DORIS HARRIS	)	BRB No. 93-2227
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	
	)	
JOHN C. HENDRICKSON	)	BRB No. 93-2454
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAKE UNION DRY DOCK COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
CIGNA/INA	)	
	)	
Employer/Carrier-Respondents	)	
	)	

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION AND ORDER

Appeals of the Summary Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor, and the Order-Summary Judgment of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

J. Bradford Doyle, Seattle, Washington, for claimant Harris.

Linda J. Dunn and Mitchell T. Harada (Levinson, Friedman, Vhugen, Duggan & Bland), Seattle, Washington, for claimant Hendrickson.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for Todd Pacific Shipyards Corporation and Fireman's Fund Insurance Company.

Thomas Owen McElmeel (McElmeel, Schultz & Carey), Seattle, Washington, for Lake Union Dry Dock Company and CIGNA/INA.

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 Harris appeals the Summary Decision and Order (92-LHC-3631) of Administrative Law Judge Vivian Schreter-Murray denying 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). Claimant Hendrickson appeals the Order-Summary Judgment (93-LHC-449) of Administrative Law Judge Steven E. Halpern denying benefits on a claim filed pursuant to the provisions of the Act. We must affirm the findings of fact and conclusions of law of the administrative law judges which are rational, supported

*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).
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 heard oral arguments in these cases in Seattle, Washington, on August 1, 1994.[1]

The claimant in *Harris v. Todd Pacific Shipyards Corp.*, BRB No. 92-2227, worked for employer for approximately two years between June 1943 and August 1945, during which time she was exposed to asbestos in the course and scope of her employment. Subsequent to her retirement in 1980 due to causes unrelated to her covered employment, claimant Harris was diagnosed with an asbestos-related condition. Thereafter, she filed third-party claims against various asbestos manufacturers as well as a claim for benefits under the Longshore Act.

In *Hendrickson v. Lake Union Dry Dock Co.*, BRB No. 93-2454, the claimant filed a claim for benefits under the Act for asbestosis due to asbestos exposure during employment. Claimant Hendrickson also filed third-party suits against asbestos manufacturers. Claimant Hendrickson was voluntarily retired from active employment before he filed his claim under the Act, although there is no evidence that his asbestos-related disease has progressed to the point where a permanent impairment rating under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) has been assigned.

The employers in each case made a motion before the administrative law judge for summary judgment. The administrative law judges found, and the parties do not dispute, that both of the claimants settled their third-party actions against the asbestos manufacturers without the prior approval of the employers or carriers.[2] The administrative law judges also found that the decision of the Supreme Court in *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), should be applied retroactively, and thus found that the claims under the Act are barred pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g)(1988). Neither administrative law judge made a finding as to whether the third-party settlements were for an amount less than the employers' liability for compensation under the Act, but found instead that the result would be the same whether the settlements were for amounts greater or less than the employers' liability, *i.e.*, the liability would be "wiped out" by either the claims' being barred under Section 33(g) or by employers' total liability being offset under Section 33(f), 33 U.S.C. §933(f)(1988).[3] Therefore, both administrative law judges granted summary judgment in favor of employers.

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[1]These appeals are hereby consolidated for purposes of decision. 20 C.F.R. §802.104(a).

[2]The claimant in *Harris* received a net recovery from the third-party claims in the amount of $36,886.21. The aggregate gross amount of the third-party settlements in *Hendrickson* was approximately $33,000 and the net amount approximately $20,000 to $22,000.

[3]The administrative law judge in *Harris* found that claimant conceded that the net aggregate recovery is less than the compensation to which she would be entitled under the Act. However, claimant Harris argued in the Response to Motion for Summary Judgment that the amount of compensation due may be less than the total of the settlements.

On appeal, the claimants contend that the administrative law judges erred in granting summary judgment without making a finding as to whether the third-party settlements were for an amount greater or less than the total amount of employers' liability for compensation under the Act. Claimants aver that the administrative law judges erred in finding that it does not matter whether the settlements are for more or less than employers' liability under the Act, as the forfeiture provisions of Section 33(g)(1) do not apply if the third-party settlements are greater than employers' liability under the Act. Claimants also contend that medical benefits are not "compensation" within the meaning of Section 33(g)(1) for purposes of determining whether the settlement amounts are greater than the amount of compensation to which they would be entitled, and that the administrative law judges erroneously determined that application of Section 33(f) eliminates all liability on the part of employers. Alternatively, claimants contend that the Supreme Court's decision in *Cowart* should not be given retroactive effect. In sum, claimants contend that the cases should be remanded for findings regarding the amount of compensation to which they would be entitled under the Act in comparison to the amount of the settlements, in order to determine if Section 33(g) applies. Employers respond, urging affirmance of the administrative law judges' granting of summary judgment as the claimants failed to comply with Section 33(g) of the Act and thus forfeited all rights to benefits from employers.

The Director, Office of Workers' Compensation Programs (the Director), also responds to claimants' appeals, agreeing that the administrative law judges erred in granting summary judgment in employers' favor without determining if claimants are "persons entitled to compensation" and without comparing the amount of the third-party settlements to the amount of compensation which the claimants would be entitled to receive under the Act.[4] The Director also contends that 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), *aff'g* 20 BRBS 239 (1988), is controlling on the issue of whether medical benefits should be included in this comparison. The Director concedes, however, that the administrative law judges properly found that the holding in *Cowart* should be applied retroactively to these cases if Section 33(g)(1) is applicable.

Initially, the claimants and the Director contend that the administrative law judges erred in

[4]Employer Lake Union Dry Dock made a motion on April 25, 1994 to strike the Director's reply brief dated March 25, 1994 and employer Todd Pacific Shipyards made a motion on July 21, 1994 to strike the Director's brief dated January 6, 1994, based on the allegations that the Director's briefs are not "response" briefs as contemplated by the regulation at 20 C.F.R. §802.212. We deny these motions. The regulation at 20 C.F.R. §802.212(b) states that arguments in response briefs are limited to those which respond to arguments raised in the petitioner's brief and to those in support of the decision below. Contrary to employers' contentions, a party may "respond" to the petitioner's brief by agreeing with the arguments made therein, as the Director has done in the instant cases. The Director is not raising completely new issues but is responding by agreeing with claimants that the administrative law judges erred in applying the forfeiture provision of 33 U.S.C. §933(g) to these cases. *See generally Mills v. Marine Repair Service*, 22 BRBS 335, 337 n.1 (1989).

granting summary judgment because there were issues of material fact in dispute in existence at the time of the motions. We agree. The administrative law judge in *Hendrickson* summarily concluded that the claimant therein was a "person entitled to compensation" at the time of the settlements. The administrative law judge in *Harris* did not make such a finding, but concluded that the Section 33(g) bar applies nonetheless. The administrative law judges also concluded that medical benefits are included in the term "compensation" as used in Section 33(g)(1). As the claimants did not dispute that they had not obtained the prior written approval of their employers, and applying the decision in *Cowart* to these cases, the administrative law judges found that the claims are barred by Section 33(g). Moreover, the administrative law judges found that it was not necessary to make a finding regarding whether the settlement amounts were for less than the employers' liability under the Act, because the effect of Sections 33(g) and 33(f) are the same, *i.e.*, either the claims are barred by Section 33(g) or the employers' liability is "wiped out" by the offset provisions of Section 33(f). Thus, the administrative law judges found that there were no material issues of fact and granted summary judgment in employers' favor.

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges,[5] 29 C.F.R. §18.40(a), Motion for Summary Decision, any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. *Id.* If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary judgment for either party. 29 C.F.R. §§18.40(d), 18.41(a).

The purpose of the summary judgment procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Id.* In determining if summary judgment is appropriate, the court must look at the record in the light most favorable to the party opposing the motion. *Hahan v. Sergeant*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

In the present cases, for the reasons discussed *infra*, the questions of whether either of the claimants was a "person entitled to compensation," and the amount and calculation of the compensation due the claimants, if any, are issues of material fact which affect the application of Section 33(g)(1). Therefore, we hold that the administrative law judges erred in granting summary decisions in favor of the employers in the present cases. For the following reasons, the administrative law judges' decisions are vacated, and the cases are remanded for factual findings consistent with this decision.

[5]The Rules apply unless inconsistent with a rule of special application as provided by statute or regulation. *See* 29 C.F.R. §18.1; *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

We begin our analysis with a discussion of the phrase "person entitled to compensation" contained in Section 33(g)(1), inasmuch as the claimants will have forfeited their right to benefits under the Act only if they were subject to the written approval provisions of Section 33(g)(1), 33 U.S.C. §933(g)(1).[6] Section 33 of the Act, 33 U.S.C. §933 (1988), addresses situations in which an employee is injured during the course of his employment, and a third party is liable in damages. 33 U.S.C. §933(a). Section 33 permits the employee to file suit against a third party while also pursuing compensation under the Act and contains provisions designed to prevent injured employees from receiving double recoveries where they are entitled to both benefits under the Act and civil damages from a successful suit. *See* 33 U.S.C. §933(e), (f), (g).

The United States Supreme Court recently discussed the proper interpretation of the phrase "person entitled to compensation" in a case in which claimant sustained a traumatic injury, entered into a settlement with a third party thereafter and was not receiving compensation payments at the time he entered into the third-party settlement. *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1993). In *Cowart*, the issue presented was whether the employee was a "person entitled to compensation" under these circumstances, in view of long-standing Board precedent holding that only a claimant receiving compensation at the time of the settlement was covered by this language. The Supreme Court held that an employee becomes a "person entitled to compensation" at the moment his right to recovery vests and not when an employer admits liability. *Cowart*, U.S. , 112 S.Ct. at 2595, 26 BRBS at 52 (CRT). The Court stated that the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the rights have been acknowledged or adjudicated, but only upon the person's satisfying the prerequisites attached to the right. *Cowart*, U.S. , 112 S.Ct. at

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[6]Section 33(g) of the Act provides:

(1) If the person entitled to compensation . . . 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 . . . 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 . . . .

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. §933(g)(1), (2)(1988).

2595, 26 BRBS at 51 (CRT). The Court went on to state that the employee in *Cowart* suffered an injury to his hand in the course of his employment which gave him a right to compensation from his employer and he became a "person entitled to compensation" at that time. The Court thus held that Cowart was a "person entitled to compensation" within the meaning of Section 33(g)(1), and that his right to benefits was forfeited by his failure to obtain his employer's consent prior to entering into a third-party settlement.

In *Cowart*, it is clear that the employee sustained an injury when he suffered the traumatic injury to his hand. His right to compensation vested at the time of injury. In the present cases, the claimants did not sustain traumatic injuries with a specific date of injury. Instead, they suffer from occupational diseases caused by exposure to asbestos in the course of their employment. This distinction is crucial, since the time of injury in an occupational disease case is not readily placed on a specific date. Under *Cowart*, we must determine when claimants' time of injury occurred, for it is at that time that their rights to compensation attached, and they became "persons entitled to compensation."

In this case, it is undisputed that claimants were exposed to asbestos and filed claims for asbestos-related diseases. In cases of retirees with occupational diseases, retirees must have a permanent impairment in order to be entitled to compensation, and their time of injury occurs when this impairment becomes manifest. This result follows from the 1984 Amendments to the Act, which amended the Act to create specific provisions applicable to an "occupational disease which does not immediately result in death or disability." 33 U.S.C. §§910(i), 912, 913. The amendments expressly allow awards to claimants such as those in this case who suffer from occupational diseases which do not become manifest until after their voluntary retirement. 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2),(i). Under these sections, claimants who are injured after they voluntarily retire are compensated for permanent partial disability based on the degree of medical impairment as rated under the AMA *Guides*. *See MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986).

Prior to the 1984 Amendments, the Board struggled to apply statutory provisions demanding a specific date of injury to occupational diseases resulting from long-term exposure to injurious stimuli with long latency periods. *See, e.g., Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (1981)(Smith, C.J., concurring)(Miller, J., dissenting); *Stark v. Bethlehem Steel Corp.*, 6 BRBS 600 (1977), *aff'd on recon.*, 10 BRBS 350 (1979). These cases primarily arose under Section 10, which requires compensation based on the average weekly wage at the time of injury. In *Dunn*, the Board identified a number of possible times when an injury could be said to occur before adopting a date of last exposure approach similar to that used for determining the responsible employer under *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).[7]

[7]Prior to the issuance of its decision in *Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (1981)(Smith, C.J., concurring) (Miller, J., dissenting), the Board used a date of manifestation approach for determining the time of injury for average weekly wage purposes. *See Stark v. Bethlehem Steel Corp.*, 6 BRBS 600 (1977), *aff'd on recon.*, 10 BRBS 350 (1979). The Board overruled *Stark* in *Dunn*, and held that, consistent with the rule for determining the responsible

This approach was rejected by the United States Court of Appeals for the Ninth Circuit in *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), which held that an injury occurs for purposes of calculating the average weekly wage at the time that the disease manifests itself through a loss of earning capacity. The statute of limitations and average weekly wage provisions added by the 1984 Amendments for occupational disease cases, 33 U.S.C. §§910(i), 912(a), 913(b)(2), specifically codified this manifestation definition of "time of injury."[8] *See Dunn v. Todd Shipyards Corp.*, 18 BRBS 125 (1986). Moreover, the manifestation approach has since been adopted for purposes of determining the appropriate coverage provisions of the Act. *See Ins. Co. of N. Am. v. U.S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 124 (CRT) (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *SAIF Corp./Oregon Ship Repair v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT) (9th Cir. 1990); 33 U.S.C. §§902(3), 903(a).

