BRB No. 02-0816

THOMAS ROGERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HAWAII STEVEDORES, INCORPORATED	)	DATE ISSUED:APR. 10, 2003
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
		DECISION and ORDER

Appeal of the Order Approving Settlement and the Order Denying Motion for Reconsideration of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

James P. Aleccia (Aleccia & Conner), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Approving Settlement and the Order Denying Motion for Reconsideration (2001-LHC-2134) of Administrative Law Judge Jeffrey Tureck 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 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).

Claimant was working as a longshoreman on January 25, 2000, when he sustained injuries to his cervical spine, low back and right arm while lifting heavy luggage. Employer voluntarily paid claimant temporary total disability benefits from January 26, 2000 through March 14, 2001, at a compensation rate of $891.47, for a total of $52,724.08. Employer controverted claimant's right to temporary total disability benefits on March 15, 2001. Claimant sought further benefits under the Act.

Claimant was originally represented in his claim by counsel, Stephen Birnbaum, who withdrew his representation on June 19, 2001. Subsequently, employer and claimant agreed to settle the claim, and submitted a completed settlement agreement, with accompanying medical reports, to the administrative law judge for approval pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). As claimant was no longer represented by counsel, the administrative law judge found that a hearing was necessary to determine whether the agreement was procured by duress and to address the issue of the adequacy of the settlement, since claimant was relinquishing his claim for disability and medical benefits in exchange for a lump sum payment of $3,000. At the hearing, claimant, now represented by new counsel, contended that the agreement was procured by duress and that it did not represent adequate compensation for his claim. Thus, claimant sought to have the settlement disapproved or to withdraw from the settlement. *See, e.g.,* Tr. at 13; Cl's Pre-Hearing Statement.

In his Order Approving Settlement, the administrative law judge found that claimant understood the terms of the settlement agreement at the time it was entered into and accepted it because he was satisfied with the sum he was to receive. In addition, the administrative law judge found that the medical evidence submitted with the settlement agreement indicates that claimant's work-related injury had resolved and did not prevent him from returning to work. Thus, the administrative law judge concluded that the settlement amount was adequate. The administrative law judge also left the record open an additional four months for claimant to submit evidence that his condition had not resolved. Claimant did not file anything within this time frame, and the administrative law judge therefore approved the settlement agreement on June 13, 2002. Claimant subsequently sought reconsideration, based on a June 28, 2002, report from Dr. Pang and other documents. In an Order Denying Motion for Reconsideration, the administrative law judge rejected claimant's contention that Dr. Pang's report establishes that claimant's work-related injury is still causing an impairment. Moreover, the administrative law judge found that any "false information" from employer regarding long term disability benefits to which claimant is entitled does not establish that claimant was misled into agreeing to the settlement.

On appeal, claimant contends that the administrative law judge erred in approving the settlement agreement as claimant attempted to withdraw from the agreement prior to its approval. In addition, claimant contends that the agreement is inadequate, *inter alia,* because it requires claimant to surrender his position with employer due to a non work-related medical condition, a term in the agreement which claimant contends the administrative law judge does not have the authority to approve. Employer responds, urging affirmance of the administrative law judge's approval of the settlement agreement. The Board heard oral argument in this case in Pasadena, California, on January 27, 2003.

Claimant initially contends that the administrative law judge erred in approving the settlement agreement as claimant attempted to withdraw from it prior to its approval. Section 8(i) of the Act, as amended in 1984, 33 U.S.C. §908(i), provides for the discharge of employer's liability for benefits where an application for settlement is approved by the district director or administrative law judge. The Act states that the district director or administrative law judge "shall approve the settlement . . . unless it is found to be inadequate or procured by duress." 33 U.S.C. §908(i)(1). Section 702.243(b) provides that if the parties to the settlement are represented by counsel, the agreement shall be deemed approved unless it is disapproved within 30 days of submission for approval. 20 C.F.R. §702.243(b); *see also* 20 C.F.R. §702.241(c)(if settlement application is first submitted to administrative law judge, 30-day period does not begin to run until five days before the date of formal hearing). Thus, where the parties are not represented by counsel, employer's liability is not discharged until the settlement is specifically approved by the district director or administrative law judge.

The issue of whether a claimant may withdraw from a settlement agreement prior to its approval is one of first impression for the Board. However, the Board has considered cases in which employer attempted to withdraw from a signed settlement agreement after the claimant died but prior to the agreement's administrative approval. In *Nordahl v. Oceanic Butler, Inc*., 20 BRBS 18 (1987), the Board affirmed the deputy commissioner's approval of a settlement agreement after the employee's death where the agreement was executed and submitted for approval prior to the claimant's death, rejecting employer's argument that it should have been allowed to withdraw from the agreement prior to its approval. *See also Maher v. Bunge Corp.,* 18 BRBS 203 (1986) (same, under pre-1984 Amendment version of Section 8(i). Employer appealed the Board's decision in *Nordahl* to the United States Court of Appeals for the Fifth Circuit. *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988). In affirming the Board's decision that employer could not withdraw from an executed agreement, the court also discussed claimant's right to withdraw from a settlement. Analyzing the relative positions of the parties under the Act, the court concluded that the cumulative effect of the provisions of the statute is "to limit *to claimants only* the right to rescind unapproved settlements." *Nordahl*,

842 F.2d at 777, 21 BRBS at 37 (CRT)(emphasis in original). The court reached this conclusion by determining that claimant is prevented from waiving compensation by virtue of Section 15(b), 33 U.S.C. §915(b), unless the claim is settled by an approved settlement agreement or is withdrawn pursuant to Section 702.225, 20 C.F.R. §702.225, of the regulations. The court also relied on Section 16, which provides that "No assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid…." 33 U.S.C. §916. The court found it relevant that while these provisions of the Act explicitly preclude claimants from waiving compensation unless a settlement is approved pursuant to Section 8(i), the Act contains no provision invalidating an employer's agreement to pay until and unless the agreement is approved. *Nordahl*, 842 F.2d at 780-81, 21 BRBS at 37(CRT). The court concluded that a claimant's obligation under a settlement agreement is invalid when made, pursuant to Sections 15 and 16, and thus does not become binding until and unless the contract is administratively approved, while an employer's obligation under an agreement is not rendered invalid by any statutory provision. *Id.* Thus, absent a contrary contractual provision, "executed settlement agreements submitted for administrative approval are binding upon the employer or insurer and not subject to rescission at their election; on the other hand. . . submitted settlements are not binding upon claimants and are subject to rescission by them, until approved . . . ." *Nordahl,* 842 F.2d at 781, 21 BRBS at 39(CRT). The court recognized this statutory asymmetry of treatment, but concluded that it was justified given the "paternalism required of the agency and of reviewing courts toward employees willing to waive lifetime claims for an immediate payment." *Nordahl,* 842 F.2d at 781, 21 BRBS at 37, 38(CRT). Under the reasoning in *Nordahl,* claimant can withdraw from a settlement agreement

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[1] If the claim is not resolved by way of an approved settlement pursuant to Section 8(i), or withdrawn pursuant to Section 702.225, it remains open for resolution. *See, e.g., Hargrove v. Strachan Shipping Co.,* 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998).

[2] The court stated that nothing in the Act prevents an employer from including in the agreement an express right of rescission during the pre-approval period. *Nordahl,* 842 F.2d at 780, 21 BRBS at 41(CRT).

[3] In contrast to the situation where the employee dies after an executed settlement has been submitted for approval, an agreement which has not been signed by the parties or submitted for approval at the time of death is not binding on either party. *See Henry v. Coordinated Caribbean Transport,* 204 F.3d 609, 34 BRBS 15(CRT)(5th Cir. 2000), *aff'g* 32 BRBS 29 (1998); *O'Neil v. Bunge Corp.,* 36 BRBS 25 (2002); *Fuller v. Matson Terminals,* 24 BRBS 252 (1991).

at any time prior to its approval.

In the present case, claimant timely notified employer of his desire to withdraw from the settlement prior to its consideration by the administrative law judge. Initially, claimant was not represented by counsel when employer presented the settlement agreement, which was accompanied by a check for $3,000, to him. By Order dated October 10, 2001, the administrative law judge deferred approval of the settlement agreement until after the formal hearing, which was set for February 14, 2002, in order to determine whether the agreement was procured by duress, and if not, whether it was reasonable and adequately protected claimant's interests. Prior to the hearing, claimant retained counsel, who filed a pre-hearing statement on February 11, 2002, contending that the agreement should not be approved as it was procured by duress and was inadequate to protect claimant's interests. This document also cited *Nordahl,* quoting a passage regarding claimant's right to withdraw from a settlement agreement. Claimant's attorney appeared at the hearing on February 20, 2002, contending that the settlement should be set aside as claimant agreed to it when he was not represented by counsel and that he did not understand he was giving up a $70,000 per year job and future medical benefits for $3,000. Counsel thus argued claimant should be allowed to go forward on the merits of the claim. *See* Tr. at 13-16. In his decisions the administrative law judge considered whether the agreement was reached by duress and whether the terms of the settlement were adequate, but he did not address the threshold question of whether claimant may withdraw from the agreement prior to its approval.

Although the Act and the regulations do not explicitly state that claimant may

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[4] Once a settlement is approved and the time for appeal has expired, however, the Board has held that it is binding upon claimant and not subject to unilateral rescission. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.*, 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP*, 176 F.3d 484 (9th Cir. 1999)(table), *cert. denied*, 120 S.Ct. 593 (1999). While not at issue in that case, the Board cited *Nordahl* for the proposition that unapproved settlements are not binding upon claimants and are subject to rescission by them until approved. *Porter*, 31 BRBS at 113; *see generally Towe v. Ingalls Shipbuilding, Inc.,* 34 BRBS 102 (2000). Thus, claimant's right to unilaterally withdraw from a settlement must be exercised prior to approval.

[5] The administrative law judge discussed adequacy only in terms of whether the agreed upon amount was adequate for compensation and medical treatment for claimant's back injury, and he did not address whether this sum was adequate given claimant's additional agreement to give up his job with employer due to an unrelated condition.

rescind a settlement agreement prior to its approval, the reasoning of the Fifth Circuit in *Nordahl* that a claimant has such a right is compelling. The holding that a claimant's agreement to waive his compensation is not binding upon him unless it is administratively approved, either through the settlement process or pursuant to a withdrawal under Section 702.225, is supported by the structure of the Act. Consistent with Sections 15(b) and 16, no agreement by a claimant to waive or compromise his right to compensation is valid until it is administratively approved pursuant to Section 8(i). Thus, claimant may withdraw his agreement at any time prior to approval of the agreement by the administrative law judge. In this case, it is clear that claimant notified employer and the administrative law judge prior to and at the hearing that he considered the settlement inadequate and procured under duress. Consequently as claimant effectively withdrew from the settlement prior to its approval by the administrative law judge, we vacate the administrative law judge's order approving the settlement agreement and hold that the agreement was rescinded by claimant prior to its approval. *Nordahl,* 842 F.2d at 781, 21 BRBS at 39(CRT). Therefore, we remand the case for consideration on the merits.

[6] Contrary to employer's contention, Section 702.225(a) of the regulations does not provide the framework for the withdrawal from an agreed settlement, but rather details the method necessary to withdraw an entire claim for compensation. *See* 20 C.F.R. §702.225; *Pool Co. v. Cooper;* 274 F.3d 173, 35 BRBS 109(CRT)(5th Cir. 2001); *Stevens v. Matson Terminals, Inc.*, 32 BRBS 197 (1998). Therefore, we reject employer's contention that claimant's attempts to withdraw from the agreement are invalid as he did not follow these procedures in a timely manner.

[7] Claimant attempted to submit new evidence for consideration by the Board. The Board denied claimant's motion to supplement the record and returned the proffered report to claimant's counsel by Orders dated October 16, 2002 and December 20, 2002. However, these documents and any other relevant evidence may be admitted into the record when the case is heard on the merits. Moreover, as we hold that claimant rescinded the agreement prior to its approval, we need not reach claimant's contentions regarding the validity of the terms of the settlement agreement, including the clause precluding claimant's return to employment with employer.

Accordingly, the administrative law judge's approval of the settlement agreement is vacated and we hold that the agreement is rescinded as a matter of law. Thus, the case is remanded for consideration on the merits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge