BRB No. 99-0307

BOBBY D. COCHRAN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	DATE ISSUED: Dec. 14, 1999
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Order on Motion for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Alexa A. Socha (Law Offices of James P. Aleccia), Long Beach, California, for self-insured employer.

Kristin M. Dadey (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Order on Motion for Reconsideration (97-LHC-2163) of Administrative Law Judge Alfred Lindeman 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, working as a marine mechanic for employer, sustained injuries to his neck, back, left leg and left arm as a result of a work-related accident on March 27, 1991. Employer voluntarily paid claimant temporary total disability benefits from March 28, 1991, through October 3, 1991, and thereafter permanent partial disability benefits until May 17, 1996.

On June 19, 1998, the parties submitted their Joint Stipulations and Application for Settlement Pursuant to 33 U.S.C. §908(i)(1) with supporting documentation, to the administrative law judge for approval.[1] Employer simultaneously renewed its application for Section 8(f) relief, 33 U.S.C. §908(f), which previously was presented to the district director, and requested that the administrative law judge initially consider and resolve that issue prior to considering and approving the settlement agreement. The parties filed a separate document with the administrative law judge entitled "Joint Stipulations of the Parties" with accompanying exhibits regarding the underlying claim, and employer submitted evidence in support of its claim for Section 8(f) relief. On June 26, 1998, the administrative law judge issued an Order to Show Cause to the Director, Office of Workers' Compensation Programs (the Director), to show why employer is not entitled to relief under Section 8(f). Citing 33 U.S.C. §908(i)(4), the Director, in his response dated July 6, 1998, argued that since the parties agreed to a Section 8(i) settlement, the Special Fund could not be made liable for any sums paid or payable to claimant. Employer responded to the Director's position on July 9, 1998, arguing that the cases of *Strike v. S.J. Groves & Sons*, 31 BRBS 183 (1997), *aff'd mem. sub*

[1]Under the settlement agreement, employer agreed to pay claimant, in addition to amounts previously paid, a lump sum of $34,000, subject to a credit for advance payment in the amount of $10,000, plus claimant's attorney fees and costs of $3,500, to discharge the claim for disability compensation and medical benefits resulting from the injuries sustained on March 27, 1991.

nom, *S.J. Groves & Sons v. Director, OWCP*, 166 F.3d 1206 (3d Cir. 1998)(table), and *Brady v. J. Young & Co.*, 17 BRBS 46, *aff'd on recon.,* 18 BRBS 167 (1985), support its position that settlements can be entered into in cases involving Section 8(f) provided the agreements are made after a determination concerning the applicability of Section 8(f).

In his Decision and Order - Awarding Benefits, the administrative law judge initially found that Section 8(i)(4) bars employer from seeking Section 8(f) relief for the voluntary payments made to claimant between March 28, 1991, and May 17, 1996, since employer did not first receive the Director's approval of its Section 8(f) application. He then determined that the Section 8(i) settlement is neither inadequate nor procured by duress. Accordingly, the administrative law judge approved the Section 8(i) settlement agreement and denied employer's request for Section 8(f) relief.

Employer thereafter filed a motion for reconsideration, requesting that the administrative law judge vacate his decision, and issue two separate orders; the first granting its request for Section 8(f) relief, and the second approving the parties' Section 8(i) settlement agreement. In response, the Director reiterated his position that Section 8(f) is not applicable. The administrative law judge again rejected employer's assertions regarding its application for Section 8(f) relief, and accordingly denied its motion for reconsideration.

On appeal, employer contests the administrative law judge's finding that Section 8(i)(4) bars its entitlement to Section 8(f) relief. The Director responds, urging affirmance.

Employer argues that the administrative law judge erred in denying its request for Section 8(f) relief. Employer asserts that it did not seek Section 8(f) relief subsequent to an approved Section 8(i) settlement. Rather, employer maintains that it requested a ruling on the Section 8(f) issues prior to obtaining approval of the parties' settlement agreement and thus its request for said relief is, contrary to the administrative law judge's finding, not precluded by operation of Section 8(i)(4).

The Director responds by initially challenging the timeliness of employer's appeal. Specifically, the Director asserts that employer requests the Board to vacate the administrative law judge's purported approval of the parties' settlement agreement, when, in fact, the settlement agreement was approved, not by the administrative law judge, but rather by operation of law on July 19, 1998, 30 days after its submission to the administrative law judge. The Director therefore argues that as a procedural matter, employer's appeal is untimely as it was not filed within 30 days of the automatic approval of the settlement agreement. Alternatively, the

Director argues that employer's contentions are erroneous, as it is clear that the parties first entered into a Section 8(i) settlement agreement which, even prior to its approval by the administrative law judge, was binding on the employer, and thus, the administrative law judge correctly ruled that Section 8(i)(4) prohibited any subsequent application for Section 8(f) relief. Moreover, the Director avers that employer's request that the administrative law judge could and should have delayed consideration of the settlement application until after rendering a determination regarding its entitlement to Section 8(f) relief is contrary to the policy that immediate consideration be given to settlement agreements, *see* 33 U.S.C. §908(i)(1), and notes that the fact-finder must, in fact, fully adjudicate the compensability of the claim before considering the applicability of Section 8(f), as the Special Fund's liability is derivative of employer's liability.

TIMELINESS OF EMPLOYER'S APPEAL

As an initial matter, we reject the Director's assertion that employer's appeal is untimely. In the instant case, the settlement agreement submitted by the parties on June 19, 1998, was approved by the administrative law judge in his Decision and Order dated July 15, 1998, and thus, met the statutory time-frame for approval directed by Section 8(i)(1). 33 U.S.C. §908(i)(1). The fact that this decision was not filed by the district director until September 3, 1998, does not render the administrative law judge's approval of the settlement agreement a nullity. The latter part of Section 8(i)(1) cited by the Director, which provides for approval of a settlement agreement by operation of law "unless specifically disapproved within thirty days," is therefore not applicable to the instant case as the administrative law judge approved the agreement within the allotted 30-day period. Consequently, employer was not compelled to file its appeal within 30 days following the thirtieth day of the submission of the parties' settlement agreement to the administrative law judge. 20 C.F.R. §702.241(d).[2]

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[2]20 C.F.R. §702.241(d) states:

> A settlement agreement between parties represented by counsel, which is deemed approved when not disapproved within thirty days, as

described in paragraph (f) of this section, shall be considered to have been filed in the office of the district director on the thirtieth day for purposes of Sections 14 and 21 of the Act, 33 U.S.C. 914 and 921.

In the instant case, the date of filing of the administrative law judge's decision by the district director, September 3, 1998, rather than the July 20, 1998, date urged by the Director, stands as the pertinent date for determining the timeliness of subsequent procedural actions taken by the parties. *See* 33 U.S.C. §921(a); 20 C.F.R. §702.350. Employer's motion for reconsideration, filed on September 15, 1998, is therefore timely.[3] 20 C.F.R. §§702.350; 802.206(a); *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999). Moreover, inasmuch as employer's appeal, filed on December 15, 1998, of the administrative law judge's Order on Motion for Reconsideration filed December 8, 1998, is within the statutory 30-day time period for appealing a case to the Board, 33 U.S.C. §921; 20 C.F.R. §802.206(a), the Director's contention that employer's appeal is untimely is without merit.

SECTION 8(i)(4)

Section 8(i) of the Act permits the parties in a case to dispose of the claim via a settlement agreement. If both parties are represented by counsel, the settlement is deemed approved if it has not been disapproved within 30 days after its submission. 33 U.S.C. §908(i)(1) (1994); *see also* 20 C.F.R. §702.241(d). Section 8(i)(4) of the Act was added by the 1984 Amendments, and it provides:

> The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

[3]The administrative law judge's decision was filed by the district director on September 3, 1998. Thus, the ten-day period begins on September 4, 1998, and excluding Saturdays, Sundays and holidays, a filing date of September 15, 1998, falls within the requisite ten-day time-frame for filing a motion for reconsideration. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999). Moreover, the tenth day was a Sunday, and September 15, 1998, the next day, was the date the motion for reconsideration was received by Office of Administrative Law Judges.

33 U.S.C. §908(i)(4) (1994). Prior to the enactment of the 1984 Amendments, the Board held that an employer could seek Section 8(f) relief after entering into a Section 8(i) settlement with a claimant, but that a settlement between an employer and a claimant which affects the liability of the Special Fund is not binding on the Fund absent the participation of the Director. *Brady v. J. Young & Co.,* 17 BRBS 46, *aff'd on recon.*, 18 BRBS 167 (1985); *Younger v. Washington Metropolitan Area Transit Authority*, 16 BRBS 360 (1984). In *Brady*, the Board specifically stated that "Section 8(i)(4) will preclude post-settlement Section 8(f) relief in the future. . . ." *Brady*, 17 BRBS at 52.[4] Additionally, the Board has stated that Section 8(i)(4) was enacted to prevent employers from seeking relief from the Special Fund after reaching a settlement with a claimant in a case that otherwise would be assigned to the Special Fund. *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993) (citing H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 2783-2784).[5]

In *Strike,* 31 BRBS at 183, the employer raised the applic

[4]In *Brady*, the Board discussed Section 8(i)(4) but held it inapplicable to settlements entered into prior to September 28, 1984, based on the language of Section 28(e)(1) of the 1984 Amendments and the inequity of retroactive application. *Brady*, 17 BRBS at 52, 18 BRBS at 169-170.

[5]The conference report discussing Section 8(i)(4) states:

> [T]he conferees would prohibit an employer/carrier, after reaching a settlement with a claimant in a case which would otherwise be assigned to the special fund, from subsequently seeking relief from the special fund. *** The fund [ ] shall not be liable for the reimbursement of the costs of any settlement or for the costs of any voluntary payments of compensation made by the employer prior to a settlement.

H.R. Conf. Rep No. 1027, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 2782-2783.

ability of Section 8(f) before the district director, *see* 33 U.S.C. §908(ff)(3), who denied the claim. The case was transferred to the Office of Administrative Law Judges for a hearing on the merits of claimant's

claim.

Some months after the hearing, claimant and the employer agreed to settle claimant's claim, and submitted a settlement application to the administrative law judge. The settlement included the statement:

> The parties by agreement have settled all claims for compensation and medical benefits; the employer reserving its rights against the Department of Labor pursuant to 8(f) of the Act. Evidence will be submitted to solely decide the issue of 8(f) for decision by [the administrative law judge].

Strike, 31 BRBS at 184. The administrative law judge remanded the case to the district director for implementation of the settlement agreement, noting it was "deemed approved" by virtue of the expiration of 30 days. *See* 33 U.S.C. §908(i)(1). Thereafter, the employer filed with the administrative law judge additional evidence it obtained in support of its claim for Section 8(f) relief; the Director opposed the claim for Section 8(f) relief, citing Section 8(i)(4). The administrative law judge found the Director was estopped from raising Section 8(i)(4) by virtue of his failure to raise the issue during the 30-day period while the private parties' settlement application was pending. Ultimately, the administrative law judge awarded employer Section 8(f) relief, and the Director appealed.

The Board reversed the administrative law judge's finding that Section 8(i)(4) was inapplicable. The Board first rejected the contention that the settlement did not "directly affect" the Special Fund because it did not attempt to hold the Fund liable for benefits or to stipulate to facts affecting the merits of the application for Section 8(f). The Board held that inasmuch as the Fund's liability is derivative of employer's liability, and as issues such as causation, nature and extent of disability and average weekly wage were not litigated, the agreement between the private parties on these issues cannot determine the liability of the Special Fund. *Strike*, 31 BRBS at 186.

The Board further explained that Section 8(i)(4) is a self-executing provision, *i.e.,* it does not have to be raised by the Director in order for it to apply.[6] Noting that the purpose of the provision is to prevent employers from seeking post-settlement relief from the Special Fund, the Board held that a "settlement provision purporting to reserve employer's right to later seek Section 8(f) relief or to set the Fund's liability is void as a matter of law." *Id.*

With this as background, we turn to the facts in the instant case. The

[6]The Board arrived at this conclusion by comparing the language of Section 8(f)(3), which specifically requires its alleged applicability to be raised by the Director, with that of Section 8(i)(4) stating that the Fund "shall not be liable...." 33 U.S.C. §908(i)(4).

administrative law judge determined that employer's request for Section 8(f) relief must be denied by application of Section 8(i)(4). He stated that the rationale of *Strike* applies equally to claims for Section 8(f) relief for benefits voluntarily paid prior to a settlement as to benefits explicitly paid pursuant to the settlement. The administrative law judge further rejected employer's contention that Section 8(i)(4) would be inapplicable if he first addressed the claim for Section 8(f) relief prior to approving the settlement. He stated that the settlement in this case was "made," *i.e.*, entered into by the private parties, prior to a determination on the claim for Section 8(f) relief, so that the order in which he addressed the issues before him was of no legal significance as Section 8(i)(4) prohibits the transfer of liability to the Special Fund after settlement.

Employer contends that Section 8(i)(4) prevents an employer from seeking Section 8(f) relief only after a settlement agreement is approved. It maintains, therefore, that inasmuch as it sought to have the administrative law judge adjudicate its claim for Section 8(f) relief prior to approving the settlement, Section 8(i)(4) does not prevent the Special Fund's liability for a portion of claimant's benefits. The Director responds that employer entered into a binding settlement agreement prior to a determination on the claim for Section 8(f) relief, citing *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), and avers, moreover, that as the settlement agreement was submitted to the administrative law judge for approval simultaneous with its request for Section 8(f) relief, the administrative law judge was required to act on the settlement expeditiously lest it be deemed approved as a matter of law. Employer replies that, pursuant to Section 8(i)(1), only an approved settlement discharges employer's liability and that its liability is not effectively resolved until approval is given; thus, employer argues that *Nordahl* does not control the applicability of Section 8(i)(4) and that it is entitled to have its claim for Section 8(f) relief adjudicated prior to the time the settlement is approved.

We affirm the administrative law judge's determination that employer's claim for Section 8(f) relief is prohibited by Section 8(i)(4). As the Board stated in *Strike*, the language of Section 8(i)(4) protects the Special Fund from liability after an employer *enters* into a Section 8(i) settlement with a claimant. An employer *enters* into a settlement agreement at the time the parties execute the document, and not at the time it is administratively approved. In *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), the United States Court of Appeals for the Fifth Circuit held that an employer/insurer does not have a right of withdrawal from a proposed settlement prior to its approval. While the Court's decision in *Nordahl* involved employer's request to completely withdraw from an executed settlement agreement and, thus, did not involve consideration of Section 8(f), it nevertheless supports the premise that the settlement agreement becomes binding upon

employer at the time it is *entered* into and not at the time of approval. Furthermore, contrary to employer's assertion, Provision 2 of the parties' settlement agreement, which it believes renders employer liable only at the point that the settlement agreement is approved, is insufficient to move the agreement beyond the statutory prohibition of Section 8(i)(4). The underlying basis for enactment of Section 8(i)(4) is to protect the Special Fund's rights to adjudicate issues relevant to a claim in a case that otherwise would be assigned to the Special Fund. *Dickinson*, 28 BRBS at 84. As a settlement agreement conclusively establishes the extent of claimant's entitlement and employer's liability, such an agreement necessarily infringes on the rights of the Special Fund to adjudicate these issues.

Moreover, given the provisions of Section 8(i) as a whole, we must reject employer's argument that the holding in *Strike* applies only where Section 8(f) is requested after the settlement is approved. Thus, in this case the simultaneous submission of the settlement agreement and the stipulations and exhibits in support of employer's claim for Section 8(f) relief foreclosed the administrative law judge's consideration of the request for Section 8(f) relief. As the Director suggests, once a settlement is submitted to the administrative law judge for approval, the statute anticipates timely action on that settlement; indeed, the failure to approve or disapprove the settlement within 30 days after its submission results in the automatic approval of the settlement. 33 U.S.C. §908(i)(1); 20 C.F.R. §702.243(b). There is no mechanism in either Section 8(f) or Section 8(i) to permit the tolling of this time period while the administrative law judge adjudicates a claim for Section 8(f) relief.[7] Furthermore, provided the application is not deficient, the only grounds for disapproving a settlement are that it is inadequate or procured by duress. The administrative law judge cannot disapprove it in order to adjudicate the case on its merits or to decide the applicability of Section 8(f).

Furthermore, due to the 1984 Amendments to Section 8(i), the method expressed in *Brady*, 17 BRBS at 53-55, of litigating cases on Section 8(f) following a settlement is no longer viable. As the Special Fund cannot be bound by settlement agreements entered into by the private parties, the Board held in *Brady* that if the private parties agree to settle the case, any issues affecting the Special Fund's liability must be fully litigated as between employer and the Fund, because the Special Fund's liability for benefits is derivative of employer's liability. Thus, *Brady*

[7]The 30-day period does not begin to run until five days before the date a formal hearing is set if the settlement application is first submitted to an administrative law judge, 20 C.F.R. §702.241(c), and the 30-day period is tolled if the parties' settlement application is incomplete, 20 C.F.R. §§702.242, 702.243.

permitted employer to litigate its claim for Section 8(f) relief against the Special Fund independent of the settlement which was binding between employer and claimant.[8] As stated, the speedy resolution mechanism of Section 8(i)(1) prevents any delay in litigating issues necessary for a Section 8(f) determination; thus, a settlement agreement must be acted upon within 30 days. Once the settlement is approved, claimant's entitlement is fixed and employer's liability is discharged; Section 8(i)(4) prevents the transfer of liability under the settlement to the Special Fund, and as employer's liability is discharged, the Fund's derivative liability is also discharged.[9] Consequently, as the administrative law judge's denial of employer's request for Section 8(f) relief pursuant to the provisions of Section 8(i)(4) is in accordance with law, it is affirmed.

[8]The Board's decision in *Brady* explicitly states that its holding would not apply to claims affected by the 1984 Amendments.

[9]A review of practical considerations where the private parties purport to settle a claim pursuant to Section 8(i) while employer is simultaneously pursuing a claim for Section 8(f) relief is illustrative. If, for example, the administrative law judge first adjudicated employer's claim for Section 8(f) relief and denied that claim, he could then address a Section 8(i) settlement between claimant and employer; however, approval of such a settlement would preclude employer's continuing to pursue Section 8(f) relief through the appellate process pursuant to Section 8(i)(4). Moreover, if Section 8(f) relief were granted, the private parties would not be able to bind the Special Fund to their settlement agreement.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge