BRB No. 07-0430

J.H. Claimant-Respondent v. OCEANIC STEVEDORING COMPANY and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: 01/31/2008 DECISION and ORDER

Appeal of the Compensation Order Approving Agreed Section 8(i) Settlement and Awarding Attorney Fees of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

James W. McCready, III (Seipp, Flick & Kissane, L.L.P.), Coral Gables, Florida, for employer/carrier.

Matthew W. Boyle (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Compensation Order Approving Agreed Section 8(i) Settlement and Awarding Attorney Fees (2005-LHC-1108) of Administrative Law Judge Alan L. Bergstrom 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 worked as a lasher for employer. On June 1, 2002, he injured his right shoulder and neck when a twist lock struck him on the back of his hard hat and right shoulder. The parties stipulated that claimant is entitled to temporary total disability benefits from June 2, 2002, through April 26, 2003, and permanent partial disability benefits from April 27, 2003, through September 20, 2006. Employer paid these disability benefits as well as all medical benefits. The parties agreed to settle the claim for additional benefits for a lump sum of $115,000, representing $90,000 for future lost wage-earning capacity, $10,000 for past temporary total disability benefits, and $15,000 for future medical care. The parties also agreed that employer would pay claimant's attorney's fee. Additionally, the settlement provides for a credit to specified employer members of Signal Mutual Indemnity Association (Signal Mutual) for permanent disability benefits if claimant returns to longshore work and suffers further injury.

The administrative law judge set forth the provisions of the settlement agreement, found it reasonable and not produced under duress, and approved it. Comp. Order at 1-5. The Director challenges the parties' settlement, contending the credit provision in the agreement settles claims not yet in existence in violation of Section 8(i) of the Act, 33 U.S.C. §908(i), and Section 702.241(g) of the regulations, 20 C.F.R. §702.241(g), and gives rise to a new extra-statutory credit. Thus, the Director avers that the administrative law judge's approval of the settlement agreement should be vacated and the case remanded to the administrative law judge for further proceedings. Employer responds, arguing that the credit provision does not settle any future claims, but, rather, merely prevents claimant from obtaining a double recovery should he re-injure his head, neck, back or shoulder upon re-entering the longshore workforce.[1] Additionally, employer

[1]Employer poses that there is an issue of ripeness, as there is no current claim for benefits for a subsequent injury and no reason to apply the credit provision at this time. We reject this argument. While the credit itself is not currently applicable, the settlement

asserts that the provision merely formalizes the credit to which an employer would be entitled following a further reduction of claimant's wage-earning capacity. Claimant has not responded to the Director's appeal. For the reasons that follow, we agree with the Director that the settlement must be vacated.

The following paragraphs constitute the "credit provision" in the parties' settlement:

> This settlement is also based to a large degree on the Claimant's representations that his alleged head, neck and back injury and/or psychological/psychiatric condition either independently or in combination with his head, neck and back injury will either prevent him from returning to work as a longshoreman resulting in a loss of wage earning capacity or if he is able to return to work as a longshoreman, that he will not be able to work as many hours or days as a result of his alleged injuries causing him to suffer a reduction in his wage earning capacity.
>
> Accordingly, *if the Claimant returns to work as a longshoreman after his Settlement Agreement is approved, and suffers a re-injury or permanent aggravation of the alleged injury which is the subject matter of this settlement or a new injury which independently or in combination with any prior injury to cause (sic) a loss of wage earning capacity, then the parties agree that the subsequent Employer will be entitled to a credit toward any future claim for permanent partial disability benefits or permanent total disability benefits for the monies paid as a result of this 8(i) settlement.* The parties agree and stipulate that this credit toward future permanent partial disability benefits and/or future permanent total disability benefits will only be enforceable if the subsequent Employer is Eller-ITO Stevedoring Company, Ltd., or any other Signal Mutual Indemnity Association, Ltd. member including [other named employers]. *The other members of Signal Mutual Indemnity Association are included in this Agreement* because Signal is a self-insured group mutual where all members share collective responsibility and liability for each other's losses.
>
> If the Claimant has a subsequent injury while working in the course and scope of his employment as a longshoreman with any of the above-Employers or a Signal Mutual Indemnity Association, Ltd. member, where he alleges an additional permanent impairment to his head, neck and back

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has been approved with this provision in it, and its terms are properly challenged in a timely appeal. *See Cortner v. Chevron Int'l Oil Co, Inc.*, 22 BRBS 218 (1989).

> and/or psychiatric injuries or a new injury which independently or in combination with the above injuries causes a loss of wage earning capacity either partial or total, then that Signal member will be entitled to a credit for the portion of this settlement allocated towards future loss of wage earning capacity.

Settlement Agreement at 13-15 (emphasis added). Thereafter, the agreement specifies how the credit is to be calculated.

Section 8(i)(1) of the Act provides for the settlement of claims under the Act. Claimants are not permitted to waive their rights to compensation under the Act except through settlements approved in accordance with Section 8(i). *O'Neil v. Bunge Corp.*, 365 F.3d 820, 38 BRBS 7(CRT) (9th Cir. 2004); *Hansen v. Matson Terminals, Inc.*, 37 BRBS 40 (2003); *see generally Henson v. Arcwel Corp.*, 27 BRBS 212 (1993). Absent a contractual provision permitting rescission prior to approval, executed settlement agreements awaiting administrative approval are binding upon the employer, *see Hansen*, 37 BRBS at 43; *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1998) (right of rescission for the employer, prior to approval of the settlement, must be expressly provided in the agreement); after approval, settlements are not subject to modification. 33 U.S.C. §922. In addition, Section 702.241(g) of the promulgating regulations, 20 C.F.R. §702.241(g) (emphasis added), provides:

> An agreement among the parties to settle a claim is *limited to the rights of the parties and to claims then in existence*; settlement of disability compensation or medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits.

We agree with the Director that the credit provision in the settlement at issue here runs afoul of the regulation at Section 702.241(g), as it is not "limited to the rights of the parties and to claims then in existence." Although employer correctly asserts that only the present claim is being settled, the provision at issue here specifically applies where claimant sustains a "new injury" after approval of the settlement. A claim for a "new injury" is not one currently in existence. *See Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999) (McGranery, J., concurring)(no claim in existence for right knee injury at time of settlement for back, left knee and left groin); *Cortner v. Chevron Int'l Oil Co., Inc.*, 22 BRBS 218 (1989) (no right to survivor's benefits during claimant's lifetime, so cannot settle survivor's claim in compensation settlement agreement). Moreover, any credit granted to a subsequent employer member by virtue of the agreement would affect claimant's right of full recovery in a potential future claim. As it affects claims and rights which are not yet in existence, the provision limiting

claimant's recovery for a potential future injury via an employer credit is invalid under Section 702.241(g).[2]

Further, as the Director contends, the settlement's credit provision is not encompassed in any existing statutory or extra-statutory credit scheme and, therefore, is contrary to law.[3] The settlement states that, if upon returning to longshore work, claimant suffers "a re-injury or permanent aggravation of the alleged injury which is the subject matter of this settlement or a new injury which independently or in combination with any priory injury to cause (sic) a loss of wage earning capacity" his employer is entitled to a credit for benefits paid by Signal Mutual as set forth in the agreement. The credit in the provision is invoked if claimant were to return to longshore work and suffer a re-injury or aggravation of his current disability *or* sustain a *new injury* that causes him to suffer a loss of wage-earning capacity either *independently* or in combination with the existing disability.[4] Pursuant to the provision, the future employer would be entitled to a credit if claimant were to suffer a loss of wage-earning capacity due to an injury unrelated to his June 2002 injury. Such a credit is not encompassed by any of the credit

[2]Additionally, the credit provision attempts to include other Signal Mutual members as parties to the settlement by providing them with a credit upon the stated contingencies. As those employers are not parties to the current claim, they cannot be parties to the settlement. 33 U.S.C. §908(i)(1); 20 C.F.R. §702.241(g) (stating that parties to the claim can settle the claim).

[3]Contrary to employer's assertion, *Hansen v. Matson Terminals, Inc.*, 37 BRBS 40 (2003), does not constitute support for this credit provision. In *Hansen*, the Board affirmed the administrative law judge's approval of the settlement and his decision that employer could not rescind the agreement. In noting that there was no specific right of rescission bargained in the settlement agreement, the Board stated that the only remedy available if the claimant returned to work was the credit provided to his subsequent employer. *Hansen*, 37 BRBS at 42-43. The validity of this credit provision was not raised as an issue or addressed in the Board's decision.

[4]In either situation, no claim could be filed until the new injury or aggravation occurred.

provisions specifically enumerated in the Act.[5] *See ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989).

As the Director asserts, the credit attempted here also does not fall within the extra-statutory credit approved by the United States Court of Appeals for the Fifth Circuit in *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Under the *Nash* credit doctrine, an employer is allowed a credit for prior payments under the schedule, 33 U.S.C. §908(c)(1) – (19), where claimant sustains an aggravating injury resulting in an increased schedule award. As claimant's injury here did not give rise to a scheduled award, the *Nash* doctrine is not applicable. *Aples*, 883 F.2d at 425-426, 22 BRBS at 129(CRT).

Moreover, even if the *Nash* doctrine were expanded to apply to other aggravations, it would not apply to the provision at issue which encompasses not only an aggravation but also a new injury which independently causes a loss in earning capacity. The law is clear that if the new injury is unrelated to the old one and independently causes a loss of wage-earning capacity, there has been no aggravation of the old injury/disability and the credit doctrine cannot apply. *See New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002); *see also Vinson*, 27 BRBS 220 (Section 14(j) does not apply to overpayment of compensation for prior unrelated injury). Thus, to the extent the provision at issue provides a credit for a new

[5]The Act contains four specific credit provisions. Section 3(e), 33 U.S.C. §903(e), permits an employer to credit "any amounts" paid to an employee under another workers' compensation law or the Jones Act for the same injury or disability for which benefits are claimed under the Act. *D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993). Section 14(j) permits an employer who has made advance payments of compensation to be reimbursed out of any unpaid installments of compensation due for the same injury. 33 U.S.C. §914(j); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992); *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993). Section 22 of the Act permits an employer who has paid compensation pursuant to an award and who obtains a decrease in benefits via modification to obtain a credit against any benefits for which it is liable. *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000). Under Section 33(f), an employer's liability to a person entitled to compensation under the Act may be offset against the net amount of any third-party recovery received by that person for the same injury for which it is liable under the Act. 33 U.S.C. §933(f); *Gilliland v. E.J. Bartells, Inc.*, 34 BRBS 21 (2000), *aff'd*, 270 F.3d 1259, 35 BRBS 103(CRT) (9th Cir. 2001).

injury, it is not consistent with law as no credit, statutory or otherwise, applies in cases involving unrelated injuries.

Even if the provision here covered only a subsequent aggravating injury, allowing employers such a credit would require expansion of the *Nash* doctrine. In *Nash*, where the claimant sought compensation for successive, aggravating injuries to his leg, the court accepted the Board's equitable credit doctrine, which was created to prevent claimants from obtaining double recovery in situations involving aggravations of scheduled disabilities. Thus, the *Nash* credit doctrine allows an employer to take a credit for the amount of a prior *scheduled* award against its liability for permanent partial disability benefits resulting from an injury to the *same scheduled member*. *Nash*, 782 F.2d at 520-521, 18 BRBS at 53-54(CRT); *see also Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (court discusses credit doctrine in holding it inapplicable). Although employer argues that it is merely applying the *Nash* credit in this case as it would naturally apply in a non-scheduled-injury claim, the Director correctly argues that the courts have refused to extend the *Nash* credit doctrine.

In *Aples*, 883 F.2d 422, 22 BRBS 126(CRT), the Fifth Circuit rejected ITO's arguments for a credit under either Section 3(e) or *Nash* in a case involving an injury to a claimant's back, a non-scheduled body part, which occurred at a prior employer and then was aggravated at ITO. ITO sought a credit against its liability for permanent total disability benefits for $20,000 paid by the earlier employer in settlement of a claim for permanent partial disability benefits for the prior back injury. The court rejected employer's Section 3(e) argument on the basis that the payments were not made under the Jones Act or state workers' compensation act as required by that section. The court held *Nash* was inapplicable because the scheduled payments at issue in that case were for the same type of disability whereas ITO sought a credit involving different types of benefits.[6] The court declined to extend *Nash* to such non-scheduled injuries and disabilities.

More recent cases have similarly limited the *Nash* doctrine as well as limiting the statutory provisions allowing credits to their specific terms. In an occupational disease case where the responsible employer was at issue, the Fifth Circuit held that the ultimately liable employer was not allowed a credit for sums paid to the claimant by prior

[6] The court also rejected ITO's double recovery argument relying on *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980), which held a claimant may receive concurrent awards for unscheduled permanent partial disability and permanent total disability where the sum of the two awards reflects the total diminution of claimant's wage-earning capacity.

employers under a previous settlement for the same injury. *Ibos*, 317 F.3d at 487, 36 BRBS at 98(CRT). The court held that the *Nash* credit doctrine did not apply in that situation because the settlements between the claimant and her deceased husband's former employers were alternatives to an entire award against either of the settling employers, who would have been liable if found responsible under the Act. Thus, as there were no successive injuries or aggravations, the *Nash* doctrine was not applicable. *Ibos*, 317 F.3d at 487, 36 BRBS at 97-98(CRT); *see also Alexander*, 297 F.3d at 809, 36 BRBS at 27(CRT). The Fifth Circuit specifically declined to expand the credit doctrine to create a new extra-statutory credit. *Ibos*, 317 F.3d at 487, 36 BRBS at 98(CRT). The court stated that if Congress had intended an employer to be able to take a credit for amounts paid by prior employers in settlements, it would have so provided. The court reasoned that, in fact, Congress added Section 3(e) of the Act in 1984 to overrule the decision in *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979), (which held that the liable employer under the Act could not take credit for compensation paid by a previous employer under a state workers' compensation law), and permit an employer a credit for any past recovery by a claimant, even against a different employer, for the same injury or disability under another workers' compensation law or the Jones Act. The Fifth Circuit found that, in amending the Act, Congress did not add a similar provision allowing subsequent employers a credit for sums paid by former employers in settlements arising under the Act. The court concluded that the amounts received from prior employers were irrelevant to the amount owed by the responsible employer and thus should not reduce its liability. *Ibos*, 317 F.3d at 487, 36 BRBS at 98(CRT); *see also Alexander*, 297 F.3d at 809, 36 BRBS at 27(CRT).

This reasoning is also applicable here, where employer seeks to allow future employers a credit for the sums it is currently paying to settle the present case. The credit which the settlement here attempts to create would similarly be extra-statutory and require expansion of the credit doctrine, which we decline to do. Therefore, as the settlement provision at issue affects claims not in existence in violation of the Act and its regulation and requires the creation of a new type of credit not authorized by statute or case law, the administrative law judge's approval of the parties' settlement agreement must be vacated. The case is remanded to the administrative law judge for further proceedings necessary to the resolution of this claim.

Accordingly, the administrative law judge's Compensation Order Approving Agreed Section 8(i) Settlement and Awarding Attorney Fees is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge