BRB No. 13-0554

PAUL LOSACANO (Deceased) Claimant-Petitioner v. ELECTRIC BOAT CORPORATION and ACE AMERICAN INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: July 28, 2014 DECISION and ORDER

Appeal of the Decision and Order Approving Settlement of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Robert J. Quigley, Jr. (McKenney, Quigley, Izzo & Clarkin, LLP), Providence, Rhode Island, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Approving Settlement (2013-LHC-00157) of Administrative Law Judge Jonathan C. Calianos 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

[1] Claimant's estate appeals on claimant's behalf. *See M.M.* [*McKenzie*] *v. Universal Maritime APM Terminals*, 42 BRBS 54 (2008).

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 sustained an injury to his lungs (asbestosis) and a hearing loss during the course of his employment with employer. Employer controverted the claim for the lung injury but paid all benefits for the hearing impairment. The parties ultimately reached a settlement agreement under Section 8(i), 33 U.S.C. §908(i). They agreed to settle both claims for the following: $90,999, inclusive of an attorney's fee, as compensation for the lung condition; $1 as consideration for the hearing loss, which had already been compensated; and employer would remain liable for medical expenses for both conditions.[2] The parties submitted this agreement to the administrative law judge; they submitted a duplicate settlement to the Connecticut Workers' Compensation Commission (CWCC) under the state act. Claimant and both counsel signed the agreements in July 2013. Within days of signing the agreements, claimant died. Employer withdrew its consent to the settlement submitted to the CWCC.

On August 13, 2013, the administrative law judge issued a Decision and Order approving the parties' Section 8(i) settlement under the Act. He concluded that the settlement was adequate and was not procured by duress. He then stated that, although he does not generally alter settlement agreements, he would do so in this case because the parties' stipulated attorney's fee resulted in a fee representing 42 hours billed at a rate of $395 per hour, which is greater than the billing rate he had previously approved.[3] Therefore, the administrative law judge reduced the fee portion of the settlement by $2,940 to reflect his designated maximum rate, and he awarded counsel $15,260 of the total settlement amount as an attorney fee; the difference was payable to claimant. Decision and Order at 2. In further summarizing the approved settlement in his Order, the administrative law judge stated: 1) employer and/or Ace American Insurance Company is to pay $75,474.13 to claimant to settle all compensation claims; 2) approval of the settlement is contingent upon the CWCC's approving the companion settlement before it; 3) employer and/or the carrier is liable for medical benefits, which remain open; 4) $15,525.38 is payable to claimant's counsel for his fee and costs; and 5) liability for all compensation for injuries covered by the stipulation is discharged upon payment.

[2] The parties submitted that $18,200 was for claimant's attorney's fee, $265.87 was for legal expenses, and the remaining $72,534.13 was compensation for claimant.

[3] In January 2011, the administrative law judge had set $325 as the maximum hourly rate for the Connecticut marketplace, *Davis v. Electric Boat Corp.*, 2009-LHC-01268 (Jan. 3, 2011), and he stated he was disinclined to exceed that rate.

Claimant appeals the administrative law judge's Decision and Order. Employer has filed a response brief.

Claimant contends the administrative law judge abused his discretion by: 1) making his approval of the settlement under the Act contingent upon approval of the state settlement; 2) holding an insurance carrier liable for paying the settlement proceeds and discharging the carrier's liability under the Act;[4] and 3) modifying his attorney's hourly rate. Claimant argues that the administrative law judge is not authorized to make any changes to a settlement agreement and that the changes were made without first informing the parties, thereby violating his right to due process of law.

Employer responds, asserting that claimant's appeal should be dismissed because the issue is not ripe for adjudication as the settlement is not final until the CWCC acts. Alternatively, employer urges the Board to affirm the administrative law judge's Order as he properly interpreted the language of the agreement. In reply, claimant attached the Connecticut Workers' Compensation Commissioner's dismissal and denial of the state claim due to employer's withdrawal of its consent to settle.[5] Claimant asserts that this dismissal makes the issue ripe for adjudication before the Board because the state denial prevents the Longshore settlement approval from becoming final and taking effect. Employer submitted a supplemental brief in reply to claimant's reply. It argues that the matter was not ripe when the appeal was filed with the Board and is not ripe now because claimant filed an appeal to the Connecticut Workers' Compensation Review Board, so the case remains pending with that agency.

We deny employer's motion to dismiss claimant's appeal, as we conclude that the issue raised by claimant is ripe for adjudication. The traditional analysis for determining whether an issue is ripe addresses two considerations: 1) the fitness of the issue for review and 2) the hardship on the parties if review is withheld. *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992) (citing *Abbott Laboratories*

[4] Claimant asserts the administrative law judge erred in releasing the insurance carrier from liability despite specific language in the agreement reserving claimant's rights against other parties. In three of the paragraphs of his Order implementing the parties' settlement, the administrative law judge held the carrier liable for the settlement proceeds along with employer. In one paragraph, he released both employer and the carrier upon payment of those sums.

[5] Once a settlement agreement is submitted under the Act, an employer may not withdraw from it unless the parties contractually agreed that such a withdrawal is permissible. *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988); *Maher v. Bunge Corp.*, 18 BRBS 203 (1986).

v. Gardner, 387 U.S. 136, 149 (1967)). The "fitness" prong involves ascertaining whether the issue is purely legal with sufficiently developed facts while the "hardship" prong involves showing that withholding review would result in immediate hardship with more than just financial loss. *Id.*[6] In this case, both prongs of the ripeness test are satisfied. The issue raised by claimant is whether the administrative law judge may modify the parties' settlement agreement. This is solely a legal issue and, therefore, fit for review. Further, because the administrative law judge conditioned the finality of his Order on the approval of the settlement by the state agency, and the state agency has not approved the settlement because of employer's withdrawal, claimant's claim under the Act has been left unresolved. If we declined to address claimant's appeal, his claim would remain in limbo as the state settlement agreement may never be approved. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Moody*], 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Chavez*, 961 F.2d 1409, 25 BRBS 134(CRT); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Boone*], 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996) (where district director's actions stripped an employer of its procedural rights, the issue was ripe for adjudication). Accordingly, we deny the motion to dismiss, and we shall address the issues raised on appeal.

Claimant contends the administrative law judge erred in modifying the parties' settlement agreement after having specifically found it adequate and not procured under duress, and having approved it. We agree with claimant, and we hold that, in altering the parties' settlement agreement, the administrative law judge's actions were not in accordance with law.

Section 8(i), 33 U.S.C. §908(i), provides for the settlement of "any claim for compensation under this chapter." Where a claimant seeks to terminate his compensation claim for a sum of money, the Section 8(i) settlement procedures, as delineated in the Act's implementing regulations, must be followed.[7] *See, e.g., Henson v. Arcwel*, 27

[6] For example, in *Chavez*, the United States Court of Appeals for the Ninth Circuit determined that the applicability of Section 33(f), 33 U.S.C. §933(f), apportionment was ripe for adjudication, despite there being no third-party settlements against which to offset benefits, as the lack of a determination on apportionment was preventing the parties from executing the settlements, and the dollar amount of the offset did not affect its legality.

[7] Section 8(i), 33 U.S.C. §908(i), is the only means for compromising an employer's obligation to pay benefits under the Act, creating an exception to Section 15(b), 33 U.S.C. §915(b) ("No agreement by an employee to waive his right to compensation under this chapter shall be valid"), and to Section 16, 33 U.S.C. §916 (no assignment, release, or commutation of compensation and benefits is valid except as provided in the Act).

BRBS 212 (1993); 20 C.F.R. §§702.241-702.243. The administrative law judge "shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress[,]" 33 U.S.C. §908(i)(1),[8] and the regulations insure that he has the information necessary to make the determination as to the settlement's adequacy. *See Richardson v. Huntington Ingalls, Inc.*, __ BRBS __, BRB No. 13-0476 (May 22, 2014); *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991). Once approved, the effect of a settlement is to completely discharge the employer's liability for the claimant's injuries that are the subject of the settlement.[9] 33 U.S.C. §908(i)(3); 20 C.F.R. §702.243(b); *see, e.g.*, *Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998).

Section 8(i) of the Act and its implementing regulations do not give an administrative law judge the authority to alter a complete Section 8(i) settlement submitted by the parties. Rather, the administrative law judge's options are limited.[10] 33

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[8] Section 8(i)(1) provides:

> Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the [district director] or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the [district director] or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

[9] An employer's liability "is not discharged until the settlement is specifically approved by a compensation order. . . ." If the parties are represented by counsel, however, "the settlement shall be deemed approved unless specifically disapproved within thirty days." 20 C.F.R. §702.243(b); *see also* 33 U.S.C. §908(i)(1), (3).

[10] Prior to the 1984 Amendments, the Act provided that the deputy commissioner "may approve" agreed settlements when it was in the best interests of the injured employee. *See* 33 U.S.C. §908(i) (1982). The amended Act provides mandatory language: "the administrative law judge *shall* approve the settlement within thirty days unless it is found to be inadequate or procured by duress." 33 U.S.C. §908(i)(1) (emphasis added). Section 8(i)(2) states that if the administrative law judge holds a hearing after the district director disapproves a settlement, the "administrative law judge

U.S.C. §908(i); 20 C.F.R. §702.243(a)-(c). When a settlement agreement is submitted to the administrative law judge, he can take only one of the following four actions within 30 days of his receipt of a settlement application: 1) issue a deficiency notice if the application is incomplete, 20 C.F.R. §§702.242, 702.243(b); 2) approve the settlement if it is adequate and not procured by duress, 33 U.S.C. §908(i)(1); 20 C.F.R. §702.243(b); 3) disapprove the settlement if it is inadequate or was procured under duress, 33 U.S.C. §908(i)(1)-(2); 20 C.F.R. §702.243(b), (c); or 4) do nothing, in which case, if the parties are represented by counsel, the settlement will be deemed approved after 30 days, 33 U.S.C. §908(i)(1); 20 C.F.R. §702.243(b). If the administrative law judge disapproves any portion of a settlement, the entire settlement is disapproved unless the parties specifically stated in the agreement that the portion could be severed and settled independently. 20 C.F.R. §702.243(e).

In this case, the administrative law judge did not question the completeness of the settlement application; therefore, he did not issue a deficiency notice. 20 C.F.R. §703.243(b). After reviewing the settlement application, the administrative law judge found the settlement to be adequate and not procured under duress, and he approved it. Decision and Order at 2-3; 20 C.F.R. §§702.242-702.243. However, the administrative law judge's Order for implementing the approved settlement altered the settlement terms in three ways. Because the administrative law judge is not authorized to alter settlement terms, his doing so is contrary to law.

First, and most importantly to claimant, the administrative law judge's order improperly amended the settlement agreement in a manner such that claimant has not received the benefits employer agreed to pay. The contract between the parties included the following paragraph:

> The parties have entered into a collateral agreement to settle these claims as to the self-insured employer under the provisions of the State of Connecticut Workers' Compensation Act. It is the parties' agreement that any consideration paid will act to satisfy the self-insured's liability and promises under both Acts and agreements, so that the total consideration to be paid by the self-insured employer to satisfy the promises within both agreements is $91,000.00.

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shall enter an order approving or rejecting the settlement." 33 U.S.C. §908(i)(2) (emphasis added).

Cl. Brief at exh. 1 at 4. Claimant asserts that this paragraph is intended to limit employer's total liability to $91,000 and to prevent a double recovery;[11] claimant avers that the parties' agreement did not make the implementation of either settlement contingent upon the approval of the other. The administrative law judge, however, stated that "the following order shall enter implementing the terms of the approved settlement:"

> (2) The approval of the Stipulation is contingent upon approval of the parties' companion stipulation pending before the Connecticut Workers' Compensation Commission. Once the settlement is approved by the Connecticut Workers' Compensation Commission, this Order shall be deemed final[.]

Id. at 3.

A reading of the plain words of the agreement signed by the parties comports with claimant's interpretation that the purpose is to avoid double recovery, as the plain words do not state or imply that the parties intended approval or finality of their settlement under the Act to be contingent upon the state agency's approval of the parties' companion agreement. Indeed, the parties did not set forth any contingencies in their settlement agreement,[12] and the administrative law judge's action has made the finality of his Order approving the settlement reliant upon the actions of an outside entity. This is problematic

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[11] This paragraph suggests the parties' implementation of Section 3(e) of the Act, 33 U.S.C. §903(e), which provides:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed by this chapter.

Thus, as a matter of law, employers are entitled to a statutory credit for state workers' compensation benefits, less attorney's fees, paid to claimants for the same injury or disability as that claimed under the Act. *See Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2d Cir. 1992); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990).

[12] Claimant asserts that employer bears the burden of establishing that the settlement contained a contingency, and it has not done so. *See Barscz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007).

because, as the state settlement has been withdrawn and may never be reinstated for approval, under the administrative law judge's terms, his own order approving the Section 8(i) settlement will never become final and effective.[13] As the administrative law judge's Order misinterpreted the parties' settlement terms, and as the administrative law judge is not authorized to alter the terms to which the parties agreed, the administrative law judge's Order cannot be affirmed.

Next, the administrative law judge modified the parties' agreement, perhaps inadvertently, by holding an insurance carrier liable for the settlement proceeds and then releasing the carrier from liability.[14] A review of the settlement agreement and cover letter establishes that no insurance carrier is a party to the settlement agreement; only claimant and the self-insured employer agreed to the terms. A settlement agreement may bind only the parties to the agreement. *See J.H.* [*Hodge*] *v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008); *Brady v. J. Young and Co.*, 17 BRBS 47, *recon. denied*, 18 BRBS 167 (1985); 20 C.F.R. §702.241(g). As no insurance carrier was a party to the settlement agreement, it was improper for the administrative law judge to order Ace American to pay the settlement proceeds and to release the carrier from liability.

Finally, the administrative law judge explicitly modified the settlement agreement by reducing the attorney's fee to claimant's counsel that had been negotiated by the parties. The administrative law judge determined that the agreed-upon fee resulted in counsel's receipt of an excessive hourly rate. *See* n.3, *supra.* After calculating the new amount payable to counsel based on his claimed hours of service, but at the administrative law judge's previously-set hourly rate, the administrative law judge stated that the difference between the negotiated fee and his award was payable to claimant. Thus, effectively, the administrative law judge disapproved the attorney's fee aspect of the parties' settlement. Although counsel specifically waived this issue in his brief on appeal, Cl. Brief at 2 n.1, the administrative law judge's action was improper and cannot be affirmed.

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[13] Because of the contingency, claimant arguably could not seek a default order against employer. 33 U.S.C. §918(a); *Seward v. Marine Maint. of Texas, Inc.*, 13 BRBS 500 (1981); *McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (1978); 20 C.F.R. §702.372.

[14] For example, the administrative law judge entered the following in his Order: "(1) [Employer] and/or Ace American Insurance Company shall pay directly to claimant" the lump sum of $75,474.13 to settle all claims covered by the Stipulation under the Act; . . . (3) [Employer] and/or [carrier] shall remain liable for all future reasonable and necessary medical care. . . ." Decision and Order at 3.

Section 702.242(b)(1), 20 C.F.R. §702.242(b)(1), requires a settlement application to contain:

> 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.

Section 702.132 requires that the fee requested be commensurate with the services provided and that it be approved by the adjudicating official. 20 C.F.R. §702.132. However, the regulation at 20 C.F.R. §702.132(c) (emphasis added) provides:

> Where fees are included in a settlement agreement submitted under §702.241, *et seq.*[,] *approval of that agreement shall be deemed approval of attorney fees* for purposes of this subsection for work performed before the Administrative Law Judge or district director approving the settlement.

Section 702.132(c) clearly addresses the very situation presented here. It deems the fee approved upon approval of the settlement. Section 702.243(e) of the regulations, 20 C.F.R. §702.243(e), provides further support for holding that the administrative law judge may not separately approve or disapprove portions of a settlement. Section 702.243(e) states:

> If either portion of a combined compensation and medical benefits settlement application is disapproved the entire application is disapproved unless the parties indicate on the face of the application that they agree to settle either portion independently.

Therefore, no provision of a settlement agreement is severable unless the parties agree it may be settled independently. As the parties control the severability of the provisions of a settlement, and as a settlement may also include the fee to be paid to the claimant's counsel, it follows that, absent a contractual provision permitting a fee to be approved independently, the fee agreement cannot be severed from rest of the settlement agreement and addressed separately.[15]

[15] That is, if the administrative law judge finds that the attorney's fee portion of the parties' agreement cannot be approved for a statutory or regulatory reason, then the entire settlement must be disapproved. In this case, the administrative law judge specifically found the amount the parties had agreed claimant would receive, apart from the amount they had agreed upon as an attorney's fee, was adequate. Decision and Order at 2. Consequently, there is no question as to whether the amount of the attorney's fee improperly diminished the payment to claimant so as to make the amount claimant is to

An administrative law judge is not authorized to modify the terms of the parties' agreement, whether deliberately or inadvertently. Because the administrative law judge in this case altered a settlement he approved as being adequate and not procured under duress, and no party has challenged the approval, we modify the order approving the settlement so as to comport with law. Specifically, we modify paragraph 2 of the administrative law judge's Order to remove the contingency and to reflect that finality of the approval Order is not dependent on actions of the CWCC or other state agency. We also modify paragraphs 1, 3, 4 and 5 of the Order to eliminate the reference to an insurance carrier and to reflect self-insured employer's sole liability for the settlement proceeds and only its discharge from liability. Finally, we vacate the administrative law judge's findings pertaining to the attorney's fee, and we modify paragraph 4 of the administrative law judge's Order to reflect counsel's entitlement to the attorney's fee originally agreed upon by the parties.[16]

receive inadequate. *See generally Jankowski v. United Terminals, Inc.*, 13 BRBS 727 (1981).

[16] Because we have held that an administrative law judge is without authority to make any changes to the parties' settlement agreement, claimant's waiver of this issue is without legal effect.

Accordingly, the administrative law judge's Decision and Order Approving Settlement is modified in accordance with this decision. In all other respects, the Decision and Order Approving Settlement is affirmed. As the settlement was properly approved and the improper contingency is now eliminated, the settlement proceeds are payable by employer to claimant and his attorney pursuant to the terms of the approved settlement agreement.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge