BRB No. 08-0522

D.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERNATIONAL TRANSPORTATION SERVICES	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE AND CASUALTY	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carriers Respondents	)	DATE ISSUED: 01/14/2009
	)	
and	)	
	)	
KAISER INTERNATIONAL CORPORATIONS	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
and	)	
	)	
MARINE TERMINALS CORPORATION	)	

	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carriers-Respondents	)	
	)	
and	)	
	)	
PACIFIC MARITIME ASSOCIATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Party-in-Interest/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Respondents' Motions for Summary Decision of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

J.S., San Pedro, California, lay representative for claimant.

Christopher M. Galichon, San Diego, California, for International Transportation Services, Kaiser International Corporation, National Union Fire and Casualty, and National Union Fire Insurance Company, and Reliance National Insurance Company.[1]

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Brown, L.L.P.), San Pedro, California, for Pacific Maritime Association, Marine Terminals Corporation, and Majestic Insurance Company.

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

[1]Reliance National Insurance was liquidated by the state of Pennsylvania, so International Transportation Services (ITS) appears on its own behalf for one of the alleged injuries.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Respondents' Motions for Summary Decision (2007-LHC-1660, 2007-LHC-1661, 2007-LHC-1662, 2007-LHC-1663, 2007-LHC-1664) of Administrative Law Judge Anne Beytin Torkington 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). In an appeal by a claimant without counsel, we will review the administrative law judge's findings of fact and conclusions of law to determine 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). If they are, they must be affirmed.

Claimant injured his right knee at work in 1987 and he injured his left long finger at work in 1990. Claimant and ITS entered into a Section 8(i), 33 U.S.C. §908(i), agreement for the knee injury in 1992. In 1993, claimant and Kaiser reached a settlement for the finger injury. In December 2003, claimant filed a claim for compensation under the Act against Pacific Maritime Association (PMA). The form identifies December 1, 2003, as the date of injury and alleges that claimant "contracted infectious disease causing bacteria at work." He stated that his "buttocks, knees, legs, hand, arms and all over body" are affected, "causing kidney failure." Cl. Ex. 10.[2] Before the administrative law judge, claimant contended he is entitled to compensation because he "has been suffering from various work-related health problems, most prominently flesh-eating disease, skin infections, and renal problems." Decision and Order at 2. Claimant asked the administrative law judge to examine all his past claims to determine which employer is liable for his current condition.[3] *Id.*; ALJ Ex. 7. Although claimant contends one of his past injuries must have failed to heal properly, thereby causing the infections, the administrative law judge stated that claimant did not elaborate on how the prior claims are allegedly connected to his current complaints. *Id.*

ITS and Kaiser filed a joint motion for summary decision asserting that the claims for claimant's 1987 and 1990 injuries were settled and that there was no claim filed for an alleged July 1993 stress injury against ITS. ITS and Kaiser argued that the current claim

[2]It appears December 1, 2003, may have been chosen as the date of injury because claimant was hospitalized in December 2003 with a necrotic skin infection and doctors had to remove infected tissue from his left thigh and buttocks. ALJ Ex. 4; Cl. Ex. 4.

[3]Claimant's 2003 claim form identified PMA as the responsible employer. PMA filed a notice of controversion arguing that it is not an employer. The district director asked claimant to identify the responsible employer. By 2007, the respondents herein were identified and associated with the claim. All filed motions for summary decision.

is untimely and that the settlements cannot be modified. The administrative law judge ordered the parties to show cause why summary decision should not be granted. On November 5, 2007, in response to the show cause order, claimant asserted that he "has been suffering terribly due to the fact that [his condition is] job related," in that he was first injured in 1987 and that his hand and knee injuries never healed. He also asserted that because he was working in "unclean conditions," he constantly has had to deal with the bacterial infection recurring, and he ultimately had to undergo surgery in 2003 to remove infected tissue from his left thigh and buttock, and he now seeks "justice." ALJ Ex. 4.

In November 2007, PMA moved for summary decision on the grounds that it is not an employer under the Act and that claimant was not employed by any of its member companies on the alleged date of injury, December 1, 2003. Marine Terminals Corporation (MTC) also filed a motion for summary decision, arguing that claimant never filed a claim or any medical evidence to support his allegation of a mental stress injury in January 1993. The administrative law judge issued another show cause order to the parties. On November 12, 2007, the administrative law judge received claimant's response. The letter stated that, following his 1990 injury, "his infection started when he went to work with stitches and bandages" and that he "should never have been sent back to work." ALJ Ex. 5. Attached to the letter were, *inter alia*, hospital records dated between 1987 and 2007. Cl. Ex. 1-10a.

In accordance with claimant's request, the administrative law judge identified the existence of four past "claims" and one current claim: the claims that were settled in 1992 and 1993, two allegations of mental stress in 1993, and the current allegation of contracting flesh-eating disease. Cl. Ex. 10. The administrative law judge found that the medical records submitted by claimant establish that claimant suffers from skin lesions, renal problems, diabetic ketoacidosis, and other complications related to his diabetes, but they do not show that claimant's flesh-eating bacteria infection or other current problems could be related to his employment. Thus, the administrative law judge found that claimant did not establish the existence of any genuine issues of material fact and that employers are entitled to summary decision as a matter of law. Consequently, she dismissed all "claims." Decision and Order at 10-11; ALJ Exs. 1-3. Claimant challenges the administrative law judge's decision to grant summary decision in this case.[4] ITS,

[4]Claimant attached photos and documents to his letter of appeal to the Board. Because it was unknown whether these items were in evidence before the administrative law judge, the Board returned them to claimant. Order (April 25, 2008). In their response brief, ITS and Kaiser contend claimant's entire "brief" should be stricken because it is replete with references to the returned documents. Their motion is moot given our disposition of the case.

Kaiser, MTC, PMA, and their insurers (collectively "employers" herein), respond, urging affirmance.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a). The party opposing a motion for summary decision, in this instance, claimant, must "set forth specific facts showing that there is a genuine issue of fact for the hearing" in order to defeat the motion. *Buck*, 37 BRBS 53; 29 C.F.R. §18.40(c). Specifically, he must establish the existence of an issue of fact which is both "material" and "genuine;" material in the sense of affecting the outcome of the litigation, and genuine in the sense of there being sufficient evidence to support the alleged factual dispute. *O'Hara*, 294 F.3d at 61; *see also First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968). Mere statements or allegations are insufficient to show that a dispute is "genuine;" the non-moving party "must produce at least some 'significant probative evidence tending to support' [the] claim." *Id.* Summary decision is also proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

1987 Injury to Right Knee[5]
1990 Left Long-finger Injury[6]

There is no dispute that claimant sustained a 1987 injury to his right knee and a 1990 injury to his left long finger. In addressing how these injuries might relate to the current claim for flesh-eating disease, the administrative law judge found that these claims were settled and paid in full. Claimant and ITS settled the claim for benefits for the knee injury in 1992 for $26,149.82. Administrative Law Judge Halpern approved the settlement in December 1992, stating that it is adequate and was not procured by duress. ALJ Ex. 1 at exh. 1. The Office of Workers' Compensation Programs (OWCP) informed

[5]Current case numbers: ALJ No. 2007-LHC-1660; OWCP No. 18-35878. Prior case numbers: ALJ No. 93-LHC-32; OWCP No. 18-35878.

[6]Current case numbers: ALJ No. 2007-LHC-1661; OWCP No.18-46153. Prior case numbers: ALJ No. 93-LHC-31; OWCP No. 18-46153; BRB No. 93-1759.

claimant in May 2007 that he had received all benefits due under this settlement. Cl. Ex. 10. Claimant and Kaiser settled the claim for benefits for the finger injury in 1993 for $30,000. Judge Halpern approved this settlement in May 1993 and denied claimant's motion for reconsideration, stating that the settlement was not made under duress and was "quite favorable." ALJ Ex. 1 at exh. 3. Claimant appealed this settlement, and the approval was administratively affirmed on September 12, 1996. ALJ Ex. 1 at exh. 2. No further appeal was taken. OWCP informed claimant in May 2007 that he had received all benefits due under this settlement. Cl. Ex. 10.

Section 8(i) provides for the settlement of "any claim for compensation under this chapter" by a procedure in which an application for settlement is submitted for the approval of the district director or administrative law judge. The procedures governing settlement agreements are delineated in the Act's implementing regulations. *See* 20 C.F.R. §§702.241-702.243.[7] These regulations ensure that the approving official obtains the information necessary to determine whether the agreement is inadequate or procured by duress. *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc*, 24 BRBS 224 (1991). Section 8(i) explicitly states that a settlement shall be approved "unless it is found to be inadequate or procured by duress." 33 U.S.C. §908(i). Once approved, the effect of a settlement is to completely discharge the employer's liability for the claimant's injury. Once the time to appeal expires, *see* 33 U.S.C. §921, an approved settlement is final, and it is not subject to modification under Section 22, 33 U.S.C. §922. *See, e.g., Downs v. Texas Star Shipping Co., Inc.*, 18 BRBS 37 (1986), *aff'd sub nom. Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986). While the case precedent indicates that a settlement may be reopened where legitimate allegations of fraud or duress exist, *id.*, if such is not established, then the general rule that the settlement is final applies.

In this case, the administrative law judge found that claimant asserted only that he had been "treated unfairly" but did not set forth any facts to show fraud or duress in the settlement proceedings. Indeed, the administrative law judge acknowledged that the settlement with Kaiser had been deemed "quite favorable" by Judge Halpern. Decision

[7]Section 702.242(a) requires the settlement application to be in the form of a stipulation signed by all parties, to contain a brief summary of the facts of the case including a description of the incident, a description of the nature of the injury including the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid. 20 C.F.R. §702.242(a). Section 702.242(b) requires that the application contain, *inter alia*, the reasons for the settlement and its terms, information on whether or not the claimant is working or is capable of working, and a justification for the adequacy of the settlement amount. 20 C.F.R. §702.242(b).

and Order at 9; ALJ Ex. 1 at exh. 3; *see also* ALJ Ex. 1 at exh. 5. As claimant only alleged "unfair treatment" but did not put forth any evidence to show that these settlements were procured under duress, the administrative law judge found that there is no triable issue of fact regarding fraud or duress, and she granted summary decision in favor of both Kaiser and ITS.[8] Decision and Order at 9. We affirm this finding.

As Judge Halpern approved the settlements over 15 years ago, and as claimant received all the proceeds to which he was entitled under both settlements, the settlements are final, and claimant cannot recover additional benefits for the 1987 and 1990 injuries. *See Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998); *Rochester v. George Washington University*, 30 BRBS 233 (1997). Moreover, a mere allegation of fraud or duress, without further proof, is not sufficient to overcome a motion for summary decision. *Buck*, 37 BRBS at 55 (mere allegation does not establish material issue of genuine fact). Claimant offered only allegations, and the administrative law judge properly found them insufficient to affect this settlement. We therefore affirm the denial of additional benefits for the knee and finger injuries.

Alleged Mental Stress Injuries on July 19, 1993[9] and January 8, 1993[10]

Next, because claimant asked her to review all his past "work injuries" to determine whether his flesh-eating disease is work-related, the administrative law judge also considered two allegations of mental stress reported in 1993. She found that, pursuant to OWCP's May 11, 2007, letter to claimant, there was an allegation of a mental stress injury on July 19, 1993, against ITS. The administrative law judge determined, pursuant to employer's explanation, that following the denial of claimant's motion for

[8]The administrative law judge also found that, assuming, *arguendo*, that duress could be shown, the medical evidence establishes that claimant's skin and health problems are all complications from his diabetes, which was diagnosed in 1990. Decision and Order at 9; *see* ALJ Ex. 4. ALJ Ex. 4 contains a copy of a 1993 letter written by, claimant's doctor, Dr. O'Hara. In his letter, Dr. O'Hara stated that claimant's left hand is 75 percent disabled because of its unreliability due to pain in the long finger when grasping and claimant's inherent reaction to unclench his hand. Dr. O'Hara stated that claimant's knee condition is permanent and stationary without significant improvement absent surgery. He concluded that claimant is disabled with respect to his knee and his hand due to the fact that claimant's uncontrolled diabetes prevents him from having the surgeries which would help those conditions.

[9]Current case numbers: ALJ No. 2007-LHC-1662; OWCP No. 18-46153.

[10]Current case numbers: ALJ No. 2007-LHC-1663; OWCP No. 18-56383.

reconsideration of the approval of the settlement for his 1990 injury, claimant attempted to allege that he suffered from a work-related stress injury in 1993. She found that the file on the matter had been closed by OWCP. Decision and Order at 6; *see also* ALJ Ex. 1; Cl. Ex. 10. The administrative law judge also found that OWCP closed the file on an alleged January 1993 mental stress injury against MTC due to lack of pursuit and lack of evidence. Decision and Order at 7; Cl. Ex. 10. The administrative law judge therefore found that these "claims" were not pursued by claimant and are unsupported by any evidence. As the administrative law judge found there were no claims filed, there is no evidence establishing any mental stress injuries, and there is no evidence as to how a mental stress injury may relate to claimant's current complaints, she granted summary judgment in favor of ITS and MTC. Decision and Order at 9-19. We affirm this finding.

In light of the fact that no claims for compensation were filed within one or two years of the alleged dates of injury, any claims for those alleged injuries would be untimely. 33 U.S.C. §913; 20 C.F.R. §§702.221, 702.222; *but see Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting) (time for filing claim may be tolled if employer fails to comply with 33 U.S.C. §930(a)); *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991) (same). Moreover, claimant is not specifically pursuing the claims for the alleged mental stress injuries, and there is no evidence in the record of any mental stress injury. Accordingly, there are no genuine issues of material fact, and as a matter of law summary decision was properly granted. *See Celotex Corp.*, 477 U.S. 317.

Alleged Contraction of Flesh-eating Disease on December 1, 2003[11]

Claimant filed a claim for compensation against PMA alleging he contracted an infectious disease on December 1, 2003, which affected his entire body. ALJ Ex. 2 at exh. 2. PMA argued before the administrative law judge that it is not an employer against which a longshore claim can be filed. ALJ Ex. 2. OWCP wrote that claimant did not identify an employer upon which to serve the claim. ALJ Ex. 4; Cl. Ex. 10; n.3, *supra*. PMA also argued that claimant did not work for any of its member employers on the date he alleges the injury occurred.[12] ALJ Ex. 2 at exh. 1. The administrative law judge granted PMA's motion for summary decision for three reasons. First, she determined that claimant was not employed by any of its member companies in

[11]Current case numbers: ALJ No. 2007-LHC-1664; OWCP No. 18-88357.

[12]Claimant's last employment with a PMA member prior to December 2003 was on November 6, 2003, with an employer which is not a party hereto. He did not work for a member company again until he worked for ITS on August 6, 2004.

December 2003. Next, she concluded that PMA is not an employer subject to the Act, and finally, she found that claimant did not provide evidence showing that his health problems could be related to any employment on or near December 1, 2003, when he asserted he was last injured. The administrative law judge stated that, although claimant is ill, his statements that his illness is work-related are conclusory and not supported by any evidence. Specifically, the administrative law judge found that the medical evidence establishes that claimant is suffering from hypertension, renal failure, skin infections, and other problems all associated with his diabetes mellitus. She found that no evidence relates these problems to claimant's longshore employment. Accordingly, she concluded that there is no genuine issue of material fact, and she granted PMA's motion. Decision and Order at 7-8, 10.

We affirm the administrative law judge's decision granting PMA's motion for summary decision. As the administrative law judge found, PMA did not employ claimant,[13] and claimant did not offer any evidence regarding any employment prior to December 1, 2003, which could have caused or contributed to his medical conditions. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Moreover, claimant did not submit any evidence in response to the motion for summary decision stating that any of his medical conditions could be related to any employment. Therefore, we affirm the administrative law judge's decision to grant PMA's motion for summary decision. *Buck*, 37 BRBS 53.

The record supports the administrative law judge's finding that claimant did not put forth any sufficient allegations or evidence in response to the motions for summary decision to establish that there are any genuine issues of material fact. Consequently, the administrative law judge properly granted employers' motions for summary decision. *Buck*, 37 BRBS 53.

[13]PMA is a non-profit mutual benefit corporation whose members are stevedoring companies, ocean carriers, and terminal operators. It acts as the collective bargaining agent and paycheck processor for these companies. ALJ Ex. 2 at exh. 1.

Accordingly, the administrative law judge's Decision and Order dismissing claimant's claims is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge