BRB No. 91-1051

BILLY R. KELLY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY (In Liquidation, by and through the Mississippi Insurance Guaranty Association)	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Approving Compromise Settlement of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Ruth E. Bennett (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Carol B. Feinberg (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: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Approving Settlement (90-LHC-1156) of Administrative Law Judge C. Richard Avery 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a machine apprentice and pipe welder with employer for various periods during the 1950's. On July 19, 1989, claimant filed a claim for an 18.1 percent binaural impairment based on a March 10, 1989 audiogram administered by Dr. Wold. Claimant contended his injury was caused by exposure to repeated noise during his employment with employer. Employer disputed the causal relationship between claimant's injury and his employment, and the extent of claimant's hearing impairment based on the December 15, 1989 audiogram administered by Dr. Stanfield which indicated a 9.38 percent binaural impairment.

After the case was referred to the Office of Administrative Law Judges, claimant and employer reached a compromise settlement that provided for a lump sum payment to claimant of $5,000 for any injury or disability which claimant may have sustained due to noise exposure while employed by employer. The agreement additionally stipulated that, inasmuch as a hearing loss is a permanent partial disability, maximum medical improvement has been reached, and there is no indication that any further medical treatment will be needed. The agreement therefore provided for a payment of $500 to claimant as full and final payment for all past, present and future medical expenses. Claimant and employer then requested approval of the settlement by the administrative law judge pursuant to Section 8(i) of the Act. 33 U.S.C. §908(i). The administrative law judge approved the settlement, and incorporated the representation in the agreement that it was not procured by fraud or duress. He found that claimant is entitled to $5,000 for any hearing loss claimant may have sustained while employed with employer including "any and all disability, death benefits, past, present, and future penalties, interest and any other costs of every kind, including all back compensation benefits, if any, and all claims based on a loss of wage earning capacity, if any, arising from the injury heretofore described." Decision and Order Approving Compromise Settlement at 2.

The Director appeals the administrative law judge's approval of the parties' settlement agreement, contending that the language approved by the administrative law judge violates Section 8(i) of the Act and its implementing regulations, inasmuch as it approves an agreement which discharges employer's potential liability for claims not yet in existence.[1] Employer responds, urging affirmance, and claimant has not responded to this appeal.

Specifically, the Director contends that the language in paragraph 9 of the Petition to

[1]Contrary to employer's contention, the Director has standing to appeal as a party-in-interest. *See* 20 C.F.R. §802.201(a).

Approve Compromise Settlement provides the following:

> Employer/carrier ... will be relieved and released from any and all claims, demands, and liability for disability or compensation benefits, all penalties, loss of wage-earning capacity, past, present and future medical expenses and penalties, attorney fees or any other amount Employer/Carrier could be held to owe....

The Director maintains that this language violates the provisions of Section 8(i) of the Act and Section 702.241(g) of the regulations. 33 U.S.C. §908(i)(1988); 20 C.F.R. §702.241(g). According to the Director, the administrative law judge's wording attempts to preclude claimant from commencing a hearing loss claim against employer that may arise in the future. The Director also asserts that the "overbroad" settlement violates Section 15(b) of the Act. 33 U.S.C. §915(b). We reject the Director's contentions.

Section 8(i)(3) of the Act, 33 U.S.C. §908(i)(3)(1988), provides that a settlement approved under this section shall discharge the employer's liability. The parties' settlement is limited to the rights of the parties and to the claims then in existence.[2] *See Cortner v. Chevron International Oil Co., Inc.*, 22 BRBS 218 (1989); *see generally Abercrumbia v. Chaparral Stevedores*, 22 BRBS 18 (1988), *order on recon.*, 22 BRBS 18.4 (1989); 20 C.F.R. §702.241(g). Section 15(b) of the Act prohibits an employee from waiving his right to compensation and invalidates any attempts to do so. 33 U.S.C. §915(b). The United States Court of Appeals for the Fifth Circuit has stated that a claimant's agreement to accept compensation pursuant to a submitted but unproven settlement is invalid under Section 15(b) because it is an agreement to waive compensation. *See generally Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988), *aff'g* 20 BRBS 18 (1987). Once approved, pursuant to Section 8(i), settlement agreements are binding and Section 15(b) no longer applies. *See generally Gutierrez v. Metropolitan Stevedore Co.*, 18 BRBS 62 (1986)(Section 8(i) is a narrow exception to Section 15(b)). Settlement procedures must be followed to effect a waiver of compensation.

[2] 20 C.F.R. 702.241(g) states, in relevant part:

> An agreement among the parties to settle a claim is limited to the rights of the parties and to claims then in existence....

Contrary to the Director's contention, the aforementioned language is not overbroad. The agreement as a whole clearly indicates a compromise settlement of the hearing loss in existence at the time of the settlement.[3] We will therefore construe the settlement as only applying to the hearing loss claim for which benefits were sought. Claimant has not worked for employer since 1959. Once this claim is settled and employer's liability is discharged there can be no future hearing loss claims against employer by claimant in the absence of further injurious exposure. *See generally Bath Iron Works Corp. v. Director, OWCP*, __ U.S. __, 113 S. Ct. 692, 26 BRBS 151 (CRT)(1993); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 210 (1991). Under these circumstances, we conclude that the administrative law judge's approval of the settlement is limited to the hearing loss claim before him.[4]

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[3]For instance, the administrative law judge states that the parties are settling claimant's claim against employer for compensation and medical expenses for any and all effects of his work-related injury and aggravation thereof while working for employer. Decision and Order at 2.

[4]Employer notes that the settlement agreement refers to death benefits, and it acknowledges that this right cannot be settled as it is not yet in existence. *See Cortner v. Chevron International Oil Co., Inc.*, 22 BRBS 218 (1989). Employer requests that the settlement agreement be amended to delete any reference to death benefits. By construing the settlement as limited to the claim for hearing loss, we have in effect, deleted the reference to death benefits. In any event, we note that a death benefits claim relating to an occupational hearing loss is unlikely.