BRB No. 08-0238

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| D.G. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CASCADE GENERAL, INCORPORATED | ) | DATE ISSUED: 09/18/2008 |
| | ) | |
| and | ) | |
| | ) | |
| LIBERTY NORTHWEST INSURANCE CORPORATION | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Supplementary Order Declaring Default of Karen P. Staats, District Director, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Flynn, L.L.P.), Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplementary Order Declaring Default (Case No. 14-134074) of District Director Karen P. Staats 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). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986).

Claimant injured his neck on October 2, 2000, while performing his duties as a shipwright for employer. He underwent an anterior cervical discectomy and allograft fusion on November 30, 2000, and returned to work on a trial basis on March 2, 2001. By July 2001, claimant had increasing neck pain, and he received additional medical care. On February 21, 2002, an administrative law judge issued a compensation order approving the parties' settlement agreement whereby employer/carrier would pay claimant temporary and permanent disability benefits. Comp. Order at 3. Claimant continued to work full time when work was available within his restrictions, and he next sought treatment on July 14, 2004, and then on February 16, 2005. As employer's insurers had changed, Liberty Northwest, the carrier at the time of claimant's 2000 injury, filed a notice of controversion arguing that employer's current insurer, AIG, is liable for any further benefits to claimant. Thereafter, the parties agreed to settle this new dispute pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i) (second settlement). They agreed to the following: employer/Liberty Northwest (hereinafter employer) is liable to claimant for a lump sum of $26,000 and employer/AIG is liable to claimant for a lump sum of $14,000. Of the proceeds, $5,200 and $2,800, respectively, were designated for future medical expenses. The district director approved the settlement on June 27, 2007.

Employer mailed the settlement proceeds to claimant five days after the district director filed the compensation order, but the check was not delivered to claimant until 15 days after the order was filed. Claimant applied for an assessment of additional compensation pursuant to Section 14(f), 33 U.S.C. §914(f). The district director found that payment of compensation should have been made by July 7, 2007, but was not made until July 12, 2007. As payment was late, she held employer liable for a Section 14(f) assessment of $5,200.[1] Employer paid the assessment in accordance with the order and filed this appeal.

Employer challenges the district director's order declaring it liable for a Section 14(f) assessment.[2] Specifically, employer asserts that claimant violated a clause of their second settlement agreement and thus waived his right to the Section 14(f) assessment. Claimant responds, urging affirmance, arguing that he complied with the terms of the agreement and that equitable excuses are not permitted to relieve an employer of liability

[1]Employer/AIG was not assessed additional compensation and is not a party to this case.

[2]Because employer paid the penalty pursuant to the district director's supplementary order, the Board has jurisdiction over this appeal. *Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994); *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000).

for a Section 14(f) assessment when there has been a delay in the payment of compensation. This case initially presents a matter of first impression: may the parties legally agree to waive the Section 14(f) assessment?[3] We hold they may.

Section 8(i)(1) of the Act, 33 U.S.C. §908(i)(1), 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), and all Section 8(i) agreements are subject to approval by an administrative law judge or district director. 33 U.S.C. §§908(i)(3), 915(b); *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); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); 20 C.F.R. §§702.242, 702.243. Parties may agree to terms which provide for the complete discharge of an employer's liability, and they may condition or restrict their agreement provided it is in accordance with law.[4] *Sablowski v. General Dynamics Corp.*, 10 BRBS 1033 (1979).

The parties to a Section 8(i) agreement, for example, may make the claimant's receipt of permanent partial disability benefits under the schedule at 33 U.S.C. §908(c)(1)-(20) contingent upon the end of total disability. *Sablowski*, 10 BRBS 1033. The parties could also give an employer the right to rescind an agreement prior to its being approved, as absent a contractual provision permitting rescission prior to approval, executed settlement agreements awaiting approval are binding upon the employer. *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); *see also J.H. v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008); *Hansen*, 37 BRBS at 43. However, any contingency or condition must be in accordance with law: an employer may not include a condition which permits non-parties to receive a credit for benefits paid to the claimant under the settlement agreement, as that violates the requirement that a settlement is limited to the rights of the parties and to claims then in existence. *J.H.*, 41 BRBS 135.

[3]The United States Court of Appeals for the Fifth Circuit specifically reserved judgment on the question of whether an express agreement with the claimant to pick up his check after the employer made it available constitutes "payment." *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985).

[4]An agreement to settle a claim is limited to the rights of the parties and the claims then in existence. *J.H. v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008); 20 C.F.R. §702.241(g).

Section 14(f) provides a claimant with an additional 20 percent assessment of compensation, payable by the employer, if the employer does not pay the claimant's compensation within 10 days after payment becomes due. 33 U.S.C. §914(f); *Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985); *Lynn v. Comet Constr. Co.*, 20 BRBS 72 (1986); *McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (1977).[5] Equitable consideration cannot excuse an employer's late payment of compensation. *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT) (9th Cir. 2002) (no excuse when the claimant supplied incorrect street address); *Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (no excuse when the employer's receipt of the administrative law judge's order is delayed); *Lauzon*, 782 F.2d 1217, 18 BRBS 60(CRT) (no excuse to rely on the claimant's course of conduct or on an express agreement with his wife); *Zea v. West State, Inc.*, 61 F.Supp. 1144 (D.Or. 1999) (no excuse when check mailed to the claimant's previous address); *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 440 (1989) (no excuse when check mailed to the incorrect address); *McKamie*, 7 BRBS 315 (no excuse that check was mailed within 10 days). However, the Ninth Circuit has reserved judgment on the issue of equitable excuse should there be an allegation of fraud or physical impossibility. *Hanson*, 307 F.3d 1139, 36 BRBS 63(CRT).

The Section 14(f) assessment is considered "additional compensation." *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); 33 U.S.C. §902(12). The Act permits a claimant to waive his right to compensation and to provide for the complete discharge of an employer's liability through an approved Section 8(i) settlement. As a Section 14(f) assessment is "compensation" for which an employer could be held liable, we hold that the parties to a Section 8(i) settlement may negotiate the claimant's entitlement to or waiver of the Section 14(f) assessment within the terms of their Section 8(i) settlement. That is, they may negotiate conditions upon which the claimant would waive his right to that additional compensation. The terms for waiver, of course, would be subject to administrative approval, provided the settlement is not inadequate or procured by duress.

[5]Section 14(f)'s 10-day requirement means that the claimant must receive payment within 10 calendar days of the filing of the award. *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT), *reh'g denied*, 128 F.3d 801 (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *Barry*, 41 F.3d 903, 29 BRBS 1(CRT); *Irwin v. Navy Resale Exch.*, 29 BRBS 77 (1995); *McKamie*, 7 BRBS 315.

In this case, the approved settlement agreement provided:

> 11. Claimant stipulates and agrees that he has provided beneath his signature on this document below, a valid street address for purposes of delivery of the settlement proceeds payable to him referenced herein. Claimant further stipulates and agrees that if the street address he has provided below is not valid or if claimant fails to provide a street address, claimant waives all right to claim any penalty for late payment of the settlement proceeds payable to him by the terms of this settlement agreement.

Settlement at 7-8. Claimant signed the agreement and beneath his signature he wrote his correct street address. *Id.* at 8. Employer argues that claimant nevertheless violated the clause by failing to provide an address that permitted delivery of the settlement proceeds, as he did not provide a receptacle into which the United States Post Office (USPS) could deliver the mail.[6] Consequently, employer argues that claimant waived his right to the Section 14(f) assessment.[7] Claimant contends he complied with the request for a "street address" and that employer should have asked for a "mailing address" if that is what it really wanted. He also asserts that employer was aware he received his mail at a post office box instead of his house. The district director awarded the Section 14(f) assessment solely because payment of the settlement proceeds was late. She did not address either the settlement clause or the parties' arguments in her order.

As we have held that the parties may contract to waive the Section 14(f) assessment in their Section 8(i) agreement, and as the parties have demonstrated that the settlement clause in this case may be interpreted in different ways, we vacate the district

[6]To the extent employer's argument attempts to invoke the physical impossibility exception hinted at by the Ninth Circuit in *Hanson*, 307 F.3d 1139, 36 BRBS 63(CRT), we reject it. While the physical absence of a mail receptacle into which mail could be delivered at claimant's street address made it physically impossible for the USPS to deliver mail to claimant's house, it did not render the act of delivering the proceeds physically impossible. Mail could have been delivered to claimant's P.O. Box or the check could have been delivered by another carrier or method to claimant's home address. We render no opinion on whether the absence of a mail receptacle violates the settlement clause in this case.

[7]Employer argues that to grant claimant the assessment in this case would be to encourage claimants to provide false or misleading information in order to cause delayed payments and obtain the additional proceeds.

director's order holding employer liable for a Section 14(f) assessment. However, as the district director may not engage in fact-finding on disputed issues, *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000); *Durham v. Embassy Dairy*, 40 BRBS 15 (2006); *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986), we remand this case to the Office of Administrative Law Judges for findings of fact. *See Hanson*, 307 F.3d 1139, 36 BRBS 63(CRT); *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000). On remand, the administrative law judge should admit evidence relevant to construing the parties agreement and determine whether claimant violated the pertinent contract clause. If he did, then by the terms of the contract, claimant is not entitled to receive additional compensation pursuant to Section 14(f). If the administrative law judge finds that claimant complied with the contract, then he is entitled to the Section 14(f) assessment, as the payment of compensation was late and no equitable excuses may relieve employer of its liability for the assessment.

Accordingly, the district director's order of default is vacated. The case is remanded to the Office of Administrative Law Judges for 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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BETTY JEAN HALL
Administrative Appeals Judge