. Specifically, Judge Schneider's determination has allowed employer to offset claimant's pre-1989 third-party recovery against both her and decedent's claims.

The prevention of such an inequitable result appears to have been contemplated by the Ninth Circuit in adopting the principle of judicial estoppel. Sometimes known as the doctrine of preclusion of inconsistent positions, judicial estoppel "is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process." *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). While this doctrine is commonly applied to bar a party from making a factual assertion which contradicts an assertion made in the same proceeding or a prior one, it is also applied to preclude inconsistent legal assertions. *Yniguez v. State of Arizona*, 939 F.2d 727, 738 (9th Cir. 1991).

Accordingly, we hereby vacate Judge Schneider's determination that employer is entitled to a Section 33(f) offset with regard to the net amount of claimant's pre-1989 potential wrongful death actions, and hold as a matter of law that based on the doctrines of collateral estoppel and judicial estoppel, the issue of a Section 33(f) offset with regard to the settlements entered into prior to Judge Karst's decision should have been precluded from litigation, inasmuch as that issue had been previously litigated in decedent's disability case.

¹³In support of his finding, Judge Schneider cited *FLRA v. U.S. Dep't of Treasury, Fin. Mgt. Service*, 884 F.2d 1446 (D.C. Cir. 1989); *Minnis v. United States Dep't of Agriculture*, 737 F.2d 784 (9th Cir. 1984); *Del Rio Distributing v. Adolph Coors Co.*, 589 F.2d 176 (5th Cir. 1979).

¹⁴Additionally, claimant argues that the doctrine of equitable estoppel bars employer from relitigating the Section 33(f) issue. "A party may invoke equitable estoppel to prevent the opposing party from changing positions if (1) the party was an adverse party in the prior proceeding; (2) the party detrimentally relied on the opponent's prior position; and (3) the party would now be prejudiced if the opponent changed positions." *Teledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214, 1220 (6th Cir. 1990). To date, the Ninth Circuit has yet to adopt the principle of equitable estoppel, and we decline to do

On remand, if Judge Schneider finds that claimant's death benefits claim is not barred by Section 33(g)(1), he must consider employer's entitlement to a Section 33(f) credit for the amounts apportioned to claimant with regard to the third-party settlements subsequent to Judge Karst's decision, since employer has not received a credit with regard to these settlements.

Accordingly, the Decision and Order Awarding Benefits of Administrative Law Judge Alexander Karst is affirmed. BRB No. 89-1328A. The Decision and Order Awarding Benefits and the Order Denying Reconsideration of Administrative Law Judge Thomas Schneider are vacated, and the case is remanded for the administrative law judge to consider whether Section 33(g)(1) bars claimant's death benefits claim. If claimant's death benefits claim is not barred by Section 33(g)(1), on remand, Judge Schneider must consider whether employer is entitled to a credit under Section 33(f) with regard to the settlements entered into by claimant subsequent to Judge Karst's decision. BRB Nos. 94-0363/A.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

so here. Accordingly, claimant's argument in this regard is rejected.

¹⁵The settlement entered into with Manville Corporation on November 17, 1990, is contained in the record. See Emp. Ex. 11. Employer, in its briefs to the Board, alludes to the fact there may have been more third-party settlements subsequent to Judge Karst's decision.