BRB No. 99-1056

CLARENCE NELSON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: May 10, 2001
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Petitioner	)	on RECONSIDERATION

Appeal of the Decision and Order Approving Settlement Granting Employer Section 8(f) Relief and Awarding Attorney Fee and Costs and Decision and Order on Reconsideration of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Kathryn A. Slagle (Slagle Morgan & Ellsworth LLP), Seattle, Washington, for employer/carrier.

Laura Stomski (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.
PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), has filed a timely motion for reconsideration of the Board's decision in the captioned case wherein the Board affirmed the administrative law judge's findings that employer is entitled to Section 8(f), 33 U.S.C. §908(f), relief, and that Section 8(i)(4), 33 U.S.C. §908(i)(4), does not preclude said entitlement. *Nelson v. Stevedoring Services of America*, 34 BRBS 91 (2000). Employer responds, urging the rejection of this motion. For the reasons which follow, the Director's motion for reconsideration is denied.

To recapitulate, claimant initially sustained an injury to his left knee while working for employer on July 6, 1989. He subsequently injured his back and left leg on May 29, 1991, during the course of his employment with employer. The parties reached an agreement whereby employer would pay claimant a lump sum of $25,000 in full and complete settlement of all future medical expenses except those pertaining to his left knee injury, as well as a lump sum payment for a 20 percent impairment of the left lower extremity and continuing benefits for a loss of wage-earning capacity, commencing on November 3, 1995, for claimant's low back injury. The agreement did not address the issue of employer's entitlement to Section 8(f) relief.

In his decision, the administrative law judge initially ordered employer to pay benefits pursuant to the terms of the parties' agreement. He then granted employer's request for Section 8(f) relief for the payment of the continuing permanent partial disability benefits under Section 8(c)(21), 33 U.S.C. §908(c)(21), based on claimant's low back injury due to the Director's "agreement" that Section 8(f) would apply if the parties reach agreement as to the extent of permanent disability and/or the level of claimant's loss of wage-earning capacity. The administrative law judge subsequently denied the Director's motion for reconsideration.

On appeal, the Director argued that the administrative law judge's grant of Section 8(f) relief, following his approval of the parties' settlement is contrary to Section 8(i)(4) of the Act. In its decision, the Board, observing that the facts of the instant case are similar to those in *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998), and distinguishable from those in *Cochran v. Matson Terminals, Inc.*, 33 BRBS 187 (1999), and *Strike v. S.J. Groves & Sons*, 31 BRBS 183 (1997), *aff'd mem. sub nom. S.J. Groves & Sons v. Director, OWCP*, 166 F.3d 1206 (3d Cir. 1998) (table), affirmed the administrative law judge's finding that employer's entitlement to Section 8(f) relief is not precluded by Section 8(i)(4). Specifically, the Board held that the purpose of Section 8(i)(4) was satisfied as, *prior to* the time that the settlement agreement was entered into by the parties, the Director was provided with the opportunity to defend, and in fact conceded, the liability of the Special Fund for permanent partial disability benefits based on an appropriate order, whether entered after a hearing or upon agreement of the parties.

Nelson, 34 BRBS at 96.

In his motion for reconsideration, the Director argues that employer's settlement of its liability extinguished, as a matter of law, the Special Fund's derivative liability pursuant to Section 8(i)(4).[1] The Director contends that contrary to the Board's decision, *Coos Head Lumber* is factually distinguishable from the instant case, as the employer therein agreed to the principle part of its liability by stipulations rather than a Section 8(i) settlement, and thus left open the issue of whether it could receive partial relief from its liability under Section 8(f). In contrast, the Director argues that there was no partial resolution of employer's liability herein pursuant to stipulations; rather, employer's liability was completely discharged pursuant to Section 8(i), as a matter of law, once it settled the case. In this regard, the Director once again urges the Board to accept the holdings in *Strike* and *Cochran* as dispositive of the issue in this case. The Director further contends that since claimant's claim was disposed of pursuant to Section 8(i), the Director's limited concession to the applicability of Section 8(f) is not controlling.

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[1]Section 8(i) of the Act permits the parties in a case to dispose of the claim via a settlement agreement. 33 U.S.C. §908(i). 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.

33 U.S.C. §908(i)(4) (1994).

The Director initially contends that the Board's decision "flip-flops" as to whether the parties' agreement represents a Section 8(i) settlement or a series of stipulations.[2] The Director contends that if the agreement is indeed a Section 8(i) settlement, his agreement that Section 8(f) would apply is inoperative. In its decision, the Board noted that on reconsideration the administrative law judge rejected the Director's argument that the discharge of employer's liability was not appropriate in an award based on stipulations, as the judge found that his decision approved a Section 8(i) settlement which is not subject to modification. *Nelson*, 34 BRBS at 92 n. 3. The Board further noted that this determination was not challenged on appeal. *Id*. The Board however subsequently acknowledged that although the administrative law judge on reconsideration referred to the agreement as a "settlement," it nonetheless is tantamount to a series of stipulations, and thus the Board held that the administrative law judge entered an appropriate order based on a stipulated loss of wage-earning capacity. *Nelson*, 34 BRBS at 96. Given these statements, we will clarify our decision.

The record reveals that claimant and employer clearly intended to enter into a settlement agreement. At the hearing, claimant, employer and the administrative law judge each repeatedly referred to their agreement as a settlement. Hearing Transcript (HT) at 6-8, 14. Additionally, at the hearing the administrative law judge noted that "this settlement is in the best interests of both parties," HT at 6, and in his decision acknowledged that the agreement of the parties provided for a complete discharge of employer's liability. Decision and Order at 9. Thus, the administrative law judge's decision reflects an approval of a Section 8(i) settlement agreement which therefore is not subject to modification. The Board's prior decision does not disturb this determination.

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[2]The Director notes that in its original decision in *Rambo v. Director, OWCP*, 81 F.3d 840 (9th Cir. 1994), *rev'd on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo*, 513 U.S. 291 (1995), the Ninth Circuit recognized that stipulated awards and settlements are distinctly different and that differing legal consequences flow from the characterization of an award. The Director requests that the Board should, at the very least, clarify whether the instant case involves a settlement agreement or a compensation order based on the parties' stipulations as the latter is, in contrast to the former, subject to modification proceedings.

However, we hold that the peculiar facts of this case nevertheless support the administrative law judge's finding that Section 8(f) relief is appropriate. First, as previously discussed in the Board's initial decision, the Director herein explicitly, in writing, conceded employer's entitlement to Section 8(f) relief for any permanent partial disability, in his pre-hearing statement, stating that an appropriate order, whether after a hearing or upon agreement of the parties, could be entered. Thus, the Director gave his specific approval to the parties' resolving this claim by agreement, and nothing in the Director's document restricts this approval to agreements based on stipulations as opposed to one contained in a settlement. In addition, the Director provided this approval *prior to* the time that the parties entered into their agreement and sought and received approval by the administrative law judge. Section 8(i)(4) prohibits reimbursement from the Special Fund where employer seeks Section 8(f) relief *after* the parties enter into a Section 8(i) settlement. *See Cochran*, 33 BRBS at 191. Additionally, the administrative law judge noted, on reconsideration, that his determination regarding Section 8(f) relief was made independently of his approval of the parties' settlement agreement, and was based on the Director's concession, although he added that a review of the evidence of record further supported employer's entitlement to Section 8(f) relief. Moreover, as the Board held, the purpose of Section 8(i)(4) was satisfied in this case as the Director was provided with, and in fact participated in the case, albeit in a cursory manner, *prior to* the time the settlement agreement was entered into. Thus, given the facts of this case, we hold that the fact that the administrative law judge's decision is an approval of a settlement agreement does not affect the outcome.

As the Board discussed in its decision, the facts of the instant case are similar to those presented in *Coos Head Lumber* and are distinguishable from those presented in *Strike* and *Cochran*. *Nelson*, 34 BRBS at 95-96. The private parties' settlement agreement in this case did not seek to subject the Special Fund to liability. It did, as the Director argues, affect the liability of the Special Fund in that it set out the extent of the permanent disability and the level of claimant's loss of wage-earning capacity. Nevertheless, the Director conceded those issues before the parties reached agreement, agreeing to employer's entitlement to Section 8(f) relief for "any permanent partial disability" and stating that the administrative law judge could enter an "appropriate order, whether after hearing *or upon agreement of the parties as to the extent of permanent disability and/or the level of the claimant's loss of wage-earning capacity* . . . subject to the normal standards of proof." Statement of the Position of the Director at 1-2 (emphasis added). The Board recognized, as suggested by the Director, that settlements are not subject to normal standards of proof, as they are compromise agreements between parties. However, as the Board observed in its decision, the Director's statement that his acquiescence on the Section 8(f) relief issue was contingent upon a finding by the administrative law judge that claimant was permanently partially disabled is negated by the specific language of his Statement of Position, wherein he conceded that an agreement between the parties on that issue would suffice for purposes of establishing Section 8(f) relief.

In *Coos Head Lumber*, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, rejected the Director's argument that the administrative law judge should not have awarded Section 8(f) relief based on a stipulation in which the Director did not concur,[3] as the administrative law judge did not award Section 8(f) relief to employer based on the parties' stipulations but rather independently arrived at that determination. In particular, the Ninth Circuit held that the stipulations did not seek to bind the Special Fund to the elements of Section 8(f), the Director filed a notice of appearance, exhibits and a statement of position in the case, and that he was free to introduce evidence and defend the liability of the Special Fund, but elected not to do so. Moreover, the Ninth Circuit observed that the Director was on notice that his failure to appear would constitute a waiver. The court also distinguished the case at hand from its decision in *E.P. Paup v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993), wherein it held that agreements between an employer and a claimant that affect the liability of the Special Fund cannot be used against the Director, since the employer and claimant did not agree to subject the Special Fund to liability. *Coos Head Lumber*, 194 F.3d at 1033, 33 BRBS at 132(CRT).

The Board further noted that the Director's concession regarding Section 8(f) relief for liability based on agreement of the parties as to claimant's loss in wage-earning capacity distinguishes this case from *Strike* and *Cochran*. In those cases, the Director did not approve Section 8(f) relief prior to settlement discussions or state that such relief would be available based on the parties' agreement on the amount of benefits. Thus, when employers sought Section 8(f) relief after the private parties entered into a Section 8(i) settlement, employers' attempts to claim Section 8(f) relief are barred by Section 8(i)(4). In contrast, the Board observed that the Director herein was provided with the opportunity to defend the Special Fund in the instant case and, in fact, participated, affirmatively stating that upon review of the case, Section 8(f) relief was appropriate *for any permanent disability arising from claimant's back injury*. The Board held that the Director herein made a conscious decision regarding the liability of the Special Fund and articulated his position to the administrative law judge and the parties well before the time the agreement was reached. *Nelson*, 34 BRBS at 96. The Board therefore concluded that as the conditions precedent for conceding employer's entitlement to Section 8(f) relief stated by the Director were met during the ensuing adjudication of this case, the Director is bound by his concession in this case and is therefore precluded from altering his position on Section 8(f) after the fact. *Id.*

[3]The Ninth Circuit indicated in *Coos Head Lumber* that the Director's quarrel is with whether the second injury fund is liable, and not with the facts stipulated to by the parties, and that the administrative law judge independently decided the liability issue. The same is essentially true in the instant case.

The Board's rationale continues to be appropriate given the facts of this case. Contrary to the Director's contention, the requirement in his concession that permanent partial disability could be determined, "subject to normal standards of proof," was met in this case, as evidenced by the administrative law judge's explicit finding, on reconsideration, that the settlement proposed by the parties, including the wage loss arising from claimant's permanent, partial disability to his lower back, was reasonable and supported by the underlying documentation.[4]

The Director lastly argues that the Board erred in finding that the Director was precluded from "altering his position" under principles of equitable estoppel, as he did not, in fact, alter his position, and the requirements for application of the estoppel doctrine were not discussed or satisfied. In support of this contention, the Director cites *Ingalls Shipbuilding, Inc. v. Director, OWCP [Rouse]*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992), for the proposition that the government should not be estopped merely because of an error by one of its representatives, particularly, in this case, where there is no basis to show that the Director's legal representative misled the employer into settling its liability knowing that Section 8(f) was not applicable once the parties settled.

[4]Although the administrative law judge did not state which evidence in the record supports this finding, he nevertheless recognized that the instant case involves a voluminous record consisting of 145 exhibits submitted by claimant, and 18 submitted by employer. Included in the record is a plethora of medical records and vocational evidence documenting claimant's condition and loss of wage-earning capacity. This evidence most certainly served as the basis for the parties' agreement as to the extent of claimant's permanent disability.

In the instant case, the Board noted that "the Director is bound by his concession in this case and is therefore precluded, at the very least by the doctrine of equitable estoppel, from altering his position on Section 8(f) after the fact." *Nelson*, 34 BRBS at 96. As such, the Board's statement regarding the application of the doctrine of equitable estoppel, when viewed in the context of the entirety of its decision, was merely meant to serve as an additional rationale, though not the primary one, for affirming the administrative law judge's finding that employer is entitled to Section 8(f) relief. Thus, the applicability of this doctrine has no relevance to the Board's disposition in this case. We therefore decline to consider the Director's contentions on this issue.[5]

[5]We do note that the holding of *Rouse* is distinguishable from the instant case. The law as applied in *Rouse* involved estopping the government from enforcing its laws because of an official's error. *Rouse*, 976 F.2d 937, 26 BRBS 109(CRT). The instant case does not involve the enforcement of Federal law or an official's error. The actions of the Director herein represent a tactical litigation position in which the Director decided, after review of employer's application and its accompanying documentation, to concede employer's request for Section 8(f) so long as certain requisites were met. Moreover, the language used in doing so could well have been relied on by the parties in entering their agreement. Thus, the Director is bound by his concession, and once the requisites are met, as in this case, he is no longer entitled to challenge employer's application for Section 8(f) relief. *See Coos Head Lumber*, 194 F.3d 1032, 33 BRBS 131(CRT).

Accordingly, the Director's motion for reconsideration is denied. 20 C.F.R. §802.409.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge