

WILLIAM F. KEENER)
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 Claimant-Respondent)
)
 v.)
)
 MARINE TERMINALS CORPORATION)
)
 and)
)
 EL DORADO/CIGA,) DATE ISSUED:
)
 Employer/Carrier-)
 Respondents)
)
 CALIFORNIA STEVEDORE &)
 BALLAST)
 Self-Insured)
 Employer-Respondent)
)
 MATSON TERMINAL)
)
 Self-Insured)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order - Approval of Agreed Settlement of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Karen B. Kracov, (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY,

Administrative Appeals Judge, and SHEA, Administrative Law Judge*.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Approval of Agreed Settlement (91-LHC-2569) of Administrative Law Judge Vivian Schreter-Murray 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was exposed to asbestos while working for employer as a longshoreman from 1944 until 1968, when he retired due to orthopedic problems. In a report dated September 20, 1983, Dr. Horton C. Hinshaw, Jr., diagnosed claimant as having a Class II pulmonary impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (1st ed. 1977), attributable to asbestos exposure based on x-ray findings of pleural disease and claimant's reduced forced vital capacity. Dr. Hinshaw further noted that because of his asbestos exposure, claimant was at an increased risk of developing several types of malignancies including lung cancer, several types of gastro-intestinal cancer, and mesothelioma. Although Dr. Hinshaw indicated that claimant did not require active medical treatment at that time, he also noted that claimant should have annual x-rays and undergo regular medical surveillance. In addition, Dr. Hinshaw indicated that if claimant were to develop increased respiratory symptoms or persistent gastro-intestinal symptoms consistent with a malignancy, further x-rays and tests would be required. Finally, Dr. Hinshaw indicated that if a malignancy were to develop, this would require extensive therapy and possibly surgery.

Claimant sought compensation under the Act, alleging that he sustained injury to his lungs as a result of his work-related asbestos exposure. After the case was referred to the Office of Administrative Law Judges, claimant and employer entered into a proposed settlement agreement which provided that claimant would receive a lump sum of \$2,550 and claimant's attorney would receive a \$450 fee in the California Workers' Compensation Appeals Board forum,¹ in settlement of his pending compensation claim. On September 12, 1991, the administrative law judge issued a Decision and Order in which she approved the parties' proposed settlement, finding the proposed agreement and supporting documents in all respects adequate, and the parties ably represented and under no legal disability. *See* 33 U.S.C. §908(i)(1988); 20 C.F.R. §§702.241-702.243.

On appeal, the Director asserts that the administrative law judge exceeded the scope of her

¹Claimant's counsel waived his attorney's fee in the federal forum.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

authority in approving the proposed settlement agreement because the parties' settlement is not in accordance with Section 8(i) of the Act and Section 702.241(g), 20 C.F.R. §702.241(g), of the regulations. Neither claimant nor the employers has responded to the Director's appeal.

The Director specifically takes issue with the language in paragraph 1 of the agreement which provides:

The parties specifically recognize and acknowledge that by agreement in consideration for the sum paid hereunder by Employers, the employee/ claimant Willie Frank Keener hereby settles and forever discharges and releases the Employers from any and all claims or liability for temporary disability compensation; permanent disability compensation; medical and hospital care and treatment, past and future; mileage; attorneys' fees; litigation costs and *any and all other claims or liabilities which are or may be related to the injury* allegedly arising out of asbestos exposure cumulative to 1968.

(emphasis added). The Director maintains that this language violates the provisions of Section 8(i) of the Act and Section 702.241(g) of the regulations because it discharges employer from potential liability for claims not yet in existence.

We agree with the Director that the settlement proposed by the parties and approved by the administrative law judge contains language which is not acceptable under Section 8(i) and its implementing regulations. *See generally Kelly v. Ingalls Shipbuilding, Inc.*, 27 BRBS 117, 119 (1993).

Section 8(i), as amended in 1984, provides in pertinent part:

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.

33 U.S.C. §908(i)(1)(1988). Section 702.241(g) of the Act's implementing regulations states:

An agreement among the parties to settle a claim is limited to the rights of the parties and *to claims then in existence*; settlement of disability compensation or medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits.

20 C.F.R. §702.241(g) (emphasis added).

Section 702.241(g) of the regulations explicitly states what is implicit under the statute--that settlement of a claim is "limited to the rights of the parties and to the claims then in existence." *See Cortner v. Chevron International Oil Co., Inc.*, 22 BRBS 218 (1989). Thus, in *Cortner*, where the claimant filed a claim for bilateral hernias and asbestos-related disease and was alive at the time of the settlement, the Board vacated the settlement which discharged employer from all claims for compensation, medical benefits, survivor benefits, and death benefits. The Board held that Section 8(i) of the Act and Section 702.241(g) of the Act's implementing regulations prohibited the settlement of potential future survivor claims which would not arise until the death of the injured worker. *See Cortner*, 22 BRBS at 220. In contrast to *Cortner*, the Board has, in cases involving settlements of claims for a work-related hearing loss, construed those settlements as only applying to the hearing loss claim for which benefits were sought where the settlement agreement as a whole clearly indicated a compromise settlement of the hearing loss in existence at the time of the settlement. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993); *Kelly*, 27 BRBS at 120. Thus, in *Poole*, the Board affirmed the administrative law judge's decision to specifically limit a settlement to the present claim, noting that claimant was a retiree and was unlikely to return to the workforce. *See Poole*, 27 BRBS at 235. Similarly, in *Kelly*, the Board affirmed the administrative law judge's approval of a settlement, noting that claimant had worked for employer since 1959, could not file a future hearing loss claim against employer in the absence of future injurious exposure, and that a death benefits claim relating to an occupational hearing loss is unlikely. *See Kelly*, 27 BRBS at 120.

Although the parties' agreement in this case does not attempt to discharge any future survivor or death claims and, in fact, specifically mentions the possibility of such a claim consistent with the mandate of *Cortner*, we agree with the Director that the language contained in paragraph 1 of the parties' agreement is nonetheless overbroad because it discharges employer from liability for future claims not yet in existence. We note that Dr. Hinshaw's report, which was submitted as supporting medical documentation for the settlement application, specifically indicates that while claimant exhibits no sign of cancer at the present time, he has an increased chance of developing three types of malignancies as a result of his work-related asbestos exposure -- lung cancer, gastro-intestinal cancer, and mesothelioma. Because paragraph 1 of the settlement agreement purports to relieve employer from liability for "any and all other claims or liabilities which are, or may be, related to the injury," it would preclude claimant from obtaining compensation and medical benefits from employer if he were to develop one of these asbestos-related cancers in the future. Because the settlement agreement as a whole cannot logically be construed as being limited to the claim for claimant's Class II pulmonary impairment which is currently in existence, and inasmuch as Section 8(i) of the Act and Section 702.241(g) of the regulations prohibit the settlement of potential future claims, we vacate the administrative law judge's Decision and Order approving the parties' settlement. The case is accordingly remanded for the administrative law judge to take further action necessary to the resolution of this claim.²

²In this regard, we note that because Dr. Hinshaw's medical report was over seven years old at the time that the proposed settlement agreement was submitted, it would not appear to constitute a

current medical report as is required by 20 C.F.R. §702.242(b)(5). We further note that the parties' characterization of claimant's medical care needs in paragraph 7 of the proposed settlement does not appear to be accurate. While Dr. Hinshaw did indicate that claimant did not require active treatment of his lungs, he also indicated that claimant should have yearly chest x-rays and medical surveillance, a recommendation which was not reflected in the parties' proposed agreement. Finally, we note that although the administrative law judge found that the settlement and underlying documentation were "in all respects adequate," she did not explain the basis for this determination as is required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A).

Accordingly, the administrative law judge's Decision and Order - Approval of Agreed Settlement is vacated, and the case is remanded for further proceedings as the parties require to dispose of the claim.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge