BRB No. 89-451

TERRY NORTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER on
Respondent	)	RECONSIDERATION *EN BANC*

Appeal of the Order of Summary Judgment of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Roy D. Axelrod and Jacqueline P. McManus (Littler, Mendelson, Fastiff & Tichy), and Alvin G. Kalmanson, San Diego, California, for self-insured employer.

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

STAGE, Chief Administrative Appeals Judge:

Employer has timely filed a Petition for Reconsideration *En Banc* of the Board's Decision and Order in *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991). 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(a), (c), 802.407(b), 802.409. In its decision, the Board reversed the administrative law judge's Order of Summary Judgment, holding that the parties' 1977 "agreement" was not an approved Section 8(i) settlement, 33 U.S.C. §908(i) (1982)(amended 1984), and that because the "settlement application" was deficient under 20 C.F.R. §702.243(b) (1985), the settlement could not have been automatically deemed approved pursuant to Section 8(i), as amended in 1984, 33 U.S.C. §908(i)(1988), 90 days after the enactment of the 1984 Amendments to the Act. We grant employer's request to reconsider this case *en banc*, but we deny the relief requested.

To recapitulate, on October 10, 1975, claimant, a welder for employer, sustained multiple

fractures and lacerations to his face, fractures of both heels, and fractures of his right wrist when he slipped and fell off scaffolding and fell approximately forty-five feet onto a steel-plated deck. Claimant filed a claim under the Act that day and employer voluntarily paid temporary total disability compensation from October 11, 1975 through June 2, 1977, and temporary partial disability compensation for the week of June 3, 1977, for a total of $9,763.62. 33 U.S.C. §908(b), (e).

On May 27, 1977, the parties executed a one page document entitled "Withdrawal of Claim" in which they agreed to "settle" the claim for a lump sum payment of $35,000 less attorney's fees, in addition to all payments of compensation made through that date.[1] The agreement was encompassed in the form of a letter to the Office of Workers' Compensation Programs district office and concluded with a request for approval of the agreement.

On July 21, 1977, a claims examiner from the district office wrote a letter to the parties which informed them that the informal disposition of the claim was approved, but she modified the agreement by apportioning the $35,000 to reflect specific sums owed for past temporary disability, $1,218.02, and scheduled compensation for permanent impairment of the right arm and both legs totalling $33,781.98. The claims examiner's letter concluded that upon such payment the case would be "closed subject to the limitations of the Act." Emp. Ex. 15. On July 27, 1977, employer paid the aforementioned sum and submitted an LS-208 "Notice of Final Payment" Form which stated that the reason for termination or suspension of payments was that there had been an "Informal Withdrawal of the Claim." Emp. Ex. 17.

On December 24, 1986, claimant, through new counsel, filed another claim against employer for disability arising out of the October 10, 1975 injury. A hearing was held before the administrative law judge on November 21, 1988. Prior to the hearing, employer sought summary judgment based on the alleged 1977 settlement. On May 6, 1988, the administrative law judge denied employer's motion, finding that the parties had not followed the proper procedures for withdrawal of a claim under 20 C.F.R. §702.225. At the hearing, employer renewed its motion for summary judgment on a new ground, arguing that the settlement automatically had been deemed approved on the 90th day after enactment of the 1984 Amendments pursuant to 33 U.S.C. §908(i)(1)(1988). On January 16, 1989, the administrative law judge granted employer's motion and denied the claim, finding that the informal settlement which was never approved by the deputy commissioner had been automatically deemed approved under Section 8(i)(1) of the amended Act because the parties were represented by counsel at the time of the agreement.

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[1]The one page document stated that:

> By this agreement and Withdrawal of Claim all issues are resolved with respect to temporary total disability, permanent partial disability and any claim of loss of wage-earning capacity.

Emp. Ex. 13.

Claimant appealed the administrative law judge's decision. The Board held that there was no effective withdrawal of the 1975 claim pursuant to the parties' 1977 agreement, inasmuch as the agreement and the claims examiner's July 21, 1977 letter approving the agreement did not comport with Section 8(i) of the 1972 Act and its implementing regulations.[2] Moreover, the Board held that the attempted withdrawal of the claim was ineffective because a claim cannot be withdrawn for a sum of money absent compliance with Section 8(i). *Norton*, 25 BRBS at 83; 33 U.S.C. §915(b).

The Board further held, assuming, *arguendo*, that the 1984 Amendments apply to the 1977 agreement, that the "automatic approval" provision of amended Section 8(i) does not apply because the incomplete "settlement application" tolled the automatic approval provision pursuant to 20 C.F.R. §§702.242(b), 702.243(a) (1985). Lastly, the Board concluded that since the 1975 claim was not withdrawn or settled, it remained pending and merged with the 1986 claim. *Norton*, 25 BRBS at 86-87. The case was remanded to the administrative law judge to allow the parties to amend their deficient application or to proceed with a hearing on the merits. *Id.* at 87.

Employer raises several contentions in support of its motion for reconsideration. It first contends that the 1977 agreement became binding and final when it was approved by the claims examiner on July 21, 1977, as it was properly submitted to the Office of Workers' Compensation Programs and as both parties were represented by counsel at that time. Employer also maintains that the Board erred in holding that the 1977 agreement was not automatically deemed approved under amended Section 8(i). In this regard, employer specifically alleges that the Board erred in *sua sponte* raising the applicability of the regulations at 20 C.F.R. §§702.242, 702.243, and that portions of these regulations are invalid because they are inconsistent with Section 8(i) of the Act. Lastly, employer contends that claimant's 1986 claim was not timely filed and should be barred by the doctrine of laches.[3]

Initially, we reject employer's contention that the Board erred in holding that the 1977 "withdrawal of claim" was not a valid settlement under the 1972 version of Section 8(i). 33 U.S.C. §908(i)(1982) (amended 1984). The Board fully addressed employer's contentions in this regard in its Decision and Order, and employer has not raised any theory of the case that warrants reconsideration. *See Norton*, 25 BRBS at 84.

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[2]The Board noted that there had been no determination that the settlement was in claimant's best interests or that employer's liability was completely discharged, and that a claims examiner lacks the authority to approve Section 8(i) settlements. *Norton*, 25 BRBS at 84.

[3]Employer also contends that the Board failed to follow its own rules of practice and procedure in allowing claimant and the Director, Office of Workers' Compensation Programs, to file untimely briefs. This contention was considered and rejected by the Board in its Order dated December 20, 1990, in response to employer's Motion for Reconsideration of the Board's August 14, 1990 Order accepting claimant's brief. Inasmuch as employer has raised no new issues in this regard, we decline to reconsider employer's contention.

Employer next contends that the Board erred in holding that the 1977 "agreement" was not automatically deemed approved on the 90th day after enactment of the 1984 amendments to Section 8(i). Specifically, employer contends that the Board erred in *sua sponte* raising the applicability of the regulations at 20 C.F.R. §§702.242, 702.243, and that portions of these regulations are invalid because they are inconsistent with Section 8(i).[4]

Section 8(i)(1), as amended in 1984, states:

> Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

33 U.S.C. §908(i)(1)(1988). The regulation at 20 C.F.R. §702.242 sets forth the information necessary for a complete settlement application. Section 702.243(a), (b), provides in pertinent part:

(a)... Failure to submit a complete application shall toll the thirty day period mentioned in Section 8(i) of the Act, 33 U.S.C. §908(i), until a complete application is received.

(b) The adjudicator shall consider the settlement application within thirty days and either approve or disapprove the application. The liability of an employer/insurance carrier is not discharged until the settlement is specifically approved by a compensation order issued by the adjudicator. However, if the parties are represented by counsel, the settlement shall be deemed approved unless specifically disapproved within thirty days after receipt of a complete application. This thirty day period does not begin until all the information described in §702.242 has been submitted. The adjudicator

[4]Section 28(b) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984 states that the amendments to Section 8(i) shall be effective 90 days after the date of enactment of the amendments, and shall apply both with respect to claims filed after the 90th day and to claims pending on the 90th day. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1646, 1655, §§8(f), 28(b). The 90th day after enactment is December 27, 1984. Employer's contention assumes that the 1984 Amendments apply to this "agreement." The Board declined to address the applicability of the 1984 Amendments in its decision because assuming, *arguendo*, their applicability, the agreement failed to conform to the requirements of the regulations. *Norton*, 25 BRBS at 86.

> shall examine the settlement application within thirty days and shall immediately serve by certified mail on all parties notice of any deficiency. This notice shall also indicate that the thirty day period will not commence until the deficiency is corrected.

20 C.F.R. §702.243(a), (b). For the reasons stated in *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71, 74 (1992), *aff'g on recons. en banc*, 24 BRBS 224 (1991), we reject employer's contention that the Board erred in *sua sponte* considering the effect the regulations have on the resolution of this case.

We also reject employer's contention that Section 702.243(a), (b) is invalid to the extent it tolls the 30-day approval period contained in Section 8(i). Employer contends that Section 8(i) states that when the parties are represented by counsel any agreement not specifically disapproved within 30 days after submission shall be deemed approved and that Section 702.243(a), (b) is invalid to the extent that it tolls the 30-day period if a "complete" application, as provided for in Section 702.242, is not submitted. Employer maintains that in amending Section 8(i), Congress intended that there be prompt action on the proposed settlement and that the "deemed approved" language applies even to an incomplete settlement application if it is not "specifically disapproved" within 30 days. The Board addressed and rejected employer's contention in *McPherson*, 26 BRBS at 74-75, and for the reasons stated therein, we reject employer's contention in this case.

We similarly reject employer's contention that Section 702.243(b) is internally inconsistent and in conflict with Section 8(i). *Id.* at n.2. Employer contends that the second sentence of Section 702.243(b) conflicts with the last sentence of Section 8(i). *See* text, *supra*. The second sentence regarding the discharge of employer's liability must be read in conjunction with the third sentence which qualifies it and which follows the language of Section 8(i)(1) of the Act.[5] Thus, if the settlement is "deemed approved," the liability of the employer is discharged, and, contrary to employer's interpretation, the second sentence of Section 702.243(b) does not indicate that an employer's liability is not discharged unless the settlement is "actually" approved.

In sum, we reject employer's contentions regarding the validity of the regulations implementing Section 8(i). *McPherson*, 26 BRBS at 74-75. Inasmuch as the 1977 "agreement" of the parties is incomplete as a settlement application under 20 C.F.R. §702.242, *see Norton*, 25 BRBS at 85-86, the automatic approval provision of Section 8(i) is tolled under 20 C.F.R. §702.243(a).

We next address employer's contentions that claimant's 1986 claim is untimely as a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, or is barred by the doctrine of laches pursuant to the Board's decision in *Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984). Section 22 of the Act provides, in part:

[5]Section 8(i)(1) provides that the liability of employer or carrier is not discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge.

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation....

33 U.S.C. §922 (1988). Employer contends that because the 1977 "withdrawal" was, in essence, a memorandum of understanding following an informal conference as contemplated by 20 C.F.R. §702.315[6] pursuant to which it paid benefits, claimant's request was not made within one year of the last voluntary payment and is therefore untimely under Section 22. Employer contends that under Section 702.315, the deputy commissioner would have been required to issue a formal compensation order, which it contends is a purely ministerial task, had it so requested. Employer further contends that the decision of the Supreme Court in *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975) is distinguishable from the instant case in that there was no "settlement" in that case.

We first address employer's contention regarding *Intercounty*. In *Intercounty*, the Supreme Court addressed whether Section 22 barred consideration of a claim which was timely filed and which had not been the subject of a formal compensation order within one year after the cessation of voluntary payments. The claimant in *Intercounty* timely filed a claim for benefits in 1960 and employer instituted voluntary payments while contesting the claim for total disability. A claims examiner adjourned a hearing on the claim in 1966 without resolution. Thereafter, employer stopped its payments to claimant upon reaching the statutory maximum for conditions other than permanent total disability or death. In 1970, two years after receiving the last voluntary payment, claimant requested a hearing on his previously filed claim. The deputy commissioner determined that the claim was not time-barred under Section 22, and awarded claimant permanent total disability benefits. The district court held that Section 22 barred the claim, but the United States Court of Appeals for the District of Columbia Circuit reversed, holding that since the deputy commissioner had not issued an order prior to the request for a hearing, Section 22 did not bar

[6]Section 702.315(a) states, in pertinent part:

> Following an informal conference at which agreement is reached on all issues, the [deputy commissioner] shall ... embody the agreement in a memorandum or ... issue a formal compensation order ... If either party requests that a formal compensation order be issued the [deputy commissioner] shall, within 30 days of such request, prepare, file and serve such order ....

consideration of the claim. *Intercounty Construction Corp. v. Walter*, 500 F.2d 815 (D.C. Cir. 1974).

The Supreme Court agreed with the Court of Appeals,[7] and held that the one year limitations period contained in Section 22 applies only where a compensation order has been issued by the deputy commissioner. *Intercounty*, 422 U.S. at 11-12, 2 BRBS at 9. Thus, as no order had been entered in *Intercounty*, claimant's request for a hearing on his claim was not barred by the one year limit in Section 22. *Id.*

Similarly, in the instant case, no order was entered that would bar claimant from pursuing his claim. We reject employer's implication that the 1977 "agreement" constitutes an order as contemplated by the Supreme Court in *Intercounty*. First, no order was ever issued by the deputy commissioner; employer would have us consider a claims examiner's letter, purporting to approve a withdrawal as a formal compensation order. Employer's assertion that the claims examiner's letter of July 21, 1977, is the memorandum of conference contemplated by the regulations is erroneous. On February 22, 1977, the same claims examiner had issued a memorandum following an informal conference held on February 17, 1977, in which she recommended that employer pay claimant continuing temporary total disability benefits. Moreover, no formal compensation order was issued by the deputy commissioner under 20 C.F.R. §702.315; that such an order could have been issued had employer so requested does not obviate the fact that it was not issued. No order was issued with findings as to claimant's entitlement; the 1977 letter discussed benefits only in the context of the parties' agreement. Although, as employer notes, no settlement or withdrawal was attempted in *Intercounty*, we do not find this distinction persuasive in the absence of a formal compensation order and in view of our holding that the attempted settlement did not comply with Section 8(i). Claimant's pursuit of his claim from the 1975 injury, therefore, is not barred by the limitations period of Section 22.

We also reject employer's reliance on *Rodriguez*, 16 BRBS at 371. In *Rodriguez*, the claimant was injured in 1967, and the claim for disability resulting from this injury was withdrawn in 1972 after the parties reached an agreement as to the amount of compensation due. At the hearing before an administrative law judge in 1980 or 1981, claimant sought, *inter alia*, compensation for disability arising out of the 1967 injury. The administrative law judge found that the present claim for that injury was timely filed, and he awarded temporary total disability benefits for various periods.

On appeal, the Board agreed with the administrative law judge that the withdrawal of the claim in 1972 was not for a proper purpose as the settlement provisions of Section 8(i) were not satisfied. *Rodriguez*, 16 BRBS at 374; 33 U.S.C. §915(b). However, the Board held that although the 1968 timely filed claim theoretically remained open, it was contrary to the purposes of the Act to

[7]In so doing, the Court rejected a contrary approach taken by the United States Court of Appeals for the Fifth Circuit in *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir. 1972), *cert. denied*, 409 U.S. 887 (1972).

permit "old" claims to be reopened because certain technical requirements were not met. *Id.* The Board stated that as so much time had passed between the last payment of compensation and the subsequent pursuit of the claim, it would be unfair to reopen the case when memories were no longer fresh. *Id.*

As employer notes, the facts in *Rodriguez* are similar to those in the instant case. Specifically, in the instant case the Board held that the attempted withdrawal of the claim in 1977 was invalid as it was not for a proper purpose, and that the claim thus remained open as it was not settled or litigated. *Norton*, 25 BRBS at 83-84, 86-87. Employer therefore maintains that *Rodriguez* mandates that the Board not permit the instant claim to be reopened because technical requirements for settlement or withdrawal were not met.

In light of subsequent Board case law, we reject employer's argument that *Rodriguez* is controlling. The holding of *Rodriguez* does not discuss or attempt to distinguish the Supreme Court's decision in *Intercounty*. Since *Rodriguez*, the Board consistently has applied *Intercounty*, and additionally has held that the doctrine of laches does not apply to cases arising under the Act in view of the specific statutes of limitations provided for in the Act. *See, e.g., Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); *Simpson v. Bath Iron Works Corp.*, 22 BRBS 25 (1989); *Lewis v. Norfolk Shipbuilding & Dry Dock Co.*, 20 BRBS 126 (1987). Moreover, since we have held that the facts in *Intercounty* are not distinguishable in any material way from those in the instant case, we are compelled to follow the precedent of the Supreme Court. We, therefore, hold in accordance with the Board's earlier decision in this case, that as claimant's 1975 claim was timely filed, but never adjudicated, it remained viable and merged with the 1986 claim for disability arising from the same injury. *See Norton*, 25 BRBS at 87. *See also Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990).

Finally, we disagree with our dissenting colleague's conclusion that the 1977 agreement was a properly approved settlement under Section 8(i) for the reasons addressed in this and our prior decision. We also note our disagreement with the conclusion that a claims examiner had the authority to approve a settlement pursuant to Section 8(i). The dissent cites *Barulec v. Skou R.A.*, 471 F. Supp. 358 (S.D.N.Y. 1979), *aff'd mem.*, 622 F.2d 572 (2d Cir. 1980), *aff'd on other grounds sub nom. Rodriguez v. Compass Shipping Co. Ltd.*, 451 U.S. 596, *reh'g denied*, 453 U.S. 923 (1981), for the proposition that a claims examiner has the authority to approve a Section 8(i) settlement. In *Barulec*, however, the court held that Section 8(i) applies only to settlements reached by the parties independently, and that if the parties reach an agreement following an informal conference a claims examiner had the authority under the existing regulation to approve this agreement. *See* 20 C.F.R. §702.312 (1976) (amended 1977)(as amended, designee may no longer issue compensation order embodying agreement). The court does not hold that a claims examiner has the authority to approve a settlement pursuant to Section 8(i), and the Board has held specifically that the deputy commissioner may not delegate discretionary duties to claims examiners. *See Mazzella v. United Terminals, Inc.*, 8 BRBS 755 (1978), *aff'd on recon.*, 9 BRBS 191 (1978); *Bradley v. Director, OWCP*, 8 BLR 1-418 (1985); *Cf. House v. Southern Stevedoring Co.*, 14 BRBS 979 (1982), *aff'd*,

703 F.2d 87, 15 BRBS 114 (CRT)(4th Cir. 1983) (deputy commissioner may delegate discretionary authority to assistant deputy commissioner who is duly authorized). Similarly, the "agreement" in *Rodriguez v. Compass Shipping Co. Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, 451 U.S. 596, *reh'g denied*, 453 U.S. 923 (1981), is one which the parties reached following an informal conference; there is no reference to Section 8(i) in this decision. In our opinion, the most that can be gleaned from these decisions is that a claims examiner had the authority to issue a compensation order following an informal conference based on the parties' agreement. 20 C.F.R. §702.312 (1976) (amended 1977). They do not support our colleague's opinion that the claims examiner properly approved the agreement here under Section 8(i). Moreover, the testimony of Stanley Levine and Edward Corley regarding the procedures used by the deputy commissioner in 1977 is irrelevant in view of the statutory and regulatory requirements for settling a case pursuant to Section 8(i).

In summary, we reaffirm the Board's determination that the 1977 "agreement" was not a valid settlement pursuant to Section 8(i) of the 1972 Act. We further reject employer's challenge to the validity of the regulations implementing Section 8(i) of the 1984 Act, and we hold that the 1977 "agreement" was not automatically approved on the 90th day after enactment of the 1984 Amendments as it was an incomplete application thereby tolling the automatic approval provisions. Finally, we reject employer's contentions regarding *Intercounty* and *Rodriguez*, and we hold that claimant's claim is not barred by Section 22 or by the doctrine of laches.

Accordingly, employer's motion for reconsideration *en banc* is granted, but the relief requested is denied. The Board's prior decision is affirmed in all respects.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

The procedural history of this case, and the facts, are amply set forth in the Decision and Order in *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991). In that decision the Board reversed a summary judgment order of the administrative law judge in which he held that there had been an approved settlement of the case. The Board remanded the case to allow the parties to amend the settlement application or to proceed with a hearing on the merits. Employer has filed a Petition for Reconsideration *En Banc* which has been granted, but the relief requested is being denied by the majority. I respectfully dissent.

The sole issue in this case is whether a valid settlement was entered into by the parties. The subject of a settlement was first discussed by the parties, both represented by counsel, with Mr. Norton present, at an informal conference in San Diego with Carol Pesch, Claims Examiner, United States Department of Labor, on February 17, 1977. Subsequently, pursuant to a letter dated May 27, 1977, signed by Mr. Norton and Stanley L. Levine, his attorney, the Department of Labor was advised that in consideration for the *agreement* of National Steel & Shipbuilding Company to pay $35,000, in addition to other monies paid and credits, all issues are resolved with respect to temporary total disability, permanent partial disability, including scheduled permanent partial disability and any claims of loss of wage-earning capacity. Approval of the *agreement* was requested. In addition to the references to an agreement the subject reference was also identified as *Withdrawal of Claim*. Employer's Ex. 13. On July 21, 1977, Carol Pesch, the claims examiner, advised the parties that the disposition *is affirmed* with amendments. The parties were advised that upon payment of the recommended compensation a Form LS-208 was to be submitted, subsequent to which the matter *will be closed* subject to the limitations of the Act. Employer's Ex. 15. The necessary and last payments of compensation were made on July 27, 1977, with the reason stated as "informal withdrawal of claim," and the required Form LS-208 was filed. Significant is that Stanley Levine, claimant's attorney, and Edward Corley, a former claims examiner who later was appointed Assistant Deputy Commissioner for the District of Southern California, testified that in 1977 the only mechanism for approval of a lump sum settlement was by means of a withdrawal of a claim and that formal Section 8(i) settlements were not utilized. *See* Dep. at 14; Tr. at 41-44, 55-58. This testimony was uncontradicted.

The above amounted to a consummated settlement resulting from an informal conference before a claims examiner and approved by a claims examiner. All aspects of the case were thoroughly discussed. It was presented that the claim was for injuries to all parts of the body that were injured. It was acknowledged that medical rights would be open for life. *See* Dep. of Stanley Levine. Mr. Norton was advised, and realized that if he proceeded to a hearing he could get an

award for a figure greater, or less, than $35,000. Dep. of Stanley Levine, p. 20. The parties looked upon the agreement as a final settlement, at least until Mr. Norton filed another claim over nine years later on December 24, 1986, for the same incident of October 10, 1975. In the meantime no assertions had been made of fraud, duress, mistake, inadequacy or that the settlement was not in the best interests of the claimant. The administrative law judge looked upon the agreement as an approved settlement in his order of December 27, 1988. The Board, however, in its decision of September 30, 1991, for a myriad of technical reasons, concluded that it was not a valid settlement. This action came fourteen years after approval of the agreement.

Section 8(i)(A) of the Longshore and Harbor Workers' Compensation Act, as amended in 1972, gives authority to deputy commissioners to approve agreed settlements. It has been suggested that claims examiners do not have any such authority. However, in *Barulec v. Skou R.A.*, 471 F.Supp. 358 (S.D.N.Y. 1979), *aff'd mem.*, 622 F.2d 572 (2d Cir. 1980), *aff'd on other grounds sub nom. Rodriguez v. Compass Shipping Co. Ltd.*, 451 U.S. 596, *reh'g denied*, 453 U.S. 923 (1981), the court did recognize the delegated authority of a claims examiner to approve settlements. It stated that it could reasonably be construed under the general authority of a deputy commissioner to make or cause to be made such investigations as he considers necessary in respect of a claim under Section 19(c) of the Act. The court referred to an informal conference as the first stage of an investigation and that it appears reasonable to conclude that the deputy commissioner's authority is delegable and that such delegation "facilitates operation of the system." *Id.* at 362. The *Barulec* court drew a line between settlements agreed upon at a conference and those consummated by the parties on their own without the assistance of the deputy commissioner's office. In the former it held that a claims examiner had the authority to approve settlements. In the within case, as stated above, the settlement proceedings were instituted at an informal conference before Claims Examiner Carol Pesch, with claimant and counsel for both parties present. The proceedings were subsequently completed by the forwarding of a letter of agreement by the parties and its approval by Claims Examiner Pesch. I would hold that this procedure comes within the one recognized in *Barulec* in which a claims examiner has delegated authority. To hold otherwise would not "facilitate operation of the system."

The United States Court of Appeals for the Second Circuit also recognized the authority of a claims examiner to approve settlements. In *Rodriguez v. Compass Shipping Co. Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd on other grounds*, 451 U.S. 596, *reh'g denied*, 453 U.S. 923 (1981), the court disagreed with a claimant who argued that an award must be approved by a deputy commissioner. The court referred to Section 39(a) of the Act, 33 U.S.C. §939(a), empowering the Secretary of Labor to make such rules and regulations as necessary. It held that in this day and age an administrator with such authority may delegate authority unless expressly forbidden by statute. It held that a claims examiner is in just as advantageous a position as a deputy commissioner to determine whether a settlement is in the best interest of an injured employee. It recognized the approval by a claims examiner of a settlement signed *after* an informal conference. That is the situation in this case. The court did not say that authority was contingent upon a signing *at* the conference. In *Rodriguez*, which involved the assignment of a right to sue a third party under Section 33(b) of the Act, 33 U.S.C. §933(b), claimant contended there could be no assignment since neither the deputy commissioner nor claims examiner filed a formal order. The court disagreed. It

held that where an employee, upon signing the settlement with the assistance and co-signature of his counsel, is fully aware of his rights, failure of the administrator to file a formal order can have no significance as far as the substantive rights of the parties are concerned.[8] The employer's obligation to start paying compensation commences immediately. To delay until the filing of an order would "exalt form over substance." It appears that there is much of that in the myriad reasons given in this case to reverse the administrative law judge's finding of an approved settlement.

As I see it, this case was settled in 1977 by reason of the informal conference, the letter of agreement, the approval by the claims examiner and payment. The case should be

[8]I note that, subsequently, in *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 15 BRBS 152 (CRT) (1983), the Supreme Court held that a formal order is needed to trigger an assignment under Section 33(b). The holding in this case was codified in the 1984 amendments to Section 33(b), 33 U.S.C. §933(b)(1988). *Pallas*, however, did not involve a settlement.

finished. *See Rodriguez v. VIA Metropolitan Transit System*, 802 F.2d 126 (5th Cir. 1986), which held that settlement agreements when fairly arrived at and properly entered into, are generally binding, final and as conclusive of the rights of the parties as is a judgment entered by the court. To the same effect was the holding in *Thibault v. Ourso*, 605 F.Supp. 1 (M.D. La. 1981), *appeal dismissed*, 705 F.2d 118 (5th Cir. 1983). It was also held that a settlement agreement, once concluded, is as binding, conclusive, and final as if it had been incorporated into judgment. *See Bostich Foundry Co. v. Lindberg*, 797 F.2d 280 (6th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

I would grant the motion for reconsideration and would affirm the administrative law judge's dismissal of the claim, although on the grounds stated herein rather than on the basis utilized by the administrative law judge.

JAMES F. BROWN
Administrative Appeals Judge