BRB No. 93-0427

ANTHONY LINTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTAINER STEVEDORING COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order of Dismissal of James J. Butler, Administrative Law Judge, United States Department of Labor.

Kathryn E. Ringgold, San Francisco, California, for claimant.

Frank B. Hugg and Jeanne M. Bates, San Francisco, California, for self-insured employer.

Samuel J. Oshinsky, Counsel for Longshore, and Mark A. Reinhalter (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, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Order of Dismissal (91-LHC-349) of Administrative Law Judge James J. Butler dismissing a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

must affirm the findings of fact and conclusions of law of the administrative law judge if they 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). The Board held oral argument in this case in San Francisco, California, on August 5, 1994.

Claimant worked for employer as a utility man from 1970 until his retirement on December 31, 1985, during which time he was exposed to asbestos. On November 12, 1985, claimant was diagnosed as suffering from an asbestos-related pulmonary impairment, classified as class three according to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). Claimant subsequently filed a third-party civil suit against various manufacturers of asbestos products; it is uncontested that between 1987 and 1989 claimant entered into settlement agreements with several of the third-party defendants with notice to, but without the prior written approval of, employer. Thereafter, on December 1, 1989, claimant filed a claim for permanent partial disability benefits under the Act. It is undisputed that employer paid claimant no compensation under the Act.

With regard to claimant's claim for benefits under the Act, the parties stipulated that claimant, as a result of his employment-related asbestos exposure, sustained an injury under the Act resulting in a permanent respiratory impairment. *See* 33 U.S.C. §§908(c)(23), 910(d)(2). Although the parties disagreed as to the extent of claimant's respiratory impairment, they agreed that, based on the medical evidence, the range of impairment under the AMA *Guides* is 15 percent to 25 percent. The parties further stipulated to an applicable average weekly wage of $673.08. Finally, the parties stipulated that employer is entitled to a credit for the third-party settlement recoveries received by claimant in the amount of $13,943.65, 33 U.S.C. §933(f), and to a credit for California state workers' compensation payments made to claimant in the amount of $17,765.00. 33 U.S.C. §903(e).

Subsequent to the issuance of the United States Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), employer moved for summary dismissal of the instant claim on the ground that the claim was barred by Section 33(g)(1), 33 U.S.C. §933(g)(1) (1988), because claimant entered into third-party settlements for amounts less than the amount to which he would have been entitled under the Act without obtaining the prior written approval of employer. Claimant objected to this motion to dismiss his claim, contending that Section 33(g)(1) did not bar his longshore claim because the amount of the third-party settlements was not less than the amount of his accrued entitlement to benefits under the Act. In an Order of Dismissal issued on October 21, 1992, the administrative law judge dismissed the claim; specifically, the administrative law judge's Order, in its entirety, provides as follows:

> Finding from the evidence that the claimant herein, Anthony Linton, made third party settlement on an injury claim for which compensation was obtained less than that to which he would have been entitled under the provisions of the Longshore and Harbor Workers' Compensation Act, without obtaining proper prior approval of his employer, the instant claim must be and is hereby dismissed.

Order of Dismissal dated October 21, 1992.

On appeal, claimant reiterates his argument made below that Section 33(g)(1) of the Act is inapplicable to the instant claim because the amounts he received as a result of the third-party settlements into which he entered were greater than the accrued compensation to which he was entitled under the Act. In support of this contention, claimant avers that the payment of compensation for a nonscheduled disability is on an accrual basis and, thus, the method of calculating the compensation to which an employee would be entitled under the Act, for purposes of Section 33(g)(1), is to total the amount of compensation which has accrued as of the date of the third-party settlement.[1] Employer responds that the phrase "[the amount of] compensation to which the person (or the person's representative) would be entitled under this chapter," contained in Section 33(g)(1) should be interpreted to mean the total amount of compensation for which employer is liable for the subject injury throughout the employee's lifetime. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in support of employer's position that the calculation of the amount of compensation to which claimant would be entitled under the Act involves the amount to which claimant ultimately would be entitled, based on a projection or estimate of claimant's lifetime benefits, taking into account the current extent of claimant's disability, the applicable compensation rate, and claimant's life expectancy. Thus, the instant case presents us with a case of first impression, *to wit*, the proper interpretation of the phrase "[the amount of] compensation to which the person (or the person's representative) would be entitled under this chapter," contained in Section 33(g)(1) of the Act.[2]

[1]Claimant initially argued, both below and in his Petition for Review and brief, that the date for calculation of the accrued compensation to which the employee with a nonscheduled disability would be entitled under the Act is the date of submission of the case, *i.e.*, the hearing date. After review of employer's response brief, claimant revised his position to argue that the relevant date is the date of the third-party settlement.

[2]We note that in *Glenn v. Todd Pacific Shipyards Corp.*, 27 BRBS 112 (1993)(Smith, J., concurring in the result), *aff'g on recon.* 26 BRBS 186 (1993), the Director requested, on reconsideration, that the Board define the terms "amount" and "compensation" for purposes of determining whether the claimant settled third-party claims for less than the amount of compensation to which she would be entitled under the Act. The Board, however, declined to reach this issue, stating it would not affect the outcome of the case.

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). Our consideration of claimant's contentions on appeal must begin with a discussion of *Estate of Cowart v. Nicklos Drilling Co.,* U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), wherein the United States Supreme Court held that under the plain language of Section 33(g)(1), an injured employee forfeits his right to compensation benefits under the Act by failing to obtain the employer's written approval of a third-party settlement for an amount less than the compensation due under the Act. In *Cowart*, the claimant suffered a work-related injury and the employer paid temporary total disability benefits for ten months but refused to pay permanent partial disability benefits. During the period when he was not receiving benefits, the claimant settled a third-party action, but did not secure the employer's written approval of the settlement. The claimant argued that since the employer was not voluntarily paying benefits at the time of the settlement and a formal award of benefits had not been issued, he was not a "person entitled to compensation" under Section 33(g)(1). Thus, the claimant argued, compliance with Section 33(g)(1) was not required.

The Board agreed with the claimant's argument. *Cowart v. Nicklos Drilling Co.,* 23 BRBS 42 (1989). However, the United States Court of Appeals for the Fifth Circuit reversed, holding that Section 33(g) contains no exceptions to the written approval requirement. *Nicklos Drilling Co. v. Cowart,* 927 F.2d 828, 24 BRBS 93 (CRT)(5th Cir. 1991)(*en banc*). In affirming the Fifth Circuit's decision, the Supreme Court held that the claimant "became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability. . . ." *Cowart*, U.S. , 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). Thus, the claimant became a person entitled to compensation at the time he suffered his work-related traumatic injury to his hand on July 20, 1983, prior to his entering into a third-party settlement. Despite the employer's conceded knowledge of the settlement, the Court held that the claimant was required to obtain the employer's written approval of the settlement pursuant to Section 33(g)(1). The Court noted that a claimant is required to provide notice of a settlement under Section 33(g)(2), but not to obtain written approval, in two instances: "(1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability." *Cowart,* U.S. , 112 S.Ct. at 2597, 26 BRBS at 53 (CRT).

In the instant case, we must initially address claimant's request by letter dated April 6, 1993,

that the Board take judicial notice of Administrative Law Judge Paul Mapes' Decision and Order in *Prince v. Matson Terminals, Inc.*, 26 BRBS 589 (ALJ)(1992), wherein Judge Mapes concluded that the Supreme Court's decision in *Cowart* should not be applied retroactively.[3] The Board has recently addressed the issue of the retroactivity of the Supreme Court's decision in *Cowart* to cases pending at the time of issuance of the *Cowart* decision in *Kaye v. California Stevedore & Ballast*, BRBS , BRB No. 93-1085, (Oct. 19, 1994). Following a discussion of Supreme Court precedents regarding retroactivity, *see, e.g., Harper v. Virginia Dept. of Taxation*, U.S. , 113 S.Ct. 2510 (1993), the Board held that where, as in *Cowart*, the Supreme Court applied its rule of law to the parties before it, the rule of law announced by the Court must be applied to parties in cases pending at the time the Court issued its decision. Thus, the Board determined that the Supreme Court's decision in *Cowart* was to be given retroactive effect. Accordingly, for the reasons set forth in *Kaye*, we hold that the Court's decision in *Cowart* must be given retroactive effect to the parties in the instant case.[4]

It is uncontested in this case that claimant is a "person entitled to compensation" under Section 33(g)(1) as defined by *Cowart*. His claim for benefits is thus barred by that subsection if the settlements into which he entered without the prior written approval of employer were for amounts less than the amount of compensation to which he is entitled under the Act. As the Court explained in *Cowart*, one of the two situations where notice to employer must be given rather than employer's consent obtained is where the settlement amount exceeds the amount of compensation due. In determining the amount of compensation due, costs of medical treatment are not included. The Board has recently held that the term "compensation" in Section 33(g) refers to weekly disability benefits and does not include medical treatment provided by employer under 33 U.S.C. §907. *Harris v. Todd Pacific Shipyards Corp.*, BRBS , BRB Nos. 93-2227, 93-2454 (Oct. 25, 1994). In this case, we must determine how the amount of compensation due is to be calculated where the award is for continuing disability benefits.

In this regard, claimant contends that, in a nonscheduled permanent partial disability claim, only *accrued* benefits, and not continuing benefits, may be considered in calculating the amount of

[3]We note that Judge Mapes, in a subsequent decision, expressly disavowed this conclusion. *See Goldade v. Todd Pacific Shipyards Corp.*, 27 BRBS 540 (ALJ)(1994).

[4]Claimant additionally contends that the 18 month lapse between the submission of this case on March 27, 1991, and the issuance of the administrative law judge's decision in October 1992, resulted in "a miscarriage of justice." At oral argument, claimant's counsel noted that *Cowart* was decided by the Supreme Court in the interim, and that subsequent to the *Cowart* decision, claimant in the instant case was defined as a "person entitled to compensation," where previously the Board would not have so considered him. We reject claimant's contention that the lapse between the hearing date and the issuance of the administrative law judge's Order of Dismissal requires remand. Claimant has not shown that the delay resulted in prejudice to claimant; we note that the Section 33(g)(1) bar was raised prior to the initial hearing and was the basis for the post-trial motions and reopening of the record.

compensation under the Act to which claimant would be entitled.[5] In contrast, employer and the Director argue that it is the total amount of compensation to which claimant would be entitled throughout the employee's lifetime for the subject injury which is the relevant figure to be compared with a third-party settlement to ascertain whether the settlement is less than the compensation to which the claimant would be entitled for purposes of Section 33(g)(1).

We agree with employer and the Director that the total amount of compensation to which claimant would be entitled over his lifetime is the relevant figure to be compared with the amount of claimant's third-party settlement. 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 circumstance, is finished. *Cowart*, U.S. , 112 S.Ct. at 2594, 26 BRBS at 51 (CRT). The express language of Section 33(g)(1) provides that the compensation amount to be considered in making the "less than" comparison is the amount of compensation to which the person "would be entitled under this chapter." We agree with the Director's argument that the verb tense used in Section 33(g)(1) dictates that future entitlement to compensation under the Act must be included in the calculation of compensation for Section 33(g)(1) purposes. Specifically, we conclude that the language of Section 33(g)(1) providing for consideration of the compensation to which the person *would be* entitled is plain and cannot support claimant's interpretation that consideration is limited to that compensation which had accrued as of the date of his third-party settlement. Section 33(g)(1) contains no words of limitation or any other indication that the calculation required by that subsection be limited to compensation entitlement that has accrued as of a particular point in time.

This interpretation is supported by the decision of the Supreme Court in *Cowart*. Specifically, the Court recognized that the purpose of Section 33 is to protect an employer's interest in any third-party settlement that might reduce, but not extinguish, the employer's liability. *Cowart*, U.S. , 112 S.Ct. at 2598, 26 BRBS at 53 (CRT). An interpretation of Section 33(g)(1) which limits consideration of compensation entitlement under the Act only to accrued compensation would undercut the purpose behind the Section 33(g)(1) forfeiture provision. Moreover, even were the statutory language of Section 33(g)(1) to be susceptible to other interpretations, we would defer here to the Director's interpretation of the meaning of the statutory phrase in question, inasmuch as her interpretation is reasonable. *See generally Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13

[5]Claimant additionally argues that this case is controlled by the decision of the United States Court of Appeals for the Ninth Circuit in *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990). We disagree. In *Mobley*, the administrative law judge found that the claimant had no measurable disability and, thus, was not entitled to compensation. Having determined that medical benefits awarded to the claimant are not considered "compensation" for purposes of Section 33(g), the court ruled that the claimant's third-party recovery necessarily exceeded his entitlement to compensation, which was zero. Accordingly, the court held that the claim (for medical benefits) was not barred by Section 33(g)(1). The *Mobley* decision is therefore inapposite to the case at bar where, unlike *Mobley*, there is undisputed disability for which claimant is entitled to compensation.

(CRT)(9th Cir. 1991); *see also Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992).

We therefore hold that, in comparing the amount of compensation to which the claimant would be entitled under the Act to the amount of the third-party recovery in a case involving a continuing award, the claimant's total lifetime entitlement to compensation must be considered. In arriving at an amount determinative of claimant's lifetime entitlement, the administrative law judge, as finder-of-fact, may use any reasonable method to calculate the amount of compensation to which the claimant would be entitled over his lifetime.[6] The determination of this lifetime amount will necessarily entail findings regarding claimant's extent of impairment, the applicable compensation rate, and claimant's life expectancy. In addressing these issues, the administrative law judge is not limited to the use of any particular approach in calculating claimant's lifetime compensation entitlement; rather, the administrative law judge, within his discretionary authority, may find it necessary to consider, *inter alia*, medical testimony and reports regarding claimant's physical condition, actuarial tables, and any other evidence which he finds probative in order to project claimant's lifetime compensation entitlement.[7]

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[6]Case precedent on this issue provides little guidance and no definitive method for making this calculation where the award of benefits is for an indefinite period. Calculation of the amount of compensation due was not difficult in *Cowart*, as claimant had a finite period of temporary total disability and his permanent partial disability was compensable under the schedule, 33 U.S.C. §908(c)(3), which provides an award for a finite amount. Similarly, in *Bundens v. J. E. Brenneman Co.*, 28 BRBS 20 (1994), the compensation award also involved a readily calculable finite amount. In *Bundens*, the widow had remarried and her dependent son had achieved his majority, so the compensation was fixed at an amount less than the net settlement recovery. Finally, while *Glenn v. Todd Shipyards Corp.*, 26 BRBS 186 (1993), *aff'd on recon*, 27 BRBS 112 (1993)(Smith, J., concurring in the result), involved a continuing award for permanent partial disability, 33 U.S.C. §908(c)(23), it was clear that claimant would have to live well beyond any reasonable life expectancy in order for her compensation to exceed the net settlement amount.

[7]We note our disagreement with the position taken by claimant and the Director that credits for receipt of state workers' compensation payments pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e), should be subtracted from the computation of compensation payable under the Act when considering the applicability of Section 33(g)(1). While we accord deference to the Director's reasonable interpretations of the Act, in this regard, the Director's construction is inconsistent with the statute. Section 3(e) provides an employer with a statutory credit for state workers' compensation benefits received by an employee for the same disability or injury for which benefits are being sought under the Act. The Section 3(e) credit precludes double recovery by a claimant for the same injury; award of the Section 3(e) credit, however, is not tantamount to a finding that the claimant is not entitled to the full amount of compensation under the Act prior to the imposition of the credit. *See Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992)(award under the Act must be entered prior to imposition of Section 3(e) credit). Thus, while a claimant's federal entitlement may be subject to a Section 3(e) credit to the employer, such credit should not be subtracted from the calculation of total lifetime entitlement to compensation under the Act when considering the

Lastly, in order to make the comparison required by Section 33(g)(1) between the amount of claimant's compensation entitlement under the Act and the amount of his third-party recovery, the administrative law judge must calculate the amount of claimant's third-party recovery. The Board has recently held that in cases involving multiple third-party settlements, such as the case at bar, the multiple settlements are to be aggregated in determining the total amount of the third-party recovery. *See Harris*, slip op. at 13. Consistent with the Board's opinion in *Harris*, we thus hold that the necessary comparison under Section 33(g)(1) of the amount of claimant's entitlement under the Act and his third-party recovery entails consideration of the third-party settlements in the aggregate.

Furthermore, with respect to the aggregation of claimant's multiple settlement recoveries, the Board in *Harris* held that the *net* amount of claimant's third-party settlements is to be used. *Harris*, slip op. at 13. Thus, for the reasons set forth in *Harris*, we reject the argument advanced by the Director at oral argument that the gross amount of claimant's settlements is to be used in calculating the amount of claimant's third-party recoveries. Accordingly, in arriving at the amount of claimant's third-party recovery for Section 33(g)(1) purposes, the net amounts of claimant's multiple third-party settlements, in the aggregate, must be considered.

In the instant case, the administrative law judge summarily dismissed the claim without setting forth his calculation of the "less than" comparison required by Section 33(g)(1) and without citing to record evidence which could support such a calculation. As this comparison is necessary under *Cowart*, without it we are unable to review his conclusion that the instant claim is barred by Section 33(g)(1). *See generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). We therefore vacate the administrative law judge's Order of Dismissal and remand the case for reconsideration of the applicability of the Section 33(g)(1) forfeiture provision. Consistent with this opinion, the administrative law judge on remand must determine claimant's lifetime compensation entitlement for the subject injury and, thereafter, compare that amount to the aggregate amount of claimant's net third-party settlements in order to determine whether the claim is barred by Section 33(g)(1).

Accordingly, the Order of Dismissal of the administrative law judge is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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applicability of Section 33(g)(1).

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge