

BRB Nos. 01-0817 BLA,
01-0817 BLA-A and 01-0817 BLA-B

| | | |
|--------------------------------|---|--------------------|
| LURLIE RAMEY |) | |
| o/b/o CHARLES RAMEY (Deceased) |) | |
| |) | |
| Claimant-Petitioner |) | |
| Cross-Respondent (B) |) | |
| |) | |
| v. |) | |
| |) | |
| TRIPLE R COAL COMPANY |) | |
| |) | |
| and |) | |
| |) | |
| OLD REPUBLIC INSURANCE COMPANY |) | DATE ISSUED: |
| |) | |
| Employer/Carrier- |) | |
| Cross-Petitioners (A) |) | |
| Cross-Respondents (B) |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest/Respondent |) | |
| Cross-Respondent (A) |) | |
| Cross-Petitioner (B) |) | DECISION and ORDER |

Appeals of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Martin Wegbreit (Southwest Virginia Legal Aid Society), Castlewood, Virginia, for claimant.

W. William Prochot (Greenberg Traurig), Washington, D.C., for employer/carrier.

Edward Waldman (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of

Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals,¹ employer cross-appeals and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order (86-BLA-0864) of Administrative Law Judge Robert D. Kaplan finding a proposed settlement agreement of a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act), to be invalid under the Act.² This case is before the Board for the fifth time.³ Initially, the administrative

¹ The Board received notification on March 26, 2002, that the miner, Charles Ramey, died on February 26, 2002, from Lurlie Ramey, the surviving widow of the miner. Mrs. Ramey, as the surviving widow of the miner, also noted her substitution as claimant and petitioner in this case.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ The miner originally filed a claim on June 22, 1981, Director's Exhibit 1. In the most recent, relevant adjudication before the Office of Administrative Law Judges, the administrative law judge issued a Decision and Order on October 2, 1997, denying benefits under 20 C.F.R. Part 718. The miner appealed and the Board affirmed the administrative law judge's Decision and Order denying benefits, *see Ramey v. Triple R Coal Co.*, BRB No. 98-0161 BLA (Oct. 14, 1998)(unpub.). Subsequently, the miner appealed the Board's most recent Decision and Order affirming the denial of benefits under Part 718 to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises.

On September 22, 2000, while the case was pending before the Fourth Circuit, the parties filed a Joint Motion for Remand of the case to the administrative law judge for "consideration of a proposed [settlement] agreement to resolve the case without further litigation." On September 28, 1999, by order issued by the clerk of the Court, the Fourth Circuit granted the motion to remand the case to the Board, with directions to remand the case to the administrative law judge for further proceedings. Ultimately, in accordance with the Fourth Circuit's order, the case was remanded to the Board on October 31, 2000, and the

law judge found that the terms of the settlement agreement reached by the parties were adequate, reasonable and appropriate. Nevertheless, the administrative law judge found the proposed settlement agreement to be invalid under the Act.

On appeal and cross-appeal (A), both claimant and employer contend that the administrative law judge erred in holding that the proposed settlement agreement reached by the parties is invalid under the Act. The Director, as a party-in-interest, responds, urging the Board to affirm the administrative law judge's finding that the proposed settlement agreement reached by the parties is invalid under the Act. In reply, claimant and employer filed a joint brief reiterating their contention. Alternatively, the Director has also filed a cross-appeal (B), contending that the administrative law judge erred in finding, nevertheless, that the terms of the settlement agreement reached by the parties are adequate, reasonable and appropriate. Claimant and employer have filed a joint brief in response, urging the Board to affirm the administrative law judge's finding that the terms of the settlement agreement reached by the parties are adequate, reasonable and appropriate.⁴

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 422 of the Act, 30 U.S.C. §932, incorporates the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA) as amended, except as otherwise provided; *i.e.*, every provision not specifically excluded is incorporated. Thus, Sections 15(b) and 16 of the LHWCA, 33 U.S.C. §§915(b) and 916, are incorporated into the Act, but

record in this case was received from the Fourth Circuit by the Board on December 29, 2000. Subsequently, on January 24, 2001, the Board remanded the case to the administrative law judge for further proceedings consistent with the "1999" order of the Fourth Circuit.

⁴ The Director has filed a motion to expedite the Board's consideration of this case, which has not been opposed by the parties. Thus, the Director's motion is granted and the Board will decide the merits of the issues raised by the parties on appeal in this case, herein.

the provisions at Section 8 of the LHWCA, 33 U.S.C. §908, were expressly excluded from incorporation into the Act under 30 U.S.C. §932. Section 15(b) of the LHWCA, as incorporated into the Act by 30 U.S.C. §932, provides that “No agreement by an employee to waive his right to compensation under the Act shall be valid,” *see also* 33 U.S.C. §915(b), as implemented by 20 C.F.R. §725.620(d). Section 16 of the LHWCA, as incorporated into the Act by 30 U.S.C. §932, provides, in relevant part, that “No assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid,” *see also* 33 U.S.C. §916, as implemented by 20 C.F.R. §725.515.

The administrative law judge noted that both claimant and employer contended that the language of 33 U.S.C. §916, as incorporated into the Act by 30 U.S.C. §932, barring settlements “except as provided by this chapter,” can be read to permit settlement under the Act, because it could import, or incorporate by reference, the settlement provisions at Section 8(i) of the LHWCA, 33 U.S.C. §908(i), into the Act.⁵ The administrative law judge rejected their contention, noting that Section 8(i) was explicitly excluded and/or specifically written out of the Act by 30 U.S.C. §932 and, therefore, concluded that “Congress has clearly spoken on this subject,” Decision and Order at 5. The administrative law judge agreed with the Director that when originally enacted, Sections 15(b) and 16 of the LHWCA barred settlements and that Section 8(i) was subsequently enacted to override [and/or as an exception to] the bar on settlements at Sections 15(b) and 16. Thus, the administrative law judge concluded that there was “no Congressional ignorance of, or confusion about, what it was doing” in excluding Section 8(i) from the Act. The administrative law judge further held that “the Director’s reasonable interpretation” of the Act “is entitled to deference.” In addition, the administrative law judge found persuasive the Director’s contention that allowing settlements under the Act would jeopardize the ability of the Black Lung Disability Trust Fund (the Trust Fund) to obtain reimbursement of interim benefits paid to a claimant when the claim is subsequently in denial status at the time of the settlement, as in this case, because reimbursement must then be sought from the claimant rather than from the more financially secure employer. Finally, the administrative law judge noted that the Board has

⁵ While the language of Section 16 bars settlements “except as provided by this *Act*,” the language of 33 U.S.C. §916 bars settlements “except as provided by the *chapter*,” (emphasis added). Similar to the language of Section 16, the implementing regulation at Section 725.515 bars settlements “[e]xcept as provided by the Act and this part,” *see* 20 C.F.R. §725.515.

held that settlement of claims under the Act is prohibited, as 30 U.S.C. §932 expressly excludes Section 8(i) from incorporation into the Act, *see Gerzarowski v. Lehigh Valley Anthracite, Inc.*, 12 BLR 1-62 (1988).

Claimant contends (and the Director concedes) that there is no legislative history specifically stating that settlements are prohibited under the Act, or published Courts of Appeals decisions holding likewise, and contends that Section 8 was merely excluded from the Act because it would have been rendered meaningless if incorporated into the Act as written, *in toto*, as it also deals with the Special Fund as well as a range of disabilities (permanent and temporary; partial and total) that, while relevant under the LHWCA, are not relevant under the Act, which only compensates for total disability. However, claimant contends that the plain meaning of the language of 33 U.S.C. §916, as incorporated into the Act by 30 U.S.C. §932, barring settlements “except as provided by this chapter,” necessitates that only the settlement provisions at Section 8(i) are incorporated by reference [and/or by inference] into the Act, otherwise Congress would have excluded the phrase “except as provided by this chapter” if it intended not to authorize settlements under the Act. Employer adds that, otherwise, the Director’s position that settlements are barred fails to give full effect to all of the words and the cross-reference in 33 U.S.C. §916, as incorporated into the Act by 30 U.S.C. §932. At the very least, claimant and employer contend that the language of Section 16 creates an ambiguity that requires an interpretation, that would give effect to both the Act’s exclusion of Section 8 and Section 16’s obvious reference to Section 8(i) as an exception to the bar on settlements under the Act. Finally, claimant contends that deference to the Director’s position that settlements are barred under the Act is not appropriate when the Director is interpreting a statute enacted by Congress, as opposed to an agency regulation within the agency’s expertise, and the Director’s interpretation is contrary to the plain meaning of the statute.⁶

⁶ Claimant contends the Director’s position that settlements are barred under the Act is not a permissible construction of the Act, as it is contrary to every other workers’ compensation law and form of adjudication.

In response, the Director contends that Section 8(i) is an “exception” to the bar on settlements provided at Sections 15(b) and 16 of the LHWCA, *see generally Norfolk Shipbuilding & Drydock Corp. v. Nance*, 858 F.2d 182, 21 BRBS 166 (CRT) (4th Cir. 1988), *aff’g* 20 BRBS 109 (1987), *cert. denied*, 492 U.S. 911 (1989); *Gutierrez v. Metropolitan Stevedore Co.*, 18 BRBS 62 (1986). Thus, the Director contends that as the plain language of Section 422 of the Act, 30 U.S.C. §932, excludes Section 8(i) from the Act, then Section 8(i) is inapplicable to claims arising under the Act and, therefore, Sections 15(b) and 16, which were incorporated into the Act pursuant to 30 U.S.C. §932, bar settlements of claims arising under the Act.⁷ The Director asserts that Congress could not have intended to allow for settlements under the Act without providing some procedure to regulate settlements, as it did with Section 8(i) under the LHWCA.

Regarding the cross-reference phrase in Section 16 barring settlements “except as provided by this chapter,” the Director notes that the cross-reference at Section 16 was enacted before the exception to the bar on settlements at Section 8(i) was added to the LHWCA and refers to other relevant sections of the LHWCA as well, *see* 33 U.S.C. §917. In addition, the Director notes that when the Act was originally enacted, Section 8(i) of the LHWCA, in effect at that time, 33 U.S.C. §908(i)(1970)(amended 1972 and 1984), provided only for settlement of partial disability claims arising under the LHWCA and, therefore, could not have been applicable to claims under the Act which compensates only for total disability, explaining why Section 8(i) was not incorporated into the Act at that time. When Section 8(i) was subsequently amended in 1972 to provide for the settlement of claims for total disability as well under the LHWCA, the Director notes that Congress did not take the opportunity, at that time, to then incorporate Section 8(i) into the Act as well. Finally, as claimant and employer also contend, the Director notes that the current version of Section 8(i), as revised in 1984, is not applicable *in toto* to claims under the Act, as Section 8(i) also refers to concepts that are unique only to the LHWCA, such as the Special Fund. However, the Director notes that while Congress has incorporated certain subsections of the Social Security Act into the Act, *see* 30 U.S.C. §923(b), it did not do so with regard to the subsections of Section 8(i) of the LHWCA that could be applicable to the Act.⁸

⁷ Although claimant and employer contend that Section 15(b) does not necessarily bar settlements, but was intended to prevent employers from requiring their employees to contract away their rights to benefits as a condition of employment and/or to share the cost of insuring benefits, and note that Sections 15(b) and 16 do not use the word “settlement,” courts have held that Sections 15(b) and 16 have operated as a general bar to settlements, *see DuPuy v. Director, OWCP*, 519 F.2d 536, 538 (7th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

⁸ Claimant and employer contend that if Congress did not mean to incorporate Section 8(i) into the Act when Section 8(i) was enacted, it could have done as it did when Congress

amended Section 7 of the LHWCA, 33 U.S.C. §907, and stated that the amendments at Section 7 did not apply to claims under the Act. In addition, claimant and employer contend that there was no reason for Congress to have to specifically exclude the subsections of Section 8(i) that are unique only to the LHWCA and not applicable to the Act, as they have no effect on the subsections that are applicable.

Moreover, the Director contends that claimant's and employer's contention that the phrase in Section 16 "except as provided by this chapter," and/or "except as provided by this Act," refers to the LHWCA, and, therefore, to Section 8(i), violates the principle of statutory construction which provides that an incorporated provision is applied as though it were written into the reference statute, *i.e.*, the Act in this case, *see U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 617 (1992); *Yarborough v. U.S.*, 230 F.2d 56, 60 (4th Cir. 1956), *cert. denied*, 351 U.S. 969 (1956). Similarly, the Director notes that 20 C.F.R. §725.515, which implements Section 16, also bars settlements "[e]xcept as provided by the Act and this part," and that "Act" is defined at 20 C.F.R. §725.101(a)(1)-(2) as referring to the Act and not the LHWCA.⁹

Finally, the Director also notes that his policy that settlement is prohibited under the Act is evidenced by the fact that the regulations promulgated by the Director, implementing the Act, make no reference to settlement or Section 8(i), *see* 20 C.F.R. §§725.514, 725.620(d), 726.203(c)(5), whereas the regulations implementing the LHWCA specifically implement Section 8(i), *see* 20 C.F.R. §§702.241-243, and claims under the Act have been excluded from the Department of Labor's settlement procedures and alternative resolution program, *see* 29 C.F.R. §18.9(e)(2)(iii)-(iv); 62 Fed. Reg. 6690 (1997); 57 Fed. Reg. 7292, 7295 (1992). Moreover, the Director has noted that the reasons for his policy, that settlement is prohibited under the Act have been delineated in the comments provided in conjunction with the promulgation of the newly revised regulations, *see* 65 Fed. Reg. 80014, 80043-80044. In reply, claimant and employer contend that public policy favors the settlement of claims arising under the Act.

⁹ Claimant and employer contend that as Section 8(i) amends Section 16, because it provides an exception to the Section 16 bar on settlements, and as Section 16 references Section 8(i), than Section 8(i) is part and parcel of the incorporation of Section 16 into the Act, *see* 30 U.S.C. §932.

The Board has previously recognized and accepted the Director's contention that neither the Act, nor the regulations promulgated thereunder, provide authority for the settlement of a claim and has, therefore, held that there is no question that the settlement of claims under the Act is prohibited, as the settlement provisions of the LHWCA were expressly excluded from incorporation into the Act, *see* 33 U.S.C. §908(i)(1), excluded under 30 U.S.C. §932(a); *see generally* 20 C.F.R. Part 725. *See Gerzarowski*, 12 BLR 1-62, 1-64-65 n. 5; *Myers v. Director, OWCP*, 11 BLR 1-45, 1-49 (1988)(order on recon. *en banc*); *Blake v. Director, OWCP*, 11 BLR 1-7, 1-11 (1987)(*en banc*); *Grieco v. Director, OWCP*, 10 BLR 1-139, 1-144 (1987)(*en banc*); *Putnam v. Director, OWCP*, 8 BLR 1-388, 1-389 (1985); *Ladigan v. Central Penn Industries, Inc.*, 7 BLR 1-192, 1-193 (1984); *see also Niece Mining Company v. Quillen*, No. 88-4170, 884 F.2d 580, 1989 WL 99046, slip op. at 7 (6th Cir., Aug. 28, 1989)(unpub.) (concurring with the Board's holding that there is no authority under the Act for settlement agreements).¹⁰ Nevertheless, claimant and employer contend that while holding that the settlement of claims under the Act is prohibited, the Board has never addressed whether Section 16, 33 U.S.C. §916, as incorporated into the Act by 30 U.S.C. §932, barring settlements "except as provided by this chapter," incorporates the settlement provisions at Section 8(i) into the Act.

The Fourth Circuit has held that the incorporation of the LHWCA into the Act is a specific, rather than a general, incorporation, and in recognition of the possibility that some of the LHWCA sections incorporated may not be completely compatible with the provisions of the Act, Section 422(a) provides that the LHWCA is incorporated "except as otherwise provided ... by regulations of the Secretary," *see* 30 U.S.C. §932(a); *Director, OWCP v. National Mines Corp.*, 554 F.2d 1267, 1272-1274 (4th Cir. 1977). The Director's interpretation that because the plain language of Section 422 of the Act, 30 U.S.C. §932, excludes Section 8(i) from the Act, then Section 8(i) is inapplicable to claims arising under the Act and, therefore, Sections 15(b) and 16, which were incorporated into the Act pursuant to 30 U.S.C. §932, bar settlements of claims arising under the Act, is evidenced by the regulations promulgated by the Director implementing the Act, *see* 20 C.F.R. §§725.514, 725.620(d), 726.203(c)(5); *see also* 65 Fed. Reg. 80014, 80043-80044. Because the Director's regulatory interpretation of the statute is reasonable, it is entitled to deference,

¹⁰ Although claimant contends that by initially referring this case to a court mediator and ultimately granting the parties' joint motion for remand for consideration of the proposed settlement agreement, the Fourth Circuit thereby indicated that settlements are not prohibited by the Act, no order from the Fourth Circuit in the record addresses the validity or merits of the proposed settlement agreement in this case and, as the Director contends, granting the motion merely reflects that the validity of the proposed settlement agreement was never addressed by an administrative law judge or the Board below and, therefore, was not ripe for the Fourth Circuit to review.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 845 (1984); *National Mines Corp.*, *supra*. See 20 C.F.R. §§725.514; 65 Fed. Reg. 80014, 80043-80044; *Gerzarowski*, *supra*; *Myers*, *supra*; *Blake*, *supra*; *Grieco*, *supra*; *Putnam*, *supra*; see also *Niece*, *supra*.

Further, the parties' arguments as to whether settlement agreements should be permitted in claims arising under the Act and/or whether the exclusion of Section 8(i) from the Act by Congress was by design or oversight must be addressed to the Congress which has the authority to amend the statute, rather than to this Board, *see generally Lee v. Boeing Co., Inc.*, 123 F.3d 801 (4th Cir. 1997); *Cades v. H&R Block, Inc.*, 43 F.3d 869, 874 (4th Cir. 1994). Consequently, we affirm the administrative law judge's finding that the proposed settlement agreement reached by the parties in this case is prohibited.¹¹

Accordingly, the administrative law judge's Decision and Order finding the proposed settlement agreement reached by the parties in this case is prohibited is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

¹¹ Inasmuch as we affirm the administrative law judge's Decision and Order holding that the proposed settlement agreement reached by the parties in this case is prohibited, we need not address the Director's cross-appeal challenging the administrative law judge's alternative finding that the terms of the settlement agreement reached by the parties were adequate, reasonable and appropriate and/or claimant's and employer's contentions in reply, regarding whether the terms of the settlement agreement violated the Act and/or whether the Director has standing to object to the terms of the settlement agreement.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge