BRB Nos. 94-1427 - 94-2176

GEORGE A. GLADNEY, *et al.*	)	
	)	
Claimants-Petitioners	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DATE ISSUED:_____
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motions for Summary Judgments and the Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Hayden S. Dent (Scruggs, Millette, Lawson, Bozeman & Dent), Pascagoula, Mississippi, for claimants.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Mark Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

SMITH, Administrative Appeals Judge:

Claimants appeal the Decision and Order Granting Employer's Motions for Summary Judgments and the Decision on Motion for Reconsideration (93-LHC-7050, *et al.*) of Administrative Law Judge C. Richard Avery granting summary judgment on 750 claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901

et seq. (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case represents a consolidation of 750 cases filed by claimants who were allegedly exposed to asbestos during the course of their employment with employer. After the cases were transferred to the Office of Administrative Law Judges, employer filed a motion for summary judgment for the consolidated cases, and claimants were ordered to show cause why the motion should not be granted. Employer contended that claimants entered into third-party settlements without its prior approval and that, therefore, all are barred from seeking compensation under the Act pursuant to Section 33(g), 33 U.S.C. §933(g). Claimants and the Director, Office of Workers' Compensation Programs (the Director), responded to the motions, arguing that there are issues of fact which must be resolved before it can be determined whether Section 33(g) can be invoked to bar claimants from seeking benefits under the Act. Specifically, they asserted that the administrative law judge must determine whether each claimant is a "person entitled to compensation" under Section 33(g) and whether each claimant received third-party settlement proceeds in amounts more or less than the amount to which each is entitled under the Act. Alternatively, the Director asked the administrative law judge to hold the cases in abeyance until various cases pending before the Board could be decided.

[1]By Order dated April 19, 1994, the Board consolidated these 750 appeals and designated the *Gladney* case, BRB No. 94-1427, as the lead case for purposes of briefing and decision. A list of all claimants and BRB Numbers is attached to this decision.

The administrative law judge rendered his summary judgment based on William Jordan's affidavit which was submitted by employer and averred that, without prior approval, each claimant entered into third-party settlements for less than the amount of compensation to which he would be entitled to under the Act.[2] Although claimants responded to employer's motion, they filed no rebuttal affidavits, and the administrative law judge concluded that the facts of each case were as employer averred. Decision and Order at 3. He then purported to apply the law as set forth in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2705 (1994), and *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), and he determined that each claimant forfeited his right to compensation and medical benefits under the Act by virtue of the failure to comply with the requirements of Section 33(g). Decision and Order at 4-6. Consequently, the administrative law judge granted employer's motion for summary judgment. *Id.* at 6.

Claimants filed a Motion for Reconsideration, attaching the affidavit of Hayden S. Dent, counsel for claimants, who testified that the claimants can be categorized into four different groups: those who have been diagnosed with a pulmonary disease but who have no disability; those who have a disability;[3] those who died from causes relating to their pulmonary condition; and those who died from causes unrelated to their pulmonary condition. Based on the affidavit, claimants argued that there are unresolved issues of fact affecting the applicability of Section 33(g) to each claimant. The administrative law judge summarily denied claimants' motion for reconsideration, concluding there is no compelling reason to alter his original decision. Claimants appeal the administrative law judge's decisions. Employer responds, urging affirmance, and the Director responds, urging the Board to vacate the decisions and remand the cases to the administrative law judge.

On appeal, claimants contend the administrative law judge erred in granting summary judgment in each case because questions of material fact remain unresolved. They argue that the administrative law judge should have determined whether each is a "person entitled to compensation" and whether each entered into third-party settlements for amounts less than the amount of compensation to which he is entitled under the Act before it can be determined whether Section 33(f) and/or (g), 33 U.S.C. §933(f), (g), applies to extinguish employer's liability for benefits under the Act. The Director agrees and contends the administrative law judge erroneously failed to follow the Board's decision in *Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186 (decision on recon.), *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J., concurring), which was subsequently reaffirmed in *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on*

[2]William Jordan is the Senior Staff Attorney for Ingalls Shipbuilding, Inc., and he testified that he has legal responsibility for all claims filed under the Act and that he observed the reviewing process for each of the claims herein.

[3]Counsel subdivided this group into claimants who entered into third-party settlements for less than the amount to which they would be entitled under the Act and those who entered into settlements for more than they would be entitled under the Act.

recon. en banc, ___ BRBS ___, BRB No. 93-2227 (January 25, 1996) (Brown and McGranery, JJ., concurring and dissenting). Additionally, claimants challenge the administrative law judge's reliance on William Jordan's affidavit as well as the constitutionality of Section 33(g)(1). Employer responds, maintaining that the administrative law judge correctly disposed of the 750 cases before him. Employer also asserts the propriety of the administrative law judge's reliance on *Villanueva*, 868 F.2d at 684, as it contends that *Glenn* and *Harris* were incorrectly decided by the Board.

We agree with claimants and the Director that there are unresolved issues of material fact in the cases presently before the Board; therefore, we hold that it was improper for the administrative law judge to grant employer's motion for summary judgment. The Board recently addressed issues identical to the ones raised in these cases in its two decisions in *Harris*. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, ___ BRBS ___, BRB No. 93-2227 (January 25, 1996) (Judges Brown and McGranery dissenting from majority's construction of the term "person entitled to compensation"). In *Harris*, the Board discussed when a claimant in an occupational disease case sustains an "injury" within the meaning of the Act. It held that a claimant who is a voluntary retiree does not sustain an injury until he is aware of the relationship between his disease, his employment, and his permanent physical impairment, and that a claimant who is not such a retiree must be aware of a work-related disease which has caused a loss in his wage-earning capacity. This awareness must occur before one can be considered a "person entitled to compensation," thereby potentially invoking the Section 33(g) bar. Resolution of this issue requires findings of fact. Thus, an administrative law judge's failure to ascertain these facts and instead grant an employer's motion for summary judgment is erroneous. *Harris*, slip op. at 10; *see also Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); *Glenn*, 27 BRBS at 115; *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). Further, the Board held that receipt of payments for medical treatment alone does not make a claimant a "person entitled to compensation," and that in order for Section 33(g) to bar a claimant's entitlement to compensation, a comparison must be made between the gross amount of claimant's aggregate third-party settlement recoveries and the amount of compensation, exclusive of medical benefits, to which he would be entitled under the Act. *Harris*, slip op. at 16, 18; *see also Cowart*, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT) (Section 33(g)(1) is inapplicable if a claimant's third-party settlement is for an amount greater than the amount to which he is entitled under the Act). The Board also determined that Section 33(f) does not extinguish an employer's total liability for benefits in every case, but rather provides the employer with a credit in the amount of the claimant's net third-party recovery against its liability for compensation and medical benefits. *Harris*, slip op. at 20; *see also Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995) (deficiency compensation due to minor child pursuant to Section 33(f)).

As the Board previously has addressed the issues presented in this consolidation of cases, we decline to revisit them. For the reasons set forth in the Board's prior decisions in *Harris*, we hold that the administrative law judge erred in granting summary judgment because there are unresolved questions of material fact. Specifically, there are questions as to whether each claimant is a "person entitled to compensation" under Section 33(g) and whether each settled a third-party claim for less than or more than the amount of compensation to which he is entitled under the Act. Therefore, we

vacate the administrative law judge's decisions herein, and we remand these cases to him for further action consistent with law.[4] *Harris*, 28 BRBS at 270; *Deakle v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994) (dismissal is appropriate when a claim is moot); *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994) (dismissal is appropriate when a claim is premature); *see also Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994); *Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (Brown, J., concurring), *aff'g on recon. en banc* 27 BRBS 250 (1993) (Brown, J., concurring) (dismissal is appropriate when there is no claim pending); *Glenn*, 26 BRBS at 189-190.

Further, we reject employer's argument that the administrative law judge properly relied on *Villanueva*, 868 F.2d at 684, in concluding that he need not make a factual determination of the amount for which each claimant settled his third-party cases. In *Villanueva*, decided three years before the Supreme Court of the United States rendered its decision in *Cowart*, the United States Court of Appeals for the Fifth Circuit denied Villanueva's cross-claim for additional workers' compensation benefits. The Fifth Circuit stated that, although it was impossible to tell whether Villanueva's third-party settlement was for more or less than his entitlement under the Act, it was not necessary to make such a finding, as the employer and its carrier were not liable for any further compensation. Specifically, the court stated that if Villanueva's settlement was for more than his entitlement, Section 33(f) extinguished the employer's liability, and if it was for less than his entitlement, Section 33(g) precluded additional compensation because Villanueva failed to obtain prior approval of the third-party settlement. *Villanueva*, 868 F.2d at 688. Contrary to the administrative law judge's conclusion in this case that *Cowart* did not alter the outcome of *Villanueva*, the Supreme Court's decision in *Cowart* made it clear that an employee's third-party settlement proceeds must be compared with his workers' compensation entitlement in order to determine the applicability of the Section 33(g)(1) bar. *Cowart*, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT); *see also Bundens*, 46 F.3d at 292, 29 BRBS at 52 (CRT); *Harris*, 28 BRBS at 265-266; *Linton*, 28 BRBS at 289-290; *Glenn*, 26 BRBS at 190-191. If an employee obtains third-party settlement proceeds in excess of his entitlement under the Act, the Section 33(g)(1) forfeiture provision does not apply; however, the employer must be notified of such a settlement. Failure to make the comparison and determine which subsection of Section 33(g) applies effectively reads the notice requirement of Section 33(g)(2) out of the Act. *See Harris*, 28 BRBS at 266 n.12. Moreover, as is demonstrated by *Bundens*, factual situations may arise where all benefits are not offset by

[4]In view of the case precedent, claimants' argument that the administrative law judge improperly relied on the affidavit submitted by employer is moot. We note that the administrative law judge acted within his discretion in crediting Mr. Jordan's affidavit in ruling on the motion for summary judgment. 29 C.F.R. §18.40. Claimants, however, were not required to file counter affidavits but merely to oppose the motion by setting forth specific facts demonstrating the existence of a genuine issue of fact to be decided at a hearing. 29 C.F.R. §18.40(c); Fed. R. Civ. P. 56(b). Claimants and the Director did so in the instant case. Moreover, we conclude it was reversible error for the administrative law judge to ignore the affidavit submitted by claimants in their motion for reconsideration which also established the existence of a factual dispute fundamental to the disposition of these cases. *See generally Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992); *Gray & Co., Inc. v. Highlands Insurance Co.*, 9 BRBS 424 (1978); 20 C.F.R. §§702.338 - 702.339; 29 C.F.R.§18.41(b).

Section 33(f). Therefore, we reject employer's argument that *Villanueva* controls the outcome of this case.[5]

Accordingly, the administrative law judge's decision granting employer's motion for summary judgment is vacated, and the cases are remanded for consideration consistent with this opinion.[6]

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

_____

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur only in the result reached by my colleagues in these cases.

_____

REGINA C. McGRANERY
Administrative Appeals Judge

[5]We also reject employer's argument that the administrative law judge properly relied on *Cretan*, 1 F.3d at 843, 27 BRBS at 93 (CRT). In *Cretan*, the United States Court of Appeals for the Ninth Circuit determined that the Supreme Court's discussion of a "person entitled to compensation" is *dicta* and it held that an employee's wife and daughter were "persons entitled to compensation" at the time they entered into third-party settlements prior to the employee's death. The Fifth Circuit recently disavowed *Cretan* in its decision in *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), stating that the Supreme Court's definition of when a person becomes a "person entitled to compensation" is the "core" of its holding in *Cowart*. The court held that a widow was not a "person entitled to compensation" at the time she entered into pre-death settlements as her right to seek death benefits did not vest until the employee's death. As the case at bar arises within the jurisdiction of the Fifth Circuit, *Yates*, and not *Cretan*, is controlling.

[6]In light of our decision to remand the cases herein for appropriate adjudication, we decline to address claimants' challenge to the constitutionality of Section 33(g) at this time. Claimants' arguments may be presented to the administrative law judge when their cases are heard.