Based on these developments in the Act and in case law, it is now clear that in occupational disease cases, the employee does not sustain an injury under the Act until he is aware of the relationship between the disease, the disability and the employment. *See generally Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). In order to be "aware" of his disability, the employee must be aware that his work-related disease has caused a loss in wage-earning capacity, *see generally Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993), or, if he is a voluntary retiree, a permanent physical impairment. *See generally Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989). It is thus axiomatic that the mere fact of exposure to injurious stimuli such as asbestos is an insufficient basis upon which to find that a claimant has been "injured." *See Black*, 717 F.2d at 1289-1290, 16 BRBS at 20-21(CRT); *see generally Morin v. Bath Iron Works Corp.*, BRBS , BRB No. 92-0947 (Aug. 22, 1994).

The reasoning of the United States Court of Appeals for the Ninth Circuit in *Johnson*, 908 F.2d at 1434, 23 BRBS at 113 (CRT), is instructive with regard to the preference for a manifestation

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employer or carrier, the "time of injury" for average weekly wage purposes in an occupational disease case would be the date of last injurious exposure. *Dunn*, 13 BRBS at 663.

[8]Section 10(i), 33 U.S.C. §910(i)(1988), states:

> For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease . . . the time of injury shall be deemed to be the date on which the employee or claimant becomes aware . . . of the relationship between the employment, the disease, and the death or disability.

Sections 12(a) and 13(b)(2), 33 U.S.C. §§912(a), 913(b)(2)(1988), state, respectively, that the time for giving notice of injury and for filing a claim does not begin to run in an occupational disease case until:

> the employee or claimant becomes aware . . . of the relationship between the employment, the disease, and the death or disability.

approach to date of injury in occupational disease cases. In extending this approach to the issue of coverage under the Act, the court stated that applying the manifestation rule in determining the amount of compensation and claimant's coverage best serves the paramount goal of the Act, which is to compensate workers for a loss in wage-earning capacity. Similarly, application of a manifestation rule here provides the best method of determining when claimant is a "person entitled to compensation," as it is at that point that he must file his claim, his compensation is calculated, coverage is determined and his rights attach. The court further stated in *Johnson* that its decision in *Black* was also based upon "a realistic definition of the term `injury.'" *Johnson*, 908 F.2d at 1439, 23 BRBS at 121 (CRT), *citing Black*, 717 F.2d at 1289, 16 BRBS at 21 (CRT). The court noted its statement in *Black* that the trend is toward use of a manifestation rule, and that this trend continues. Finally, the court discussed the use of an exposure approach in the context of proper venue, but found that situation distinguishable from one affecting claimant's ultimate recovery. *Johnson*, 908 F.2d at 1439-1440, 23 BRBS at 121-122 (CRT). Similarly, in this case, in deciding at what point entitlement vests, the manifestation approach provides the most realistic and rational "time of injury."

The Board has applied the manifestation approach in an occupational disease case in considering when a claimant's rights vested under *Cowart* so that she became a "person entitled to compensation" under Section 33(g)(1). *Glenn v. Todd Shipyards Corp.*, 27 BRBS 112 (1993)(Smith, J., concurring), *aff'g on recon.* 26 BRBS 186 (1993) (decision on recon.). In *Glenn*, the parties stipulated to a date of injury, and claimant entered into third-party settlements after this date without employer's consent. The Board rejected the contention that before claimant could be said to be "injured," the claim would have to be adjudicated to determine the onset of the impairment, holding this approach was contrary to *Cowart*. *Id.*, 27 BRBS at 115. Instead, the Board held that the time of injury occurred when the disease became manifest, which in the case of a retiree is the date of awareness of the relationship between the disease, the employment and the permanent impairment and, in *Glenn*, was the date stipulated by the parties.

Therefore, as voluntary retirees, claimants herein must be aware of the relationship between their asbestos-related diseases, their employment and a permanent physical impairment before they can be found to have an injury and thus a vested right to compensation. The claimants in these cases are not "persons entitled to compensation" under Section 33(g)(1) if they do not have a permanent physical impairment under the AMA *Guides*, and are not aware of the relationship between their impairments and their employment. *Id*. Resolution of this issue requires findings of fact, and as the administrative law judges erroneously granted summary judgment in employers' favor, no testimony or physicians' reports were admitted into evidence. On remand, the administrative law judges must hold hearings and admit evidence into the record. 20 C.F.R. §§702.338, 702.339. If the evidence establishes that the claimants did not have a permanent physical impairment or were not aware of the work-relatedness of such impairments at the time of the third-party settlements, they are not "persons entitled to compensation" and the forfeiture provision of Section 33(g)(1) does not apply.

In reaching our decision, we must address the administrative law judges' conclusions that medical benefits are considered "compensation." We hold that payments for medical treatment are not "compensation." Thus, if the claimants did not have a permanent physical impairment at the

time of the settlements, employer's liability for their medical treatment resulting from their exposure to asbestos[9] does not result in their being "persons entitled to compensation."

In this regard, we agree with the arguments of the Director and claimants that the term "compensation" in Section 33 refers to periodic disability benefits and does not include payments for medical treatment under Section 7. The administrative law judges in these cases interpreted the word "compensation" as it appears in subsection (g)(1) as including medical benefits based on *Cowart*. We do not agree with this interpretation of *Cowart*. Initially, the judges rely on isolated language removed from its proper context on the facts and holding of *Cowart*. Whether medical benefits are "compensation" was not at issue in *Cowart*, and given the precedent on this issue, the issue cannot be said to be resolved based on a few words with no discussion of the issue or caselaw.

Prior to the Supreme Court's decision in *Cowart*, the United States Court of Appeals for the Ninth Circuit considered a case in which the claimant was not disabled and thus was not entitled to disability benefits, but was entitled to medical treatment. *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990), *aff'g* 20 BRBS 239 (1988). The court held that Section 33(g)(1) did not bar the claim because the compensation to which claimant was entitled ($0) did not exceed the amount of the settlements. The court noted that subsection (g)(1) refers solely to "compensation" and that subsection (g)(2) refers to "compensation and medical benefits," indicating clear intent that the two terms have different meanings, and found that Congress did not intend to compel compliance with Section 33(g)(1) by one who is entitled only to medical benefits. *Mobley*, 920 F.2d at 561, 24 BRBS at 53 (CRT). Citing *Marshall v. Pletz*, 317 U.S. 383 (1943), a Supreme Court decision holding that the term "compensation" in Section 13 does not include medical benefits, the court held that the term "compensation" as used in Section 33(g)(1) also does not include medical benefits. *Mobley*, 920 F.2d at 560-561, 24 BRBS at 52 (CRT). As Section 33(g)(1) was inapplicable, the court concluded that claimant's notice to his employer of a third-party settlement which is provided before the employer has made any payments or the agency has announced any award is sufficient to preclude the claim from being barred under Section 33(g)(2). *Mobley*, 920 F.2d at 562, 24 BRBS at 54 (CRT).

Contrary to the administrative law judge's inference in *Hendrickson*, the decision in *Mobley* was not effectively overruled by *Cowart*, as the factual situations of the two cases are disparate. In

[9]Employers may be liable for medical treatment regardless of whether claimants are disabled. An employee need not be disabled in order to receive medical treatment under Section 7 of the Act, 33 U.S.C. §907, but must only sustain a "harm." *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). While a broad definition of "injury" has been adopted for purposes of establishing a right to medical treatment, the right to medical treatment is irrelevant to entitlement to disability benefits. As we have stated, it is when a disability is manifest that the full panoply of rights under the Act comes into play. At that point, claimant must file his claim and establish coverage, and at that time, his compensation is computed.

fact, the *Mobley* court explicitly declined to rule on the issue in *Cowart*, namely, the interpretation of the phrase "person entitled to compensation." 920 F.2d at 560
n.3, 24 BRBS at 52 n.3 (CRT). The Supreme Court in *Cowart*, moreover, was not faced with the situation where the claimant was not disabled as in *Mobley*. The claimant in *Cowart* was clearly disabled and entitled to compensation, and the Court's decision cannot be viewed without regard to these facts. The plain language of Section 33(g)(1) refers to a person entitled to *compensation*, whereas Section 33(g)(2) refers to *compensation and medical benefits*. In order to give meaning to every word in the statute, *see Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524 (1985), the two phrases must have different meanings. Thus, we hold, consistent with the decisions in *Mobley* and *Marshall*, that the term "compensation" in Section 33(g)(1) does not include medical benefits. As the Supreme Court stated in *Cowart*, "identical terms within an Act bear the same meaning."[10] *Cowart*, U.S. , 112 S.Ct. at 2596, 26 BRBS at 52 (CRT), *citing Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Therefore, if, on remand, the administrative law judges determine that at the time of the settlements the claimants were entitled only to medical benefits, claimants' failure to

[10]In *Marshall v. Pletz*, 317 U.S. 383 (1943), the Supreme Court held that the term "compensation" used in Sections 2(12), 6, 8, 10 and 14 of the Act refers to periodic money payments made to the claimant and does not refer to the expense of medical care. The court thus held that the term compensation as used in Section 13 does not include medical benefits. Employer Todd Pacific Shipyards, however, citing *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145 (CRT)(5th Cir. 1992), contends that if the term "compensation" in Section 33(g)(1) and Section 33(f) is interpreted as compensation for disability or death only, and not medical benefits also, then correspondingly, the judicial authority to enforce administrative awards for medical benefits under the Act under 33 U.S.C. §§918(a) and 921(d) would be doubtful. In *Lazarus*, the Fifth Circuit held that for purposes of accelerated enforcement proceedings, medical benefits were included in the phrase "compensation due under any award" appearing in Section 18(a) of the Act. *Lazarus*, 958 F.2d at 1303, 25 BRBS at 150 (CRT).

Contrary to employer's contention, since enforcement serves a unique purpose, *Lazarus* is not controlling. In fact, the court recognized in *Lazarus* the differences between medical and disability benefits, but found that enforcement of an order for reimbursement of medical costs paid by the employee best served the purposes of the Act. In the context presented here, *Marshall* provides better guidance to the general meaning of this term as used in the Act as a whole. *See Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988). Indeed, in *Marshall*, the Court recognized that Section 4 of the Act could be construed as including medical treatment in the term "compensation" but concluded that the better interpretation based on the Act as a whole and on the differing nature of medical care and other payments was that "compensation" refers to periodic money payments to be made to the employee and not to medical benefits. This interpretation also is logical in the context of the "time of injury" previously discussed. An employee who is not disabled may seek medical care and file an action against an asbestos manufacturer. His disease is nonetheless not manifest, and his "time of injury" has not occurred. On all grounds, he is not a "person entitled to compensation" at that time.

comply with Section 33(g)(1) cannot bar the claim as they were not "persons entitled to *compensation*."[11]

If, on remand, the administrative law judges find that either of the claimants is a "person entitled to compensation" under the Act, the case must be further analyzed under Section 33(g). Before the forfeiture provisions of Section 33(g) may be invoked, a determination must be made as to the amount of compensation to which a claimant would be entitled under the Act. The Supreme Court explicitly stated in *Cowart* that an employee is not required to get prior written approval of the settlements from employer in two situations: (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); *see also Bundens v. J.E. Brenneman Co.*, 28 BRBS 20, 26-27 (1994); *Glenn*, 26 BRBS at 190-191. We agree with the Director that *Cowart* requires this comparison of the amount of compensation before the claim can be found barred by Section 33(g)(1).[12]

Initially, we reject employer Lake Union's contention that the settlements should be analyzed individually, rather than in the aggregate, in order to determine whether Section 33(g)(1) is applicable. Employer is entitled to offset the entire net amount of the third-party recoveries under Section 33(f) in the aggregate, and is liable for deficiency compensation in the event that the aggregate recovery is less than its liability. 33 U.S.C. §933(f)(1988). Moreover, although not specifically addressed, the recent cases discussing Section 33(g) do not distinguish between fact patterns where there is one third-party settlement, *see Cowart*, and where there are multiple third-party settlements. *See generally Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994); *Bundens*, 28 BRBS at 20; *Glenn*, 26 BRBS at 186.

In order for Section 33(g)(1) of the Act to apply, a person entitled to compensation under the Act must enter into a settlement with a third person for "an amount less than the compensation" to which the person would be entitled under the Act. We reject the Director's contention that Section

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[11]As employers clearly have notice of the settlements before an award was entered or voluntary payments made, the notice requirements of Section 33(g)(2) have been satisfied. *See Mobley*, 920 F.2d at 562, 24 BRBS at 54 (CRT).

[12]The administrative law judges' determination that this comparison was not necessary is contrary to the clear statement in *Cowart* that the notice requirement, rather than the written approval requirement, applies in two situations--where a judgment is rendered or where the compensation is less than the settlement amount. The Court discussed this requirement in response to the argument that its interpretation of "person entitled to compensation" would nullify the notice requirement of subsection (g)(2). The Court rejected that argument on the basis that notice is required in these two instances. If the comparison is irrelevant, as the administrative law judges believe, then the notice requirement would be unnecessary for third-party settlements, a result clearly not intended by the *Cowart* Court.

33(g)(1) requires the gross amount of the third-party settlements to be compared with the amount of compensation to which the claimant would be entitled under the Act. Rather, inasmuch as Section 33(g) references the provisions of Section 33(f), which specifically refers to employer's entitlement to an offset for the *net* amount recovered from third parties, we hold that in order to make this determination, the administrative law judge must compare the net amount of the third-party settlements to the amount of compensation to which claimant would be entitled under the Act.[13]

Furthermore, we hold that the net amount of the third-party settlements must be compared only with the compensation to which the claimant would be entitled under the Act, without the addition of potential medical benefits, as advocated by claimants and the Director. As discussed earlier, Section 33(g)(1) uses the term "compensation" alone while the provision in Section 33(g)(2) refers to "compensation and medical benefits," and the Ninth Circuit has stated that medical benefits alone do not constitute "compensation" for purposes of determining whether a claimant's third-party recovery is for less than the "compensation under the Act." *Mobley*, 920 F.2d at 560-561, 24 BRBS at 52 (CRT).

We are not persuaded, as were the administrative law judges, that the Supreme Court in *Cowart* meant to include medical benefits in the comparison between the settlement amounts and the amount of compensation to which claimants would be entitled merely by its statement that the written approval provision of subsection (g)(1) does not apply if the settlements are for less than employer's "total liability." *Cowart*, U.S. , 112 S.Ct. at 2597, 26 BRBS at 53 (CRT). The statute refers to "an amount less than the *compensation*" entitlement of the employee. We agree with the Director that in applying *Cowart*, the Court's statements must not be divorced from the specific issue before the Court, *i.e.*, whether Section 33(g)(1) applies to a worker whose employer at the time of the third-party settlement is neither paying compensation nor is yet subject to an order to pay under the Act. *Cowart*, U.S. , 112 S.Ct. at 2592, 26 BRBS at 50 (CRT). As discussed *supra*, if possible, meaning must be given to every word of the statute so as to not render any part meaningless or superfluous. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993). Thus, we hold that in determining if the third-party settlements are for an amount greater or less than the "amount of *compensation* to which claimant is entitled under the Act," medical benefits are not to be included in the calculation of the amount of compensation.[14]

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[13]We note that although the 1984 Amendment to Section 33(f) specifically states that employer receives a credit for the *net* third-party recoveries, pre-amendment case law also limited employer to a credit for the net amount. *See Luke v. Petro-Weld, Inc.*, 14 BRBS 269 (1981).

[14]We reject the interpretation of the administrative law judge in *Hendrickson* that the language in Section 33(f) that employer "shall be required to pay as *compensation* . . . a sum equal to the excess of the amount the Secretary determines is payable" under the Act over the net amount of the third-party recovery mandates that the term "compensation" in Section 33(g)(1) includes medical benefits. An employer may be liable for medical benefits under the Act even if it is not liable for disability compensation. *See, e.g., Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984) (right to

It is undisputed by the parties that the claimant did not receive employer's written approval of the third-party settlements in either of these cases. If, on remand, the administrative law judges find that either claimant is a "person entitled to compensation" and that the net amount of the aggregate third-party settlements is for an amount less than the compensation, not including medical benefits, to which the claimants would be entitled under the Act, we hold, for the reasons stated in *Kaye v. California Stevedore & Ballast,* BRBS , BRB No. 93-1085 (Oct. 19, 1994), that the Supreme Court's decision in *Cowart* is to be applied to these cases to bar the claims. However, if the claims are found to be for medical benefits only, or if the net amount of the aggregate third-party settlements are found to be for an amount greater than the compensation, not including medical benefits, to which the claimants would be entitled to under the Act, the forfeiture provisions of Section 33(g) would not be applicable.[15]

Even if the claims are not barred under Section 33(g), employer may be entitled to offset benefits due under the Act against the net amount of the third-party recovery pursuant to Section 33(f) of the Act, 33 U.S.C. §933(f).[16] The administrative law judge in *Harris* did not reach the scope of Section 33(f), as she found the claim barred by Section 33(g). The administrative law judge in *Hendrickson* discussed the Ninth Circuit's decision in *Cretan,* 1 F.3d at 843, 27 BRBS at 93 (CRT), and noted that the court stated therein that "if the [third-party] recovery exceeded [employer's] statutory liability, [employer] is entitled to set off its entire statutory liability under section 33(f)....." *Cretan*, 1 F.3d at 848, 27 BRBS at 99 (CRT). The administrative law judge in *Hendrickson* thus found that Section 33(f) extinguishes an employer's total liability under the Act, although he did not determine if the settlements were indeed greater than employer's liability.

Contrary to this line of reasoning, Section 33(f) does not necessarily "wipe out" or extinguish an employer's total liability in every case, although this may be the practical effect in many cases.

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medical benefits is not barred by failure to comply with Section 12 of the Act). The employer's liability for medical benefits is separately determined pursuant to Section 7 of the Act, 33 U.S.C. §907. That employer is entitled to set off the cost of medical care against the third-party recovery does not change this result. *See* discussion, *infra.*

[15]As noted, the notice provisions of Section 33(g)(2) have been satisfied in these cases.

[16]Section 33(f), 33 U.S.C. §933(f)(1988), provides:

> 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).

Rather, employer receives a credit against future amounts due equal to the net recovery of the employee. 33 U.S.C. §933(f). Compensation and medical benefits[17] are suspended until the net recovery is exhausted. *Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT) (5th Cir. 1991). We disagree that *Cowart* and *Cretan* stand for the proposition that Section 33(f) extinguishes an employer's total liability in all cases, as the facts of those cases did not present the issue nor do they lead to that result. In *Cowart*, the question before the Court involved whether the forfeiture provision applies to a worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor is yet subject to an order to pay under the Act. Although in discussing the viability of Section 33(g)(2), the Court did state that where the employee settles for an amount greater than the employer's liability, the employer is protected regardless of the precise amount of the settlement because its liability for compensation is *wiped out* under Section 33(f), *Cowart*, U.S. , 112 S.Ct. at 2598, 26 BRBS at 53 (CRT), the Court also noted that Section 33(f) provides that the net amount of damages recovered from any third party for the injuries sustained *reduces* the compensation owed by the employer. *Id.* Moreover, we note that unlike the claimants in the present cases, the claimant in *Cowart* was deceased by the time the case reached the Supreme Court and the claim was for a scheduled injury. Therefore, the Court did not have to consider the long-term effect of medical treatment or worsening disability in an occupational disease case in discussing the applicability of an offset pursuant to Section 33(f). Consequently, the effect of Section 33(f) was not before the Court and any discussion on this issue is merely *dicta*.

In *Cretan*, the Ninth Circuit addressed the question of whether decedent's survivors were "entitled to compensation" at the time of the pre-death settlements. The court held that the claimants were persons entitled to compensation at the time of the settlements within the meaning of Section 33(g) and thus, as they had not obtained written approval of the settlements by employer, their claims were barred. *Cf. Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994) (Brown, J., concurring)(Smith, J., concurring and dissenting) (in a case arising in the Fifth Circuit, the Board held that a widow was not a "person entitled to compensation" at the time deceased employee entered into settlements prior to his death). Furthermore, the court stated that if the claimants' third-party recovery exceeded their entitlement under the Act, the employer would be entitled to set off its entire statutory liability. Inherent in the court's decision is the fact that the amount of the net third-party settlements, $333,489, plus a $50,000 annuity, exceeded employer's liability for decedent's *inter vivos* claim for disability and medical benefits, and for death benefits under Section 9 of the Act, 33 U.S.C. §909. As in *Cowart*, the employee in *Cretan* was deceased. The court did not have to consider the effect of employer's liability for ongoing medical benefits, which could exhaust employer's credit against the third-party recovery. *See Maples*, 23 BRBS at 310-311. Thus, the decision in *Cretan* also is not dispositive in the present cases based on this distinction.

Under Section 33(f), the employer is required to pay as compensation under the Act "a sum

[17]Section 33(f) provides a credit, for the "amount . . . payable on account of such injury," and is not limited to compensation.

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." 33 U.S.C. §933(f). Thus, the plain language of Section 33(f) provides for the eventuality of deficiency compensation to be paid by employer. Therefore, we hold that where the forfeiture provision of Section 33(g) does not apply, the offset provision under Section 33(f) does not "extinguish" employer's total statutory liability, but rather provides employer a credit in the amount of the net third-party recovery against employer's liability for both compensation and medical benefits under the Act. *Id.*

In summary, we vacate the administrative law judges' summary decisions, and we remand the cases for further fact-finding. Initially, the administrative law judges must consider whether the claimants are "persons entitled to compensation," and thus subject to Section 33(g). If, on remand, the administrative law judges find that the claimants are subject to Section 33(g), the administrative law judges must make a comparison between the net amount of the aggregate settlements and the amount of compensation to which the claimants would be entitled under the Act. Furthermore, if the settlements are found to be for an amount greater than employer's liability for compensation only under the Act, or if the claims are for medical benefits only, Section 33(g)(1) is not applicable and the offset provision under Section 33(f) would apply. However, if either administrative law judge finds that the settlements were for an amount less than the compensation to which the claimant would be entitled, Section 33(g)(1) would be applicable in that case. Moreover, as it is undisputed that no written approval of the settlements was obtained, the decision in *Cowart* applies to these cases and the claims would be barred. *Kaye*, slip op. at 11.

Accordingly, the Summary Decision and Order of Administrative Law Judge Schreter-Murray and the Order-Summary Judgment of Administrative Law Judge Halpern are vacated, and the cases are remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge