U.S. Department of Labor

Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation
Washington, D.C. 20210

LHWCA BULLETIN NO. 14-05

Issue Date: September 17, 2014

Subject: Evaluating applications for settlement under section 908(i) of the Longshore and Harbor Workers' Compensation Act (LHWCA) subsequent to a Benefits Review Board (BRB) decision in *Richardson v. Huntington Ingalls, Inc.*

Statutory and Regulatory References: Section 908(i)(1) of the LHWCA states that:

> Whenever the parties to any claim for compensation under this Act, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress.... 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. (emphasis added)

The regulations at 20 C.F.R. 702.241-243 govern action by the District Director or the Administrative Law Judge (denominated by 20 C.F.R. 702.241(a) as "adjudicators") when considering a settlement application.

20 C.F.R. 702.242(b) requires that settlement applications contain the following information:

> (1) A complete description of the terms clearly indicating the amounts to be paid for compensation, medical, and attorney fees;
> (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, including 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 describing any injury related impairment as well as any unrelated conditions, indicating whether maximum medical improvement has been reached and whether further disability or medical treatment is anticipated;
> (6) A statement explaining how the settlement amount is considered adequate;
> (7) If the settlement 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 and an estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical treatment. The adjudicator may waive these requirements for good cause; and
> (8) Information on any collateral source available for the payment of medical expenses.

Adequacy of the settlement amount is an express statutory requirement and is therefore critical to consideration of the application. For that reason, 20 C.F.R. 702.243(f) identifies specific criteria for assessing adequacy:

> When presented with a settlement, the adjudicator shall review the application and determine whether, considering all of the circumstances, including, where appropriate, the probability of success if the case were formally litigated, the amount is adequate. The criteria for determining the adequacy of the settlement application shall include, but not be limited to:
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> > (1) The claimant's age, education and work history;
> > (2) The degree of the claimant's disability or impairment;
> > (3) The availability of the type of work the claimant can do;
> > (4) The cost and necessity of future medical treatment (where the settlement includes medical benefits).

In addition, 20 C.F.R. 702.243(g) addresses adequacy in cases being paid pursuant to a final compensation order and where no substantive issues are in dispute:

> ...a settlement amount which does not equal the present value of future compensation payments commuted, computed at the discount rate specified below, shall be considered inadequate unless the parties to the settlement show that the amount is adequate. The probability of the death of the beneficiary before the expiration of the period during which he or she is entitled to compensation shall be determined according to the most current United States Life Table .... The discount rate shall be equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 weeks U.S. Treasury Bills settled immediately prior to the date of the submission of the settlement application.

Background:
On May 22, 2014, the BRB issued a significant decision in *Richardson v. Huntington Ingalls, Inc.*, 48 BRBS 23 (May 22, 2014), 2014 WL 2649645, BRB No. 13-0476.

Richardson

The employee in *Richardson* was 52 years old and had worked for the employer as a welder for over twenty years, until she suffered a shoulder injury that required surgery. Although the employer initially permitted her to return to light-duty work, it later concluded that she was permanently incapable of returning to her pre-injury duties, terminated her employment, and paid a second period of TTD. After the employer's vocational expert identified suitable alternative employment, the employee returned to work in a different field, earning substantially less than her pre-injury wages. Consistent with both the vocational expert's labor market survey and the employee's actual post-injury earnings, the employer made voluntary payments for permanent partial disability compensation under section 8(c)(21) in the amount of $538.68 per week. The parties then presented a settlement proposal to the District Director for $140,000. The proposal stated that a dispute existed regarding the employee's post-injury wage-earning capacity. The District Director rejected the settlement proposal as inadequate. Considering the actuarial value of the claim, the District Director determined that the present value of the employee's current periodic payments (even using a significantly inflated 8% discount rate) was $306,000, and noted that the parties failed to explain how the proposed settlement amount of $140,000 was adequate. 20 C.F.R. 702.242(b)(6). The parties requested an ALJ hearing as permitted by 20 C.F.R. 702.243(c).

Administrative Law Judge Decision

Before the ALJ, the employer added $500 to the proposed settlement amount, and the parties expanded their adequacy justification in a conclusory fashion. The ALJ approved the settlement

and distinguished between settlements in which the claimant is represented and those in which the claimant is pro se. Finding that settlements involving represented claimants require less scrutiny, the ALJ declined to "second-guess" the parties by independently examining the proposal's adequacy. He found that doing so would imply that employee's counsel was not competent. The ALJ found that section 8(i)(a)'s "automatic approval" provision created an implicit presumption of effective assistance of counsel, and therefore presumed that counsel for the employee here was "competent and ethical." The ALJ found that the employee submitted the settlement application with the advice of counsel, after considering the risks of litigation and her personal circumstances (even though all of those may not have been documented), and concluded that the settlement was adequate "based on the representation of the employee and her" attorney. The Director appealed to the Board.

Benefits Review Board Adjudication

The Board affirmed the ALJ's decision. It upheld the ALJ's distinction between settlement applications submitted by represented versus unrepresented claimants and relied on 33 U.S.C. § 908(i)(1) and 20 C.F.R. 702.243(b), which provide that, if the parties are represented by counsel, the settlement agreement shall be deemed approved unless the adjudicator specifically disapproves it within 30 days of its submission. The Board also agreed with the ALJ that specific disclosure of the information supporting an adequacy determination is not required, and that "general assertions may be sufficient to justify accepting a significant discount from the judgment value of a claim, if the claimant is represented by counsel who is presumed to be competent and ethical."

The Board rejected the Director's argument that the actuarial value of the claim is a factor that must be considered in assessing the adequacy of settlement proposals. The Board noted that the regulations require an actuarial analysis only in cases where there are no substantive issues in dispute and the claim is being paid pursuant to a final compensation order. Compare 20 C.F.R. 702.243(g) with 20 C.F.R. 702.243(f) and 702.242(b). It emphasized that a settlement in cases without a final order was, at bottom, a compromise in which the claimant and her attorney have assessed the situation and arrived at a solution mutually acceptable to both them and the Employer/Carrier.

Finally, the Board addressed the issue of whether the parties needed to provide evidence to sufficiently explain why a certain dollar amount was adequate. The Board found that the application need only address the four factors outlined in 20 C.F.R. 702.243(f) and that disclosure of the claimant's rationale for acceptance of the settlement amount was not required.

Purpose: To provide guidance for evaluating the adequacy of 8(i) settlements in light of *Richardson*.

Applicability: All DLHWC Federal Staff

Actions:

Review of Adequacy

a. Cases with a final compensation order and no bona fide substantive disputes –

   These cases should be reviewed under the terms of 20 C.F.R. 702.243(g), and the District Director should continue to evaluate these cases using life tables and the actuarial present value of the claim using the facts in the compensation order.

b. Cases without a compensation order -

(1) Represented Claimants – 20 C.F.R. 702.243(f) requires the adjudicator to determine the adequacy of the settlement "considering all of the circumstances." Thus, it does not prohibit performing an actuarial analysis of the value of the claim. Under *Richardson*, however, such an analysis is not required, and an adjudicator's failure to perform such an analysis is not an abuse of discretion.

The District Director should continue to ensure that all of the information required by 702.242(b) is included in the 8(i) settlement application and review the proposal considering the factors outlined in 20 C.F.R. 702.243(f). Under *Richardson*, however, considerable weight must be given to the views of the claimant and his counsel as to the adequacy of the settlement amount. In particular, their opinion regarding the risks of litigation and the "probability of success if the case were formally litigated" should be respected unless information in the file or application contradicts the parties' statements in the application. If a represented claimant expresses an unambiguous willingness to settle, complete agreement with and understanding of the settlement terms proposed, and there is no reason to question the claimant's counsel's competence or ethics, the District Director should ordinarily approve the settlement, keeping in mind that the settlement process requires compromise.

If the District Director disapproves a settlement application and a party requests an ALJ hearing, when the case is referred to OALJ, a copy of the disapproval statement should be transmitted to OALJ together with the pre-hearing statements in accordance with Procedure Manual Chapter 3-501-9(b).

(2) Unrepresented Claimants - The District Director should review the factors outlined in 20 C.F.R. 702.243(f) with more rigor than for a represented claimant bringing to bear his experience and expertise regarding the risks of litigation and the "probability of success if the case were formally litigated." The District Director should attempt to ensure that the claimant fully understands the potential value of the claim. The District Director must also determine whether the proposed settlement is adequate given the particular circumstances of the case.

Disposition: This bulletin is to be retained until the DLWHC Procedure Manual, Chapter 3-501, has been updated.

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