BRB No. 89-435

LEON HENSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCWEL CORPORATION	)	
	)	
and	)	
	)	
PACIFIC SHIP REPAIR AND FABRICATION, INCORPORATED	)	
	)	
and	)	DATE ISSUED:_____
	)	
UNITED MARINE MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Jeffrey Winter (Law Offices of Preston Easley), National City, California, for claimant.

David L. Bain, San Diego, California, for employer/carrier.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (86-LHC-1532) of Administrative Law Judge John C. Holmes denying benefits 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleges he injured his back, hip and legs while working as a truck driver for employer on August 18, 1980. Tr. at 55, 60-63. He filed claims for benefits under both California law and the Act. On November 19, 1984, employer's attorney mailed an original and four copies of a Compromise and Release[1] to claimant's attorney for signature.[2] Emp. Ex. 4 at 6. On November 26, 1984, claimant signed the Compromise and Release for the state claim. That same day he and his attorney, Mr. Mullen, signed a letter to the district director,[3] requesting a withdrawal of the Longshore claim. Cl. Ex. V. The letter informed the district director of the resolution of the state claim and stated:

Since I [claimant] am satisfied with this resolution of my claim, I would request withdrawal of the claim now pending before your department in accordance with the provisions of Section 702.216 of the Regulations.

Id.

[1]The Compromise and Release was printed on a California Workers' Compensation Appeals Board form. *See* Emp. Ex. 4.

[2]The letter enumerated the terms of the agreement and stated:

We are also attaching Withdrawal of Claim before the U.S. Department of Labor also for the signature of your client and office.

Emp. Ex. 4 at 6.

[3]Pursuant to 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

On December 5, 1984, the California Workers' Compensation Appeals Board (WCAB) approved the Compromise and Release agreement settling the case for $45,000.[4] On December 13, 1984, Mr. Easley, claimant's new attorney, sent the district director a letter asking him to disregard claimant's November 26 withdrawal letter. He stated that claimant had previously signed a substitution of attorney form for representation in the Longshore claim, that claimant was told by a secretary in Mr. Mullen's office that the effect of the earlier letter merely released Mr. Mullen from further obligation, and that claimant never wished to withdraw the claim under the Act. Cl. Ex. U. An informal conference was conducted by claims examiner Linda Myer on March 18, 1985, and on December 16, 1985, she rendered her recommendation referring the case to the administrative law judge for a determination of whether the case is still pending. Memo. of Inf. Conf. dated December 16, 1985.

A hearing was held on July 22, 1988, wherein the parties submitted medical, procedural, and testimonial evidence. The administrative law judge heard all issues of the case and identified the threshold issue as whether claimant had validly withdrawn or settled his claim under the Act. Decision and Order at 1, n. 1. First, the administrative law judge stated that "beyond a reasonable doubt" the agreement between employer and claimant settled both the state claim and the Longshore claim. Decision and Order at 3. He determined that Section 702.216 of the regulations, 20 C.F.R. §702.216 (1984),[5] does not apply in this case as the district director neither approved nor disapproved claimant's withdrawal, and he concluded that claimant validly withdrew the claim. *Id.* at 4. Alternatively, the administrative law judge found that if the cancellation of the withdrawal was effective, then the filing of the WCAB Compromise and Release with the district director constituted a request for a Section 8(i), 33 U.S.C. §908(i), settlement. Notwithstanding whether the 1984 amendments to Section 8(i) of the Act apply, he found that he had the authority to approve a settlement, and he determined that the settlement submitted by claimant is "reasonable."[6] Decision

[4]The WCAB found that claimant is entitled to temporary total disability benefits from September 1, 1980 through September 10, 1981, and from September 13, 1981 through October 31, 1983, and employer is entitled to credit for payments previously made. Additionally, it found that claimant is entitled to permanent partial disability benefits for a 74 percent disability from November 4, 1983 and continuing, until the settlement is paid in full. Of the $45,000 settlement, claimant is entitled to receive $39,196.56 in benefits, and his counsel is entitled to the remainder as a fee.

[5]Section 702.216 of the regulations was later redesignated as Section 702.225. But for the substitution of the term "district director" for "deputy commissioner," the sections are identical. 20 C.F.R. §702.216 (1984); 20 C.F.R. §702.225 (1993).

[6]The administrative law judge did not determine whether the 1984 amendments to the Act apply in cases where the injury occurs prior to the effective date of the amendments and the settlement occurs thereafter. Decision and Order at 5. Instead, he found that if the amendments apply, then the settlement in this case is effective because it was not rejected within 30 days. *Id.*; *see* 33 U.S.C. §908(i)(1) (1988). Further, even if the 30-day limit were tolled under the regulations, 20 C.F.R. §§702.242, 702.243, he determined that he has the authority to approve a submitted settlement. Decision and Order at 5.

and Order at 5. Finally, he determined it would be "a dangerous precedent" for him to ignore "the stark facts" indicating that claimant and employer "engaged in a good faith settlement of *all* claims arising from the August 1980 injury" and to find that claimant cancelled his withdrawal by notifying only one of the parties and by not offering restitution. *Id.* (emphasis in original). Claimant appeals the denial of benefits. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging reversal and remand.

Claimant contends the administrative law judge erred in finding that he withdrew the claim and in denying benefits. The Director supports claimant's contentions, asserting that the administrative law judge's decision is contrary to applicable law. The critical facts are not in dispute and establish that claimant and employer signed a settlement under California law on November 26, 1984, which was subsequently approved by the California WCAB. On the same day, claimant and his attorney at that time signed a letter seeking withdrawal of the longshore claim. Prior to approval of the withdrawal by the district director, claimant's current counsel sent a letter on December 14, 1984, asking that the withdrawal be disregarded and stating that claimant had retained new counsel on his longshore claim on November 24. Based on these facts, the administrative law judge determined:

> Claimant's protests to the contrary notwithstanding, it is clear beyond reasonable doubt that the agreement entered into between Employer and Claimant resulting in a Compromise and Release by the California Workmen's Compensation Board was a settlement of *both* the claims under the Act and the California statute.

Decision and Order at 3 (emphasis in original). Thus, he concluded that claimant's withdrawal was a part of the settlement agreement and was valid.

While a claimant may withdraw his claim prior to the adjudication thereof, a withdrawal is effective only if the provisions of Section 702.225 of the regulations, 20 C.F.R. §702.225, are met. Section 702.225 states that a claimant may make such a withdrawal provided:

> (1) He files with the district director with whom the claim was filed a written request stating the reasons for withdrawal; . . .
>
> (3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and
>
> (4) The request for withdrawal is filed, on or before the date the OWCP makes a determination on the claim.

20 C.F.R. §702.225(a). The Director argues that in this case the district director did not approve the withdrawal. Both claimant and employer note that the claims examiner denied the withdrawal in

January 1988.[7] *See* Cl. Brief at 4; Emp. Brief at 3. The administrative law judge found that the district director "neither approved [nor] disapproved the withdrawal since that was a matter in dispute." Decision and Order at 4. Based on this determination, he concluded that the regulation, Section 702.216, now Section 702.225, does not apply to the present case, and he determined that the claim had been withdrawn.

This finding is erroneous as a matter of law. The regulation is not rendered inapplicable merely because the district director took no action on the withdrawal request. Although the administrative law judge has the authority to consider the withdrawal issue, *see Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155 (1978), he must consider the issue in light of the requirements of the regulation, *i.e.*, whether the withdrawal is for a proper purpose and is in claimant's best interest. In this regard, we hold that the administrative law judge failed to apply the regulatory criteria. Within a few weeks of signing the withdrawal letter, moreover, claimant obtained new counsel and sent a letter to the district director indicating he wished to pursue his claim.[8] As claimant indicated his intent to pursue his claim before the district director or the administrative law judge acted upon the withdrawal request, *see generally Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 31 (CRT) (5th Cir. 1988), the administrative law judge lacked authority to find the withdrawal effective. Thus, we reverse the administrative law judge's finding that claimant validly withdrew his claim.[9]

Moreover, we hold that the administrative law judge erred in finding that the parties accomplished a settlement pursuant to Section 8(i) of the Act by sending a copy of the Compromise and Release to the district director. Because a claim may not be withdrawn in exchange for a sum of money, as that would violate the Act's explicit prohibition of waiver of compensation, a claimant must follow the settlement procedures of Section 8(i) if he wishes to withdraw his claim in return for a sum of money. *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79, 84 (1991), *aff'd on*

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[7]Although the record contains the claims examiner's 1985 referral of the case to the administrative law judge, it does not contain any correspondence from her in 1988 regarding claimant's attempted withdrawal. If, as claimant and employer state, the claims examiner denied the withdrawal, she lacked the authority to do so, as such a determination is within the discretion of the district director. *See Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33, 41 (1993) (*en banc*) (Brown, J., dissenting), *aff'g on recon.* 25 BRBS 79 (1991); *Mazzella v. United Terminals, Inc.*, 8 BRBS 755, *aff'd*, 9 BRBS 191 (1978).

[8]As the Director notes, even if claimant accomplished a valid withdrawal, such withdrawal is without prejudice to the filing of another claim. 20 C.F.R. §702.225(c). Therefore, claimant's letter cancelling the withdrawal could be interpreted as seeking reinstatement of the original claim or as filing another claim as permitted by Section 702.225(c).

[9]We note that, if claimant is entitled to benefits under the Act, Section 3(e) prevents the possibility of a double recovery by providing that any benefits claimant receives under the California law for the same injury or disability be credited against employer's liability under the Act. 33 U.S.C. §903(e) (1988).

recon. en banc, 27 BRBS 33 (1993) (Brown, J., dissenting); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd in pert. part on recon.*, 22 BRBS 430 (1989); *see also Jennings v. Lockheed Shipbuilding & Construction Co.*, 9 BRBS 212 (1978); 33 U.S.C. §§908(i), 915(b). The regulations in effect at the time of the alleged agreement provide the requirements for a complete settlement application including the settlement application procedure and approval criteria. 20 C.F.R. §§702.241-702.242 (1984).[10] Although the administrative law judge considered the filing of the WCAB Compromise and Release and the letter of withdrawal with the district director's office as a request for a Section 8(i) settlement, such filing does not constitute a Section 8(i) settlement because it does not satisfy the requirements of the regulations. Specifically, as the "application" lacked a current medical report describing claimant's injury, the nature and extent of his disability, and any other relevant physical conditions, the parties failed to supply the requisite supporting documentation from which a decision could be made as to the adequacy of the settlement. 20 C.F.R. §702.241 (1984). Furthermore, the agreement on a form created by the state of California and filed with the California WCAB was not submitted in accordance with, and neither party sought its approval under, Section 8(i) of the Act or Sections 702.241 and 702.242 of the regulations. *See generally Norton*, 25 BRBS at 84; *Jennings*, 9 BRBS at 215. Section 16 of the Act, 33 U.S.C. §916, allows no assignments, releases or commutations of compensation, except as provided by the Act. *See*, *e.g.*, 33 U.S.C. §908(i). The release signed by claimant, therefore, cannot be effective as to his claim under the Act, as its purpose was to finalize the settlement of the state claim, not the settlement of his longshore claim.

Although an administrative law judge has the authority to approve a Section 8(i) settlement, in this case, the administrative law judge erred in finding that the parties' settlement is reasonable under the Act because the filing of the Compromise and Release with the district director was not for the purpose of seeking a Section 8(i) settlement and, moreover, was not in accordance with the regulations. *See generally Norton*, 25 BRBS at 84. Therefore, we hold that a proper settlement has not been accomplished pursuant to Section 8(i) of the Act. Because there has not been a valid withdrawal or settlement of the Longshore claim, we remand the case to the administrative law judge for a determination on the merits.

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[10]As previously noted, the administrative law judge did not determine which version of the Act or regulations applies to the instant case. Pursuant to Section 28(b) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1655, the amended version of Section 8(i) is applicable on the 90th day after September 28, 1984 and applies with respect to claims filed after or pending on such 90th day. The regulations implementing amended Section 8(i) were not promulgated until January 1985. 20 C.F.R. §§702.242-702.243 (1993). Thus, the alleged settlement submitted to the district director in November 1984 could not have been evaluated under the new regulations. Nevertheless, we note that the alleged settlement application also does not satisfy the amended versions of the Act and regulations. *See* 33 U.S.C. §§908(i) (1988); 20 C.F.R. §§702.242-702.243 (1993). In particular, the "application" does not satisfy the requirements of Section 702.242(a) in that it does not constitute a stipulation signed by all the parties. 20 C.F.R. §702.242(a). In fact, neither of the copies of the Compromise and Release in the record contains the signatures of both parties. Further, the "application" does not contain a recent medical report nor does it indicate claimant's likelihood of future employment. 20 C.F.R. §702.242(b)(4), (5).

Accordingly, the administrative law judge's finding that claimant validly withdrew his Longshore claim, and his alternate finding that the parties submitted a valid and reasonable settlement under the Act are reversed, and the case is remanded for a decision on the merits.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge