

BRB Nos. 96-0863

ROBERT E. GOODY )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 THAMES VALLEY STEEL ) DATE ISSUED:  
 CORPORATION )  
 )  
 and )  
 )  
 HARTFORD INSURANCE GROUP )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Decision and Order - On Remand Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Amy M. Stone (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

David A. Kelly (Monstream and May), Glastonbury, Connecticut, for employer/carrier.

Mark Reinhalter (J. Davitt McActeer, Acting Solicitor of Labor; Carol 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.

PER CURIAM:

Employer appeals the Decision and Order - On Remand Awarding Benefits (90-LHC-2333) of Administrative Law Judge David W. Di Nardi rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time this case is before the Board. To recapitulate the facts, claimant was employed by General Dynamics Corporation - Electric Boat Division (Electric Boat) as a sheet metal worker from 1953 to 1970, where he was exposed to asbestos. From 1972 until November 1986, claimant was employed by employer first as a layout man and then as a working foreman, during which time he was exposed to various pulmonary irritants such as welding smoke, grinding dust, and paint fumes. Claimant subsequently filed claims under the Act against both employer and Electric Boat, seeking compensation for a pulmonary disability and a loss of hearing. After these claims were filed, claimant filed a third-party lawsuit against several manufacturers and distributors of asbestos products. Thereafter, in November 1990, claimant entered into settlements of his third-party claims after obtaining written approval of them from Electric Boat. At the first hearing, employer conceded that claimant was not exposed to asbestos during his employment with it.

In his Decision and Order Awarding Benefits, Administrative Law Judge George G. Pierce found that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's chronic obstructive pulmonary disease to his work place exposures, concluded that claimant was temporarily totally disabled by a pulmonary impairment from December 5, 1986 to July 5, 1988, and permanently totally disabled thereafter, and that employer was the party responsible for the payment of claimant's benefits as it was the last employer to expose claimant to injurious pulmonary irritants. Judge Pierce next determined that Section 33(g) of the Act did not bar claimant's claim for benefits under the Act since claimant was not "a person entitled to compensation" within the meaning of Section 33(g)(1) at the time he settled his third-party claim, and that claimant complied with Section 33(g)(2) when he notified employer of the settlements at the formal hearing. *See* 33 U.S.C. §933(g)(1), (2)(1988). Judge Pierce further determined that employer is entitled to a credit for monies received under the settlements,<sup>1</sup> but that employer is not entitled to relief under

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<sup>1</sup>Claimant received \$30,400.70 from his \$45,200 settlement, the remainder going for his attorney's fee. Of this amount, the administrative law judge found that employer was entitled to a credit of \$24,320.56, the actual amount recovered by claimant; the remainder was credited to the interest of claimant's wife.

Section 8(f) of the Act, 33 U.S.C. §908(f). Lastly, because he found claimant entitled to an award of permanent total disability, Judge Pierce did not address claimant's claim for hearing loss benefits under the schedule.<sup>2</sup>

On appeal, the Board vacated Judge Pierce's finding that claimant's claim was not barred by Section 33(g), and remanded the case for reconsideration in light of the holding of the United States Supreme Court in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992). The Board directed the administrative law judge to address the argument of claimant and the Director, Office of Workers' Compensation Programs (the Director), that Section 33(g)(1) cannot bar the instant claim against employer since claimant's claim involves two separate and distinct injuries, as this argument was not considered below. The Board noted that it was uncontested that claimant was exposed to asbestos only while employed by Electric Boat and that Electric Boat gave its consent to the third-party settlements. Additionally, the Board vacated the administrative law judge's denial of Section 8(f) relief, as he failed to adequately detail the rationale behind his decision, and directed the administrative law judge on remand to consider and discuss all the medical evidence relevant to employer's contentions on this issue. *See Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994)(McGranery, J., dissenting). Judge McGranery dissented, both because she deemed remand for consideration of the applicability of *Cowart* to be unnecessary, since it would not affect the administrative law judge's holding that Section 33(g)(1) does not bar the claim against employer, and because the administrative law judge adequately discussed the absence of evidence in the record to support an award of Section 8(f) relief.

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<sup>2</sup>Thereafter, in a Decision and Order on Motion for Reconsideration, Judge Pierce reaffirmed his decision that employer was not entitled to Section 8(f) relief. Finally, in his Order Denying Clarification, Judge Pierce declined to further elucidate on the issue of Section 8(f) relief.

On remand, Administrative law Judge David W. Di Nardi (the administrative law judge) reaffirmed Judge Pierce's conclusion that employer failed to rebut the Section 20(a) presumption that claimant's chronic obstructive pulmonary disease was caused by his employment with employer, as well as Judge Pierce's award of disability benefits and his determination that employer is the employer responsible for payment of the benefits. The administrative law judge noted that since the Board had previously affirmed these findings and conclusions, they constituted the law of the case.<sup>3</sup> Next, the administrative law judge found that claimant's asbestos exposure at Electric Boat caused an injury separate and distinct from the pulmonary impairment he suffered while working for employer. The administrative law judge reasoned that since only claimant's asbestosis gave rise to his third-party action against manufacturers and distributors of asbestos products, claimant was not obligated to seek employer's written approval of the third-party settlements and, therefore, Section 33(g)(1) did not bar claimant's claim for benefits for his chronic obstructive pulmonary disease against employer. With regard to employer's request for Section 8(f) relief, the administrative law judge found that employer failed to establish that claimant suffered from a pre-existing permanent partial injury that was manifest to employer. In addition, the administrative law judge determined that the absolute defense provision of Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3)(1988), applied to the instant case, and denied Section 8(f) relief on that ground as well.<sup>4</sup>

On appeal, employer contends that the administrative law judge erred in failing to find claimant's claim barred pursuant to Section 33(g)(1) of the Act. Specifically, employer argues that, as Judge Pierce found that claimant suffered from one injury due to his exposure to pulmonary irritants at Electric Boat and employer, the administrative law judge on remand erred in finding the existence of two separate injuries. Alternatively, if the finding of two separate injuries is affirmed, employer asserts that the Section 33(g)(1) bar should still apply, as *Cowart* dictates no exceptions. Additionally, employer contends that the administrative law judge erred in allowing claimant and the Director to assert the argument that claimant

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<sup>3</sup>In its decision, the Board noted that employer, in its appeal of Judge Pierce's decision, did not contest its liability for claimant's entire respiratory disability. *Goody*, 28 BRBS at 173.

<sup>4</sup>In an Amended Decision on Motion for Reconsideration, issued on March 14, 196, the administrative law judge reversed this finding.

suffered from two distinct injuries, as this contention was not argued before Judge Pierce at the initial hearing; moreover, employer avers that the administrative law judge committed error by failing to allow additional evidence to be submitted on this issue. Lastly, employer challenges the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's finding that Section 33(g)(1) does not bar his claim, and of his award of benefits. The Director also responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

## I. Section 33(g)

Initially, we reject employer's contention that the administrative law judge improperly allowed claimant and the Director to raise a new issue at the hearing on remand. In its first decision in this case, the Board remanded the case to the administrative law judge to reconsider the applicability of the Section 33(g) bar in light of the intervening decision of the United States Supreme Court in *Cowart*; in so doing, the Board specifically directed the administrative law judge to consider claimant's and the Director's contention that Section 33(g)(1) cannot bar the instant claim since the claim involves two separate and distinct injuries - asbestosis, a restrictive impairment resulting from claimant's exposure to asbestos while employed at Electric Boat, and chronic obstructive pulmonary disease, an obstructive impairment resulting from exposure to noxious fumes at employer's facility. See *Goody*, 28 BRBS at 173. While the Board will not address issues raised for the first time on appeal, see *Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989), the Board will entertain a new theory on an issue necessitated by changes in the law while the case was pending on appeal. See *Bukovi v. Albina Engine/Dillingham*, 22 BRBS 97 (1988). In the instant case, Judge Pierce initially found that since claimant was not being paid compensation by employer either pursuant to an award or voluntarily at the time he settled his third-party claims, he was not "a person entitled to compensation" within the meaning of Section 33(g)(1), and therefore, his claim was not barred under that subsection. Subsequent to the issuance of Judge Pierce's decision, the Supreme Court in *Cowart* held that a claimant becomes "a person entitled to compensation" under Section 33(g)(1) at the moment his right to recovery vests, not when the employer admits liability. Thereafter, claimant and the Director argued before the Board, as they did before Judge Pierce, that Section 33(g)(1) did not bar the instant claim; however, based on the change of law, claimant and the Director advanced a different theory - that since claimant suffered two distinct injuries, employer's written approval of the third-party settlements concerning his asbestosis was not required. As Judge Pierce had not addressed this theory, the Board specifically directed the administrative law judge to address this theory on remand; accordingly, the administrative law judge on remand committed no error by doing so.<sup>5</sup>

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<sup>5</sup>Additionally, we reject employer's assertion that the administrative law judge improperly denied it the opportunity to submit evidence establishing that claimant was exposed to asbestos at employer's facility. The administrative law judge noted that at the initial hearing employer conceded that claimant was not exposed to asbestos while working for employer, and that Judge Pierce so found in his Decision and Order. See Jan. 29, 1991 Hearing Transcript at 34; Decision and Order - on Remand Awarding Benefits at 7. Employer did not

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appeal Judge Pierce's finding to the Board, and the Board accepted this finding. *See Goody*, 28 BRBS at 168, 173. Thus, Judge Pierce's finding that claimant was exposed to asbestos only while working for Electric Boat, and not while working for employer, constitutes the law of the case. *See, e.g., Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991). If employer has obtained evidence that claimant was exposed to asbestos while working at employer's facility, it may petition the administrative law judge for modification pursuant to Section 22 of the Act, 33 U.S.C. §922.

We now consider employer's contention that the administrative law judge erred in determining that claimant's claim for benefits is not barred by Section 33(g)(1) of the Act. Section 33(g)(1), as amended in 1984, states:

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1)(1988). In the instant case, the administrative law judge found that claimant sustained two separate and distinct injuries, *i.e.*, asbestosis and chronic obstructive pulmonary disease, and that, with reference to employer, claimant was not entitled to compensation for his asbestosis. As claimant was not exposed to asbestos while working for employer, the administrative law judge concluded that only the injury related to claimant's exposure to asbestos at Electric Boat is relevant for purposes of Section 33(g)(1) and claimant's third-party causes of action, and thus, Section 33(g)(1) does not bar claimant's claim against employer for his chronic obstructive pulmonary disease.

On appeal, employer argues that, pursuant to *Cowart*, since claimant is "a person entitled to compensation," under the Act, his claim for benefits against employer must be barred pursuant to Section 33(g)(1). We disagree. In *Cowart*, the Supreme Court held that an employee becomes a "person entitled to compensation" at the moment his right to recovery vests, not when an employer admits liability. The right to recovery vests when the claimant satisfies the prerequisites attached to the right, *i.e.*, when the claimant suffers the work-related injury. *Cowart*, 505 U.S. at 477, 26 BRBS at 52 (CRT); see generally *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 796 (1997). In *Cowart*, however, the Court was not presented with the situation where the claimant suffered two separate injuries as a result of distinct exposures with two employers. In the instant case, whether claimant was a "person entitled to compensation" does not resolve the issue in dispute. Indeed, claimant, having been exposed to asbestos



from 1953 to 1970, diagnosed with asbestosis and chronic obstructive pulmonary disease, and disabled since 1986, was a “person entitled to compensation” under *Cowart* and *Yates* at the time he settled his third-party suits in 1990. Thus, in the instant case, claimant did comply with Section 33(g)(1) by obtaining written consent of his third-party settlements from Electric Boat, the employer that exposed him to asbestos. As claimant was not exposed to asbestos at employer’s facility, the Court’s holding in *Cowart* does not require that claimant also must obtain employer’s written consent, and is thus of no aid to employer.

Employer’s contention that the Section 33(g)(1) bar applies to the instant case since it is liable for claimant’s entire disability also must fail. Specifically referred to in Section 33(g)(1) is Section 33(a), which 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 persons.

33 U.S.C. §933(a). Thus, the provisions of Section 33 apply where a third party is liable in damages for the same disability or death for which compensation is sought. See *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979). As the Board stated in the previous appeal in this case, in such a case, claimant’s right to seek damages from the third party may be assigned to his employer under certain circumstances, see 33 U.S.C. §933(b), and where claimant files suit, the employer may gain the rights to a credit for amounts recovered under Section 33(f) and to approve any settlement under Section 33(g). In the instant case, employer did not purchase any asbestos products from the third party asbestos distributors or manufacturers against whom claimant filed his third-party suits, and it is undisputed that it did not expose claimant to asbestos during claimant’s employment with employer; thus, it was not an employer to whom claimant’s right to file suit could be assigned under Section 33(b). Rather, only Electric Boat would have a cause of action against the third-party asbestos distributors and manufacturers under Section 33(b). The fact that employer is liable for claimant’s entire disability under the aggravation rule is not controlling where claimant suffers from a separate and distinct injury caused by his employment with Electric Boat, as the third parties are not potentially liable to both claimant and employer. See *Melson*, 594 F.2d at 1068, 10 BRBS at 494; see also *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Accordingly, claimant was required to obtain only Electric Boat’s written approval of the third-party settlements under Section 33(g)(1), which he succeeded in doing. See *Goody*, 28 BRBS at 176 (dissenting opinion of J.

McGranery). The administrative law judge's finding that claimant's claim is not barred by Section 33(g)(1) is therefore affirmed.

## II. Section 8(f)

Employer also challenges the administrative law judge's denial of its request for Section 8(f) relief; specifically, employer asserts that the administrative law judge erred in determining that claimant's pleural thickening and chronic bronchitis were manifest pre-existing permanent partial disabilities which contributed to his permanent total disability. Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for permanent total disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently totally disabled, an employer may be granted Special Fund relief if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his permanent total disability is not due solely to the subsequent work-related injury. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996).

In the instant case, the administrative law judge concluded that employer failed to establish that claimant suffered from a manifest pre-existing permanent partial disability.<sup>6</sup> After review of the record, we affirm the administrative law judge's conclusion that employer is not entitled to Section 8(f) relief. With regard to claimant's pleural thickening, the administrative law judge found that although a January 1974 x-ray report showed minimal pleural thickening, Dr. Gaensler's complete interpretation of that film was that the pleural thickening was caused by fat, and that after claimant lost 30 to 40 pounds, a 1979 x-ray showed that the diffuse pleural thickening had disappeared. Emp. Exs. 1, 8. In addition, the administrative law judge relied on Dr. Olsen, who interpreted the 1979 x-ray as "normal in every way." Emp. Ex. 8 at 7. With regard to claimant's chronic bronchitis, the administrative law judge initially acknowledged claimant's testimony that although he had one or two bouts of bronchitis, he never missed work because of it; moreover, the administrative law judge determined that there was no evidence of record prior to December 15, 1986, which included either a diagnosis of a chronic bronchitic condition or a permanent pulmonary condition. Decision and Order on Remand at 23. Although employer asserted that Dr. Colom diagnosed chronic bronchitis prior to claimant's work injury, the administrative law judge relied on Dr. Colom's testimony that he had a "working impression" of chronic bronchitis in February 1986, but did not write down this diagnosis at that time. Emp. Ex. 9 at 6; *see* Decision and Order at 22. Moreover, the diagnoses of chronic bronchitis

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<sup>6</sup>The administrative law judge did not address the contribution element of Section 8(f).

and asbestosis in the reports of Drs. Cherniak, Godar and Buckley, given in 1987, 1988 and 1990 respectively, each post-date claimant's December 1986 injury and, thus, are insufficient to render these conditions manifest under Section 8(f). *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Inasmuch as the administrative law judge's determination that claimant did not suffer from a manifest, serious lasting pulmonary condition is rational and supported by the record, we affirm the administrative law judge's denial of Section 8(f) relief. *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see also Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988).

Accordingly, the Decision and Order - On Remand Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge