BRB No. 99-1112

ANTHONY TOWE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: July 25, 2000
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Compensation Order Approval of Agreed Settlement Under 33 U.S.C. §908(i) of Chris J. Gleasman, District Director, United States Department of Labor.

Donald P. Moore (Franke, Rainey & Salloum, P.C.), Gulfport, Mississippi, for self-insured employer.

Joshua T. Gillelan, II (Henry L. Solano, 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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Approval of Agreed Settlement Under 33 U.S.C. §908(i) (Case Nos. 6-168138, 7-148179) of District Director Chris J. Gleasman rendered on claims 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

determinations of the district director unless they are arbitrary, capricious, an abuse of discretion or not in accordance with law. *See, e.g., Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Claimant sustained a back injury at work in October 1995, which necessitated surgery and resulted in a 5 percent whole man impairment. Claimant returned to work in September 1997. Employer paid various periods of temporary total disability and medical benefits for this injury. Claimant suffered a second injury to his back in April 1998. He was released to work without restrictions in October 1998. Employer also paid claimant temporary total disability benefits for this injury. By application dated January 12, 1999, employer and claimant submitted to District Director Jeana Jackson an application for a Section 8(i) settlement. 33 U.S.C. §908(i). The application stated that claimant would receive $10,000 to settle the disability claim,[1] but that employer would remain liable for medical benefits. The application also provided for an attorney's fee of $1,162.50 to one of claimant's attorneys.

On January 29, 1999, District Director Jeana Jackson, of the Jacksonville district office, disapproved the settlement on the basis that it was inadequate given claimant's young age (28) and the diagnosis of "failed back syndrome." She also stated that the medical documentation is inconclusive as to maximum medical improvement, and noted that the issue of a fee for another of claimant's attorneys was not addressed. District Director Jackson then transferred the case file to the New Orleans district office for further handling, apparently based on a policy requiring injuries occurring in Mississippi after April 1, 1996, to be handled from the New Orleans office.

On June 22, 1999, employer's claims adjuster wrote to District Director Chris Gleasman of the New Orleans office informing him that employer considered the prior settlement offer null and void as claimant no longer suffered from a loss in wage-earning capacity due to his release to normal work duties. District Director Gleasman replied to employer on June 23, 1999, that the disapproval of the settlement does not permit employer to withdraw from it in view of claimant's June 7, 1999, letter correcting the deficiencies noted by District Director Jackson. He stated that deficient applications may be corrected by the interested parties or that any of the parties can request that the "settlements denied by the District Director be forwarded to the Office of Administrative Law Judges for consideration." He concluded that the settlement was in a posture for approval, and that a separate order would be forthcoming. Claimant's letter of June 7, 1999, was written by claimant himself, as

[1]The application noted that the contested issues were causation, nature and extent of disability, average weekly wage, and wage-earning capacity.

he apparently was without counsel at this juncture. The letter states that claimant considers $10,000 to be adequate, as he had returned to work and "was doing fairly well."

By Order dated June 25, 1999, District Director Gleasman approved the settlement agreement by which claimant would receive $10,000 in disability compensation in exchange for the complete discharge of employer's liability for the October 1995 and April 1998 injuries. The Order stated that this amount is adequate and in claimant's best interest, and that the settlement was not procured by duress. It further stated that employer remains liable for medical benefits related to claimant's injuries. The district director approved the fee agreement for one of claimant's attorneys, and stated that a petition filed by the other attorney would be addressed in a separate order.

Employer appeals this Order, contending that District Director Gleasman lacked authority to approve the settlement as the regulation at 20 C.F.R. §702.243 contemplates only the submission of an amended application, or a request for a hearing before an administrative law judge, following the district director's disapproval of a proposed settlement. Employer contends District Director Gleasman (the district director) erred in construing claimant's June 1999 letter as an amended application. Employer further contends that the disapproval of the settlement by District Director Jackson renders the settlement petition void or voidable, relying on *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), for this proposition. Employer subsequently submitted the Fifth Circuit's decision in *Henry v. Coordinated Caribbean Transport*, 204 F.3d 609 (5th Cir. 2000), issued on February 18, 2000, as supplemental support for its position. In response to the Board's Order dated June 30, 2000, the Director, Office of Workers' Compensation (the Director), filed a response brief. The Director contends that the district director erred in approving the settlement agreement as, following disapproval, the regulation at 20 C.F.R. §702.243 does not permit one party to resubmit the same application for approval. The Director, however, does not concur in employer's opinion that the disapproval renders the application void or voidable at employer's discretion. Claimant has not responded to employer's appeal.

Section 8(i) of the Act, 33 U.S.C. §908(i), permits the claimant to accept a settlement of his claim in exchange for the discharge of employer's liability. Section 8(i)(2) of the Act, 33 U.S.C. §908(i)(2), states that if the district director disapproves an application for settlement, the district director:

> shall issue a written statement within thirty days containing the reasons for disapproval. Any party to the settlement may request a hearing before an administrative law judge in the manner prescribed by this chapter. Following such hearing, the administrative law judge shall enter an order approving or rejecting the settlement.

The regulation implementing Section 8(i)(2), 20 C.F.R. §702.243(c), states that "if the disapproval was made by a district director, any party to the settlement may request a hearing before an ALJ. . . or an amended application may be submitted to the district director." Employer contends that under these statutory and regulatory provisions, the district director had no authority to approve the disapproved settlement, as no amended settlement petition was submitted to him.[2] The Director agrees that the approval should be vacated, as an amended application was not submitted as contemplated by the regulations.

[2]Employer also notes, correctly, that no party requested a formal hearing, which is the only other action permitted following the disapproval of a settlement.

We agree with employer and the Director that the district director was without authority to rule on the settlement application following its disapproval by District Director Jackson. The regulation at 20 C.F.R. §702.242 is detailed as to the prerequisites for a complete settlement application.[3] The failure to provide a complete application prevents the

[3]Section 702.242 states:

> a) The settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file. The application shall be in the form of a stipulation signed by all parties and shall contain a brief summary of the facts of the case to include: a description of the incident, a description of the nature of the injury to include the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid and the compensation rate or, where benefits have not been paid, the claimant's average weekly wage.
>
> (b) The settlement application shall contain the following: (1) A full description of the terms of the settlement which clearly indicates, where appropriate, the amounts to be paid for compensation, medical benefits, survivor benefits and representative's fees which shall be itemized as required by §702.132. (2) The reason for the settlement, and the issues which are in dispute, if any. (3) The claimant's date of birth and, in death claims, the names and birth dates of all dependents. (4) Information on whether or not the claimant is working or is capable of working. This should include, but not be limited to, a description of the claimant's educational background and work history, as well as other factors which could impact, either favorably or unfavorably, on future employability. (5) A current medical report which fully describes any injury related impairment as well as any unrelated conditions. This report shall indicate whether maximum medical improvement has been reached and whether further disability or medical treatment is anticipated. If the claimant has already reached maximum medical improvement, a medical report prepared at the time the employee's condition stabilized will satisfy the requirement for a current medical report. A medical report need not be submitted with agreements to settle survivor benefits unless the circumstances warrant it. (6) A statement explaining how the settlement amount is considered adequate. (7) If the settlement application covers medical benefits an itemization of the amount paid for medical expenses by year for the three years prior to the date of the application. An estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical

district director or the administrative law judge from ruling on the application, 20 C.F.R. §702.243(b), and also prevents the application from being automatically approved 30 days after its submission, 20 C.F.R. §702.243(a). *See* 33 U.S.C. §908(i)(1); *Nelson v. American Dredging Co.*, 143 F.3d 780, 32 BRBS 115(CRT) (3d Cir. 1998)*; Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

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treatment shall also be submitted which indicates the inflation factor and/or the discount rate used, if any. The adjudicator may waive these requirements for good cause. (8) Information on any collateral source available for the payment of medical expenses.

The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, recently discussed the regulation at 20 C.F.R. §702.242 in *Henry v. Coordinated Caribbean Transport*, 204 F.3d 609 (5th Cir. 2000), *aff'g* 32 BRBS 29 (1998). In *Henry*, the claimant and the employer reached an agreement to settle the claimant's claim. A week later, the claimant died. Unlike *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), however, in *Henry*, no settlement application had been executed by the parties and submitted for approval prior to the claimant's death.[4] The Board held that this factor was critical in distinguishing the two cases, and thus affirmed the administrative law judge's refusal to enforce the agreement. *Henry v. Coordinated Caribbean Transport*, 32 BRBS 29 (1998). The Fifth Circuit affirmed. Relevant to the instant case, the court stated that "[t]he prescribed settlement application is the *sine qua non* of the regulations, which carry out the statutory intent." 204 F.3d at 611. The court stated that acceptance of the position that an agreement which was not embodied in a formal application was enforceable would permit the adjudicator to:

> enforce specific performance of improperly documented settlement agreements, to compel employers and their insurers to participate in the preparation of settlement applications, and *even to allow employees' counsel unilaterally to prepare, sign, and submit settlement applications.*

Id. (emphasis added). The court concluded that the district director "could not enforce an agreement that was not documented according to the regulations . . . ." *Id.* at 613.

As is apparent from the foregoing discussion, a settlement application requires certain documentation for completeness. It follows, therefore, that an amended settlement application must also meet these regulatory criteria. Moreover, it also is apparent that submission of an amended application cannot be accomplished by only one of the parties to the original agreement. First, we note that the two clauses of Section 702.243(c) are not parallel, as the regulation provides that where the district director disapproves a settlement "any party" can request a hearing or an amended application may be submitted. The term "any party" is thus not part of the second clause concerning the submission of an amended application. Second, the regulation states that an "application shall be in the form of a stipulation *signed by all parties*." 20 C.F.R. §702.242(a) (emphasis added). As the Director contends, resubmission of the same agreement, with additional supporting documentation, by

[4]In *Nordahl*, the Fifth Circuit held that an employer cannot rescind a settlement agreement which has been signed by both parties and submitted to an appropriate official for approval prior to administrative action on the application, unless the settlement agreement itself permits withdrawal upon some condition precedent, such as the death of the claimant. *See* discussion, *infra.*

one of the parties following the disapproval of a settlement is not permitted by the regulation.[5] Moreover, this issue was addressed by the Fifth Circuit in *Henry* in the context of an original application. In rejecting the arguments advanced on appeal, the court stated, in effect, that unilateral applications are not permitted under the regulations at 20 C.F.R. §§702.242, 702.243. *Henry*, 204 F.3d at 613. Therefore, we hold that claimant's June 1999 letter to the district director, unilaterally submitted, cannot constitute an amended application as a matter of law. Thus, the district director did not have an amended application before him, and he was without authority to approve the settlement. Accordingly, we vacate the approval of the settlement by District Director Gleasman.

We next address employer's contention, based on the Fifth Circuit's decision in *Nordahl*, 842 F.2d at 773, 21 BRBS at 33(CRT), that the agreement was void or voidable following its disapproval. In *Nordahl*, the claimant and the carrier agreed to a Section 8(i) settlement and submitted the application for approval. Claimant died prior to administrative action on the application. Following claimant's death, the carrier tried to withdraw from the settlement. Citing the Board's decision in *Maher v. Bunge Corp.*, 18 BRBS 203 (1986) (similar facts under pre-1984 Section 8(i)), the district director disallowed the attempted withdrawal and approved the settlement. The Board affirmed. *Nordahl v. Oceanic Butler, Inc.*, 20 BRBS 18 (1987).

[5]The Director suggests that had District Director Jackson issued a deficiency notice to the parties, rather than disapproved the settlement, unilateral correction of the deficiency might be permitted. The Board need not consider this issue here, as District Director Jackson clearly disapproved the agreement.

The Fifth Circuit affirmed the Board's decision, holding that an employer cannot rescind a settlement prior to administrative action on the application, unless the settlement agreement itself permits withdrawal upon some condition precedent, such as the death of the claimant.[6] The court held that claimants, on the other hand, may withdraw from a settlement prior to administrative action, by virtue of Sections 15(b) and 16 of the Act, 33 U.S.C. §§915(b), 916, which render agreements to waive compensation invalid absent compliance with Section 8(i). *Nordahl*, 842 F.2d at 778-782, 21 BRBS at 37-41(CRT).

In discussing the nature of settlements under the Act, the court made the following observations, upon which employer relies in this case:

> Of course, the insurer's obligation to perform what it has agreed to do--to pay a lump sum--can be, *and is, conditioned upon administrative approval of the agreement. If the settlement should be disapproved, there is a failure of the consideration for the agreement*--a release of the disabled worker's lifetime benefits.

Nordahl, 842 F.2d at 780, 21 BRBS at 38-39(CRT) (emphasis added). In rejecting the carrier's contention that, on the facts presented, there was a failure of consideration upon the claimant's death, the court stated, "Though governing legal standards (*such as administrative disapproval*) may make a promise (to release future benefits upon receipt of an approved lump-sum payment) *void or voidable*," there was valid consideration in *Nordahl* at the time the agreement was entered into. *Id.* (parenthetical in the original, emphasis added). Finally, the court stated,

> The sufficiency of the claimant's voidable promise as consideration for the insurer's binding obligation is judged when made and is impaired only after disapproval . . . Statutory invalidation of the claimant's release of the potential right to a greater amount of compensation obviates performance after disapproval.

Id., 842 F.2d at 780, 21 BRBS at 39(CRT).

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[6]In the case at bar, the settlement agreement explicitly provided that if the claimant died from an accidental injury or from causes unrelated to the work injuries prior to approval, the agreement shall be null and void.

Without specifically discussing *Nordahl*, the Director disagrees with employer's contention that an agreement's disapproval renders the agreement void or voidable at employer's election. The Director contends that the provisions of Section 8(i)(2) of the Act and 20 C.F.R. §702.243(a) permitting "any party" to a disapproved settlement to request a hearing before an administrative law judge does not permit a finding that an agreement becomes void upon its disapproval. Moreover, the Director contends that the agreement herein is not voidable at employer's election because the contractual agreement itself does not give employer the option of voiding the agreement upon disapproval. *See, e.g.,* n.6, *supra*. For the reasons that follow, we hold that, upon disapproval, the settlement agreement is not void as a matter of law, but is voidable at employer's election. We further hold that employer's June 22, 1999, letter voided the agreement.

In rejecting the contention that a settlement agreement is automatically void upon disapproval, we agree with the Director that such an interpretation would negate the statutory and regulatory provisions permitting "any party" to the settlement to seek a hearing before an administrative law judge on the disapproved settlement agreement itself. 33 U.S.C. §908(i)(2); 20 C.F.R. §702.243(c). If the agreement were deemed void upon disapproval, these provisions would be completely without effect. Such a result is not consistent with conventions of statutory construction that seek to avoid superfluous language. *See, e.g., Lake Cumberland Trust, Inc. v. United States E.P.A.*, 954 F.2d 1218 (6th Cir. 1992); 2A Sutherland Stat. Const. §46.06 (5th ed.).

Nevertheless, we hold that the disapproval of a settlement agreement results in the agreement's being voidable by a party to the agreement. As the Fifth Circuit stated in *Nordahl*, upon disapproval, there is a failure of consideration on the claimant's part due to the operation of Sections 15(b) and 16 of the Act, 33 U.S.C. §§915(b), 916,[7] which prohibit the claimant from performing his part of the bargain, that is, agreeing to waive his compensation entitlement, as claimant has not complied with Section 8(i) where the settlement is disapproved. *Nordahl*, 842 F.2d at 780, 21 BRBS at 38-39(CRT); *see generally Brown v. Forest Oil Corp.*, 29 F.3d 966, 28 BRBS 78(CRT) (5th Cir. 1994)*; Henson*, 27 BRBS at 212. Administrative approval is a statutory condition precedent to claimant's performing his contractual obligation; the failure of this condition to occur obviates employer's performance of its contractual promise, *see Restatement (Second) of Contracts*

[7]Section 15(b) states: "No agreement by an employee to waive his right to compensation under this chapter shall be valid." Section 16 states, in relevant part: "No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid...."

§§224, 225 (1979), and *Nordahl* supports employer's position that, upon this failure, employer is permitted to rescind its agreement. *Nordahl,* 842 F.2d at 780, 21 BRBS at 38-39(CRT). Contrary to the Director's contention, this right of rescission need not be explicitly stated in the contract, as it follows from the administrative action on the settlement resulting in its disapproval. As stated in *Nordahl,* disapproval by the administrative authority renders the settlement voidable. Unlike the death of the claimant following execution of an agreement but prior to any action on the agreement, disapproval itself results in a failure of consideration. As this failure occurs as a consequence of the disapproval, it is not necessary for the agreement to so state in order to render it voidable. Moreover, disapproval is not an event occurring prior to administrative action, as was claimant's death in *Nordahl,* but results from administrative action being taken. Thus, upon disapproval, the agreement became voidable.

Having held that a settlement agreement is voidable upon disapproval, we further hold that, in the instant case, employer voided the agreement by its letter dated June 22, 1999, declaring the agreement null and void due to the changed circumstances surrounding claimant's employability. While following disapproval claimant could have sought a hearing on the settlement before administrative law judge, he did not do so. Employer then wrote its letter, taking effective action to terminate the agreement, consistent with *Nordahl.* Otherwise, the disapproved settlement agreement could remain pending for an indefinite period, despite the changed circumstances of the parties. Claimant at this juncture may seek a hearing on the merits of his claim or the parties jointly may submit an amended settlement application to the district director or administrative law judge for approval. 20 C.F.R. §702.243(c).

Accordingly, we vacate the district director's approval of the agreement as he was without authority to act on the disapproved settlement agreement. As the agreement was voidable, and, in fact, voided by employer following its disapproval, the case is remanded to the district director for further action as desired by one or both of the parties to this claim, consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge