SECTION 8(i)—Settlement and Withdrawal of Claims

Settlements

In General

Section 8(i) provides the requirements for the settlement of claims under the Act. This provision was substantially amended by the 1984 Amendments, following which the Department of Labor promulgated new regulations, effective January 31, 1986. 20 C.F.R. §§702.241, 702.242, 702.243.

Section 8(i) is the only means for compromising an employer's obligation to pay benefits under the Act, creating an exception to Section 15(b), which states, "No agreement by an employee to waive his right to compensation under this Act shall be valid," 33 U.S.C. §915(b), and Section 16, which provides that no assignment, release, or commutation of compensation and benefits is valid except as provided in this Act, and that all such benefits are exempt, without possibility of waiver, from claims of creditors and attachment or any other remedy to recover or collect a debt.

Prior to the 1984 Amendments, Section 8(i)(A) provided that whenever the deputy commissioner determined that it was in the "best interests" of an employee, he could approve a settlement discharging employer's liability for compensation notwithstanding the provisions of Sections 15(b) and 16. Section 8(i)(B) allowed the Secretary to approve settlements of medical benefits notwithstanding Section 16 where it was in the best interests of the employee. Under Section 8(i)(B), only the Secretary, or her designee, had the authority to approve a settlement of medical benefits. *Marine Concrete v. Director, OWCP*, 645 F.2d 484, 13 BRBS 351 (5th Cir. 1981), *aff'g Ladner v. Marine Concrete,* 12 BRBS 742 (1980). Also, under the pre-1984 Act, a claim for death benefits under Section 9 of the Act could not be settled. *S. H. DuPuy v. Director, OWCP*, 519 F.2d 536, 2 BRBS 115 (7th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

Section 8(i), as amended, expressly includes "any claim for compensation under this Act, including survivors benefits," and allows the deputy commissioner/district director or administrative law judge to approve all settlements, including compensation, survivors' benefits, and future medical benefits. The amended provision also eliminated the "best interests" standard, providing for the approval of settlements unless inadequate or procured by duress.

Specifically, Section 8(i)(1) provides

> Whenever the parties to any claim for compensation under the 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. Such settlement may include future medical benefits if the parties agree.

33 U.S.C. §908(i)(1). The section further states that no liability of any employer or carrier is discharged unless the settlement is approved and, if the parties to the settlement are represented by counsel, the agreement shall be deemed approved unless specifically disapproved within thirty days after submission for approval. The regulations contain specific provisions delineating the beginning and ending times for this 30-day period. 20 C.F.R. §702.241(b)-(d),(f).

Section 8(i)(2) states that where the deputy commissioner disapproves an application for settlement, he must issue a written statement within 30 days stating the reasons for the disapproval. Any party to the settlement can then request a hearing before an administrative law judge, after which the judge must enter an order approving or rejecting the settlement. *See* 20 C.F.R. §702.243.

A settlement approved under Section 8(i) discharges the liability of the employer or carrier, or both. 33 U.S.C. §908(i)(3). This subsection further provides that a settlement may be agreed to at any stage of the proceedings, including after entry of a final compensation order. This provision complements the repeal of Section 14(j), 33 U.S.C. §914(j)(1982)(repealed 1984), which provided for the commutation of benefits by the Secretary after an award had been issued.

Section 8(i)(4) addresses the liability of the Special Fund where the claimant and employer wish to settle a case. *See Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *recon. denied*, 18 BRBS 167 (1985) (amended provision applies to settlements after enactment date of 1984 Amendments). It provides that the Special Fund is not liable for reimbursement of any sums paid to an employee under an approved settlement or voluntarily paid prior to a settlement by an employer or carrier or both.

A settlement under Section 8(i) thus is a final resolution of a claim. Section 22 of the Act explicitly states that settlements are not subject to modification. 33 U.S.C. §922. However, where the parties enter into an agreement which does not comply with the requirements for a Section 8(i) settlement, the claim remains open and pending if it has not been closed by a compensation order, s*ee Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975), and if a compensation order is issued based on the parties' stipulations, the case is subject to modification. *E.g., Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988); *Falcone v. Gen. Dynamics Corp.*, 21 BRBS 145 (1988). *See* Finality, *infra.*

Section 702.241(e) states that an attorney's fee approved as part of a settlement which is "deemed approved" is also considered approved for purposes of Section 28(e) of the Act,

33 U.S.C. §928(e) (prohibiting the receipt of attorney's fees without approval). The Board has held that under certain circumstances, the parties may include provision for employer's liability for claimant's attorney's fees in a settlement. The inclusion of attorney's fees in settlement agreements under Section 8(i) is discussed under Section 28 of this desk book. *See Amantia v. Visek Tailors*, 14 BRBS 1043 (1982); *Gjertson v. Pacific Architects & Engineers, Inc.*, 14 BRBS 885 (1981); *Carpenter v. Lockheed Shipbuilding & Constr. Co*., 14 BRBS 382 (1981); *Jankowski v. United Terminals, Inc*., 13 BRBS 727 (1981); *Huf v. Nw. Constr., Inc.*, 13 BRBS 730 (1981); *Carswell v. Wills Trucking*, 13 BRBS 340 (1981).

Section 702.241(g) provides that a settlement agreement is limited to the rights of the parties and to claims in existence at the time of the settlement; settlement of disability compensation or medical benefits is not a settlement of survivors' benefits and may not affect the right of survivors to file a claim for such benefits. 20 C.F.R. §702.241(g). Section 702.241(h) defines the term "counsel" as "any attorney admitted to the bar of any state, territory or the District of Columbia." 20 C.F.R. §702.241(h).

The information necessary for a complete settlement application is set forth in Section 702.242. Section 702.243 states criteria regarding the submission, approval and disapproval of applications.

In *Clefstad v. Perini North River Associates*, 9 BRBS 217 (1978), the Board articulated factors to be considered by the reviewing authority in determining whether a settlement was in claimant's "best interests," including claimant's age, education, work history, medical condition, and availability of work which claimant could perform in light of these factors. Similar factors are included in 20 C.F.R. §702.243(f), which sets forth the criteria for determining whether a settlement application under the 1984 Amendments is "adequate." Prior to the amendments, the Board held that the fact-finder must specifically articulate reasons in support of his/her findings of fact and failure to discuss relevant factors would be grounds for remand. *White v. Ingalls Shipbuilding*, 12 BRBS 905 (1980), *aff'd in part, rev'd in part*, 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982).

Section 702.243(g) contains requirements for settlements to be deemed adequate in cases where a final compensation order exists and there are no substantial issues in dispute. In such cases, a settlement amount which is not equal to the present value of future compensation computed in accordance with the regulation, which specifies the probability table and discount rate to be used, shall be considered inadequate unless the parties show it is adequate.

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Where the deputy commissioner found a settlement application was deficient under 20 C.F.R. §702.242, the 30-day automatic approval period was tolled as a matter of law under 20 C.F.R. §702.243(a) and the administrative law judge erred in finding that the proposed settlement agreement had been deemed automatically approved. The Board also held that the administrative law judge erred in concluding that employer was represented by counsel at the time the parties entered into the proposed settlement agreement as a claims examiner does not meet the definition of 20 C.F.R. §702.241(h), as "any attorney admitted to the bar of any state, territory, or the District of Columbia." *McPherson v. Nat'l Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

The Board held that under both Section 702.241(b) and Section 702.243(a), (b), the 30-day automatic approval provision of Section 8(i) was properly tolled until the case record was returned to the district director from the 11th Circuit. Thus, contrary to claimant's contention, the district director's consideration and approval of the parties' Section 8(i) settlement is timely as it occurred within 30 days of his receipt of the remanded case, and employer timely paid with regard to this approval. Thus, employer is not liable for interest and penalties. *Jenkins v. Puerto Rico Marine*, 36 BRBS 1 (2002).

The Board vacated the administrative law judge's order which accepted a stipulation that waived claimant's entitlement to interest on past-due benefits. The Board held that, as this case does not involve a Section 8(i) settlement, interest is mandatory and cannot be waived. Permitting such a waiver would violate Sections 15 and 16 of the Act. Accordingly, the Board remanded the case to the administrative law judge to make findings of fact or accept a proper stipulation that reflects claimant's entitlement to interest as appropriate. *Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010).

Where the private parties were represented by counsel and reached a Section 8(i) agreement which the administrative law judge found was both adequate and not procured under duress, the Board rejected the Director's contention that the settlement amount was not adequate because it did not result in claimant's obtaining a larger proportion of the amount of her claim had she been fully successful in prosecuting her case. The administrative law judge found that the settlement agreement, as well as claimant's response to the Director's objection, provided sufficient reasons for claimant's accepting the lump sum settlement amount and, because she was represented by competent counsel, he declined to second-guess her decision. The Board held that it was reasonable for the administrative law judge to conclude that claimant was entitled to rely on the advice of counsel in assenting to a settlement amount. The Board also rejected the Director's assertion that the adequacy of the settlement amount had to be ascertained by using actuarial tables pursuant to Section 702.243(g), as that section is not applicable in this case (applies only when the parties settle after a compensation order issues and there are no disputes) and as no other statutory or regulatory section addressing adequacy requires such an analysis. As the parties addressed

the regulatory factors of Section 702.243(f) in the agreement, and as the administrative law judge considered all the circumstances and addressed the risks of litigation, the Board concluded that the Director did not establish an abuse of discretion by the administrative law judge in approving this settlement. *Richardson v. Huntington Ingalls, Inc.*, 48 BRBS 23 (2014).

In a case where the administrative law judge approved the parties' Section 8(i) settlement as adequate and not procured by duress, the Board held that the administrative law judge erred in altering the terms of the agreement in purporting to "implement" it. Section 8(i) of the Act and its implementing regulations give the approving authority the options to: give the parties a notice of deficiency, approve the settlement, disapprove the settlement, or do nothing (in which case if the parties are represented by counsel, the settlement automatically will be deemed approved at the end of 30 days). Thus, the terms of the agreement cannot be altered unless the parties agree that any portion can be severed. The administrative law judge erroneously interpreted the parties' settlement agreement as being contingent upon the prior approval of a state settlement agreement; rather, the parties' settlement agreed that employer's total liability under both statutes was $91,000, thus implementing Section 3(e). The administrative law judge also erred in holding an insurance carrier jointly liable with employer and releasing it from liability under the Act; the agreement was only between self-insured employer and claimant. Additionally, the administrative law judge erred in amending the parties' agreement as to claimant's attorney's fee; he reduced it to comply with the hourly rate he had approved in a prior case. As there is no option to alter the parties' settlement agreement, and as the parties did not agree that any part of the settlement could be severed, the Board modified the Order to comply with law by removing the contingency and the insurance carrier, and by reinstating the parties' fee agreement. *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014).

Where self-insured employer and claimant entered into a settlement agreement which was approved by the administrative law judge, it was erroneous for the administrative law judge to alter the attorney's fee provision of the agreement. Section 702.132(c) of the regulations provides that an attorney's fee included in a settlement agreement is deemed approved upon approval of the settlement agreement. As the parties did not indicate that any part of the settlement could be severed, the administrative law judge was not permitted to reduce the hourly rate to reflect a rate he had approved in a prior case. The Board modified the administrative law judge's Order to reflect that counsel is entitled to the fee negotiated by the parties, despite counsel's waiver of this issue on appeal. *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014).

Proper Parties

Claimant was injured while working for a borrowing employer and filed a claim under the Act against the nominal (lending) employer, which they settled pursuant to Section 8(i). Claimant then filed a claim against the borrowing employer for benefits under the Act after his lawsuit in federal district court was dismissed. The Board affirmed the administrative law judge's finding that as the statutory (borrowing) employer was not a party to the claim that was settled, the settlement does not discharge its liability. This result is consistent with *Alexander,* 297 F.3d 805, 36 BRBS 25(CRT), and *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT). Thus, the award of benefits against the borrowing employer is affirmed. *Sears v. Norquest Seafoods, Inc.*, 40 BRBS 51 (2006).

The Board vacated a settlement agreement which contained a "credit provision" stating that if claimant returned to longshore work and was permanently injured via new injury or aggravation, then employer or any other Signal Mutual member would be entitled to a credit for some of the settlement amount. The Board vacated the administrative law judge's approval of the parties' settlement agreement, holding that it was not "limited to the rights of the parties and to claims then in existence" pursuant to 20 C.F.R. §702.241(g). Not only did this provision affect claimant's rights with regard any future new, unrelated injury he might sustain, but it also provided a credit to employers who are not parties to the claim. As other Signal Mutual members are not parties to the claim, they cannot be parties to the settlement. *J.H. [Hodge] v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008).

The Board held that ILWU-PMA is, by virtue of its intervention in these cases in pursuit of its Section 17 lien and reimbursement of medical benefits, "a party to any claim" as contemplated by Section 8(i). Thus, claimant and employer cannot settle under that provision without the ILWU-PMA's involvement in the settlement. Only after addressing ILWU-PMA's interests as they pertain to its Section 17 lien claims for disability benefits and Section 7 claims for medical reimbursement can an administrative law judge determine whether the amount of the settlement is "adequate," as is required for approval under Section 8(i). Thus, the Board vacated the settlement agreements and remanded the cases for any action necessary to resolve claimants' claims and ILWU-PMA's lien and medical reimbursement claims. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1 (2009), *aff'd on recon.*, 43 BRBS 115 (2009).

On reconsideration, the Board reiterates that since ILWU-PMA's claims for reimbursement of medical benefits are derivative of claimants' claims for medical benefits, ILWU-PMA's claims must be resolved simultaneously with the claimants' claims. If employers and claimants were permitted to settle the claim for medical benefits without ILWU-PMA's participation, employers' liability for medical benefits would be extinguished and the Plan would be without recourse. Thus, the Board properly held that since the settlements in these cases infringe on ILWU-PMA's derivative right to

reimbursement of medical benefits, they must be vacated. *M.K. [Kellstrom] v. California United Terminals,* 43 BRBS 115, *aff'g on recon.* 43 BRBS 1 (2009).

At the Director's urging, the Board clarified its holding to reflect that only those parties with a financial interest in the claim must have their rights resolved simultaneously with the rights of the other parties whose financial interests are also at stake. In these cases, ILWU-PMA has, via its valid Section 17 liens, a financial interest in the disability aspect of the settlements in these cases. As for medical benefits, ILWU-PMA's financial interests, premised on its Section 7(d)(3) reimbursement claims, arose because the settlement agreements included releases for past medical benefits. Thus, the Board reiterated that claimants and employers cannot settle claimants' disability and past medical benefits claims without ILWU-PMA's agreement. The Board stated, however, that the parties could settle any claims for future medical benefits without the Plan's participation as it has no financial interest in such claims. *M.K. [Kellstrom] v. California United Terminals,* 43 BRBS 115, *aff'g on recon.* 43 BRBS 1 (2009).

Where self-insured employer and claimant entered into a settlement agreement which was approved by the administrative law judge, it was erroneous for the administrative law judge to include an insurance carrier in the Order to pay the settlement proceeds and to release the insurance carrier from liability under the Act. The Board modified the Order to reflect self-insured employer's sole liability and release. *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014).

In a case with several potentially responsible employers named, the Board held that only the parties whose individual claims are addressed in the Section 8(i) settlement agreement need sign the settlement application in order for it to be "complete" under 20 C.F.R. §702.242(a). Thus, the Board held, in this case, that only the claimant and the settling employer need sign the agreement. The remaining potentially responsible employers whose rights or obligations are not affected by the settlement agreement are not required to sign the settlement application, and the administrative law judge erred in disapproving the settlement agreement for lack of their signatures. *Stovall v. Total Terminals Int'l, LLC*, 49 BRBS 1 (2015).

Complete Application

The requirements for a settlement application are contained in Section 702.242. Under Section 702.242(a), the application must be a "self-sufficient document which can be evaluated without further reference to the administrative file." It must be in the form of a stipulation, signed by all parties and contain a brief summary of the facts of the case, including descriptions of the work incident, the nature of the injury including the degree of impairment and/or disability, the medical care rendered, and the compensation paid and applicable rate or, if benefits have not been paid, claimant's average weekly wage.

Section 702.242(b) states that the application must include 8 specific items, as follows: (1) A full description of the terms of the settlement clearly indicating amounts to be paid for compensation, medical benefits, survivor benefits and representative's fees; (2) the reason for settlement and the issues in dispute, if any; (3) claimant's date of birth and, in death claims, the names and birth dates of dependents; (4) information regarding claimant's work status, including a description of his education and work history as well as other factors which could impact future employability; (5) a current medical report fully describing any injury-related impairment as well as any unrelated conditions and indicating whether maximum medical improvement has been reached and whether further disability or medical treatment is anticipated. Where claimant has reached maximum medical improvement, a medical report prepared at the time the condition stabilized satisfies the requirement for a current report. A medical report is not necessary for agreements to settle survivor claims unless the circumstances warrant it; (6) a statement explaining how the settlement amount is considered adequate; (7) where the settlement includes medical benefits, an itemization of medical expenses by year for the three years prior to the date of the application and estimates of the need for future medical treatment as well as its cost which indicates the inflation factor and/or the discount rate used, if any.
The requirements of this element may be waived for good cause; (8) information on any collateral source available for the payment of medical expenses.

Affirming a disability settlement approved after an employee's death, the Board rejected employer's argument that the application was insufficient to show adequacy because it failed to address the degree of claimant's impairment, the availability of work which claimant could perform, and the probability of success. The Board held that the settlement did address these issues, stating that at oral argument, counsel for employer conceded that there was no question as to the settlement's adequacy at the time the agreement was executed and that it was a fair agreement so long as the claimant was alive. The Fifth Circuit affirmed this decision, agreeing that the application was sufficient to demonstrate adequacy and there was no allegation it was procured by duress. *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), *aff'g* 20 BRBS 18 (1987).

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Where the deputy commissioner disapproved a settlement and forwarded the case to the administrative law judge, the Board held the administrative law judge erred in finding the settlement "deemed approved" as the settlement agreement as submitted was deficient under Section 702.242(a) and the 30 day automatic approval period was tolled when the deputy commissioner disapproved it. *See* 20 C.F.R. §702.243(a). An unsigned settlement application which does not include a statement explaining how the settlement amount is considered adequate is not a complete application under Section 702.242. Although a claims adjuster for employer signed the portion of the application regarding the disability claim, his failure to sign the portion addressing medical benefits renders the application incomplete. The Board also held that the deputy commissioner properly found that the settlement application's discussion of the adequacy of the proposed settlement was incomplete because it stated only that the settlement was in claimant's best interest and did not contain any specific information justifying the adequacy of the amount agreed to or clearly outline potential disputed issues as is required by the regulations. The Board also held that the administrative law judge erred in concluding that employer was represented by counsel, *see* 20 C.F.R. §702.241(h), when the parties entered into the proposed settlement agreement. The Board noted that while parol evidence may be used in construing settlements under Section 33, *see, e.g., Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in pert. part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992), Section 702.242 states that an application must be self-sufficient and consideration of an affidavit submitted by an attorney from employer's legal department regarding employer's representative may violate that section. Whether the parties were represented by counsel, however, was not determinative in this case, as it pertains to whether the settlement could be deemed approved and other deficiencies in the settlement application rendered the settlement agreement incomplete as a matter of law and served to toll the 30-day automatic approval period. *McPherson v. Nat'l Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

In its *en banc* decision on reconsideration, the Board held that the regulations at 20 C.F.R. §§702.241-702.243, concerning the contents of a complete settlement agreement are consistent with the automatic approval provision of Section 8(i) of the Act. The Board stated that the regulations properly implement congressional intent by providing an administrative framework for the submission of an application and ensure that the approving official obtains the information necessary to determine whether the settlement application is inadequate or procured by duress. The Board rejected employer's argument that it erred in addressing the completeness of the settlement application under the regulations in determining that the proposed settlement had not been deemed automatically approved pursuant to Section 8(i) prior to being specifically disapproved by the district director. The Board held that the issue of whether the proposed agreement was deemed approved was before the Board on appeal and could not be resolved without review of the

agreement under the applicable regulations. *McPherson v. Nat'l Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991).

The Board reversed the administrative law judge's finding that parties' agreement which remained pending 90 days after the enactment date of the 1984 Amendments was automatically deemed approved by operation of law where the settlement agreement as submitted did not satisfy the applicable regulations, 20 C.F.R. §§702.242(b), 702.243(a). The Board noted that the settlement agreement as submitted was not a self-sufficient document which included all the documentation necessary to constitute a complete application and that even several documents viewed together did not constitute a complete settlement application. The Board also noted that because the only statement regarding the adequacy of the settlement amount lacked any specific information which justified the amount agreed to, the settlement application was deficient for failure to comply with Section 702.242(b)(6). Where claimant seeks to terminate his compensation claim for a sum of money, Section 8(i) settlement procedures must be followed. Because the parties failed to supply the requisite supporting documentation in this case and the claims examiner's letter approving the parties' agreement did not contain any findings regarding whether the compensation awarded was in claimant's best interests or provide for the complete discharge of employer's liability, stating only that the matter would be closed "subject to the limitations of the Act," the Board found that there was no approval of the parties' agreement under the 1972 Act. *Norton v. Nat'l Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting).

On reconsideration *en banc,* the Board rejected employer's contention that the Board erred in *sua sponte* considering the effect of the settlement regulations at 20 C.F.R. §§702.242, 702.243, for the reasons stated in *McPherson*, 26 BRBS 71. Similarly, the Board rejected employer's contention that these regulations are invalid and internally inconsistent. Since the parties' 1977 "agreement" was incomplete under Section 702.242, the automatic approval provision of Section 8(i) is tolled under Section 702.243. *Norton v. Nat'l Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991).

The filing of a compromise and release on a state form with the district director does not constitute an application for a Section 8(i) settlement where: 1) it does not satisfy the requirements of the regulations; 2) it is not submitted in accordance with Section 8(i); and 3) its sole purpose is to finalize the settlement of the state claim. The administrative law judge's finding that the parties settled the claim is reversed, and the case is remanded for a decision on the merits. *Henson v. Arcwel Corp.*, 27 BRBS 212 (1993).

In two consolidated hearing loss cases where the administrative law judge approved the parties' stipulations in the form of a Section 8(i) settlement, the Board rejected the Director's contentions that the settlements do not satisfy the requirements of Section 702.242 of the regulations. Particularly, the Board held: a) Section 702.242(b)(2) does not

require the settling parties to "outline" the disputed issues, as the parties complied with the regulation in that they listed disputed issues and stated their reasons for settlement; b) In hearing loss cases where claimants are retirees, an audiogram, upon which the claim and settlement are based, is sufficient for purposes of Section 702.242(b)(5), which requires a current medical report be attached to the settlement agreement; c) the administrative law judge's finding that the settlements are adequate and satisfy the requirements of Section 702.242(b)(6), is rational; d) Neither the Act nor the regulations requires settlements to be made in lump sum payments as the Director contends; e) Although the Director challenged the validity of two particular phrases used by the administrative law judge in approving the settlements, the administrative law judge unambiguously explained that his approval and the settlements are limited to the present cases. Moreover, as claimants are retirees, they are unlikely to return to the workforce and be exposed to industrial noise. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

The Board rejected claimant's contention that the administrative law judge erred in failing to approve a settlement agreement where there was discussion of a settlement at an initial hearing but a completed agreement was never placed in the record or submitted to the administrative law judge for approval. Although claimant attached the purported agreement and other documents to his Petition for Review and brief, the Board stated that it could not accept new evidence. *Nelson v. Am. Dredging Co.*, 30 BRBS 205, 208 (1996), *aff'd in pert. part*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

Affirming this decision, the Third Circuit rejected claimant's contentions that the Board erred in affirming the administrative law judge's refusal to enforce the alleged settlement agreement and that employer waived its right to challenge coverage. The court found that the applicable regulations prescribe in detail the procedures for, and the necessary contents of, settlement applications under the Act, and held that the Board properly concluded that the parties did not submit an application in compliance with the regulations. The court thus concluded that there was at most an "agreement in principle" to settle, which never matured and that employer was entitled to challenge coverage. *Nelson v. Am. Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

Where a settlement agreement had been prepared which contained the negotiated positions of the parties, but the document had not been signed by the employee or submitted for administrative approval prior to the employee's death, the Board affirmed the administrative law judge's determination that no valid Section 8(i) settlement agreement existed. The Board rejected claimant's attempt to distinguish *Henry,* 204 F.3d 609, 34 BRBS 15(CRT), on the basis that the parties' agreement in *Henry* was not embodied in a formal settlement application prior to the employee's death whereas here such an application had been prepared, although it had not been signed by decedent or submitted for approval prior to his death. *O'Neil v. Bunge Corp.,* 36 BRBS 25 (2002), *aff'd*, 365 F.3d 820, 38 BRBS 7(CRT) (9th Cir. 2004).

Affirming this decision, the Ninth Circuit initially noted that under general contract law, the lack of a signed formal agreement would not necessarily preclude its enforcement. However, the agreement here was subject to the requirements of the Act, which requires a claimant's signature. Since claimant did not sign the agreement, it was not complete under the Act's regulations and thus was not enforceable. Moreover, the signature of the representative of claimant's estate cannot cure this deficiency. *O'Neil v. Bunge Corp.*, 365 F.3d 820, 38 BRBS 7(CRT) (5th Cir. 2004).

The Director, in his capacity as administrator of the Act, challenged the administrative law judge's summary approval of claimant's settlement of his future medical benefits claim with employer for $15,000. The Board vacated the administrative law judge's approval of the settlement since: (1) She did not determine whether the settlement agreement complies with the regulations at 20 C.F.R. §§702.242, 702.243, by adequately documenting claimant's need for future medical treatment as well as the cost for such services; or (2) sufficiently address whether $15,000 represents an amount which is adequate for those purposes. The decision notes that Medicare is not an acceptable collateral source of medical care. *Bomback v. Marine Terminals Corp.,* 44 BRBS 95 (2010).

In a case with several potentially responsible employers named, the Board held that only the parties whose individual claims are addressed in the Section 8(i) settlement agreement need sign the settlement application in order for it to be "complete" under 20 C.F.R. §702.242(a). Thus, the Board held, in this case, that only the claimant and the settling employer need sign the agreement. The remaining potentially responsible employers whose rights or obligations are not affected by the settlement agreement are not required to sign the settlement application, and the administrative law judge erred in disapproving the settlement agreement for lack of their signatures. *Stovall v. Total Terminals Int'l, LLC*, 49 BRBS 1 (2015).

Authority to Approve Settlements

Prior to the 1984 Amendments, Section 8(i)(A) referred specifically only to the deputy commissioner's authority to approve settlements. In *Clefstad v. Perini North River Associates*, 9 BRBS 217 (1978), the Board held that both deputy commissioners and administrative law judges had the authority to approve proposed settlements under the Section 8(i)(A) of the 1972 Act. The Fifth Circuit, however, held that administrative law judges were not authorized to approve such settlements, but could only recommend approval or disapproval and then remand the case to the deputy commissioner for ultimate approval. *Ingalls Shipbuilding Div. Litton Sys., Inc. v. White*, 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982). The Board followed *White* only in cases arising in the Fifth Circuit. In *Blake v. Hurlburt Field Billeting Fund*, 17 BRBS 14 (1985), which arose in the Eleventh Circuit, the Board reaffirmed its holding that both deputy commissioners and administrative law judges may approve settlements and expressly refused to adopt the Fifth Circuit's view in *White.* The Board noted that its determination was consistent with the 1984 Amendments.

Section 8(i)(1) of the amended statute rendered this dispute moot, expressly providing that deputy commissioners and administrative law judges have the authority to approve settlements.

In *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), the Board rejected claimant's attempt to challenge the administrative law judge's authority to approve a settlement in 1981 via a Section 22 modification proceeding filed in 1982. The Board held that since the administrative law judge's authority was never raised nor litigated during the settlement proceedings and the settlement became final when it was not appealed within thirty days, the Order could be altered only through modification under Section 22 based on a change in condition or mistake in fact. As the issue of the administrative law judge's authority raised a question of law, it could not be challenged in a modification proceeding. Affirming the Board's decision, the Fifth Circuit held that Section 8(i) as amended in 1984 applied, as it was made applicable to pending cases, and it allows administrative law judges to approve lump-sum settlements, overruling *White*, 681 F.2d 275 (5th Cir. 1982). *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986).

The power to approve a settlement may be delegated to an assistant deputy commissioner who is designated as an acting deputy commissioner and duly authorized to perform the duties of a deputy commissioner. *House v. S. Stevedoring Co*., 14 BRBS 979 (1982), *aff'd*, 703 F.2d 8'7, 15 BRBS 114(CRT) (4th Cir. 1983). *See also Barulec v. Skou*, 471 F. Supp. 358 (S.D.N.Y. 1979) (claims examiner's award based on an agreement reached at an informal conference constitutes an order for purposes of 33 U.S.C. §933(b); distinguishes Section 8(i) settlements which claims examiners lack authority to approve), *aff'd*, 622 F.2d

572 (2d Cir. 1980), *aff'd sub nom. Rodriguez v. Compass Shipping Co*., 451 U.S. 596 (1981) (claims examiner authority not at issue on appeal).

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The Board rejected the Director's challenge to the administrative law judge's authority to approve a pre-amendment settlement, relying on *Clefstad*, 9 BRBS 217. In upholding the administrative law judge's approval of the settlement, the Board reiterated its previous statement that it would not follow *White*, 681 F.2d 275, 14 BRBS 988, in cases arising outside the Fifth Circuit, and noted that even in the Fifth Circuit, *Downs* has rendered *White* inapplicable in cases decided after the effective date of the 1984 Amendments. *Georges v. Todd Shipyards Corp.*, 20 BRBS 32 (1987).

The Board affirmed the administrative law judge's approval of a Section 8(i) settlement, holding that the administrative law judge has the authority to approve settlements under both pre-1984 Amendment Board law and the 1984 Amendments to Section 8(i). *Ziemer v. The Stone Boat Yard*, 21 BRBS 74 (1988).

Because a claims examiner lacks the authority to approve a Section 8(i) settlement, Board held the claims examiner's purported approval of the parties' agreement a nullity. Accordingly, the administrative law judge properly determined that the parties' agreement remained pending on the enactment date of the 1984 amendments. *Norton v. Nat'l Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown J., dissenting).

When Claims May Be Settled; Claims in Existence

Under the Act as amended in 1972, the Board held that a proposed settlement may properly be considered at any point prior to an adjudication becoming final, *i.e*., until all appeal rights have been exhausted. *Chavez v. Todd Shipyards, Inc*., 12 BRBS 324 (1980). A settlement entered into after an adjudication became final, however, constituted a waiver of compensation prohibited by Sections 15(b) and 16 of the Act. *Id.* at 326 n.2. Once an award became final, it was subject to commutation pursuant to Section 14(j) of the 1972 Act. 33 U.S.C. §914(j) (1982) (repealed 1984).

The 1984 Amendments added Section 8(i)(3) providing that a settlement may be agreed upon at any stage, including after entry of a final compensation order. This provision corresponds with the 1984 Amendments repeal of Section 14(j) providing for the commutation of benefits.

If a settlement agreement is submitted to the district director or administrative law judge and the case is pending at a higher level, *e.g.*, before the Board or circuit court, the parties may request that the case be remanded for consideration of the application. 20 C.F.R. §702.241(b). The 30-day period for approval begins when the remanded case is received by the adjudicator. The Board will remand the case to either the administrative law judge or district director, whichever is requested by the moving party; the appeal may be reinstated if a settlement is not finalized.

Where a case is pending before the administrative law judge and the case has not been set for a hearing, the parties may request the case be remanded to the district director for consideration of the settlement. 20 C.F.R. §702.241(c); *see Clefstad*, 9 BRBS 217. Under Section 702.241(c) where a settlement application is submitted to the administrative law judge, the 30-day period does not commence until five days before the date the formal hearing is set; however, this rule does not preclude submission of an agreement at another time, including after referral, at the hearing or after the hearing but before issuance of a decision. Section 702.241(f) provides that the thirty days are calculated from the day after receipt of an application.

Section 702.241(g) provides that a settlement of 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). *See Almeida v. Gen. Dynamics Corp*., 12 BRBS 901 (1980) (administrative law judge erred in stating a death benefit claim was denied where only the settlement of decedent's disability claim was before him as disability and death involve separate claims and the administrative law judge had acknowledged that a death claim could not be settled under the pre-1984 Amendment Act; Board affirmed lump sum settlement of decedent's claim).

Thus, the Board has held that under Section 702.241(g) and Section 8(i) the settlement of the right to survivor's benefits before it arises, *i.e.,* before the death of the injured worker, is prohibited. *Cortner v. Chevron Int'l Oil Co., Inc*., 22 BRBS 218 (1989). The Fifth Circuit relied on this regulation in rejecting employer's attempt to offset a disability settlement approved after the employee's death against survivor's benefits, stating that a survivor's benefits are distinct from a settlement of disability benefits and that Section 702.241(g) explicitly prohibits settlement or compromise of the right to death benefits before it arises, *i.e.*, before the death of the injured worker. *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), *aff'g* 20 BRBS 18 (1987).

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The Board affirmed the administrative law judge's approval of a settlement for hearing loss due to noise exposure. Although the terms of the settlement relieved employer of liability for "future" claims, the Board construed the settlement as limited to the hearing loss for which benefits were sought inasmuch as claimant last worked for employer in 1959 and there can be no future claims against employer absent additional exposure to noise. *Kelly v. Ingalls Shipbuilding, Inc.*, 27 BRBS 117 (1993).

In two consolidated hearing loss cases where the administrative law judge approved the parties' stipulations in the form of a Section 8(i) settlement, the Board rejected the Director's contentions that the settlements do not satisfy the requirements of Section 702.242 of the regulations. Although the Director challenged the validity of two particular phrases used by the administrative law judge in approving the settlements, the administrative law judge unambiguously explained that his approval and the settlements are limited to the present cases. Moreover, as claimants are retirees, they are unlikely to return to the workforce and be exposed to industrial noise. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

Affirming the administrative law judge's approval of a settlement agreement between employer and claimant which provided that the Special Fund is liable for claimant's pre-existing hearing loss where the Director constructively participated in the settlement process, the Board further held that language discharging employer's potential liability for death benefits did not warrant holding the agreement invalid. The agreement as a whole indicated the parties' intention to settle the claim for a 15 percent binaural hearing loss; thus, the Board concluded that the administrative law judge's approval was limited to the hearing loss claim before him. *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993).

The Board reversed the administrative law judge's finding that claimant's awareness of a work-related right knee injury at the time he entered into a settlement for other conditions precluded his seeking medical benefits for the right knee. The Board held that including

an additional injury under the boilerplate "Settlement includes all issues…which could have been raised…for…any injuries caused by Employer" is overbroad. The settlement was specifically for injuries to the left knee, left groin and back. Even if claimant were aware of a right knee injury, the claim for it was not yet in existence, and claimant had not sought medical treatment for this injury. Therefore, the settlement agreement could not contain information relevant to the knee sufficient to comply with the regulatory criteria, 20 C.F.R. §702.242. The case was thus remanded for consideration of the merits of the claim for medical benefits for claimant's knee. *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999) (McGranery, J., concurring).

The parties' settlement agreement contained a "credit provision" stating that if claimant returned to longshore work and was permanently injured via new injury or aggravation, then employer or any other Signal Mutual member is entitled to a credit for some of the settlement amount. The Board vacated the administrative law judge's approval of the parties' settlement agreement, holding that it was not "limited to the rights of the parties and to claims then in existence" pursuant to 20 C.F.R. §702.241(g) because it affected claimant's rights with regard any future new, unrelated injury he might sustain. The Board also held that the agreement was invalid because the "credit provision" is not encompassed by any existing statutory or extra-statutory credit scheme under the Act. *J.H. [Hodge] v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008).

The Board affirmed the administrative law judge's denial of benefits under pre-Amendment Section 8(d)(3) as the death occurred after the repeal of the section. The Board rejected the contention that a letter written in 1983 by employer's claims examiner explaining Section 8(d)(3) had any binding effect in view of the repeal of the section. In addition, the Board rejected the contention that, in stipulating to his entitlement to permanent partial disability benefits, decedent had bargained for benefits for his widow. The stipulations and compensation order are silent as to such benefits. Moreover, prior to the 1984 Amendments, claims for death benefits could not be settled, and, after the 1984 Amendments, claims for death benefits cannot be settled prior to death. *Wilson v. Bethlehem Steel Corp.*, 44 BRBS 59 (2010).

Ability to Rescind or Condition a Settlement

A settlement agreement may be conditioned and restricted, as long as it is in accordance with law. For example, the Board has held that a settlement agreement providing benefits for Section 8(c)(13) permanent partial disability could be made contingent on the end of total disability. *Sablowski v. Gen. Dynamics Corp*., 10 BRBS 1033 (1979).

Once claimant and employer finalize a settlement agreement and submit it for approval, employer may not withdraw from the settlement. In *Maher v. Bunge Corp*., 18 BRBS 203 (1986), the Board held that where employer and claimant enter into a settlement for disability benefits and claimant thereafter dies, the deputy commissioner may approve the settlement; employer may not withdraw its approval due to claimant's death. The Board followed *Maher* in affirming a settlement submitted prior to but approved after the employee's death in *Nordahl v. Oceanic Butler, Inc*., 20 BRBS 18 (1987), *aff'd*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988).

In its decision in *Nordahl,* the Board declined to distinguish the case from *Maher* on the grounds that it involved a post-amendment settlement, it was an OCSLA case and a claim for death benefits had been filed. The Board reaffirmed its holding in *Maher* that an employer which has agreed to settle a claim may not withdraw from the settlement solely because claimant has died. The Fifth Circuit affirmed the Board's determination that employer cannot withdraw from a settlement due to the death of the claimant prior to the settlement's approval. The court stated that claimant can withdraw from a submitted, but unapproved, settlement as a claimant's obligation under the settlement contract - to accept the sum agreed upon and to waive compensation otherwise payable - is invalid when made due to Section 15(b) and is not binding until and unless there is administrative approval of the settlement. Employer's obligation under the settlement contract, on the other hand - to pay the designated amount in exchange for a release of liability under the Act - is not rendered invalid by the Act when it is created, although employer's obligation to perform its part of the contract is conditioned upon approval of the settlement. Thus, absent language in the settlement contract, employer cannot withdraw from or rescind an unapproved settlement. The court also discussed policy considerations underlying Section 8(i). *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988). *See also Simpson v. Seatrain Terminal of California*, 15 BRBS 187 (1982) (employer's appeal of the deputy commissioner's refusal to approve a settlement agreement is moot where claimant has withdrawn from the agreement).

Thus, claimant can withdraw from an agreement prior to its approval, but employer cannot unilaterally rescind an agreement unless it explicitly reserves the right to do so in the agreement itself.

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Where the employee died and at the time of death, while the parties had negotiated an agreement, the settlement document had not been signed by the employee or employer or submitted for approval, the Board distinguished *Nordahl* and affirmed the administrative law judge's determination that no enforceable settlement agreement existed under Section 8(i) of the Act. *Fuller v. Matson Terminals*, 24 BRBS 252 (1991).

The Board rejected claimant's contention that the administrative law judge erred in failing to approve a settlement agreement where there was discussion of a settlement at an initial hearing but a completed agreement was never placed in the record or submitted to the administrative law judge for approval. Although claimant attached the purported agreement and other documents to his Petition for Review and brief, the Board stated that it could not accept new evidence. *Nelson v. Am. Dredging Co.*, 30 BRBS 205, 208 (1996), *aff'd in pert. part*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

Affirming this decision, the Third Circuit rejected claimant's contentions that the Board erred in affirming the administrative law judge's refusal to enforce the alleged settlement agreement and that employer waived its right to challenge coverage. The court found that the applicable regulations prescribe in detail the procedures for, and the necessary contents of, settlement applications under the Act, and held that the Board properly concluded that the parties did not submit an application in compliance with the regulations. The court thus concluded that there was at most an "agreement in principle" to settle, which never matured and that employer was entitled to challenge coverage. *Nelson v. Am. Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

Where claimant had accepted employer's settlement offer, but no agreement had been prepared, signed by the parties or submitted for approval prior to the death of the employee, the Board affirmed the administrative law judge's determination that no valid settlement agreement existed under Section 8(i) of the Act. *Henry v. Coordinated Caribbean Transp.*, 32 BRBS 29 (1998), *aff'd*, 204 F.3d 609, 34 BRBS 15(CRT) (5th Cir. 2000).

Affirming this decision, the Fifth Circuit held that where a settlement agreement had not been signed by the parties or submitted for approval prior to the death of the employee, no valid agreement exists under Section 8(i) of the Act, and therefore, the settlement was unenforceable. The court distinguished *Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT), as that case concerns the rights of the parties to withdraw from a settlement that was executed pursuant to the regulations and submitted for administrative approval prior to the claimant's death. *Henry v. Coordinated Caribbean Transp.*, 240 F.3d 609, 34 BRBS 15(CRT) (5th Cir. 2000).

Where a settlement agreement had been prepared which contained the negotiated positions of the parties, but the document had not been signed by the employee or submitted for

administrative approval prior to the employee's death, the Board affirmed the administrative law judge's determination that no valid Section 8(i) settlement agreement existed. The Board rejected claimant's attempt to distinguish *Henry,* 204 F.3d 609, 34 BRBS 15(CRT), on the basis that the parties' agreement in *Henry* was not embodied in a formal settlement application prior to the employee's death whereas here such an application had been prepared, although it had not been signed by decedent or submitted for approval prior to his death. *O'Neil v. Bunge Corp.*, 36 BRBS 25 (2002), *aff'd*, 365 F.3d 820, 38 BRBS 7(CRT) (9th Cir. 2004).

Affirming this decision, the Ninth Circuit initially noted that under general contract law, the lack of a signed formal agreement would not necessarily preclude its enforcement. However, the agreement here was subject to the requirements of the Act, which requires a claimant's signature. Since claimant did not sign the agreement, it was not complete under the Act's regulations and thus was not enforceable. Moreover, the signature of the representative of claimant's estate cannot cure this deficiency. *O'Neil v. Bunge Corp.*, 365 F.3d 820, 38 BRBS 7(CRT) (5th Cir. 2004).

In this *pro se* appeal, the Board affirmed the administrative law judge's rejection of claimant's motion to rescind an approved settlement, holding initially that in contrast to *Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT), which stated claimant may rescind an *unapproved* settlement, approved settlements are not subject to unilateral rescission. The Board also affirmed the administrative law judge's finding that he lacked jurisdiction to set aside his compensation order as claimant did not file a timely motion for reconsideration of the decision approving the settlement and settlements are not subject to modification. The Board further held that it lacked jurisdiction to review the merits of the decision approving the settlement as claimant did not file an appeal to the Board within 30 days of the date the decision was filed. Moreover, claimant's motion to rescind cannot considered an appeal of the order approving the settlement under 20 C.F.R. §802.207(a)(2) as the motion was not a misdirected notice of appeal to the Board and did not evince an intent to seek Board review of the approved settlement but was directed to the administrative law judge, who ruled on it. Additionally, the Board held that it was not in the interest of justice to consider claimant's motion to rescind the settlement agreement as a timely appeal of the approval of the settlement in light of the policy favoring the finality of settlements. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.*, 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP,* 176 F.3d 484 (9th Cir. 1999)(table), *cert. denied*, 528 U.S.1052 (1999).

Where claimant sought to withdraw from a settlement, the Board followed *Nordahl,* 842 F.2d 773, 21 BRBS 33(CRT), and held that claimant can rescind a settlement agreement prior to its approval. In this case, as claimant notified employer and the administrative law judge prior to and at the hearing that he considered the settlement inadequate and procured under duress, the Board vacated the administrative law judge's order approving the settlement agreement and held that claimant effectively withdrew from the settlement prior

to its approval. The Board remanded the case to the administrative law judge for consideration on the merits. *Rogers v. Hawaii Stevedores, Inc.*, 37 BRBS 33 (2003).

The Board affirmed the administrative law judge's approval of a settlement as it did not include an express right of rescission by employer. In this case, employer attempted to withdraw from an executed settlement agreement a few days after it had been approved by the administrative law judge on the grounds that claimant had returned to work. While acknowledging that, pursuant to *Nordahl,* 842 F.2d 773, 21 BRBS 33(CRT), an employer may bargain for the inclusion of an express reservation of a right of rescission should some specific event occur prior to approval by the administrative law judge, the Board held that the settlement agreement here did not specifically provide for rescission should claimant return to work, but called only for a credit should claimant return to work as a laborer and re-injure himself. Therefore the Board rejected the contention that the administrative law judge erred in not setting aside the settlement. The Board also rejected the contention that claimant's return to work as a wharf gang member violated his agreement that he could not work as a laborer and thus invalidated the settlement. As the parties agreed that "wharf gang member" and "laborer" were separate positions, the Board affirmed the administrative law judge's finding that claimant made no misrepresentations to employer which would undermine the settlement agreement. *Hansen v. Matson Terminals, Inc.*, 37 BRBS 40 (2003).

The parties' settlement agreement contained a "credit provision" stating that if claimant returned to longshore work and was permanently injured via new injury or aggravation, then employer or any other Signal Mutual member is entitled to a credit for some of the settlement amount. The Board vacated the administrative law judge's approval of the parties' settlement agreement, holding that it was not "limited to the rights of the parties and to claims then in existence" pursuant to 20 C.F.R. §702.241(g) because it affected claimant's rights with regard any future new, unrelated injury he might sustain. The Board also held that the agreement was invalid because the "credit provision" is not encompassed by any existing statutory or extra-statutory credit scheme under the Act. No credit is applicable where there has been no aggravation, and even if an aggravation were to occur, *Nash*, 782 F.2d 513, 18 BRBS 45(CRT), does not apply because the courts have declined to extend the *Nash* credit doctrine to cover non-scheduled injuries. The Board vacated the settlement approval and remanded the case for further proceedings to resolve claimant's claim. *J.H. [Hodge] v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008).

In a case where the administrative law judge approved the parties' Section 8(i) settlement as adequate and not procured by duress, the Board held that the administrative law judge erred in altering the terms of the agreement in purporting to "implement" it. Section 8(i) of the Act and its implementing regulations give the approving authority the options to: give the parties a notice of deficiency, approve the settlement, disapprove the settlement, or do nothing (in which case if the parties are represented by counsel, the settlement automatically will be deemed approved at the end of 30 days). Thus, the terms of the

agreement cannot be altered unless the parties agree that any portion can be severed. The administrative law judge erroneously interpreted the parties' settlement agreement as being contingent upon the prior approval of a state settlement agreement; rather, the parties' settlement agreed that employer's total liability under both statutes was $91,000, thus implementing Section 3(e). The administrative law judge also erred in holding an insurance carrier jointly liable with employer and releasing it from liability under the Act; the agreement was only between self-insured employer and claimant. Additionally, the administrative law judge erred in amending the parties' agreement as to claimant's attorney's fee; he reduced it to comply with the hourly rate he had approved in a prior case. As there is no option to alter the parties' settlement agreement, and as the parties did not agree that any part of the settlement could be severed, the Board modified the Order to comply with law by removing the contingency and the insurance carrier, and by reinstating the parties' fee agreement. *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014).

Whether an Agreement is a Section 8(i) Settlement; Finality

Where an agreement is properly approved under Section 8(i), it is a final resolution of the claim for the disability, survivor's and/or medical benefits covered by the settlement and is not subject to Section 22 modification. If an order does not meet the requirements of Section 8(i), it may be subject to modification under Section 22. Moreover, a timely filed claim remains open and pending until it is closed by a formal order. *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). Thus, where employer pays benefits pursuant to an agreement but no order is issued, the claim remains open and claimant need not initiate modification proceedings under Section 22 in order to seek additional benefits at a later time. *See, e.g., Falcone v. Gen. Dynamics Corp.*, 21 BRBS 145 (1988).

Settlements approved in accordance with Section 8(i) are not subject to Section 22 modification. A Section 8(i) settlement is similar to a final release in a civil action provided the settlement is properly approved. It bars any further recovery by claimant of compensation for his injury. Thus, the Board and Fifth Circuit held that modification of settlements pursuant to Section 22 was not available under the pre-1984 Amendment Act. *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); *Lambert v. Atl. & Gulf Stevedores*, 17 BRBS 68 (1985); *cf. House v. S. Stevedoring Co*., 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983), *aff'g* 14 BRBS 979 (1982) (modification petition untimely; court thus did not reach issue of whether settlements may be modified); *Amantia v. Visek Tailors*, 14 BRBS 1043 (1982) (administrative law judge's denial of modification based on no mistake in fact affirmed as claimant understood terms of settlement). However, in *Downs,* the Board stated that a settlement could be reopened as a matter of equity where fraud was established. The Board found no support for claimant's allegation of fraud.

Consistent with these holdings, the 1984 Amendments added language to Section 22 explicitly barring the modification of settlements. The last sentence of Section 22 now states, "This section does not authorize the modification of settlements." 33 U. S.C. §922.

In contrast, where an agreement does not meet the requirements of Section 8(i), there is no final resolution of a claim. *See Bowen v. Alaska Interstate Co*., 12 BRBS 577 (1980) (where there had been no valid approval of a settlement or claim withdrawal, a claim timely filed under Section 13 remained open); *Young v. Todd Pac. Shipyards Corp*., 17 BRBS 201 (1985) (remand for determination of whether settlement was agreed to and, if so, whether it was approved). An order based on the stipulations of the parties which does not contain language indicative of a Section 8(i) approval—for example, stating that it was in claimant's best interests under the 1972 Act or that it was not inadequate or procured by duress under the 1984 Amendments and that it discharged employer's liability—will not preclude further action on a claim. Such an award approved by the district director based on the parties' stipulations is an order under 20 C.F.R. §702.315 and is subject to modification. *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); *Lawrence v.*

Toledo Lake Front Docks, 21 BRBS 282 (1988); *Stock v. Mgmt. Support Associates*, 18 BRBS 50 (1986). *See also* Withdrawal of Claims, *infra.*

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The administrative law judge erred in construing the deputy commissioner's order as a Section 8(i) settlement. The Board noted the order contained no findings regarding whether the compensation awarded was in claimant's best interests and did not provide for the complete discharge of employer's liability for payment of compensation. Rather, the order stated that the file will be closed "subject to the limitations of the Act or until further Order of the deputy commissioner." Thus, it was not a settlement, but must be considered an award based upon the agreements and stipulations of the parties pursuant to 20 C.F.R. §702.315. Such awards are subject to Section 22 modification since they do not provide for the complete discharge of employer's liability or terminate claimant's right to benefits. *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988); *Stock v. Mgmt. Support Associates*, 18 BRBS 50 (1986).

Where there is no evidence that an informal agreement between the parties was approved by a deputy commissioner or an administrative law judge, the agreement does not discharge any liabilities of employer. *Falcone v. Gen. Dynamics Corp.,* 21 BRBS 145 (1988).

The Board held that, regardless of the parties' intent, the deputy commissioner's Compensation Order could not be construed as a Section 8(i) settlement as it contained no findings regarding whether the compensation awarded was in claimant's best interests under pre-1984 Section 8(i) and did not provide for the complete discharge of employer's liability. The Board held that the order must be considered an award based upon the agreements and stipulations of the parties pursuant to 20 C.F.R. §702.315. *Madrid v. Coast Marine Constr. Co.,* 22 BRBS 148 (1989).

Where the administrative law judge's award failed to provide for the complete discharge of employer's liability and did not contain findings as to whether the compensation awarded was in claimant's best interest, it did not constitute the approval of a settlement. It constituted instead an award of benefits based on the agreements and stipulations of the parties, which is subject to Section 22 modification. *Finch v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 196 (1989).

The Board reversed the administrative law judge's finding that parties' agreement which remained pending 90 days after the enactment date of the 1984 Amendments was automatically deemed approved by operation of law, as the settlement agreement as submitted did not satisfy the applicable regulations, 20 C.F.R. §§702.242(b), 702.243(a). Where claimant seeks to terminate his compensation claim for a sum of money, Section 8(i) settlement procedures must be followed. Because the parties failed to supply the requisite supporting documentation in this case, the agreement could not be approved under

the 1984 Act. As the claims examiner's 1977 letter approving the parties' agreement did not contain any findings regarding whether the compensation awarded was in claimant's best interests or provide for the complete discharge of employer's liability, stating only that the matter would be closed "subject to the limitations of the Act," the Board held that there was also no approval under the 1972 Act. Claimant's claim thus remained open when he sought additional benefits in 1986. *Norton v. Nat'l Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting).

The Board affirmed a grant of summary judgment in employer's favor, where claimant sought modification and the administrative law judge found that the parties previously entered into a Section 8(i) settlement which was final. Although neither the agreement itself nor the administrative law judge's order of approval explicitly referred to Section 8(i), the administrative law judge on modification properly noted that such is not required under the Act and that Section 702.242(a) was complied with. Moreover, inasmuch as the judge approving the agreement found it adequate and not procured by duress, the standard applicable under Section 8(i), the administrative law judge on modification reasonably interpreted the order as approving a Section 8(i) settlement. Finally, while claimant argued for the first time on appeal that the parties' agreement was not a valid Section 8(i) agreement because of omissions or technical deficiencies in the documentation underlying the settlement application, the Board held that the validity of the agreement underlying a Section 8(i) settlement order is not subject to an attack in modification proceedings under Section 22, but rather raises legal issues which must be timely appealed under Section 21. *Diggles v. Bethlehem Steel Corp.,* 32 BRBS 79 (1998).

The U.S. Court of Appeals for the District of Columbia Circuit upheld a denial of Section 22 modification of a pre-1984 settlement, relying in part on *Downs*, 803 F.2d 193, 19 BRBS 36(CRT). The court also upheld the deputy commissioner's determination that the settlement was in claimant's best interest under the pre-1984 Amendment standard. *Bonilla v. Director, OWCP*, 859 F.2d 1484, 21 BRBS 185(CRT) (D.C. Cir. 1988), *amended*, 866 F.2d 451 (D.C. Cir. 1989).

The Board held that the administrative law judge erred in addressing, *sua sponte*, the issue of D.C. Act jurisdiction, given that the parties had entered into a Section 8(i) settlement providing that employer was liable for a lump sum payment and future medical benefits and the settlement was approved by the deputy commissioner. As employer's liability was established, the only issue before the administrative law judge concerned a disputed medical cost. *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988).

The Board rejected claimant's contention that his settlement of his asbestosis claim did not include compensation for permanent total disability, as the administrative law judge's finding that it was for permanent total disability is supported by the agreement. As claimant had therefore been compensated for total disability, he could not recover additional benefits

under Section 8(c)(23) for stomach cancer diagnosed after the settlement. *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989).

The Fifth Circuit held that an approved Section 8(i) settlement precludes a claimant from pursuing a Jones Act suit for the same injury. *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 26 BRBS 59(CRT) (5th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

The Board rejected employer's argument that the parties' prior settlement of claimant's FELA action should be deemed a settlement under Section 8(i), as the purpose of the settlement was to finalize the FELA action, not the settlement of claimant's longshore claim, and the agreement was not submitted in accordance with Section 8(i) or its implementing regulations. *Wilson v. Norfolk & W. Ry. Co.*, 32 BRBS 57 (1998), *rev'd*, 7 F. App'x 156 (4th Cir. 2001) (holding receipt of benefits under FELA precludes Longshore claim).

The Board affirmed the administrative law judge's finding that claimant's hearing loss claim is not barred by his prior third-party recovery for a crush injury, since there is no decision finding that the crush injury caused disability under the Act and only the claim for claimant's unrelated hearing loss is being made against employer. Additionally, the recovery could not be a settlement under Section 8(i) of the Act since there was no approval by the deputy commissioner or administrative law judge. *Harms v. Stevedoring Services of Am.*, 25 BRBS 375 (1992), *vacated on other grounds mem.*, 17 F.3d 396 (9th Cir. 1994) (court remanded for calculation of hearing loss under the schedule).

The Board held that a lump sum settlement of $50,000 complied with the requirements of Section 8(i) and was therefore not subject to Section 22 modification, noting that the agreement was neither "inadequate" nor "procured by duress." Thus, the approval discharged the liability of employer for further compensation. The Board rejected claimant's contention that he had an independent right to request rehabilitation services pursuant to Section 39 and the regulations at 20 C.F.R. §§702.502, 702.504-507. The Board held that under Section 8(i), claimant's settlement completely discharged his rights to seek any form of additional compensation under the Act. Had claimant wished to receive reimbursement for vocational rehabilitation services, he should have requested that such services be included as part of the settlement. In addition, the Board reasoned that if vocational rehabilitation was paid for by the Special Fund, an additional financial burden would be placed on employer in the form of assessments to the fund under Section 44(c)(2), contrary to the terms of the settlement. *Olsen v. Gen. Eng'g & Mach. Works*, 25 BRBS 169 (1991) (Note: By Industry Notice 113, dated August 5, 2003, the Director, OWCP, determined that all permanently disabled workers who settle their Longshore claims may continue to receive rehabilitation services after settlement).

The Board affirmed the administrative law judge's approval of a settlement for hearing loss due to noise exposure. Although the terms of the settlement relieve employer of liability

for "future" claims, the Board construed the settlement as limited to the hearing loss for which benefits were sought inasmuch as claimant last worked for employer in 1959 and in light of the fact that there can be no future claims against employer absent additional exposure to noise. *Kelly v. Ingalls Shipbuilding, Inc.,* 27 BRBS 117 (1993).

The Board, citing *Bonilla*, 859 F.2d 1484, 21 BRBS 185(CRT), reiterated in a D.C. Act case that Section 22 modification is not available to reopen a case for new evidence where a settlement agreement has been entered into and approved pursuant to Section 8(i). Moreover, the Board rejected the argument that it is a "court" with the equity power to overturn such a settlement, noting that no allegations of fraud were raised in this case. The Board also rejected claimant's argument to the extent it attempted a collateral attack on the finding the 1981 settlement was in claimant's best interest. As medical benefits were left open by the settlement, that issue was properly before the administrative law judge. *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

The Board reversed the administrative law judge's finding that claimant's awareness of a work-related right knee injury at the time he entered into a settlement for other conditions precluded his seeking medical benefits for the right knee. The Board held that including an additional injury under the boilerplate "Settlement includes all issues…which could have been raised…for…any injuries caused by Employer" is overbroad. The settlement was specifically for injuries to the left knee, left groin and back. Even if claimant were aware of a right knee injury, the claim for it was not yet in existence, and claimant had not sought medical treatment for this injury. Therefore, the settlement agreement could not contain information relevant to the knee sufficient to comply with the regulatory criteria, 20 C.F.R. §702.242. The case was thus remanded for consideration of the merits of the claim for medical benefits for claimant's knee. *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999) (McGranery, J., concurring).

Employer accepted liability for future medical benefits in a settlement agreement, although it noted that other employers were potentially liable. The district director approved the agreement under Section 8(i), and it became final. Accordingly, the settlement agreement conclusively resolved the issue of the responsible employer for claimant's future medical benefits and employer cannot assert in a later proceeding involving medical benefits that other employers should be liable. *Jeschke v. Jones Stevedoring Co.*, 36 BRBS 35 (2002).

In this case, claimant sustained two work related injuries. Claimant and the second employer settled the claim for benefits due to the second injury, thus precluding any further recovery from the last employer. The Second Circuit initially affirmed the Board's finding that there was no evidence that claimant had fully recovered from the first injury before the second injury occurred. The court rejected the first employer's argument that it was not liable for benefits on the basis that claimant's second injury with another employer aggravated the first injury, holding that the aggravation rule is not a defense to be used by first or earlier employers as a shield from liability. The court then addressed the effect of

claimant's settlement with the second employer, holding that claimant may recover from an earlier employer when he cannot recover from the last employer. However, the court stated that in order to hold the first employer liable, claimant bears the burden of showing that his current disability can be attributed to the first injury, reasoning that as there is less proximity between the current condition and the first injury, the normal shifting burdens applicable in establishing disability do not apply. The court remanded the case for the administrative law judge to determine whether, and to what extent, the first injury contributed to claimant's disability. In so doing, the administrative law judge must consider whether claimant acted in good faith in entering into the settlement and whether he attempted to manipulate the aggravation rule. *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003).

Where self-insured employer and claimant entered into a settlement agreement which was approved by the administrative law judge, it was erroneous for the administrative law judge to mistake a paragraph granting employer a credit for payments made so as to limit its total liability as a paragraph that made finality of the settlement under the Act contingent upon the approval of the duplicate settlement under state law. Because employer withdrew its consent for a settlement under state law, the administrative law judge's Order making his approval contingent upon action by the state agency prevents his Order from taking effect, thus preventing claimant from receiving his settlement proceeds. As the administrative law judge is not empowered to modify a settlement agreement, the Board modified the Order to remove the contingency. *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014).

Crediting Settlement Amounts

The Board has upheld a credit for employer for prior payments claimant received in settlement for a scheduled injury against employer's liability for an aggravating injury to the same body part. *Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983)(Ramsey, dissenting), *aff'd*, 782 F.2d 513, 18 BRSS 45(CRT) (1986) (en banc). The Board held that employer's credit is dollar-for-dollar. In *Nash,* claimant had a 20 percent impairment of the knee prior to employment and a second injury resulting in an additional 10 percent; following this injury, claimant agreed to a settlement based on the 10 percent rating. When claimant sustained a final injury resulting in an additional 4 percent impairment, the Board held that employer at the time of the final injury was liable for the entire 34 percent impairment with a credit for the settlement based on the actual amount paid.

This decision was affirmed by the Fifth Circuit on *en banc* review, holding that where a subsequent employer is due a credit for injuries with a previous employer, with which the claim was settled, the subsequent employer's credit is limited to what claimant actually received under the settlement with the previous employer. This is true regardless of the fact that claimant should have or could have received greater compensation from the previous employer. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRSS 45(CRT) (5th Cir. 1986) (en banc), *aff'g* 15 BRBS 386 (1983)(Ramsey, dissenting), *rev'g in relevant part* 751 F.2d 1460, 17 BRBS 29(CRT) (5th Cir. 1985).

The Fifth Circuit rejected employer's attempt to offset a disability settlement approved after the employee's death against survivor's benefits, stating that a survivor's benefits are distinct from a settlement of disability benefits and that Section 702.241(g) explicitly prohibits settlement or compromise of the right to death benefits before it arises, *i.e.*, before the death of the injured worker. *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), *aff'g* 20 BRBS 18 (1987).

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The Fifth Circuit denied a credit against employer's liability, pursuant to the aggravation rule, for permanent total disability where a prior employer settled a claim for unscheduled permanent partial disability for $20,000. The court held Section 3(e) did not apply to allow employer a credit for the $20,000 settlement as that payment was made pursuant to the Act rather than a state act or the Jones Act. The court also held ITO was not entitled to a credit under the credit doctrine, distinguishing *Nash* as it allowed a later employer to take a credit against its liability under the schedule for a prior settlement involving injuries to the same scheduled member, whereas in this case employer is liable for permanent total disability and seeks a credit for a settlement for permanent partial disability due to injury of a non-scheduled member. The court also rejected employer's argument that a credit was necessary to avoid a double recovery relying on case law permitting concurrent awards of

permanent partial and total disability. *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir.1989).

The Ninth Circuit reversed the Board's holding that the credit doctrine supports the last responsible employer's entitlement to a credit for the Section 8(i) settlement payments made by other potentially liable longshore employers in claimant's occupational disease claim, discussing the fact that the doctrine developed to prevent double recovery in scheduled injury cases involving successive aggravations and stating that it thus does not apply to the type of settlement in this case. The court also found Section 14(j) does not allow a credit as it refers to "advance payments" by "an employer," whereas a settlement is not "an advance payment" and the section does not apply to payments by other employers. The court deferred to the Director's interpretation that Section 3(e) does not apply to this situation; economically, it does not make sense for the injured employee to settle claims to the benefit of the responsible employer. Thus, application of Section 3(e) would discourage settlements. *Alexander v. Director, OWCP,* 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002), *rev'g in pert. part Alexander v. Triple A Mach. Shop*, 32 BRBS 40 (1999) and 34 BRBS 34 (2000).

Citing its decision in *Alexander,* 32 BRBS 40, the Board affirmed the administrative law judge's finding that employer is entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The Board distinguished *Aples,* 883 F.2d 422, 22 BRBS 126(CRT), in which the employer was denied a credit for the previous employer's settlement payment, on the basis that *Aples* involved multiple traumatic injuries with successive employers liable for each as opposed to the instant case in which employer was held solely liable for the entire disability caused by decedent's occupational disease. *Ibos v. New Orleans Stevedores*, 35 BRBS 50 (2001), *rev'd in pert. part and aff'd on other grounds*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S.1141 (2004). Reversing this decision, the Fifth Circuit deferred to the Director's position that the amounts received from the settling employers are irrelevant to the amount owed by the responsible employer and should not reduce its liability, rejecting the Board's application of the *Nash* extra-statutory credit doctrine to a case involving alternative liability for a single occupational injury. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S.1141 (2004) (Jones, J., dissenting on the basis that there is no reason not to apply the *Nash* credit doctrine, applicable in "aggravation rule" cases, to cases involving a single occupational injury).

Claimant was injured while working for a borrowing employer and filed a claim under the Act against the nominal (lending) employer, which they settled pursuant to Section 8(i). Claimant then filed a claim against the borrowing employer for benefits under the Act after his lawsuit in federal district court was dismissed. The Board affirmed the administrative law judge's finding that as the statutory (borrowing) employer was not a party to the claim that was settled, the settlement does not discharge its liability. This result is consistent with

Alexander, 297 F.3d 805, 36 BRBS 25(CRT), and *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT). Thus, the award of benefits against the borrowing employer is affirmed. *Sears v. Norquest Seafoods, Inc.*, 40 BRBS 51 (2006).

The parties' settlement agreement contained a "credit provision" stating that if claimant returned to longshore work and was permanently injured via new injury or aggravation, then employer or any other Signal Mutual member is entitled to a credit for some of the settlement amount. The Board vacated the administrative law judge's approval of the parties' settlement agreement, holding that it was not "limited to the rights of the parties and to claims then in existence" pursuant to 20 C.F.R. §702.241(g) because it affected claimant's rights with regard to any future new, unrelated injury he might sustain. The Board also held that the agreement was invalid because the "credit provision" is not encompassed by any existing statutory or extra-statutory credit scheme under the Act. No credit is applicable where there has been no aggravation, and even if an aggravation were to occur, *Nash*, 782 F.2d 513, 18 BRBS 45(CRT), does not apply because the courts have declined to extend the *Nash* credit doctrine to cover non-scheduled injuries. The Board vacated the settlement approval and remanded the case for further proceedings to resolve claimant's claim. *J.H. [Hodge] v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008). *See also Hansen v. Matson Terminals, Inc.*, 37 BRBS 40 (2003).

In a case where the administrative law judge approved the parties' Section 8(i) settlement as adequate and not procured by duress, the Board held that the administrative law judge erred in altering the terms of the agreement in purporting to "implement" it. Section 8(i) of the Act and its implementing regulations give the approving authority the options to: give the parties a notice of deficiency, approve the settlement, disapprove the settlement, or do nothing (in which case if the parties are represented by counsel, the settlement automatically will be deemed approved at the end of 30 days). Thus, the terms of the agreement cannot be altered unless the parties agree that any portion can be severed. The administrative law judge erroneously interpreted the parties' settlement agreement as being contingent upon the prior approval of a state settlement agreement; rather, the parties' settlement agreed that employer's total liability under both statutes was $91,000, thus implementing Section 3(e). As there is no option to alter the parties' settlement agreement, and as the parties did not agree that any part of the settlement could be severed, the Board modified the Order to comply with law by removing the contingency. *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014).

The Board vacated the administrative law judge's denial of a scheduled award for claimant's right carpal tunnel syndrome, and remanded the case for the administrative law judge to determine whether claimant has a permanent right hand impairment that was caused or aggravated by his employment with employer. The Board stated that if the administrative law judge enters a scheduled award on remand, he must determine whether employer is entitled to a credit for the payment made to claimant by a previous longshore employer pursuant to a Section 8(i) settlement of an earlier claim for scheduled benefits for injuries to claimant's hands, and, if employer is so entitled, he must calculate such credit on a dollar-for-dollar basis. *Myshka v. Elec. Boat Corp.*, 48 BRBS 79 (2015).

Section 8(f)

In cases under the 1972 Act, the Board held that absent the participation of the Director, a settlement between employer and claimant is not binding on the Special Fund. *Brady v. J. Young and Co*., 17 BRBS 47 (1985), *recon. denied*, 18 BRBS 167 (1985). The Board stated that nature and extent of disability, average weekly wage, the work-relatedness of disability, and numerous other issues have a direct bearing on the Fund's liability, and agreements as to these matters between employer and claimant cannot be determinative as to the extent of the Fund's liability, if any. Thus, claimant and employer cannot agree to a settlement based on application of Section 8(f) or stipulate as to the elements of Section 8(f) relief without the Director's participation. *See Younger v. Washington Metro. Area Transit Auth.*, 16 BRBS 360 (1984); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984); *Collins v. Northrop Corp*., 12 BRBS 949 (1980).

However, the Board also held that a settlement between employer and claimant does not bar employer from subsequently seeking Section 8(f) relief. The terms of the agreement are not binding on the Fund but are only binding on the parties to the agreement. Thus, under *Brady*, 17 BRBS 47, claimant and employer could settle a claim, but then if employer wished to obtain Section 8(f) relief, it had to litigate its Section 8(f) case, proving the applicability of Section 8(f) as well as the necessary elements for claimant's entitlement to benefits.

Section 8(i)(4) of the amended Act resolved this issue by providing that the Special Fund is not liable for reimbursement of any sums paid or payable to a claimant under a settlement, or voluntarily paid prior to the settlement. In *Brady,* the Board held that Section 8(i)(4) does not retroactively apply to cases in which a settlement was approved prior to the 1984 Amendments.

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Where the parties settled the claim for decedent's disability benefits by agreeing that employer should pay the probate court, which would then pay decedent's estate, the Board held that the settlement between the parties accords with Section 8(d)(3), affects neither the rights nor the liability of the Special Fund, and completely discharges employer's liability, as decedent's estate, and not the Special Fund, is entitled to his scheduled permanent partial disability benefits which accrued prior to his death. Consequently, the Board rejected the Director's contention, based on his interpretation of Section 8(d)(3), that the settlement deprived the Fund of money to which it was entitled. As the settlement thus comported with Section 8(i) of the Act, the Board affirmed the administrative law judge's approval of the settlement. *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994).

In a post-1984 case, the Board affirmed the administrative law judge's approval of a settlement agreement between employer and claimant which provided that the Special Fund is liable for claimant's pre-existing hearing loss, even though the Director did not directly participate in the settlement. The district director had previously approved employer's Section 8(f) application, noting that based on a pre-existing 11.3 percent monaural hearing loss, the Special Fund is liable for 5.9 weeks of compensation; thus, the settlement did not bind the Special Fund to anything to which the Director had not previously agreed. The Board held that since employer's entitlement to Section 8(f) relief was established prior to the settlement, the Director constructively participated in the settlement process. In addition, the Board held that the discharge of employer's potential liability for death benefits contained in the settlement agreement does not warrant its invalidation; the agreement as a whole indicates the parties' intention to settle the claim for a 15 percent binaural hearing loss; thus, the Board concluded that the administrative law judge's approval is limited to the hearing loss claim before him. *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993).

The Board distinguished the facts of two consolidated hearing loss cases, where the district director either deferred adjudication of employer's request for Section 8(f) relief or approved employer's request but did not indicate the extent of the Special Fund's liability, from *Dickinson*, 28 BRBS 84, and held that the Director did not constructively participate in either settlement process. Because the Director did not participate, explicitly or constructively, and the administrative law judge used the incorrect average weekly wage, the administrative law judge erred in approving settlement agreements which affect the liability of the Special Fund. The case was remanded for consideration on the merits. *Byrd v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 253 (1993).

The Board reversed the administrative law judge's conclusion that Section 8(i)(4) requires the Director to raise objectionable settlement terms. Specifically, the Board held that Section 8(i)(4) imposes no duty on the Director but rather automatically acts to prohibit the Special Fund from being held liable for reimbursement of sums voluntarily paid by employer or paid under a settlement. Thus, a settlement provision which purports to reserve an employer's right to later seek Section 8(f) relief or to set the Fund's liability when the Director has not participated in the settlement is void as a matter of law. Because the provision in the settlement in this case is void as a matter of law, the Board also reversed the administrative law judge's award of Section 8(f) relief. *Strike v. S. J. Groves & Sons*, 31 BRBS 183 (1997), *aff'd sub nom. S.J. Groves & Sons v. Director, OWCP*, 166 F.3d 1206 (3d Cir. 1998)(table).

Rejecting employer's argument that the Board's holding in *Strike,* 31 BRBS 183, that the language of Section 8(i)(4) protects the Special Fund from liability after an employer enters into a Section 8(i) settlement with a claimant applies only where Section 8(f) is requested after the settlement is approved, the Board affirmed the administrative law judge's determination that employer's claim for Section 8(f) relief is prohibited by Section 8(i)(4).

The Board held that a settlement is entered into when it is executed by the parties, not when it is administratively approved. Moreover, the simultaneous submission of the settlement agreement and the stipulations and exhibits in support of employer's claim for Section 8(f) relief foreclosed the administrative law judge's consideration of the request for Section 8(f) relief, since the speedy resolution mechanism of Section 8(i)(1) prevents any delay in litigating issues necessary for a Section 8(f) determination. Consequently, once the settlement is approved, claimant's entitlement is fixed and employer's liability is discharged; Section 8(i)(4) prevents the transfer of liability under the settlement to the Special Fund, and as employer's liability is discharged, the Fund's derivative liability is also discharged. *Cochran v. Matson Terminals, Inc*., 33 BRBS 187 (1999).

The Ninth Circuit rejected the Director's contention that the administrative law judge and Board should not have awarded Section 8(f) relief based on a stipulation in which the Director did not concur, since the stipulations that the employee could not return to his usual employment and setting the employee's residual wage-earning capacity and employer's liability for attorney's fees did not purport to establish the Special Fund's liability in violation of Section 8(i)(4). The Director participated in the hearing, but did not object to the matters on which the parties stipulated; thus, his right to object was waived. The Ninth Circuit further observed that the administrative law judge heard evidence and independently arrived at the finding, not based on the stipulation, that the employer was entitled to Section 8(f) relief because of the employee's previous broken back. *Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998).

Noting that the facts of the instant case are similar to those presented in *Coos Head*, 194 F.3d 1032, 33 BRBS 131(CRT), and are distinguishable from those presented in *Strike,* 31 BRBS 183 (1997), and *Cochran,* 33 BRBS 187 (1999), the Board affirmed the administrative law judge's finding that employer is entitled to Section 8(f) relief and that its entitlement is not precluded by Section 8(i)(4). The Board noted that like *Coos Head*, the private parties' settlement agreement did not seek to subject the Special Fund to liability and that while it did affect the liability of the Special Fund in that it set out the extent of permanent disability and the level of claimant's loss of wage-earning capacity, the Director had already conceded those issues as well as employer's entitlement to Section 8(f) relief "upon agreement of the parties as to the extent of permanent disability and/or the level of claimant's loss in wage-earning capacity." Additionally, the Board observed that the Director's concession regarding Section 8(f) relief for liability based on the agreement of the parties as to claimant's loss in wage-earning capacity is the distinguishing feature from *Strike* and *Cochran*. *Nelson v. Stevedoring Services of Am.*, 34 BRBS 91 (2000), *aff'd on recon.*, 35 BRBS 55 (2001).

On reconsideration, the Board clarified its earlier decision, holding that the administrative law judge's decision reflects an approval of a Section 8(i) settlement agreement which is not subject to modification. The Board however also held employer's claim for Section

8(f) relief is not barred by Section 8(i)(4). The Board relied on the fact that the Director explicitly, in writing, conceded employer's entitlement to Section 8(f) relief for any permanent partial disability in his pre-hearing statement, whether after a hearing or upon agreement of the parties. The Director thus gave his specific approval to the parties' resolving this claim by agreement and nothing in the Director's document restricted this approval to agreements based on stipulations as opposed to those contained in an approved Section 8(i) settlement. The Director provided this approval *prior* to the time that the parties entered into their agreement and sought and received approval by the administrative law judge. Moreover, the Board noted that the purpose of Section 8(i)(4) was satisfied as the Director was provided with the opportunity to, and in fact did, participate in the case prior to the time the settlement was entered into. *Nelson v. Stevedoring Services of Am.*, 35 BRBS 55 (2001), *aff'g on recon.* 34 BRBS 91 (2000).

The Board affirmed the administrative law judge's conclusion that Section 8(i)(4) barred the employer's claim for Section 8(f) relief. The Director has no obligation to respond to a request for Section 8(f) relief prior to approval of a settlement. Thus, the employer cannot assert reliance on the Director's silence as constructive acceptance of its application for Section 8(f) relief. The Board noted that, assuming arguendo, the settlement was executory until it was approved, such is of no legal significance given the administrative law judge's subsequent approval of the parties' settlement. *Johnson v. BAE Sys. Se. Shipyard*, 49 BRBS 67 (2015).

Section 14(f)

An approval of an agreed settlement constitutes an "award" for the purposes of Section 14(f). *Seward v. Marine Maint. of Texas, Inc*., 13 BRBS 500 (1981). The Board has rejected the contention that the Section 14(f) assessment for late payments may not be applied where the settlement provides for employer's discharge, holding that the application of Section 14(f) is mandatory. *McKamie v. Trans World Drilling Co*., 7 BRBS 315 (1977). For settlements approved by an administrative law judge where payment is not made within 10 days, the Section 14(f) assessment is made by the deputy commissioner as this action is purely ministerial. *Patterson v. Tidelands Marine Serv.*, 15 BRBS 65 (1982), *rev'd on other grounds*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983). *See* Section 14(f) of the desk book.

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In a case where employer paid the 20 percent penalty under Section 14(f), giving the Board jurisdiction over the appeal, the Board held that the parties may negotiate claimant's entitlement to or waiver of a Section 14(f) assessment in a Section 8(i) settlement, as the assessment is additional compensation and claimants may waive their rights to compensation through a Section 8(i) settlement. In this case, claimant and employer entered into a Section 8(i) settlement which provided for claimant's waiver of the Section 14(f) assessment in the event he did not provide a "valid street address for purposes of delivery of the settlement proceeds." Claimant supplied his correct street address but the USPS refused delivery because claimant did not have a mailbox at that address. Consequently, delivery of the proceeds was late. Because the district director did not address employer's argument that claimant violated the settlement clause, the Board vacated the Section 14(f) assessment and remanded the case to the OALJ for fact-finding on this issue. *D.G. [Graham] v. Cascade Gen., Inc.*, 42 BRBS 77 (2008).

Effect of Disapproval

If the adjudicator disapproves a proposed settlement, a written statement or order containing the reasons must be served on the parties. If the proposed settlement is disapproved by the district director, the parties may either request a hearing before an administrative law judge or submit an amended settlement application. 20 C.F.R. §702.243(c). If the administrative law judge disapproves a settlement following a hearing, the parties have the option to submit a new application, file an appeal to the Board, or proceed with a hearing on the merits of the claim. *Id.* If the settlement is initially disapproved by the administrative law judge, the parties may either submit a new application or proceed with a hearing on the merits. *Id.* The district director or administrative law judge must explain the reasons for rejecting a settlement agreement with sufficient particularity so as to allow a proper review of his determination. *Sablowski v. Gen. Dynamics Corp.*, 10 BRBS 1033 (1979); *see* 20 C.F.R. §702.243(c).

Where the deputy commissioner (now district director) disapproved a settlement, employer appealed, and claimant thereafter withdrew from the agreement, the Board held that employer's appeal was moot. *Simpson v. Seatrain Terminal of California*, 15 BRBS 187 (1982)

Under the 1984 Amendments, where a settlement application addresses both compensation and medical benefits, if either portion 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. 20 C.F.R. §702.243 (e).

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Where a Section 8(i) settlement application is disapproved by the deputy commissioner, any party to the settlement may request a hearing before an administrative law judge or submit an amended application to the deputy commissioner. 20 C.F.R. §702.243(c). Accordingly, this case was properly forwarded to the administrative law judge once the settlement was disapproved by the deputy commissioner. However, the administrative law judge erred in finding the settlement should have been deemed approved as the application did not comply with the regulations.. Although a claims adjuster for employer did sign the portion of the settlement application regarding the settlement of the disability claim, his failure to sign the portion of the settlement application which dealt with settlement of the medical benefits renders the entire settlement application incomplete; under 20 C.F.R. §702.243(e), if either portion of a combined compensation and medical benefit settlement is disapproved, the entire application is disapproved unless the parties indicate on the face of the application that they agree to settle each portion independently. *McPherson v. Nat'l Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

In this case, one district director disapproved the parties' settlement application due to its inadequacy. The claim was then transferred to another district for processing. Following claimant's subsequent unilateral letter stating that he considered the amount adequate, the second district director approved the settlement over employer's objection. The Board vacated the approval of the settlement, holding that the second district director was without authority to rule on the application after it was disapproved. The only actions permitted following disapproval are requesting a hearing or submitting an amended application. The Board further held that while "any party" may request a hearing, an amended application must be submitted in accordance with the regulations concerning an initial application, which necessarily requires the agreement of all parties. One party cannot resubmit the rejected application with additional documentation. The Board further held that a disapproved settlement application is not void as a matter of law, as this would negate the provision of 20 C.F.R. §702.243(c) permitting "any party" to request a hearing upon disapproval. The Board held, however, that a disapproved settlement is voidable at employer's election, due to a failure of consideration on claimant's part, as claimant cannot waive his right to compensation absent compliance with Section 8(i). In this case, employer took action to void the agreement. The Board rejected the Director's contention that this right of rescission must be stated in the agreement itself (as with the right to withdraw upon the claimant's death, *Nordahl,* 842 F.2d 773, 21 BRBS 33(CRT), holding that as administrative approval is a condition precedent to claimant's performance of his contractual obligation, the failure of this condition to occur obviates employer's performance of its contractual promise. *Towe v. Ingalls Shipbuilding, Inc.*, 34 BRBS 102 (2000).

Withdrawal of Claim

Withdrawals of claims are not provided by statute but are authorized by regulation, 20 C.F.R. §702.225 (formerly 20 C.F.R. §702.216), which provides that prior to adjudication, a claim may be withdrawn by a living claimant where he files a written request stating the reasons for withdrawal with the district director (formerly deputy commissioner) with whom the claim was filed, the district director approves the request for as being for a proper purpose and in the claimant's best interest and the request for withdrawal is filed on or before the date OWCP makes a determination on the claim. 20 C.F.R. §702.225(a). After adjudication, a claim may be withdrawn by a written request if the requirements in subsection (a) for a living claimant, a statement of the reasons for withdrawal and approval are met and, in addition, the amount of benefits previously paid is repaid or OWCP is satisfied that repayment is assured. 20 C.F.R. §702.225(b). Section 702.225(c) provides that where a request for withdrawal is approved, the withdrawal shall be without prejudice to the filing of another claim, subject to the time limitations of Section 13 of the Act and the regulations.

While the section refers to the district director's authority to approve withdrawals, the Board has held that either the district director or the administrative law judge may consider requests for withdrawal within their respective spheres of authority. *Graham v. Director, OWCP*, 9 BRBS 155 (1978). *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996); *Downs v. Ingalls Shipbuilding, Inc.*, 30 BRBS 99 (1996); *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., dissenting on other grounds).

If a request for withdrawal is disapproved by either the district director or administrative law judge, the parties have the option of proceeding with the claim or immediately appealing the disapproval to the Board. *Graham*, 9 BRBS 155.

A withdrawal of a claim is valid only if the deputy commissioner or administrative law judge determines that the withdrawal is both in claimant's best interests and for a proper purpose. 20 C.F.R. §702.225(a)(3). Thus, the Board has held that the closing of the administrative file by the deputy commissioner did not constitute a withdrawal of a claim, *Scruggs v. Savannah Mach. & Foundry*, 8 BRBS 617 (1978), nor did an exchange of writings between claimant and the deputy commissioner, *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 139 (1979), because no proper findings were made under the regulatory criteria. Moreover, a finding that withdrawal was in claimant's best interests without a finding that withdrawal was for a proper purpose is insufficient. *Jennings v. Lockheed Shipbuilding & Constr. Co*., 9 BRBS 212 (1978).

The Board has held that a claim cannot be withdrawn for a sum of money under the regulations as such a withdrawal is not for a proper purpose. *Gutierrez v. Metro. Stevedore Co.,* 18 BRBS 62 (1986); *Rodriguez v. California Stevedore & Ballast Co.,* 16 BRBS 371

(1984); *Jennings,* 9 BRBS 212; *Graham v. Ingalls Shipbuilding/Litton Sys., Inc.*, 9 BRBS 155 (1978). *See also Rodman v. Bethlehem Steel Corp*., 16 BRBS 123 (1984). Where claimant seeks to terminate his compensation claim for a sum of money, he must follow the Section 8(i) settlement procedures, *Gutierrez*; *Rodriguez*; and the district director or administrative law judge must treat withdrawal requests which are made in exchange for a sum of money as requests for approval of a settlement under Section 8(i), *Jennings*.

Where a timely claim is filed, but it is not closed by an approved withdrawal, settlement or other order, it remains open and pending. *Intercounty Constr. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *see Bowen v. Alaska Interstate Co*., 12 BRBS 577 (1980). *Cf. Rodriguez*, 16 BRBS 371 (although technical requirements for withdrawal or settlement of an old claim were not met, the claim cannot be reopened and litigated years after the parties thought the claim was closed). Subsequent decisions, *infra,* have limited *Rodriguez* to its facts in light of the holding in *Intercounty.*

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A claim cannot be withdrawn in exchange for a sum of money, since Section 15(b) explicitly provides that an agreement by an employee to waive his right to compensation is invalid. The Board followed *Graham*, 9 BRBS 155, and *Gutierrez*, 18 BRBS 62, holding that an approved settlement was not achieved where claimant sought to terminate his compensation claim for a sum of money, but failed to follow the Section 8(i) settlement procedures which include obtaining approval of the deputy commissioner, which was refused. Thus, the claim remained open, as it was never adjudicated. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd in relevant part on recon.*, 22 BRBS 430 (1989).

The Board reversed the administrative law judge's finding that claimant's failure to take any further action during the three years following his timely modification request constituted an abandonment of his modification claim. Since claimant filed no written request with the deputy commissioner to withdraw his claim, *see* 20 C.F.R. §702.255, and the claim was never adjudicated, it remained open and pending. *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

The deputy commissioner is authorized to approve a request for a withdrawal of a claim if the request is for a proper purpose and is in claimant's best interest, *see* 20 C.F.R. §702.225. The letter from the deputy commissioner "approving the withdrawal" in this case was not an effective withdrawal in that it did not contain a determination as to whether the withdrawal was for a proper purpose and in claimant's best interests. Because the payment or promise of payment for a sum of money was involved in the purported withdrawal in this case, the Board held that the withdrawal was ineffective. *Norton v. Nat'l Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting). In its decision on reconsideration, the Board, in essence, overruled

Rodriguez, 16 BRBS 371, in which it held that an "old" claim, which technically remained open, could not be reopened because too much time had passed between the last payment of compensation and the subsequent pursuit of the claim. However, *Rodriguez* did not discuss the holding in *Intercounty,* 422 U.S. 1, 2 BRBS 3, that a claim never adjudicated remains open until an order is issued. The Board consistently has applied *Intercounty* in recent cases. *Norton v. Nat'l Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991).

The Board affirmed the administrative law judge's decision to grant claimant's request to withdraw his claim, as the request complied with 20 C.F.R. §702.225. Claimant's request was based on the fact that the state act provided for higher benefits. The Board also noted that the administrative law judge had the authority to approve such a request. *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., dissenting on other grounds).

Where claimant and employer settled a state claim and claimant's attorney requested withdrawal of the Longshore claim, which was never approved by the district director, the Board reversed the administrative law judge's finding that claimant withdrew his claim. In order for a claim to be withdrawn, the requirements of 20 C.F.R. §702.225 must be met. The administrative law judge erred as a matter of law in finding that the regulation is inapplicable merely because the district director neither approved nor disapproved the withdrawal request. Although the administrative law judge has the authority to consider the withdrawal issue, he failed to apply the regulatory criteria. Moreover, as claimant sent a letter to the district director indicating he wished to pursue his claim within a few weeks of submitting his withdrawal request, the Board reversed the administrative law judge's finding that claimant validly withdrew his claim. The Board noted that even if the withdrawal was valid, it is without prejudice under the regulation; thus, claimant's letter cancelling the withdrawal could be interpreted a reinstatement of the original claim or a new claim. The Board also found there was no Section 8(i) settlement. The case was remanded for a decision on the merits. *Henson v. Arcwel Corp.*, 27 BRBS 212 (1993).

Appealing a decision of the district court granting a writ of mandamus ordering the district director to transfer cases to the OALJ pursuant to employer's request, the Director asserted that the district director should have the opportunity to consider voluntary requests for withdrawal by any claimants prior to referring claims to OALJ. The Fifth Circuit noted that the regulations at 20 C.F.R. §702.225 permit the withdrawal of claims under certain circumstances and held that this issue was properly before the district court and should have been addressed. The court also stated that the record was not sufficiently developed on this point, as it did not indicate whether proper motions to withdraw had been filed, and that the effect of the district court's mandamus order on the Director's power to consider motions to withdraw is unclear. Thus, the case was remanded for further consideration of this issue. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994).

Where employer sought transfer to OALJ and three years later claimant filed a motion to withdraw her claim based on asbestos exposure, which was granted by the district director without prejudice, the Board initially rejected employer's appeal of the withdrawal on the basis that it was not adversely affected or aggrieved until such time as a new claim was filed. *Boone v. Ingalls Shipbuilding, Inc*., 27 BRBS 250 (1993) (en banc)(Brown, J., concurring). On reconsideration, the Board addressed employer's substantive arguments and the Fifth Circuit's decision in *Asbestos Health.* The Board initially held that the district director had the authority at any time while the case was before her to approve a withdrawal, and she properly applied the regulations and found withdrawal was in claimant's best interests and for a proper purpose as claimant is not yet disabled. The Board rejected the argument that the district director lacked jurisdiction to take this action due to employer's prior request for transfer to OALJ, stating as claimant was not disabled and his claim was withdrawn, there is no claim to pursue and the failure to transfer the case is harmless. The Board also rejected the argument that it was required to either remand the case or dismiss it with prejudice under Rule 41(a)(1) of the FRCP, stating that, contrary to employer's argument that a request for dismissal which succeeds a motion for summary judgment violates Rule 41(a)(1), instead, it invokes Rule 41(a)(2), which, after approval of the court, results in a dismissal without prejudice. Thus, if Rule 41(a) were applicable, it would not change the outcome of this case. However, the Federal Rules apply only to issues not governed by the Act or regulation, and in this case 20 C.F.R. §702.225 thus controls. The Board also rejected employer's Section 33(g) argument. *Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (en banc) (Brown and McGranery, JJs., concurring), *aff'g on recon*. 27 BRBS 250 (1993) (en banc) (Brown, J., concurring), *rev'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996). *See also Crandle v. Ingalls Shipbuilding, Inc.*, 27 BRBS 248 (1993) (order en banc)(Brown, J., concurring) (appeal additionally dismissed as untimely).

The Fifth Circuit reversed the Board's holding that the district director's granting claimant's motion to withdraw did not aggrieve employer, and the Board's consequent dismissal of employer's appeal. The district director's failure to forward the cases to the OALJ upon employer's request for a formal hearing is a ministerial and nondiscretionary duty. Once a party requests a hearing, the district director loses any authority to act on the claim. The court stated that after the claim was transferred, the administrative law judge could act on claimants' motions to withdraw their claims while safeguarding employer's procedural rights. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996)*, vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996) (court reached the same result based on district director's failure to follow mandamus order, later determined to be inapplicable to this group of cases), *rev'g Boone v. Ingalls Shipbuilding*, *Inc.*, 28 BRBS 119 (1994) (en banc) (Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993)(en banc)(Brown, J., concurring).

The Board affirmed the administrative law judge's granting of claimant's motion to withdraw his claim based on consideration of regulatory criteria at 20 C.F.R. §702.225(a) and employer's objections. Based on the Fifth Circuit's initial decision in *Boone*, 81 F.3d 561, 30 BRBS 39(CRT), *rev'd on other grounds*, 102 F.3d 1385, 31 BRBS 1(CRT), the Board held that employer's procedural rights to a decision in an adjudicative forum were protected, and noted that the court did not address the broader issue of whether a withdrawal, in general, cannot aggrieve employer as it cannot be presently held liable for any benefits. The Board stated that the administrative law judge's subsequent remand of the case to the district director was for purely ministerial actions. *Downs v. Ingalls Shipbuilding, Inc.*, 30 BRBS 99 (1996).

The Board rejected employer's contention that the claim was properly withdrawn in 1973 as the withdrawal request was made in exchange for a sum of money. Moreover, the administrative law judge rationally found that there is no "probative reliable evidence" that the district director approved claimant's request for withdrawal of his claim as being for a proper purpose or in claimant's best interest. Therefore, the Board held that the claim was still open for resolution. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon*., 32 BRBS 224 (1998). On reconsideration, the Board affirmed its previous holding that Section 702.216 is applicable in determining whether there was an effective withdrawal in 1973, rather than the predecessor regulation which did not require claimant to state in writing the reasons for the withdrawal. Procedural regulations in force at the time the administrative proceedings take place govern, not those in effect at the date of injury. Moreover, the administrative law judge rationally found no evidence that the district director closed the case after considering claimant's best interest and whether a withdrawal was for a proper purpose. The Board thus affirmed its remand of the case to the administrative law judge for consideration of the merits of the timely filed and never adjudicated claim. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998), *aff'g on recon.* 32 BRBS 11 (1998).

The Board vacated the administrative law judge's denial of claimant's motion to withdraw his claim, and held that claimant's decision to withdraw his longshore claim to pursue a claim under state law is, as a matter of law, a proper purpose for withdrawing a claim under the Act. Nevertheless, the Board remanded the case for further consideration because, under the regulation at 20 C.F.R. §702.225, the administrative law judge also must consider whether the withdrawal is in claimant's best interest and in this case he did not do so. *Stevens v. Matson Terminals, Inc.*, 32 BRBS 197 (1998).

Where claimant informed the administrative law judge of the fact that he is "no longer pursuing benefits" under the Act and requested that the case be remanded to the district director, the Board held that claimant's motions did not unambiguously declare claimant's intent to withdraw the claim. Consequently, the administrative law judge erred in granting withdrawal and remanding the case to the district director over employer's objections to the motions and its request for a hearing on the merits. The Board vacated the

administrative law judge's orders and remanded the case for him to determine claimant's exact intentions and then either consider the motion for withdrawal in accordance with the regulations or hold a hearing on the merits. *Ridley v. Surface Technologies Corp.*, 32 BRBS 211 (1998).

The Fifth Circuit held that the term "claim" refers to the whole of the employee's demand for compensation, rather than to specific categories of benefits allowed under the Act, and thus only if claimant seeks to retract his claim in its entirety is he obliged to follow the requirements of 20 C.F.R. §702.225(a) for withdrawal. Otherwise, claimants remain free to modify the dates or categories of disability encompassed in their claim when they seek compensation for a single injury. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

In this case claimant filed a letter in 1999 seeking additional benefits, but no further action was taken until over one year later when claimant filed an additional claim in 2000, seeking another type of benefit. The Board held that the 1999 letter constituted a valid motion for modification and concluded that the administrative law judge properly determined that claimant's inaction for over one year did not constitute a withdrawal of the 1999 claim. He correctly reasoned that once the claim was filed, the district director was obliged to take some action to begin processing the claim, and claimant cannot be held responsible for the district director's failure to act. As the claim had not been withdrawn or adjudicated, the letter filed in 2000 was a permissible amendment to the earlier, open claim. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

A claim is not withdrawn unless the requirements of Section 20 C.F.R. §702.225(a) are met. An administrative law judge has the authority to enter an order approving a withdrawal request but must determine, consistent with the regulatory criteria, whether the request for withdrawal is for a proper purpose and whether approval is in the claimant's best interest. In this case, where neither an order approving a Section 8(i) settlement nor one granting withdrawal of the claim was entered, the claim remained open and viable. *Petit v. Elec. Boat Corp.,* 41 BRBS 7 (2007).

The Board held that the administrative law judge erred in finding that the claimants' motion to withdraw was not for a proper purpose as required by 20 C.F.R. §702.225(a)(3). The claimants are entitled to pursue a tort remedy in state court, as they have the right to choose the forum in which they will first litigate their cases. The Board declined to address claimants' contention that the administrative law judge erred in assessing the prejudice to employer under this prong of the regulation, noting however, that in a black lung case, the Board agreed with the Director that this factor need not be assessed. The Board affirmed the administrative law judge's finding that claimants' motion to withdraw was not in their best interests pursuant to C.F.R. §702.225(a)(3). This inquiry is specifically given to the fact-finder. The administrative law judge rationally found that claimants' recovery in state court was speculative, both on a monetary basis and on the claims asserted. Moreover,

depending on the success of employer's defenses in state court, claimants could lose the right to refile under the Act, pursuant to Section 13(d). The Board remanded the case to the administrative law judge for adjudication/ruling on employer's motion for summary decision. *Irby v. Blackwater Sec. Consulting, LLC*, 41 BRBS 21 (2007).

The Board declined to address claimant's contention that the administrative law judge erred in denying her motion to withdraw her claim based on the law of the case doctrine. The Board fully addressed this contention in its first decision and none of the exceptions to this doctrine applies. *Irby v. Blackwater Sec. Consulting*, 44 BRBS 17 (2010).