BRB No. 07-0957

J.N. Claimant-Respondent v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY/HAYWARD BAKER and LUMBERMAN'S MUTUAL CASUALTY COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: 06/27/2008 DECISION and ORDER

Appeal of the Decision and Order Approving Settlement and Order Denying Motion for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Michael W. Thomas and Sean T. Monaghan (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Approving Settlement and Order Denying Motion for Reconsideration (2006-LHC-01302) of Administrative Law Judge Jennifer Gee 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*. (1982) (the Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (the D.C. 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).

On July 12, 1977, claimant sustained a work-related injury to his right knee. Claimant was awarded compensation for a 50 percent permanent impairment of the right lower extremity in a compensation order dated December 28, 1983. 33 U.S.C. §908(c)(2). Subsequently, a dispute arose between the parties regarding claimant's medical expenses and their relationship to the work accident. In 1997, the parties entered into a settlement agreement regarding the disputed medical treatment. Employer agreed to pay claimant $5,000 for the disputed expenses and to remain liable for reasonable future treatment related to the knee injury. Administrative Law Judge Karst approved the settlement agreement pursuant to Section 8(i), 33 U.S.C. §908(i), in October 1997.

On September 25, 2006, employer controverted its liability for medical benefits on the basis that the ongoing treatment requested by claimant was not related to the work injury of July 12, 1977. The parties subsequently entered into an agreement whereby employer would pay claimant $300,000 in return for the discharge of all liability for medical care after February 16, 2007. Employer also agreed to pay the disputed medical bills predating February 16, 2007. The parties submitted this agreement to Administrative Law Judge Gee (the administrative law judge) for approval.

In a Decision and Order Approving Settlement issued on April 19, 2007, the administrative law judge stated, after reviewing the settlement agreement and its supporting documents, that the agreement "appears to be reasonable, adequate and not the result of duress." Thus, the parties' agreement was approved pursuant to Section 8(i). The Director filed a motion for reconsideration of the approval, arguing that the administrative law judge does not have the authority to approve a settlement of a claim for medical benefits in a case arising under the D.C. Act. Specifically, the Director contended that the 1972 Act, applicable to this case by virtue of the decision in *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert.*

denied, 480 U.S. 918 (1987), conferred exclusive authority to approve settlements of claims for medical benefits on the district director.

The administrative law judge denied the Director's motion for reconsideration. The administrative law judge acknowledged the case precedent cited by the Director, but refused to apply it, relying instead on the preamble to the regulations issued by the Secretary implementing the 1984 amendments. *See* 20 C.F.R. §702.101(b). Specifically, the administrative law judge stated that as the preamble language reflected the Secretary's views after formal rulemaking proceedings, this language should receive the high level of deference afforded agency regulations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The administrative law judge found that she need not defer to the "litigating position" of the Director as it is espoused for the first time in the course of this litigation and contradicts the regulations' preamble. Thus, the administrative law judge denied the Director's motion for reconsideration and affirmed her approval of the parties' settlement.

On appeal, the Director contends that the administrative law judge lacked the authority under Section 8(i) of the 1972 Act to approve the parties' settlement of claimant's claim for medical benefits. The Director contends that the administrative law judge erred in relying on the regulation at 20 C.F.R. §702.101(b) as it has been superseded by case precedent holding the 1984 Amendments inapplicable to cases arising under the D.C. Act. Therefore, the Director requests that the administrative law judge's approval of the settlement be vacated and the case remanded to the district director for consideration of the parties' settlement under the 1972 Longshore Act. Employer responds, urging affirmance of the administrative law judge's approval of the settlement. Claimant has not responded to this appeal.

The 1972 Longshore Act provided that,

> Whenever the *Secretary* determines that it is for the best interests of the injured employee entitled to medical benefits, [s]he may approve agreed settlements of the interested parties, discharging the liability of the employer for such medical benefits. . . .

33 U.S.C. §908(i)(B) (1982) (emphasis added); *see also* 20 C.F.R. §702.242 (1984) (stating that "the Director" may approve settlements of claims for medical benefits). It is well established that when the statute uses the term "Secretary," the authority to act is delegated only to the district directors and not to administrative law judges. *See, e.g., Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting); *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989); *Ogundele v. American Security & Trust Bank*, 15 BRBS 96 (1980); *c.f. Maine v. Brady-Hamilton Stevedore Co.*,

18 BRBS 129 (1986) (pursuant to 33 U.S.C. §919(d), an administrative law judge is given the authority over adjudicative functions where the statute refers to "deputy commissioner"). Indeed, the United States Court of Appeals for the Fifth Circuit held that Section 8(i)(B) of the 1972 Act conferred the authority to approve settlements of medical benefits claims only on the Secretary and his designees, the district directors.[1] *Marine Concrete, Inc. v. Director, OWCP*, 645 F.2d 484, 13 BRBS 351 (5th Cir. 1981). The Longshore Act was amended in 1984; the amended Act gives express authority to both district directors and administrative law judges to approve settlements for medical benefits. 33 U.S.C. §908(i)(1) (2000).

Following the enactment of the 1984 Amendments, regulations were promulgated by the Secretary of Labor to implement the statutory amendments. Relevant to this case, the regulations at 20 C.F.R. §§702.241-702.243 permit the district director or the administrative law judge to approve a settlement for medical benefits. In addition, the final regulation at 20 C.F.R. §701.101(b) (1986) states:

> The regulations also apply to claims filed under the District of Columbia Workmen's Compensation Act (DCCA). That law applies to all claims for injuries or deaths based on employment events that occurred prior to July 26, 1982, the effective date of the District of Columbia Workers' Compensation Act.

In implementing this regulation, the Secretary gave considerable consideration to the decisions in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985), *cert. denied,* 475 U.S. 1066 (1986), and *In re Metro Subway Accident Referral,* 630 F.Supp. 385 (D.D.C. 1984), in which the District of Columbia Court of Appeals and the United States District Court for the District of Columbia, respectively, held that the 1984 Amendments did not apply to cases arising under the 1928 D.C. Act because the latter had been repealed at the time of the former's enactment. The Secretary deemed this view ill-considered for a variety of reasons explicated in the implementation of the final regulation at Section 701.101(b). *See* 51 Fed. Reg. 4270-4273 (Feb. 3, 1986).

Subsequent to this regulation's promulgation, however, the United States Court of Appeals for the District of Columbia Circuit decided *Keener,* 800 F.2d 1173, in which the court deferred to the decision in *O'Connell* on this matter of local law and held that the

[1] The term "district director" has replaced "deputy commissioner" which is used in the statute. 20 C.F.R. §702.301(a)(7). This change in nomenclature is strictly administrative and does not affect any statutory or regulatory authority granted to the district director.

"1984 amendments [are] without effect" in cases arising under the 1928 D.C. Act. The 1928 D.C. Act had been repealed at the time the 1984 Amendments were enacted, and, therefore, the 1972 Act, by virtue of the General Savings Statute at 1 U.S.C. §109, applies to cases arising under the 1928 D.C. Act. *Keener*, 800 F.2d at 1175, 1178-1179; *see also Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 32 BRBS 104(CRT) (D.C. Cir. 1998); *Shea, S & M Ball Corp. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991); *Railco Multi-Constr. Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990). The *Keener* court expressly addressed the regulation at Section 701.101(b) and stated:

> We find it irrelevant that the Department of Labor has reached a contrary conclusion. *See* 51 Fed. Reg. 4270 (Feb. 3, 1986). We have before us not a question of interpreting *how* the 1984 amendments are to be applied to claims for injuries incurred prior to the 1928 Act's repeal, but of determining *whether* they have any application to those claims whatsoever. Whereas the former question would enlist the Department's expertise with respect to a matter within its statutory responsibility, the latter involves a pure question of law whose interpretation lies within the exclusive province of the courts.

Keener, 800 F.2d at 1179 (emphasis in original). In 1987, in promulgating Rules of Practice and Procedure before the Benefits Review Board, the Secretary explicitly acknowledged the holding in *Keener*. Thus, the regulation at 20 C.F.R. §801.301(d) does not permit *en banc* reconsideration of Board decisions in cases arising under the 1928 D.C. Act pursuant to amended Section 21(b)(5) of the Act, 33 U.S.C. §921(b)(5)(2000). *See* 52 Fed.Reg. 27288 (July 20, 1987); *Higgins v. Hampshire Gardens Apartments*, 19 BRBS 192 (1987).

In view of the decision in *Keener*, which is controlling precedent and which has been followed by the courts and the Board for over 20 years,[2] we agree with the Director

[2] *See, e.g., Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 32 BRBS 104(CRT) (D.C. Cir. 1998); *Shea, S & M Ball Corp. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991); *Railco Multi-Constr. Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990); *Durham v. Embassy Dairy*, 40 BRBS 15 (2006); *Henderson v. Kiewit Shea*, 39 BRBS 119 (2006); *Terrell v. Washington Metropolitan Area Transit Authority*, 34 BRBS 1 (2000); *Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125 (1988);

that the administrative law judge erred in relying on the regulation at 20 C.F.R. §701.101(b) to apply the amended Act and regulations to the parties' settlement agreement. It is clear that the 1972 Act and its implementing regulations apply to this case, which arises under the 1928 D.C. Act. Pursuant to the 1972 Act, only the Secretary, through her designate, the district director, may approve a settlement for medical benefits. 33 U.S.C. §908(i)(B) (1982); 20 C.F.R. §702.242 (1984); *Marine Concrete*, 645 F.2d 484, 13 BRBS 351. Therefore, we vacate the administrative law judge's approval of the parties' settlement agreement. The case is remanded to the district director for consideration of the parties' settlement agreement pursuant to Section 8(i) of the 1972 Act and Section 702.242 of the regulations in effect in 1984.[3]

Accordingly, we vacate the administrative law judge's Decision and Order Approving Settlement and Order Denying Motion for Reconsideration. The case is remanded to the district director for consideration of the parties' settlement application consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

Dailey v. Edwin H. Troth, 20 BRBS 75 (1986); *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986).

[3] These provisions require the parties to submit an application for settlement to the district director, "accompanied by a report of a recent medical examination pertaining to the employee's condition and to his future need for medical attention relating to the injury." The settlement agreement may be approved if the Director finds it to be in the employee's "best interests." *See Bonilla v. Director, OWCP*, 859 F.2d 1484, 21 BRBS 185(CRT) (D.C. Cir. 1988), *amended*, 866 F.2d 451 (D.C. Cir. 1989).