

ARDELLA GLENN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS	)	
CORPORATION	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE	)	DATE ISSUED: _____
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER
	)	on RECONSIDERATION

Appeal of the Decision and Order of Robert J. Brissenden, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

BROWN, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), has timely moved for reconsideration and amendment of the Board's Decision and Order on Reconsideration in the captioned case, 26 BRBS 186 (1993), affirming the Board's Decision and Order dated April 8, 1992, which, in turn, affirmed in part and remanded in part the administrative law judge's Decision and Order awarding benefits 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). 33 U.S.C. §921(b)(5)

(1988); 20 C.F.R. §802.407. We grant the Director's motion for reconsideration, but deny the relief requested for the reasons set forth below.

To briefly reiterate the facts of this case, claimant allegedly was exposed to asbestos while working for employer in 1944-1945 as a ship scaler. She retired in 1976, prior to the onset of any physical impairment, and in 1983, she was diagnosed with asbestosis, for which she filed a claim. In 1984, claimant filed numerous tort actions against third parties. In 1988, without first obtaining written approval from employer, she settled several of them for \$66,571. Claimant received a net amount of approximately \$42,000, with the rest covering her attorney's fee and costs.

A hearing was held on July 13, 1988, wherein claimant and employer stipulated, *inter alia*, that claimant has a 15 percent permanent impairment due to employment-related pulmonary disease and that claimant has received no benefits from employer. The administrative law judge found, *inter alia*, that claimant's right to benefits is not forfeited by the provisions of Section 33(g)(1), 33 U.S.C. §933(g)(1) (1988), by her failure to obtain written approval of the settlements from employer because she was not a "person entitled to compensation" under the Act. The administrative law judge also found that claimant's claim is not barred by the provisions of Section 33(g)(2), 33 U.S.C. §933(g)(2) (1988). Further, he rejected employer's alternate argument that, because the amount of her third-party recovery exceeds the supposed present value of benefits she would receive under the Act, claimant's claim should be dismissed. The administrative law judge held employer liable for medical benefits when claimant's medical expenses exceed her net third-party recovery.

In its original decision, the Board rejected employer's arguments that claimant's failure to obtain written approval of her third-party settlements should bar her from further benefits, pursuant to Section 33(g), 33 U.S.C. §933(g) (1988), and that in accordance with Section 33(f), 33 U.S.C. §933(f) (1988), the administrative law judge should have discharged employer from future liability because claimant's third-party recovery exceeded the present value of her claim under the Act. However, it remanded the case to the administrative law judge for a determination as to the date of onset of claimant's disability and entrance of an award of disability and medical benefits to be offset by employer's Section 33(f) credit. *Glenn v. Todd Pacific Shipyards Corp.*, BRB No. 90-883 (April 8, 1992) (unpublished).

On employer's motion for reconsideration in light of the decision of the Supreme Court of the United States in *Estate of Cowart v. Nicklos Drilling Co.*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), the Board affirmed its original decision. *Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186 (1993). It held that claimant is a "person entitled to compensation" under Section 33(g)(1) pursuant to *Cowart*; however, it determined, also pursuant to *Cowart*, that Section 33(g)(1) is inapplicable because claimant did not settle her third-party claims for an amount less than the compensation to which she is entitled under the Act. Therefore, her failure to obtain employer's prior written approval of the third-party settlements does not bar the recovery of benefits. *Glenn*, 26 BRBS at 189-191. Additionally, the Board determined that claimant complied with the requirements of Section 33(g)(2), and her entitlement to compensation and medical benefits under the Act is not barred. *Id.* at 192. The Director now moves for reconsideration and amendment of the Board's Decision on Reconsideration.

Initially, the Director contends the Board erred in holding that claimant is a "person entitled

to compensation" merely because she suffered a compensable injury and her right to compensation vested. The Director argues that the important factor is when claimant's impairment became compensable, and if it did not become compensable until after she settled her third-party claims, then Section 33(f), (g) is inapplicable and cannot foreclose or decrease claimant's right to compensation which arose thereafter. Because the Board previously remanded the case for a finding regarding the onset of claimant's disability, the Director requests the Board to instruct the administrative law judge as to the significance of the date of onset as it pertains to the applicability of Section 33(f), (g). We decline to do so.

The Supreme Court defined a "person entitled to compensation" as one whose rights to compensation have vested. *Cowart*, \_\_\_ U.S. at \_\_\_, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). More specifically, the Court stated:

Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event yet to happen.

*Id.* The Court's language indicates that a claimant's right to compensation vests at the "time of injury," making the claimant a "person entitled to compensation" from that time forward. Further support for this interpretation is found in the Supreme Court's statements defining "entitlement" as meaning that a person has satisfied the prerequisites attached to the right, and need "not depend upon whether the right has been acknowledged or adjudicated." *Cowart*, \_\_\_ U.S. at \_\_\_, 112 S.Ct. at 2595, 26 BRBS at 51 (CRT).

In an occupational disease case such as this one, the "time of injury" occurs when the employee is aware of the relationship between the disease, the disability and the employment. *See Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); 33 U.S.C. §910(i). In the case of a retiree, "disability" is equated with "permanent impairment." *See Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988); 33 U.S.C. §902(10) (1988). Thus, because a claimant in an occupational disease case must have a disability or impairment before the "time of injury" can occur, under *Cowart* the right to compensation vests at the "time of injury," thereby making the claimant a "person entitled to compensation." Under the Director's interpretation, an adjudication would be needed to determine the onset of a disability as it relates to the timing of the third-party settlements. That an adjudication would be necessary to determine whether a claimant is a "person entitled to compensation" is contrary to the Court's holding in *Cowart*. *See Cowart*, \_\_\_ U.S. at \_\_\_, 112 S.Ct. at 2595, 26 BRBS at 51 (CRT). In this case, the parties stipulated that the time of injury is June 2, 1983. Under our interpretation of *Cowart*, claimant became a "person entitled to compensation" at that time, and because she settled her third-party claims in 1988, Section 33(f), (g) applies. As we have concluded that Section 33(f), (g) applies to this case, and that a determination as to the onset of the disability does not affect the application of those sections, we need not instruct the administrative law judge in the manner requested by the Director. For the purposes of defining each party's rights under Section 33(f), (g), the date of onset of the disability is irrelevant.

The Director next requests the Board to define the terms "amount" and "compensation" as they pertain to its method of determining whether claimant settled her case for an "amount less than the compensation to which [she] would be entitled" under the Act. *See Glenn*, 26 BRBS at 190-191; 33 U.S.C. §933(g)(1) (1988). He also seeks an acknowledgement that, pursuant to *Cowart*, under Section 33(g)(2), both medical benefits and compensation are forfeited when a claimant violates Section 33(g)(1), contrary to a footnote in the Board's Decision on Reconsideration. *Glenn*, 26 BRBS at 191 n.5. *See* 33 U.S.C. §933(g)(2) (1988). Alternatively, he asks the Board to delete any implication to the contrary in its Decision on Reconsideration. We deny the Director's requests, as they do not affect the outcome of this case, and we decline to modify the Board's previous decision.

Accordingly, the Director's motion for reconsideration and amendment is denied.

SO ORDERED.

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JAMES F. BROWN  
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY  
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring:

I concur in the result reached by my colleagues in this case.

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ROY P. SMITH  
Administrative Appeals Judge