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 on RECONSIDERATION *EN BANC*

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.

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.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel 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, BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employers have filed timely Motions for Reconsideration of the Board's Decision and Order in the captioned case, *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). Employers have also requested reconsideration by the permanent members of the Board *en banc*. *See* 20 C.F.R. §802.407(b). Claimants have not responded to these motions. The Director, Office of Workers' Compensation Programs (the Director), submitted a "Citation of Supplemental Authority" in connection

with the employers' petitions for reconsideration which was received by the Board on February 17, 1995.[1] We grant the motions for reconsideration and will consider the issues *en banc*.[2]

In its original decision in this case, the Board held that inasmuch as there were issues of material fact which affect the application of Section 33(g), 33 U.S.C. §933(g), the administrative law judges erred in granting summary decisions in favor of the employers in the present cases. *Harris*, 28 BRBS at 259. The Board addressed the issue of whether claimants are "persons entitled to compensation" within the meaning of Section 33(g)(1) pursuant to the decision of the United States Supreme Court in *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992). The Board also held that, 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. Thus, the claimants in these cases are not "persons entitled to compensation" under Section 33(g)(1) if they do not have a physical impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), and are not aware of the relationship between their impairments and their employment. *Harris*, 28 BRBS at 262-263.

The Board also held that the term "compensation" in Section 33(g)(1) refers to periodic disability benefits and does not include payments for medical treatment under Section 7 of the Act, 33 U.S.C. §907. *Id.* at 263-265. Thus, the Board held that if, on remand, the administrative law judges find that either of the claimants is a "person entitled to compensation" under the Act, before the forfeiture provisions of Section 33(g) may be invoked, a determination must be made as to the amount of compensation, without the addition of potential medical benefits, to which claimants would be entitled under the Act. The Board held that this amount must be compared with the aggregate net amount of the third-party settlements in order to determine the applicability of Section 33(g)(1). The Board further stated that if either claimant is a "person entitled to compensation" and 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, pursuant to *Kaye v. California Stevedoring & Ballast*, 28 BRBS 240 (1994), *Cowart* is to be applied to bar the claims notwithstanding the fact that the settlements occurred prior to the issuance of that decision. *Harris*, 28 BRBS at 267.

Finally, the Board held that even if the claims are not barred under Section 33(g), employer may be entitled to offset compensation and medical benefits due under the Act against the net

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[1]This pleading was filed after the period required for a timely motion for reconsideration. However, as the case submitted by the Director was issued on January 26, 1995 by the United States Court of Appeals for the Third Circuit, and is relevant to the instant case, we will address the Director's contention. *See* discussion, *infra*.

[2]Employer Todd Pacific's motion for oral argument is denied, inasmuch as the relevant issues are fully developed by virtue of the transcripts from the previous oral argument and the briefs of the parties.

amount of the third-party recovery pursuant to Section 33(f) of the Act, 33 U.S.C. §933(f). The Board rejected the administrative law judge's finding in *Hendrickson* that Section 33(f) always extinguishes an employer's total liability under the Act, inasmuch as Section 33(f) provides for the eventuality of deficiency compensation to be paid by employer under some circumstances. *Id*. at 269.

To recapitulate the facts and proceedings below, the cases were consolidated for decision by the Board because the issues and facts are similar. In both cases, the claimants appealed summary decisions dismissing the claims. 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 also filed third-party suits against asbestos manufacturers. It appears that claimant was voluntarily retired from active employment before he filed the 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 AMA *Guides* has been assigned.

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 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.

The employer 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 claimants settled third-party actions against asbestos manufacturers without the prior approval of the employers or carriers.[3] The administrative law judges also found that the Supreme Court's holding in *Cowart*, 112 S.Ct. at 2589, 26 BRBS at 49 (CRT), should be applied to these claims, and thus the claimants are not entitled to benefits under the Act, as Section 33(g) bars the claims. Neither administrative law judge made a finding as to whether the 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 claim's being barred under Section 33(g), or employer's total liability being offset under Section 33(f).[4] Therefore, both administrative law judges granted summary judgment in favor of employers. As discussed above, on appeal the Board vacated these decisions and remanded the cases.

[3]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 between $20,000 and $22,000.

[4]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 argued in the response to motion for summary judgment that the amount of compensation due may be less than the total of the settlements.

In their motions for reconsideration, employers Lake Union and Todd Pacific contend that the Board erred in holding that claimant must be entitled to disability benefits in order to be considered one entitled to compensation under Section 33(g) of the Act. Employers contend that this holding is contrary to the decisions in *Cowart* and *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994). Employers also contend that the Board erred in holding that the third-party settlements should be analyzed in the aggregate, not individually, in order to determine whether Section 33(g) is applicable, and that claimants' entitlement to medical benefits should be included in determining the amount of compensation to which claimants are entitled under the Act.

Employer Todd Pacific also contends that the evidence supports the administrative law judge's finding that claimant Harris was "aware" at the time she filed her claim under the Act that she had a permanent physical impairment which was related to her employment, and thus the administrative law judge properly dismissed her claim. Lastly, employers contend that the Board erred in failing to apply the "holding" in *Cretan* that Section 33(f) "wipes out" employer's liability when Section 33(g) does not apply because the third-party settlement is for more than the employer's liability under the Act.

Section 33(g)(1) - "Person Entitled to Compensation"

Employers contend that the Board erred in holding that a claimant is not "injured" and thus not a "person entitled to compensation" until he is aware that he is disabled or in the case of a retiree, permanently impaired. Specifically, employer Todd Pacific contends that the Board erred in failing to infer that claimant Harris had the requisite awareness that she had a permanent physical impairment which was related to her employment when she filed her claim for benefits under the Act in 1982. Employer Todd Pacific contends, in essence, that claimant would not have filed a claim unless she was aware of a permanent physical impairment related to her employment, since "protective" filings are impermissible under the Act. Moreover, employer Todd Pacific contends that third parties would not pay claimant "vast" amounts of money if she was not, in fact, physically impaired. Thus, employer Todd Pacific contends, claimant had the burden of proving that she was not filing a claim for an occupationally-related physical impairment in order to defeat employer's motion for summary judgment, and as she presented no evidence, the administrative law judge properly granted summary judgment dismissing the claim.

In its decision, the Board first discussed the Supreme Court's decision in *Cowart*. *Harris*, 28 BRBS at 260. The issue before the Court in *Cowart* was the proper interpretation of the phrase "person entitled to compensation." The 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*, 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. *Id.*

In this case, as employer correctly asserts, it is undisputed that claimant Harris was exposed to asbestos and filed a claim for asbestos-related diseases in 1982.[5] It was not uncommon at this time for claimants to have filed claims upon learning of a medical condition related to asbestos exposure in order to prevent the statutes of limitations from running, even though the employee was not presently disabled. *See, e.g., Black v. Bethlehem Steel Corp.*, 16 BRBS 139 (1984)(once filed, claims must be processed; the Act does not permit protective filings).[6] The fact that claimant Harris filed a claim at that time cannot be construed as demonstrating her awareness of an impairment.[7] There is no indication in the record before the Board that claimant had a permanent physical impairment at the time she filed her claim or settled her third-party suits. This issue has never been litigated, and this lack of evidence is at the crux of the Board's holding that summary judgment was improperly granted.

In its decision in *Harris*, the Board stated that the crucial issue, in light of *Cowart*, is when an injury occurred such that the prerequisites to the right to compensation vested. *Harris*, 28 BRBS at 260. In *Cowart*, the claimant sustained a traumatic injury to his hand; thus his right to compensation vested at the time of injury. In cases of retirees with occupational diseases, however, there is no definitive date of injury as there is in cases of traumatic injury. Following case law developed to define "time of injury" in occupational disease cases and the legislative changes made in 1984 to codify holdings, the Board held that the time of injury occurs when the permanent physical impairment resulting from the disease becomes manifest. *Harris*, 28 BRBS at 263. 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." *See* 33 U.S.C. §§910(i), 912, 913 (1988). The Amendments expressly allow awards to claimants such as those in these cases 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) (1988). Under these sections, claimants who are "injured" after they voluntarily retire are

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[5]Claimant Hendrickson's claim was filed in 1986, and employer Lake Union states that the claim form alleges that exposure to asbestos caused a permanent impairment.

[6]Despite the Board's holding in *Black*, it is apparent that claimants continued to file claims which were held in abeyance by the district director's office, often for years. *See Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT) (5th Cir. 1994).

[7]At the time the 1982 claim was filed, Board decisions held that in order to be timely a claim had to be filed after claimant's awareness that an occupational disease was related to employment. The Board rejected the argument that a disability was required in order for claimant to be aware of an injury under Sections 12 and 13, 33 U.S.C. §§912(a), 913(a)(1982)(amended 1984). *See Black*, 16 BRBS at 142. In addition, claimant Harris could not have claimed benefits based on permanent impairment, as such awards did not exist prior to 1984, but would have had to establish a loss in wage-earning capacity. *See generally Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984) (overruled by 1984 Amendments).

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).

In addition, in *Harris*, the Board discussed the case law developed prior to the 1984 Amendments in the attempt to provide a specific date of injury in cases of 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). In *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), the United States Court of Appeals for the Ninth Circuit held that an "injury" occurs for purposes of calculating the average weekly wage at the time that the disease manifests itself through a loss in earning capacity. The statutory changes in 1984 codified this manifestation definition of "time of injury." *See also SAIF Corp./Oregon Ship Repair v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT)(9th Cir. 1990)(adopting time of manifestation for purposes of applying jurisdictional provisions of the Act).

Therefore, the Board's holding in *Harris* 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 is based on the statute and long-standing case precedent. *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).

We deny the relief requested on this issue, as application of a manifestation rule provides the best method of determining when claimant has an injury so that his rights vest and he is a "person entitled to compensation," inasmuch as it is at that point that he must file his claim, his compensation is calculated, coverage is determined and his rights attach. The Board has previously 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.). As use of a manifestation date requires findings of fact, the Board properly remanded the cases for the administrative law judges to hold hearings and admit evidence, and to determine whether the claimants are aware of a work-related permanent physical impairment such that they are "persons entitled to compensation" within the meaning of Section 33(g) and *Cowart*. *Harris*, 28 BRBS at 263.

We are dismayed by Judge Brown's resurrection, in his dissent, of an exposure rule for determining when a retiree becomes a "person entitled to compensation," as this runs counter to every trend in the law. *See, e.g., SAIF Corp.*, 908 F.2d at 1434, 23 BRBS at 113 (CRT); *Black*, 717 F.2d at 1280, 16 BRBS at 13 (CRT). It runs counter to the holding of *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955), itself. In *Travelers*, the court applied a "manifestation" rule for determining if claims for hearing loss were timely filed. The court stated

> Although it may well be that the Congress intended that one injured in an industrial accident occurring at an identifiable time and place who, presumably, could be expected to know that he was hurt, even if, at the time, he was unaware of the extent of the disablement resulting from the injury, should be required to file a claim within one year from the accident, it seems perfectly clear that a different criterion necessarily must have been contemplated in cases of occupational disease. Every claim based upon occupational disease would be barred if the one year limitation period were declared to begin running when contact is first had with the condition causing the disease or when the disease first ensues. At such time, a potential claimant would have no occasion to realize that there is anything wrong with him, much less that he had suffered damage industrially caused.... [thus] an "`employee can be held to be `injured' only when the accumulated effects of the deleterious substance manifest themselves.'"

225 F.2d at 142-143, quoting *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (standard enunciated in the Federal Employer's Liability Act, 45 U.S.C. §51 *et seq.*). Thus, merely because one is exposed to injurious stimuli does not mean one has suffered an "injury" potentially entitling him to compensation under the Act, as we have strived to explain. The example given by our colleague regarding a retiree diagnosed with mesothelioma is not contrary to our decision. Such a person most likely has an "injury" under the Act, as mesothelioma is an incurable cancer related solely to asbestos exposure. Thus a claimant aware he was suffering that disease would have an impairment and the requisite awareness of the relationship between that impairment and his employment. The

existence of an impairment is not an additional "technical requirement" as our colleague suggests. Rather it is a prerequisite to the right to compensation which must exist before the right vests. Thus, the Board's decision on this point is consistent with *Cowart*.

Lastly, we reject Judge Brown's suggestion that the decision herein effectively limits the applicability of Section 33(g) to non-retirees. Once hearings are held in these claims and facts are determined, the administrative law judges may well find that the claimants suffered impairments and were aware of the relationships between their diseases, impairments and employment at the time of the third-party settlements. Such claimants have an injury and, if other prerequisites are met, their claims will be barred by Section 33(g). We thus are not stating that Section 33(g) will not apply to these or other claimants. We are stating only that it was error for the administrative law judges to fail to ascertain relevant facts.

Consequently, we hold that establishing that claimant has merely filed a claim is not sufficient to establish that claimant is "entitled to compensation" under the Act; rather, in order to prevail, employer must demonstrate that, as a voluntary retiree, claimant was aware of the relationship between her asbestos-related disease, her employment and a permanent physical impairment before she can be found to have an "injury" and thus a vested right to compensation under *Cowart*. Unlike our dissenting colleague, we are not persuaded by employers' argument that claimants would not have filed third-party suits unless they were aware of a work-related physical impairment. Tort suits are filed for a variety of asserted damages, including potential disability and death, and are not limited to the grounds of a workers' compensation claim.

Moreover, we also reject employers' contention that the Board's decision contravenes the Ninth Circuit's decision in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994). In *Cretan*, the court held that an injured employee's spouse and daughter were "persons entitled to compensation" at the time they settled their potential wrongful death suits prior to the death of the employee. *Cf. Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 29 BRBS 113 (CRT) (5th Cir. 1995), *pet. for reh'g en banc denied*, F.3d (5th Cir. Nov. 22, 1995), *aff'g Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994) (Brown, J., concurring)(Smith, J., dissenting on other grounds) (Fifth Circuit holds that claimant's wife is not a "person entitled to compensation" at the time of the pre-death settlements as claim for death benefits had not yet vested). The claim for benefits under the Act in *Cretan* was based on the decedent's terminal asbestos-related disease. Although employer initially disputed liability, whether the decedent was disabled, or died, due to the asbestos-related disease was not an issue in that case. There was thus no question that an injury had occurred. For the reasons discussed *infra* at 13-15, we reject Judge McGranery's assertion, in her dissenting opinion, that we have inconsistently interpreted the phrase "person entitled to compensation" contrary to the holdings of *Cowart* and *Cretan*.

Therefore, we reaffirm the Board's holding that an injury does not occur in an occupational disease case until the claimant has a disability, or in the case of a retiree, a permanent physical impairment, and is aware that it is work-related. The question of whether claimants in these cases are "persons entitled to compensation" are issues of material fact which affect the application of

Section 33(g)(1). Thus, we reaffirm the Board's holding that the administrative law judges erred in granting summary decision in favor of employers.

Section 33(g)(1) - Medical Benefits and Compensation

Employers contend that inasmuch as the claimants are entitled to medical benefits, and medical benefits should be included as "compensation" under Section 33(g)(1), the Board erred in finding that the claimants are not "persons entitled to compensation" and that therefore Section 33(g)(1) does not apply. Employers contend that the express language of *Cowart* holds that an employee is required to provide notification to his employer but is not required 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 employer's total liability" under the Act. *Cowart*, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT). Thus, employers contend that the "total liability" language of *Cowart* commands that claimant's medical benefits be considered as a part of his compensation when considering whether Section 33(g) is applicable. Employer Lake Union also contends that the Supreme Court in *Cowart* did not make an exception for claims for medical benefits only.

Section 33(g) of the Act, 33 U.S.C. §933(g)(1988), 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)(emphasis added). Before the forfeiture provisions of Section 33 may be invoked, a determination must be made as to the amount of compensation to which a claimant would be entitled under the Act. *See* 33 U.S.C. §933(g)(1); *Glenn*, 26 BRBS at 189-191. In order to apply Section 33(g)(1) of the Act, 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. In order to make this determination, the Board held in its initial decision in this case that the administrative law judge must compare the amount of the third-party settlements to the amount of compensation only, not including medical benefits, to which claimant would be entitled under the Act. *Harris*, 28 BRBS at 264-265.

Section 33(g)(1) uses the term "compensation" alone, while the forfeiture provision in Section 33(g)(2) refers to compensation and medical benefits. Prior to the Supreme Court's decision in *Cowart*, 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 Ninth Circuit 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 employers' contention, *Cowart* does not require a different holding in this case. As the Board held in its original decision, the *Mobley* court explicitly declined to rule on the issue in *Cowart*, namely, the interpretation of the phrase "person entitled to compensation." *Mobley*, 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.[8] The plain language of Section 33(g)(1) refers to a person entitled to *compensation* and requires comparison of the amount of *compensation* to the settlement amount, 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. Moreover, inasmuch as the Court in *Cowart* did not consider whether medical benefits are "compensation" and the issue was not present on the facts in that case, it cannot be said to have been resolved without discussion of the issue or the case law. Therefore, consistent with the decisions in *Mobley* and *Marshall*, we reject employers' contention that the Supreme Court's holding in *Cowart* compels a holding that the term "compensation" in Section 33(g)(1) includes any medical benefits to which claimant may be entitled.

[8]The Supreme Court's statement in its opening paragraph that Section 33(g) provides that "under certain circumstances if a third-party claim is settled without the written approval of the worker's employer, all future benefits including medical benefits are forfeited" cannot be viewed as the Court's holding that medical benefits are included in the term "compensation" in subsection (g)(1). *Cowart*, 112 S.Ct. at 2592, 26 BRBS at 50 (CRT).

We also reject employer Lake Union's contention that in other sections of the Act, specifically Sections 2(12), 4, 6(a), 14(h), 18, and 33(a), medical benefits are included as "compensation." Contrary to employer's assertion, in *Marshall v. Pletz*, 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 claimant and does not refer to the expense of medical care. *Marshall*, 317 U.S. at 390-391. The Court did recognize that Section 4 of the Act[9] 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 made to the employee and not to medical benefits. *Marshall*, 317 U.S. at 391.

Employer Lake Union urges the Board to reconsider its discussion of the holding in *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145 (CRT)(5th Cir. 1992), contending 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 pursuant to 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). In its original decision, the Board noted that Section 18 of the Act deals with enforcement and held that enforcement serves a unique purpose. *Harris*, 28 BRBS at 264 n.10. Therefore, the Board stated that the decision in *Lazarus* was not controlling in the instant circumstances. Employer has not raised any new arguments on this issue for reconsideration and, thus, we reaffirm the Board's original statement.

Employers also contend that it is illogical to hold that a claimant entitled only to medical benefits is not a person entitled to compensation under Section 33(g), but is a person entitled to compensation within the meaning of Section 33(f), thereby entitling employer to the setoff under Section 33(f) against its liability for disability and medical benefits in the net amount of the third party settlements. Employers contend that the two phrases should be interpreted the same way as it was done in *Cretan*, 1 F.3d at 843, 27 BRBS at 93 (CRT).

Section 33(f) provides:

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[9]Section 4 states in relevant part:

> Every employer shall be liable for and shall secure the payment to his employees of the *compensation payable under sections 907*, 908, and 909 of this title...

33 U.S.C. §904 (emphasis added).

> 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 attorney's fee).

33 U.S.C. §933(f) (1988) (emphasis added). The Ninth Circuit held in *Cretan* that "[t]he term `person entitled to compensation' must receive the same construction in Sections 33(f) and 33(g), in accord with `the basic canon of statutory construction that identical terms within an Act bear the same meaning.'" *Cretan*, 1 F.3d at 849, 27 BRBS at 99 (CRT), *citing Cowart*, 112 S. Ct. at 2596, 26 BRBS at 52 (CRT). The term "compensation," however, is used in such differing contexts throughout the Act that a perfect consistency is not attainable. Our construction of the terms "compensation" and "medical benefits" accords with the basic tenet of statutory construction that statutes are to be construed as a whole, without affording inordinate importance to an individual or isolated portion. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940); *F.T.C. v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991). We note that our conclusion herein is consistent with the Supreme Court's construction in *Marshall v. Pletz*, which was based on the Act as a whole. *See* discussion, *supra*.

Employer's entitlement to an offset under Section 33(f), moreover, is not limited to "compensation." Section 33(f) specifically provides offset for "the amount" determined to be payable; this term includes medical benefits and disability compensation in employer's offset. *Maples v. Texport Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texport Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT) (5th Cir. 1991). In any event, if we accepted employer's argument regarding Section 33(f) and construed "compensation" as including medical benefits in subsections (g) and (f), this would lead to a conflict within subsection (g) as the term "compensation" used in subsection (g)(1) would render the distinction in the use in subsection (g)(2) of the term "compensation and medical benefits" meaningless. *See generally Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427 (9th Cir. 1991); *Brigder Coal Co./Pacific Minerals, Inc. v. Director, OWCP*, 927 F.2d 1150 (10th Cir. 1991) (statutes should be interpreted so as to give meaning to every word and to not render any word superfluous). Since this issue does not control with regard to the offset, we believe a construction which is consistent within the subsection is preferable. In this regard it is noteworthy that the "compensation and medical benefits" language of subsection (g)(2) was added in the most recent amendment of the Act. *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1652, §21(d). Thus, Congress explicitly adopted language consistent with the Supreme Court's construction in *Marshall v. Pletz.*

Employer Lake Union next notes that the right of any claimant to file third-party lawsuits and also to pursue a claim under the Act arises out of Section 33(a), 33 U.S.C. §933(a), of the Act. Employer avers that if the claimant is found not to be a "person entitled to compensation" within the

meaning of Section 33(g), then, reasonably, he also is not a person entitled to compensation under Section 33(a), and by a filing third-party lawsuit, the claimant has waived his right to pursue the longshore claim.

Section 33(a) provides:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

33 U.S.C. §933(a). This subsection allows a claimant who has suffered a disability or death to pursue both a claim under the Act as well as to recover damages against a third party. *See generally Mills v. Marine Repair Service*, 22 BRBS 335 (1989) (decision on recon.). The subsections following subsection (a) establish the procedure that must be followed in order to protect the employer's rights and to avoid double recoveries, including the written approval and notification requirements of Section 33(g).

Employer's argument is not supported by the plain language of Section 33(a). There is nothing in Section 33(a) to suggest that all benefits under the Act are waived if a third-party suit is brought by a claimant who is not entitled to disability or death benefits. At best, the provision is silent as to those claimants who seek medical benefits only, and silence cannot be construed as waiver. In referring to "disability or death for which compensation is payable," moreover, Section 33(a) is consistent with our interpretation of the term "compensation" as referring to periodic payments for disability or death.

Finally, in regard to employers' contention that the Board has inconsistently interpreted the phrase "person entitled to compensation," we note that it is possible to interpret it consistently as excluding medical benefits. If the term "compensation" used in Section 33(a) is interpreted to mean disability or death benefits only, and to not include medical benefits, it could be argued that a claimant filing a claim for medical benefits only is not required to follow the established procedures in the other subsections, and thus is not subject to the forfeiture provision of Section 33(g). Moreover, employer would not be entitled to offset the net third-party recovery against its liability for medical benefits pursuant to Section 33(f) if claimant is not disabled and is seeking medical benefits only. This conclusion would be consistent with the language of Section 33(a) and the result reached by the Board in *Harris* in holding that medical benefits alone are not "compensation" under Section 33(g)(1), and thus the entitlement to medical benefits alone cannot invoke the forfeiture provision under that section. Since it is not clear that either of the claims currently before us involves only medical treatment, and inasmuch as employers are not seeking to foreclose their entitlement to an offset pursuant to Section 33(f), we need not resolve this issue in the present case.

Contrary to employer Todd Pacific's contention, the Board did not hold that a claimant is

entitled to medical treatment under Section 7 without the necessity of an underlying harm.[10] *See Harris*, 28 BRBS at 267 n.14. Employer in essence contends that the Board's construction of the term "injury" means that an employee must be disabled in order to receive medical treatment at employer's expense. The Board discussed the 1984 Amendments to the Act which 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); *see* discussion, *supra*. The Board did not, however, extend this approach to the interpretation of the term "injury" under Section 7(a). Claimant's entitlement to medical benefits under Section 7 was not an issue in either of the instant cases, and thus the Board did not discuss its application. Moreover, case law has long held that in order to be entitled to medical benefits under the Act, claimant need not show that he has a specific illness or disease in order to establish he has suffered an injury under the Act, but need only establish some physical harm, *i.e.*, that something has gone wrong with the human frame. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). The case law regarding the procedure for filing a claim for disability benefits due to an occupational disease and the requisite threshold for entitlement to medical benefits have been approached with different definitions of the term "injury."[11] Thus, we hold that the Board's original decision cannot be applied to hold that a claimant is entitled to medical treatment under Section 7 without the necessity of an underlying harm.

In conclusion, inasmuch as the employers have not raised any persuasive new arguments in their motions for reconsideration, we reaffirm the Board's holding that the term "compensation" in Section 33(g)(1) does not include medical benefits. Thus, 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 comply with Section 33(g)(1) cannot bar the claim as they were not "persons entitled to compensation." Moreover, the calculation of the amount of compensation to which the claimants are entitled under the Act, in order to determine if the settlements are for an amount greater or less than this amount, should not include medical benefits.[12]

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[10]Section 7(a) states:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

[11]Significantly, the right to seek medical benefits is never time-barred under Sections 12 and 13 of the Act. 33 U.S.C. §§912, 913; *see Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984).

[12]As demonstrated by the discussion *infra*, the computation of the compensation entitlement for purposes of comparison is difficult enough without requiring an administrative law judge to include highly conjectural future medical benefits in the calculation. Congress could not have intended to create an impractical, if not impossible, calculation as a requirement for application of Section 33(g)(1).

Section 33(g)(1) - Aggregate Settlements

Employers also contend that the Board erred in finding that the third-party settlements should be analyzed in the aggregate, and not individually, in order to determine whether Section 33(g) is applicable. Employers argue that this interpretation is contrary to the plain language of Section 33(g)(1), which refers to a settlement with "a" third person and also to the Court's language in *Cowart* that said that the employer is a real party in interest with respect to "any settlement" that might reduce but not extinguish the employer's liability.

As the Board stated in its original decision, employer is entitled to offset the entire net amount of the recoveries under Section 33(f) in the aggregate. 33 U.S.C. §933(f). This is a slight simplification, as employer receives an offset for the aggregate net settlements of each "person entitled to compensation." *See generally Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT)(3d Cir. 1995)(court holds that the Board erred in not separately considering the provisions of Sections 33(f) and (g) to each claimant); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991). While the language of Section 33(g)(1) refers to a single settlement with a third person, the purpose of Section 33 is to protect employer when claimant files an action against a third person for injuries that also are covered under the Act. In some cases, claimant may file only one third-party action, as in *Cowart*, or several third-party actions as in *Glenn*, 26 BRBS at 187. Employer is not harmed by the claimant's acceptance of too little in one settlement if the aggregate of all third-party settlements adequately protects employer's lien and offset rights. Furthermore, Section 2(22) of the Act, 33 U.S.C. §902(22), specifically states that "the singular includes the plural" and thus there is no support for employers' contention that reference in Section 33(g) to "a settlement" precludes consideration of the aggregate settlement amounts. *See generally Kaye*, 28 BRBS at 253.

Employers contend that if the aggregate amount is used, a claimant can forever prevent Section 33(g) from applying by purposefully keeping one third-party case open. This concern is unfounded. In order to determine if the Section 33(g)(1) bar applies, the administrative law judge should use the amount of the aggregate third-party settlements entered into by the time of the formal hearing in comparison to the amount of compensation to which the claimant is entitled over his lifetime. *See Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). Therefore, we reaffirm the Board's use of the aggregate total of the third-party settlements in comparison to the amount of compensation to which the claimant would be entitled under the Act.

Section 33(g)(1) - Comparison of Gross Settlement

The Director has submitted supplemental authority for the Board's reconsideration of its holding that in comparing the amount recovered by a claimant from third-party settlements with the amount of compensation to which the claimant would be entitled under the Act in order to determine whether the settlement is for "less than" the compensation entitlement, the net amount of the third-party settlements is the relevant figure. *Harris*, 28 BRBS at 266. As the authority submitted by the

Director was issued subsequent to the time for filing a motion for reconsideration, and is relevant to the Board's holding in the instant case, we will address the Director's contentions. *See* n.1, *supra*.

In its initial decision in this case, the Board rejected the Director's contention that Section 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. *Harris*, 28 BRBS at 266. The Board held that inasmuch as Section 33(g) references Section 33(f), which specifically refers to employer's entitlement to an offset for the *net* amount recovered from third parties, 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.

However, subsequent to the issuance of the Board's decision, the United States Court of Appeals for the Third Circuit held in *Bundens v. J.E. Brenneman*, 46 F.3d 292, 29 BRBS 52 (CRT)(3d Cir. 1995), *aff'g and rev'g* 28 BRBS 20 (1994), that in applying Section 33(g), the gross, not the net, settlement funds should be considered in making this comparison. The court noted that the language of the statute under Section 33(f) specifically refers to the "net amount recovered against such third person" and Section 33(g) refers simply to "a settlement for an amount less than the compensation to which the person would be entitled." *Bundens*, 46 F.3d at 305, 29 BRBS at 71-73 (CRT). Thus, the court reasoned that Congress demonstrated its ability to specify "net amount" in Section 33(f), yet chose not to so specify in Section 33(g).

As we find the court's reasoning to be persuasive, we vacate the Board's decision on this issue and hold that the Section 33(g) "less than" comparison is between the gross amount of the aggregate third-party settlement recoveries and the amount of compensation to which the claimant would be entitled. The court noted that the inclusion of "net" and its definition in Section 33(f) was part of a comprehensive 1984 overhaul of Section 33. During this revision, Congress rewrote four subsections, including Section 33(g), but did not elect to include the "net" language that it placed in Section 33(f) in Section 33(g). *Id.* In addition, we note that the use of the gross settlement amounts for comparison purposes under Section 33(g)(1) is in agreement with the Director's interpretation of that section. *See Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991)(considerable deference is accorded to an agency's interpretation of its authorizing statutes).

Section 33(f)

Finally, employers contend that the Board erred in failing to apply the language of *Cowart* and *Cretan* that whether the amount of the settlements was for more than or less than the compensation to which the claimant would be entitled under the Act is irrelevant, as the claim either would be barred under Section 33(g) or "wiped out" under Section 33(f).

Even if the claims are not barred under Section 33(g), employer is 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.[13] 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.

The Board held that 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. *Harris*, 28 BRBS at 268. 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 are suspended until the net recovery is exhausted. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). The Board disagreed 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 greater than the employer's liability, the employer is protected regardless of the precise amount of the settlement because his liability for compensation is "wiped out" under Section 33(f), *Cowart*, 112 S.Ct. at 2597, 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, in its decision, the Board noted 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 Board held that the effect of Section 33(f) was not before the Court and discussion of this issue is *dicta*. *Harris*, 28 BRBS at 269.

In *Cretan*, the Ninth Circuit addressed the question of whether the decedent's survivors were "entitled to compensation" at the time of the pre-death settlements. The court held that the claimants were 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*, 65 F.3d at 464, 29 BRBS at 116 (CRT). Furthermore, the court stated that if the

[13]As noted, employer would be entitled to offset both compensation and medical benefits under Section 33(f) because it refers to the "amount" payable on account of such injury or death and not to "compensation" payable. 33 U.S.C. §933(f).

claimants' third-party recovery exceeded their statutory entitlement, employer would have been entitled to a total set-off of its entire statutory liability. *Cretan*, 1 F.3d at 848, 27 BRBS at 99 (CRT). 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 Board held that the decision in *Cretan* also is not dispositive in the present cases based on this distinction. *Harris*, 28 BRBS at 269.

Employer Todd Pacific agrees with the Board's holding to the extent that it means "when a claimant has obtained the employer's written approval of third-party settlements pursuant to Section 33(g), his rights to a "deficiency" under Section 33(f) are protected once the aggregate of his net recoveries are exceeded." Todd Pacific Br. at 11. Todd Pacific states that if the Board meant by its decision that its liability is not "wiped out" under Section 33(f) because Section 33(g) does not apply as the third-party settlement is greater than "employer's benefits liability," its decision is wrong. Todd Pacific contends the Board failed to give examples of when deficiency compensation would be due under its holding.

First, employer incorrectly suggests that the Board intended employer's setoff under Section 33(f) to be limited by a consideration of whether the third-party settlements exceed the compensation to which the claimant is entitled *at the time of the settlement*. The Board held in *Linton*, 28 BRBS at 282, that the calculation under Section 33(g) involving the compensation to which claimant is entitled under the Act is to be the claimant's expected lifetime compensation. If the expected lifetime compensation is greater than the third-party settlements, claimant must comply with Section 33(g)(1). If claimant complies with subsection (g)(1), employer receives a setoff until the net amount of the settlements is exhausted, and then is again liable for compensation and medical benefits. If claimant does not comply with subsection (g)(1), compensation is barred, and employer receives a lien against the proceeds for any payments it made to claimant.

If, however, the third-party settlements are greater than the lifetime compensation to which the claimant is entitled, *not including medical benefits*, subsection (g)(1) does not apply under *Cowart*. Employer receives an offset under Section 33(f) for the net amount of the third-party settlements, *but*, if there is a need for continuing medical benefits, the net amount could run out, leaving employer once again liable for medical benefits. Inasmuch as the injured employees were deceased in both *Cowart* and *Cretan* no issues involving medical benefits were before the courts, and the courts were not faced with the potentiality of continuing medical benefits. *Harris*, 28 BRBS at 269. Thus, these decisions are not controlling in cases with dissimilar fact patterns.

Under Section 33(f), the employer is required to pay as compensation under the Act "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." 33 U.S.C. §933(f). Thus,

the language of Section 33(f) indicates that Congress has provided for the eventuality of a deficiency judgment to be paid by employer. *See, e.g., Bundens*, 46 F.3d at 304-305, 29 BRBS at 71 (CRT) (noting child's entitlement to deficiency compensation). We therefore reaffirm the Board's holding 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 both employer's liability for both compensation and medical benefits under the Act.

We note that this decision focuses on employers' specific arguments on reconsideration. In summary, however, we wish to emphasize that the critical factor in determining the applicability of Section 33(g)(1) is the comparison between the gross amount of the aggregate third-party settlement proceeds and the amount of compensation, not including medical benefits, to which the person would be entitled under the Act. This comparison requires findings of fact by the administrative law judge, and it is improper to grant summary judgment in an employer's favor merely because the claimant failed to secure employer's prior written approval of the third-party settlement. As the Supreme Court stated in *Cowart*, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT), subsection (g)(1) does not apply if the amount of the third-party settlements is more than the amount of compensation to which the claimant would be entitled under the Act.

Accordingly, the employers' motions for reconsideration *en banc* are granted, but the relief requested is denied. 20 C.F.R. §802.409. We reaffirm the Board's previous holdings that a retiree is not a "person entitled compensation" under Section 33(g) until he is aware that he has a permanent physical impairment related to his employment and that "compensation" as used in Section 33(g)(1) does not refer to medical benefits. In addition, we reaffirm the Board's previous holding that the aggregate third-party settlements should be used in comparing the amount of compensation to which the claimants are entitled under the Act to determine the applicability of Section 33(g)(1). However, we vacate the Board's prior determination that the Section 33(g) "less than" comparison is between the net amount of third-party settlement recoveries and the amount of compensation to which the claimant would be entitled, and we adopt the court's reasoning in *Bundens*, 46 F.3d at 305, 29 BRBS at 71-73 (CRT), that the gross amount of the aggregate third-party settlement recoveries is to be used for comparison purposes under Section 33(g)(1). Lastly, we reaffirm the Board's prior holding that where the forfeiture provision of Section 33(g)(1) does not apply, the offset provision under Section 33(f) does not necessarily "extinguish" employer's total statutory liability but provides employer a credit against future amounts due equal to the net recovery of the employee.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the decision of the majority on the motion for reconsideration to uphold the order of the original panel which reversed the summary judgments of the administrative law judge in favor of the employers in these two consolidated cases. The administrative law judges dismissed the claimants' claims under the Longshore Act, holding that they were barred pursuant to *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), in that they had entered into third-party settlements without the written approval of the employers, and that, pursuant to *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), any possible further liability of the employers was precluded. I would have affirmed the grants of summary judgment.

As Section 33(a) of the Act points out, if on account of a disability or death "for which compensation is payable," the "person entitled to such compensation" may receive such compensation and may also institute suit against a third party that the "injured" person determines is liable in "damages." 33 U.S.C. §933(a). Section 33 does not specify when the compensation is payable. It allows the "person entitled to compensation" to both receive the compensation and also institute a third-party suit. The person need not make an election to pursue one remedy or the other. There is no time limit in determining when an employee becomes a "person entitled to such compensation." In a clear case it can be made immediately. In other cases it is done only after the filing and final adjudication of a claim. Regardless of when the determination is made, the employee falls within the definition of the term.

The Supreme Court in *Cowart* settled the prior misconception that when a person settled a third-party suit such person was not a "person entitled to compensation" for the purposes of the written approval requirement of Section 33(g)(1) of the Act, if the person was not receiving compensation at the time of settlement. The Supreme Court pointed out that as a preliminary matter, both in legal and general usage, the normal meaning of entitlement includes a right to benefits for which a person qualifies and does not depend upon whether the right has been acknowledged or adjudicated. *Cowart*, 112 S.Ct. at 2595, 26 BRBS at 51 (CRT). It held that Cowart suffered an injury which gave him a right to compensation. He became a person entitled to compensation at the

moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen. *Id.* I would like to point out, incidentally, that term "person entitled to compensation," as used in the Act, and as used by the Supreme Court, inferentially means not only compensation, but other entitlements such as medical services and supplies and rehabilitation. An injury arising out of and in the course of employment gives rise to those entitlements simultaneously.

The majority attempts to distinguish *Cowart*, in which there was a physical injury, which occurred instantaneously, causing immediate awareness, and an occupational disease case in which the disability may not occur until after a long latency period. It thus would be in order to re-visit *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). It was held therein that in an occupational disease case an employee can be held to be injured only when the accumulated effects of the deleterious substance manifest themselves. The *Travelers* court in a Longshore case adopted this holding from *Urie v. Thompson*, 337 U.S. 163 (1949), a case under the Federal Employer's Liability Act. The *Travelers* court went on to hold that the last employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. *Id.* at 145. Judge Medina based his holding in *Travelers*, that is, the establishment of a date of injury, upon the realization that every claim based upon occupational disease would be barred if the one year statute of limitations period were declared to begin running when contact is first had with the conditions causing the disease or when the disease first ensues. *Id.* Note that we have a court-created rule to establish a time of injury in an occupational disease case to protect a claimant from the time effects of the statute of limitations, although the court recognized that it was during the actual exposure that claimants were subjected to "deleterious substances" and to the "injurious stimuli."

The 1984 Amendments to the Act codified, in effect, the awareness rule of *Travelers* in Sections 12 and 13. 33 U.S.C. §§912, 913 (1988). Section 12(a) requires that notice of an injury in respect to which compensation is payable shall be given within thirty days. In the case of occupational disease such notice shall be given within one year after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware of the relationship between the employment, the disease and the death or disability. Section 13(b)(2) provides a two year statute of limitations for the filing of a claim in an occupational disease case after employee or claimant becomes aware, or should have been aware of the relationship between the employment, the disease and the death or disability.

The purpose of the rule in *Travelers* and in the amended Sections 12 and 13 of the Act is to protect the exposed employee who has not filed a claim, or given timely notice, because he was not aware of the effects of any occupational exposure he may have had. But that is not the situation in the two instant cases. Here the claimants apparently filed timely claims under the Act and have also apparently filed timely third-party claims within the requisite statute of limitations. The majority would remand these cases for hearings to determine whether claimants were "persons entitled to compensation" for the purposes of the written approval requirements under Section 33(g)(1), a

determination which, in turn, will be based upon a finding whether the claimants, at the time of the third-party settlements, were aware that they had a disability as a result of an occupational disease related to exposure during their employment. Since both claimants were retirees the majority would hold that they must also be aware that they had an impairment at the time of the settlements calculated according to the American Medical Association *Guides to the Evaluation of Permanent Impairment (*AMA *Guides*) pursuant to Section 2(10) of the Act, 33 U.S.C. §902(10)(1988). They would set up, really for the first time in the case of retirees, technical requirements, to determine whether they were persons entitled to compensation subject to the written approval requirements of Section 33(g)(1) when entering into third-party settlements. The Supreme Court in *Cowart* eliminated the main obstacle in this area of law when it held that a person entitled to compensation need not be actually receiving compensation at the time of settlement but that written approval was necessary if the settlement was for less than the amount of compensation to which the person would be entitled.

Here we had two claimants who were exposed to asbestos fibers during the course of their employment, who sustained pulmonary conditions related to asbestos exposure, who, with counsel, filed claims under the Act against their employers, based upon conditions sustained as a result of asbestos exposure, and who, in turn, filed suits against the asbestos manufacturers and suppliers. The basis of the claims and the suits was the same resulting conditions. The third-party claims were settled for gross amounts of $36,886.21 and $33,000, both substantial sums. Just when the claimants became aware of their conditions and the relationship to their occupational asbestos exposure to determine a time of injury in a legal sense for the purpose of the rule in *Travelers* and the limitations requirements of Sections 12 and 13 is not clear, but, with the receipt of medical advice, and with the filing of the claims and the suits, and with the substantial settlements, it is obvious that both claimants were "aware" at the time of the settlements, were injured, and thus were "persons entitled to compensation." That was the critical time period. Written approval was not obtained from the employers. Under *Cowart*, it should have been if the settlements were for less than the compensation to which they would be entitled.

At this stage of the proceedings the majority would remand for a determination of the "awareness" issue. Common sense would compel a deduction that both claimants were well aware of their conditions and their relationship to their employment. That is why they filed claims and also third-party suits. The fact that the manufacturers settled for substantial figures supports the conclusion that these claimants had suffered injuries resulting from asbestos exposure in their employment. We can take judicial notice that suits estimated to be in the neighborhood of 400,000 have been filed against manufacturers, some individually, some class actions, that many courts around the country have been overwhelmed with this type of litigation and that a number of manufacturers had to resort to Chapter 11 of the Bankruptcy Code. As a practical matter, we are reviewing facts that have already taken place; claimants met all the requirements of awareness, were injured, were in the positions of "persons entitled to compensation" at the time of the settlements. Suppose a claimant concededly had mesothelioma and entered into a third-party settlement for several hundred thousand dollars. Would it be necessary to have a hearing to determine if he was a person entitled to compensation? Suppose, in addition, he was a retiree, but was never rated under

the AMA *Guides*. Would that remove him from the requirements to obtain written approval under Section 33(g)(1)? That is what the majority has concluded. They continue to assert a statement made in the original panel decision: "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." *Harris*, 28 BRBS at 263. To use this as a standard to determine "persons entitled to compensation" would render the requirements of Section 33(g)(1) meaningless in thousands of cases involving retirees. As a practical matter, the requirements of Section 33(g)(1) would apply only to non-retirees.

The majority cites no authority for its created and newly defined definition of a "person entitled to compensation." The fact that Section 2(10) provides that the extent of impairment of a retiree shall be determined according to the AMA *Guides* simply sets forth a means to determine the extent of impairment and, in turn, the amount of compensation the claimant will receive. It has nothing to do with the requirements of Section 33 and its various subsections. What *Cowart* clearly held is that a person sustaining an injury arising out of and in the course of employment, who brings an action against a third party for damages, and who enters into a settlement for an amount less than the compensation to which he would be entitled, must obtain the prior written approval of the employer. If not, he loses the right to further benefits under the Act. In *Cowart*, the claimant sustained a traumatic injury to his hand. The majority strains to differentiate in the case of occupational diseases because of the possible long latency period before the claimant is aware of the effects of the exposure. That is significant for statute of limitations purposes, as pointed out above. There really is no difference between a traumatic injury, however, and one caused by exposures that give rise to an occupational disease. The physical injuries in both cases occur during the period of employment. In the case of an occupational lung disease the injury occurs during the period of exposure.[14] That is when the employee's lungs are subjected to the "deleterious substances" and the "injurious stimuli." The Act, of course, recognizes that there may be a long latency period before the effects of the deleterious substance and injurious stimuli are known. That is why the statute of limitations provisions were amended in 1984, codifying the *Travelers* ruling. But, as the Supreme Court in *Cowart* stated, it is the suffering of an injury which gave claimant a right under the Act to compensation from his employer. It stated he became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen. *Cowart*, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). The vesting occurs with the suffering of an injury. In these cases we do not know when that occurred, but it obviously occurred well before the third-party settlements were consummated, and thus, under *Cowart*, these claimants were persons entitled to compensation at the time of the settlements. As was observed by the United States Court of Appeals for the Fifth Circuit in *Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 846, 12 BRBS 922, 925 (5th Cir. 1981), although the cause of action for death benefits does not arise until death, it would be inaccurate to state that the right to death benefits had its origin solely in the death. The real source of the liability under the Act is traced back to a maritime injury.

[14]The Supreme Court noted this specifically in occupational hearing loss cases in *Bath Iron Works Corp. v. Director, OWCP*, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993).

Section 33(g)(1) provides, in effect, that if the person entitled to compensation enters into a settlement for an amount less than the compensation to which the person would be entitled, and written approval of the settlement is not obtained from the employer, the employer shall not be liable for further compensation under Section 33(f). The majority has engaged in a lengthy discourse to sustain its theory that medical benefits are something aside from monetary compensation with the result that if the written-approval requirements of Section 33(g)(1) are applicable, that is, when the settlement is for less than the compensation to which claimant is entitled, the employee would not be barred by Section 33(f) from obtaining future medical benefits. They contend the Longshore claim would not come to a close despite the holding in *Cretan*.

The ultimate result of *Cowart* is that if a person is subject to the written-approval requirements of Section 33(g)(1), and settles a third-party suit for less than the compensation to which he would be entitled, he forfeits all longshore *benefits*. *Cowart*, 112 S.Ct. at 2594, 26 BRBS at 51 (CRT). As stated in the first paragraph of the *Cowart* opinion, under certain circumstances "all future benefits including medical benefits are forfeited." *Id.*, 112 S.Ct. at 2592, 26 BRBS at 50 (CRT). Towards the end of the opinion, discussing Section 33(g)(2), the Court noted that written approval is not required in two circumstances: (1) where the employee obtains a judgment and (2) where the employee settles for an amount greater or equal to employer's *total liability*. The logical deduction, therefore, is that in the remaining circumstances, (3) where the settlement is for an amount less than employer's total liability, written approval is required. This brings us back to the significance of *Cowart's* opening statement on this subject. Under the "less than" settlement "all future benefits including medical benefits are forfeited."

We next come to the effect of *Cretan v. Bethlehem Steel Corporation*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied* 114 S.Ct. 2705 (1994), especially since it was a Ninth Circuit decision and the present cases are within the jurisdiction of the Ninth Circuit. In *Cretan* the claimant was exposed to asbestos in the years 1942 and 1943. He developed mesothelioma. He filed a claim under the Act against his employer for compensation and medical benefits. He also filed a third-party action against a number of asbestos manufacturers. The third-party claims were settled in a series of agreements for an aggregate net amount of approximately $333,489 plus a $50,000 annuity. Although claimant's wife and daughter were not parties to the third-party action, they joined in the settlement of their potential claims for wrongful death. The court held that the Cretans were persons entitled to compensation, although no compensation was being paid at the time, for purposes of Section 33(g) as well as Section 33(f). As authority, the court cited *Cowart*. It further went on to point out that if the third-party recovery was less than the Cretans were entitled to under the Section 33(g), recovery under the Act from employer would be precluded due to failure to obtain written approval. On the other hand, if the settlement exceeded this entitlement under the Act, employer would be entitled to a 100 percent set-off under Section 33(f). *Cretan*, 1 F.3d at 846, 27 BRBS at 96 (CRT). Consequently, the court held that the Cretans were persons "entitled to compensation" and were subject to the provisions of Sections 33(g) and (f) when they settled their tort claims. The court held that the two provisions acted as a complete bar to recovery from employer. *Id.*, 1 F.3d at 848,

27 BRBS at 99 (CRT). There was no discussion about awareness, time of injury, or an AMA *Guides* determination. There was no need to. The same is true of the present cases. Based upon the holdings in *Cowart* and *Cretan* any further recovery against employers is precluded. Of great significance is the fact that the Supreme Court denied *certiorari* in *Cretan*; thus its holding that further recovery by the claimants under the Act is precluded by reason of the application of Sections 33(g) and (f) is the law in the Ninth Circuit.

The majority expresses the view that *Cretan* is not dispositive because the court did not have to consider the effects of employer's liability for ongoing medical benefits. However, this was clearly in the holding of the Supreme Court which used such terms as employer's "total liability," forfeiture of all longshore "benefits" and under certain circumstances, "all future benefits including medical benefits are forfeited." It should be borne in mind that the Section 33(a) suits against third-parties are for "damages." Cases have held that the "damages" include compensation, funeral benefits, punitive damages and pain and suffering.[15] Damages in a third-party personal injury case would also include medical costs, present and future.[16] It thus would appear that the third-party settlements in these cases also encompassed the medical benefits and that if claimants were allowed to proceed against employers for any future medical benefits, this would amount to a double recovery. As was stated in *Force v. Director, OWCP*, 938 F.2d 981, 984, 25 BRBS 13, 18 (CRT) (9th Cir. 1991), "[t]he only relevant question is whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur." Nobody has raised this issue but it really is not necessary in view of the *Cowart* Court's pronouncement on forfeiture of all benefits.

[15]*See generally Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT) (D.C. Cir. 1986); 33 U.S.C. §902(12).

[16]The fact that the term "damages" in a third-party suit includes all medical benefits, past and future, is clear from a reading of Sections 33(a), (b) and (e) of the Act. That includes the situation where the third-party action is assigned to employer. Subsection (e) designates the amount of the recovery to be retained by employer, specifying expenses, the cost of benefits under Section 7 (*i.e.*, the medical benefits), compensation paid, present value of future compensation and the present value of all future medical benefits under Section 7 to be estimated by the Director.

Accordingly, I would affirm the summary judgments entered by the administrative law judges holding that the claimants are barred from proceeding further under the Longshore Act and that any possible further liability of the employers is precluded. I am not inclined to challenge the Supreme Court's holding in *Cowart* or the holding of the Court of Appeals for the Ninth Circuit in *Cretan*.

JAMES F. BROWN
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's opinion except for its construction of the term "person entitled to compensation" at Section 33(g). On that issue, I concur in Judge Brown's dissent. I feel constrained to write separately to demonstrate how the majority's decision contravenes the decision of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), in derogation of the Board's responsibility to apply the law of the Ninth Circuit to this case which arises within that court's geographic jurisdiction.

The majority holds that claimants, voluntary retirees, are not "person[s] entitled to compensation" within the meaning of Section 33(g) until their right to compensation vests, *i.e.*, such time as they can sue for compensation as opposed to medical benefits only. Thus, the majority remands both cases to determine whether the right of each claimant to compensation had vested prior to his third-party settlement, because if it had not vested claimant would not be a "person entitled to compensation" and Section 33(g) could not bar recovery under the Act. The majority thereby rejects the holding of the Ninth Circuit in *Cretan*, that vesting of the right to compensation is not a prerequisite to being a "person entitled to compensation" pursuant to Section 33(f). The court held that the wife and daughter of the injured worker who settled their survivors' claims prior to his death from mesothelioma, and without the requisite consent, were "persons entitled to compensation" pursuant to Section 33(g) notwithstanding the fact that their right to compensation had not vested at the time of settlement.

The court declared to be *dicta* the language in *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), which the majority cites to support its contention that vesting of the right to compensation is necessary to become a "person entitled to compensation" at Section 33(g). *Cretan*, 1 F.3d at 847, 27 BRBS at 98 (CRT). The court cautioned against divorcing the Supreme Court's language in *Cowart* from the facts of the case. *Id.* The Ninth Circuit explained that the fundamental basis of the Supreme Court's interpretation of Section 33(g) was vindication of the purpose of that subsection: to protect the employer from its employee's settling his claim against a

third party for too little money, thereby depriving employer of a proper offset under Section 33(f). *Id.*, citing *Cowart*, 112 S.Ct. at 2598, 26 BRBS at 53 (CRT). The Ninth Circuit reasoned that to exempt from the strictures of Section 33(g) those third-party settlements by claimants whose right to compensation had not yet vested would significantly undermine the purpose of the subsection. The court therefore expressly held that the term, "person entitled to compensation," under both Sections 33(f) and (g) was not restricted to those whose rights to compensation had vested. The court made plain the practical ramifications of the application of the Board's interpretation of Section 33(g): "third-party tort feasors could benefit from offering to desperate families inordinately small settlements, the deficiencies of which the employer would have to make up." *Id.* The Ninth Circuit thus expressly rejected the interpretation of "person entitled to compensation" in Section 33(g) which the majority holds applicable today.

The court further explained that its interpretation of "person entitled to compensation" in Section 33(g) was reinforced by reference to Section 33(f). Section 33(g) protects employer from an employee's entering into unwise third-party settlements so that employer can maximize its right to offset of third-party settlements, which is provided in Section 33(f). In other words, the two sections pertain to the same settlements by the same parties and the sections are complementary in protecting employer's interest. Yet the majority interprets "person entitled to compensation" differently in Section 33(f) from Section 33(g). The majority holds that the Section 33(g) requirements for settlements by "persons entitled to compensation" do not apply to those whose right to compensation has not vested but holds that employer is entitled to offset of the net proceeds of third-party settlements by a "person entitled to compensation" under Section 33(f), whether or not that person's right to compensation had vested at time of settlement. It is surprising that the majority would insist upon interpreting the term "person entitled to compensation" differently in Section 33(f) from Section 33(g), since the Supreme Court chastised the Board in *Cowart* for having "adopted differing interpretations of the identical language in Sections 33(f) and 33(g)." *Cowart*, 112 S.Ct. at 2596, 26 BRBS at 52 (CRT). The majority's attempt to justify this inconsistency is as unpersuasive as the Supreme Court found its prior explanation.

The majority seeks to evade the force of *Cretan* by asserting that it is uncontroverted that at the time of settlement Cretan had a compensable injury, whereas the relevant evidence has not been adduced to demonstrate whether claimants in the case at bar had a compensable injury at the time of settlement, resulting in the vesting of their rights to compensation. This contention is pure sophistry because the issue in *Cretan* was whether a wife or daughter who settles a survivor's claim prior to the injured employee's death is a "person entitled to compensation" under Section 33(g) at time of settlement, even though her right to compensation has not vested. The Ninth Circuit plainly held that both the wife and daughter were "person[s] entitled to compensation" under both Sections 33(f) and (g) although their rights to compensation had not vested because to hold otherwise "would contradict the policy of employer protection that is evident on the face of sections 33(f) and (g). *See Cowart*, ___ U.S. at ___, 112 S.Ct. at 2598." *Cretan* 1 F.3d at 848, 27 BRBS at 98 (CRT). In sum, the majority's interpretation of "person entitled to compensation" under Section 33(g) is unsound because it violates the Supreme Court's direction to construe in the same way identical terms used in Sections 33(f) and 33(g), and because it undermines the purpose of the section by unreasonably

restricting the applicable settlements. *Cowart*, 112 S.Ct. at 2598, 26 BRBS at 53 (CRT). Beyond peradventure, the majority's decision cannot stand because it violates the holding of the Ninth Circuit in *Cretan*, that the right to compensation need not be vested for one to be "a person entitled to compensation" under Section 33(g).

Accordingly, I would hold that both claimants were "persons entitled to compensation" under Section 33(g), but I would remand both cases for the administrative law judges to determine whether the gross amount of the third-party settlements is less than the amount of compensation to which claimants would be entitled under the Act. It if is, claimants' failure to obtain employers' written consent to the settlements precludes recovery under Section 33(g)(1) the Act. If, however, the recovery exceeds the compensation to be paid, I agree with the majority, that although Section 33(f) provides employer with an offset of the net amount of the third-party settlements, that sum could be exhausted prior to payment for continuing medical benefits. Thus, application of the credit under Section 33(f) does not necessarily terminate employers' liability under the Act.

REGINA C. McGRANERY
Administrative Appeals Judge