

VANCE SELF)
(Administrator of the estate of)
HENDERSON HOWELL SELF))
)
Claimant-Respondent)
)
v.)
)
ADDSO INDUSTRIES,)
INCORPORATED) DATE ISSUED:
)
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 - Approving Settlement of Quentin P. McColgin,
Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

Winn Faulk (Drinkard, Ulmer, Hicks & Leon), Mobile, Alabama, for self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate
Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the
Director, Office of Workers' Compensation Programs, United States Department of
Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Approving Settlement (90-LHC-1524) of Administrative Law Judge Quentin P. McColgin 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).

Decedent, a retired employee who was exposed to injurious noise during the course of his employment with employer, underwent an audiometric evaluation on April 17, 1987, the results of which revealed a 48 percent binaural impairment. Based on these results, decedent filed a claim for compensation under the Act on May 18, 1987; however, he died of cardiovascular disease on November 28, 1989, leaving no dependents. At the formal hearing, claimant¹ and employer informed the administrative law judge of their agreement to settle the claim. The administrative law judge thereafter approved the settlement, which requires employer to pay \$10,000 into the Probate Court of Mobile County in full settlement of decedent's hearing loss claim. The amount is to be paid within 20 days after a final order has been issued or the time for appeal has expired, whichever is later. If the award becomes final, either without appeal or after all appeals are exhausted, then the probate court shall distribute the money, less court costs, to decedent's estate. If the government obtains a non-appealable reversal of the award, then the money, less court costs, shall be refunded to employer, and employer will be entitled to a hearing on the merits. The settlement further provides that claimant's counsel is entitled to a fee of \$2,045, which employer shall not be obligated to pay if the award is reversed. Decision and Order at 1-4.

On appeal, the Director challenges the settlement approved by the administrative law judge. Specifically, she contends the settlement is not a proper Section 8(i), 33 U.S.C. §908(i)(1988), settlement as it does not fully resolve the claim and discharge employer of its liability, and it attempts to bind the Special Fund without the Director's participation. The Director further argues that the settlement inappropriately provides for the payment of benefits to decedent's estate instead of the Special Fund pursuant to Section 8(d)(3) of the Act, 33 U.S.C. §908(d)(3)(1988). Claimant responds, urging affirmance of the administrative law judge's Decision and Order - Approving Settlement. Employer also responds, urging the Board to uphold the settlement; however, it takes no position on which party, decedent's estate or the Special Fund, is the proper recipient of decedent's unpaid benefits. In the alternative, employer requests a hearing on the merits of the case.

¹Claimant herein is decedent's non-minor son, administrator of decedent's estate.

Section 8(i) of the Act permits the parties to a disputed claim to compromise and settle their dispute, provided the employer and/or the carrier therein are fully discharged of liability, and the administrative law judge approves the agreement. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993); 33 U.S.C. §908(i)(1), (3)(1988); 20 C.F.R. §§702.241-702.243. Section 702.242(a) of the regulations requires the settlement agreement to be a stipulation signed by all the parties. 20 C.F.R. §702.242(a). An agreement between an employer and a claimant which affects the liability or the rights of the Special Fund is not binding on the Fund absent the Director's participation, be it explicit or constructive. *Byrd v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 253 (1993); *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993); *Brady v. J. Young & Co.*, 17 BRBS 46 (1985). Thus, to determine whether the Director's contentions have merit, we must first ascertain whether the parties' settlement affects the rights or liability of the Special Fund.

The Director contends the settlement approved by the administrative law judge deprives the Special Fund of monies to which it is rightly entitled. In this regard, she argues that because decedent died without statutory survivors prior to the adjudication of this claim, Section 8(d)(3) of the Act applies, and the plain language of that section mandates payment of decedent's unpaid benefits to the Special Fund. Section 8(d) of the Act provides for the disbursement of a deceased employee's scheduled disability benefits in the event he dies prior to the payment of benefits for reasons unassociated with his work-related injury. If the employee dies leaving statutory survivors, as enumerated in Section 8(d)(1), 33 U.S.C. §908(d)(1), his unpaid benefits are distributed accordingly; however, if he dies without statutory survivors, his unpaid benefits are paid to the Special Fund pursuant to Section 8(d)(3). The Board has held that an employee has a vested interest in benefits which accrue during his lifetime and, after he dies, his estate is entitled to the accrued benefits, regardless of when the award was entered. *See Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27 (1994), *modified in part on recon.*, 28 BRBS 156 (1994). *See generally Alabama Dry Dock & Shipbuilding Corp. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT)(11th Cir. 1986); *Turner v. Christian Heurich Brewing Co.*, 169 F.2d 681 (D.C. Cir. 1948); *Wilson v. Vecco Concrete Construction Co.*, 16 BRBS 22 (1983). The Board has additionally held that the term "unpaid" in Section 8(d) means "unaccrued," and that, upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors, determined on the date of his death, or to the Special Fund upon his death without survivors. *See Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72, 73 (1994); *Clemon*, 28 BRBS at 112-113; *Wood*, 28 BRBS at 36-38.

In the instant case, all permanent partial disability due decedent as a result of his work-related hearing loss accrued prior to his death in 1989. Therefore, as decedent's estate is entitled to those accrued benefits, we hold that the settlement between the parties herein accords with our interpretation of Section 8(d), affects neither the rights nor the liability of the Special Fund, and completely discharges employer's liability. *See Clemon*, 28 BRBS at 112. Because the settlement comports with Section 8(i) of the Act, we reject the Director's Section 8(i) arguments, and we affirm the administrative law judge's approval of the parties' settlement. *Id.*; *Poole*, 27 BRBS at 234-235.

Accordingly, the administrative law judge's Decision and Order - Approving Settlement is

affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge