

CURTIS JENKINS)	
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Claimant-Petitioner)	
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5.))	
)	
PUERTO RICO MARINE,)	DATE ISSUED: <u>FEB 6, 2002</u>
INCORPORATED)	
)	
and)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Compensation Order - Approval of Agreed Settlement - Section 8(i) and the Letter denying penalties dated January 30, 2001, of Charles D. Lee, District Director, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Mark K. Eckels (Byrd & Jenerette, P.A.), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order - Approval of Agreed Settlement - Section 8(i) and letter denying penalties (OWCP No. 6-159023) of District Director Charles D. Lee on a claim filed pursuant to the provisions of the Longshore and Harbor Workers= Compensation Act, as amended, 33 U.S.C. '901 *et seq.* (the Act). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986). This is the third time this case is before the Board.

Claimant, a refrigerator mechanic, suffered injuries to his left shoulder on April 5, 1994, during the course of his employment. Prior to returning to work, claimant slipped and fell in his bathtub at home, fracturing a rib. Surgery was performed to repair a rotator cuff

tear of his left shoulder on September 23, 1994.

In his first decision, the administrative law judge denied claimant=s claim for benefits after April 10, 1994, finding that the slip and fall in the bathtub at home was the intervening cause of claimant=s need for surgery. Claimant appealed the denial of benefits to the Board, which reversed the administrative law judge=s finding that claimant=s surgery and resulting disability involving his shoulder were not work-related, vacated the denial of benefits and remanded the case for consideration of the remaining issues. *Jenkins v. Puerto Rico Marine, Inc.*, BRB No. 96-1635 (June 23, 1997)(unpub.). In addition, the Board, by Order dated August 22, 1997, awarded claimant=s counsel an attorney=s fee totaling \$8,619.82 for work performed in this appeal, but stated that the Order was neither enforceable nor payable until an award of benefits to claimant became final.

On remand, the administrative law judge determined that claimant was temporarily totally disabled from the date of injury until reaching maximum medical improvement on February 9, 1995, following his surgery, and permanently partially disabled thereafter. Further, he held that claimant=s fall at home was unrelated to his work injury and therefore employer is not responsible for his medical treatment other than that in connection with the surgery on his shoulder. Lastly, he awarded claimant=s attorney a fee of \$6,335. Claimant again appealed, challenging the administrative law judge=s calculation of claimant=s average weekly wage, the denial of medical benefits, and the award of an attorney=s fee. In response, employer urged affirmance.

On appeal, the Board affirmed the administrative law judge=s calculation of claimant=s average weekly wage, the resulting award of disability benefits, and the determination that claimant is not entitled to medical benefits for treatment related to his fall at home, but remanded the case for further consideration of an additional award of an attorney=s fee. *Jenkins v. Puerto Rico Marine, Inc.*, BRB No. 99-0667 (Mar. 23, 1997)(unpub.). Claimant appealed the Board=s decision to the United States Court of Appeals for the Eleventh Circuit. While the case was pending before the court, the parties reached a settlement whereby employer agreed to pay claimant a lump sum of \$17,378, consisting of \$5,000 in additional compensation, \$5,000 in additional medical expenses, and a representative=s fee of \$7,378, in full and complete settlement for past and future disability benefits and past and future medical benefits arising from the work-related injury sustained on April 5, 1994.

The parties thereafter submitted for approval an application for settlement to the district director pursuant to Section 8(i), 33 U.S.C. '908(i). On September 29, 2000, the

district director acknowledged receipt of the parties' application for settlement, observed that the case was presently on appeal before the Eleventh Circuit, and thus found that he did not have jurisdiction to consider the settlement. He therefore concluded that the 30-day time limit for automatic approval of the settlement was tolled and instructed the parties to request remand of the case so that he could fully consider the agreement.

On October 30, 2000, the Eleventh Circuit granted claimant's motion to dismiss his appeal with prejudice, which began the process of its jurisdictional descent back to the district director's office.¹ Following receipt of the case on January 4, 2001, the district director issued a Compensation Order - Approval of Agreed Settlement - Section 8(i) dated January 16, 2001. The district director issued a subsequent letter, dated January 30, 2001, wherein he denied claimant's request for penalties and interest on the settlement proceeds.

On appeal, claimant argues that the district director erred in denying his request for penalties and interest on the settlement proceeds, and in effect, nullifying the Board's 1997 award of an attorney's fee to claimant's counsel. Employer responds urging rejection of claimant's contentions.²

Initially, claimant argues that the district director erred by refusing to award interest and penalties resulting from employer's alleged late payment of the settlement proceeds. The crux of claimant's contention is that, contrary to the district director's findings, the 30-day time limit for consideration of the settlement cannot be tolled and, therefore, the settlement herein was automatically approved as of October 23, 2000. Claimant asserts that as a result, employer is liable for interest and penalties which accrued from that date until its payment to claimant of the agreed upon amounts on January 17, 2001.

Section 8(i) of the Act permits the parties in a case to dispose of the claim via a

¹ In a letter dated November 20, 2000, the district director reiterated his position that he could not consider the settlement agreement until a final remand was received from the Office of Administrative Law Judges and he received the case record, and thus again found that the 30-day time-frame for consideration was tolled. At this time, the district director also noted that the application for settlement was incomplete as it did not include a time and expense statement from claimant's attorney. The district director further noted that after contacting claimant's counsel, it was learned that this information was in the administrative file which had been forwarded, at the court's request, to the Eleventh Circuit.

² Employer recently filed a Notice of Supplemental Authority in this case, and claimant responds challenging the relevance of this document. We accept employer's notice and claimant's response as part of the record before the Board.

settlement agreement. If both parties are represented by counsel, the settlement is deemed approved if it has not been disapproved within 30 days after its submission. 33 U.S.C. '908(i)(1) (1994); *see also* 20 C.F.R. '702.241(d). The relevant implementing regulations, 20 C.F.R. '702.241, 702.242, 702.243, shed light on the issues at hand as they discuss, in a number of places, the application of the 30-day time limit and the automatic approval provision. In fact, Section 702.241(b), 20 C.F.R. '702.241(b), explicitly addresses the situation presented by the facts of this case. Section 702.241(b) provides that *If a settlement application is submitted to an adjudicator and the case is pending at the Office of Administrative Law Judges, the Benefits Review Board, or any Federal circuit court of appeals, the parties may request that the case be remanded to the adjudicator for consideration of the application. The thirty day period as described in paragraph (f) of this section begins when the remanded case is received by the adjudicator.*@ 20 C.F.R. '702.241(b) [emphasis added]. Section 702.241(f), 20 C.F.R. '702.241(f), in turn, provides that *Athe thirty day period for consideration of a settlement agreement shall be calculated from the day after receipt unless the parties are advised otherwise by the adjudicator (See '702.243(b)).*@ 20 C.F.R. '702.241(f).

As discussed by the district director, the instant case was pending before the United States Court of Appeals for the Eleventh Circuit at the time the parties sought approval of the settlement agreement. Thus, by operation of Section 702.241(b) the 30-day time limit did not begin until the remanded case was received by the district director, *i.e.*, on January 4, 2001. The district director's consideration and approval of the parties' Section 8(i) settlement by Compensation Order dated January 16, 2001, is therefore timely as it occurred within 30 days of his receipt of the remanded case. *See* 20 C.F.R. '702.241(b). Moreover, as provided by Section 702.241(f), the parties were advised by the district director in a timely fashion, *i.e.*, on September 29, 2000, clearly within 30 days of the September 23, 2000, date of submission of the proposed settlement, that the 30-day time-limit was tolled because of the pending appeal, and the district director explicitly informed the parties, in accordance with the language of Section 702.241(b), that they should request remand of the case so that he could consider the settlement.

In addition, the district director was correct in tolling the 30-day time-limit as the evidence before us establishes that the parties, in the initial submission of the settlement before the district director, did not provide a complete application. The regulation at 20

C.F.R. '702.242 is detailed as to the prerequisites for a complete settlement application.³

³ Section 702.242 states:

- a) The settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file. The application shall be in the form of a stipulation signed by all parties and shall contain a brief summary of the facts of the case to include: a description of the incident, a description of the nature of the injury to include the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid and the compensation rate or, where benefits have not been paid, the claimant's average weekly wage.
- (b) The settlement application shall contain the following: (1) A full description of the terms of the settlement which clearly indicates, where appropriate, the amounts to be paid for compensation, medical benefits, survivor benefits and *representative's fees which shall be itemized as required by '702.132*. (2) The reason for the settlement, and the issues which are in dispute, if any. (3) The claimant's date of birth and, in death claims, the names and birth dates of all dependents. (4) Information on whether or not the claimant is working or is capable of working. This should include, but not be limited to, a description of the claimant's educational background and work history, as well as other factors which could impact, either favorably or unfavorably, on future employability. (5) A current medical report which fully describes any injury related impairment as well as any unrelated conditions. This report shall indicate whether maximum medical improvement has been reached and whether further disability or medical treatment is anticipated. If the claimant has already reached maximum medical improvement, a medical report prepared at the time the employee's condition stabilized will satisfy the requirement for a current medical report. A medical report need not be submitted with agreements to settle survivor benefits unless the circumstances warrant it. (6) A statement explaining how the settlement amount is considered adequate. (7) If the settlement application covers medical benefits an itemization of the amount paid for medical expenses by year for the three years prior to the date of the application. An estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical treatment shall also be submitted which indicates the inflation factor and/or the discount rate used, if any. The adjudicator may waive these requirements for good cause. (8) Information on any collateral source available for the payment of medical expenses.

20 C.F.R. '702.242(b) [emphasis added].

The failure to provide a complete application prevents the district director from ruling on the application, 20 C.F.R. '702.243(b),⁴ and also prevents the application from being automatically approved 30 days after its submission, 20 C.F.R. '702.243(a). See 33 U.S.C. '908(i)(1); *Towe v. Ingalls Shipbuilding, Inc.*, 34 BRBS 102 (2000); *Nelson v. American Dredging Co.*, 143 F.3d 780, 32 BRBS 115(CRT) (3^d Cir. 1998); *Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff=d on recon. en banc*, 26 BRBS 71 (1992). In the instant case, the district director stated in his letter dated September 29, 2000, that he could not consider the merits of the settlement as the record was not before him. He further articulated, in his letter dated November 20, 2000, that the settlement as submitted did not satisfy the applicable regulations, in particular Section 702.242(b), as it did not contain a necessary time and expense statement from claimant=s counsel, which was contained in the record forwarded to the Eleventh Circuit. Thus, as the district director properly stated, the 30-day automatic approval period also was tolled as a matter of law under Section 702.243(a) when the district director found that the application was deficient. *McPherson*, 24 BRBS 224; *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff=d on recon. en banc*, 27 BRBS (1993)(Brown, J. dissenting.).

Consequently, we hold that under both Section 702.241(b) and Section 702.243(a), (b), the 30-day time-limit was properly tolled until the case record was returned to the district director from the Eleventh Circuit on January 4, 2001. Thus, contrary to claimant=s assertion, the settlement was not automatically approved on the thirtieth day following submission on September 23, 2000. Moreover, as the district director=s actions, first in tolling the 30-day time-limit and then in approving the settlement upon receipt of the remanded record, were performed in a timely manner, and employer=s payment of the settlement proceeds was timely after approval, claimant is not entitled to any interest and/or penalties in this case. The district director=s denial of interest and penalties to claimant is accordingly affirmed.

Claimant also argues that in approving the settlement the district director, in effect nullified the Board=s 1997 award of an attorney=s fee. Claimant argues that the attorney=s fee of \$8,619.82 awarded by the Board=s order dated August 22, 1997, for work performed in that appeal, should be considered separate and apart from the attorney=s fee agreed upon in the parties= settlement agreement. Moreover, claimant maintains that as employer never appealed the Board=s award of an attorney=s fee, it should be enforceable as is, and thus, cannot be altered by the terms of the settlement agreement.

⁴Section 702.243(b), in pertinent part, provides that *A*if the parties are represented by counsel, the settlement shall be deemed approved unless specifically disapproved within thirty days after receipt of a complete application. *This thirty day period does not begin until all the information described in '702.242 has been submitted.* The adjudicator shall examine the settlement application within thirty days and shall immediately serve on all parties notice of any deficiency. This notice shall also indicate that the thirty day period will not commence until the deficiency is corrected.@ 20 C.F.R. '702.243(b) [emphasis added].

Following negotiations, as part of the settlement the parties agreed upon a representative=s fee of \$7,378 to claimant=s counsel. The district director approved this fee and determined that it was to cover work on Aall matters in this claim, including any fees and costs due and owing for the appeals to the Benefits Review Board or the 11th Circuit Court of Appeals, as well as any fees for time and services provided for the employee before [the district director] and the [administrative law judge].@ Compensation Order at 2. In the settlement application, the parties listed attorney=s fees as a disputed issue, along with disability benefits, causation and medical benefits. Resolution of these issues, including fees, are stated as reasons for the settlement, and they are discussed in justifying its adequacy. Based on these provisions of the document, the district director rationally construed the settlement agreement as conclusively deciding the issue of all attorney=s fees due in this case. As the Board=s 1997 Order explicitly stated it was not enforceable until a final award of benefits was entered, it was not final and was thus superseded by the parties= settlement agreement. Moreover, claimant has not put forth any assertion, or for that matter any evidence, to show that the attorney=s fee provided for in the settlement agreement was inadequate or that the settlement was procured by duress. Consequently, we hold that the issue of an attorney=s fee to be paid by employer to claimant=s counsel for all of the work performed in this case is completely resolved by the terms of the settlement. We therefore reject claimant=s contention that he is entitled to any additional attorney=s fees in this case. The Board=s previous non-final order regarding fees is vacated.

Accordingly, the district director=s Compensation Order - Approval of Agreed Settlement - Section 8(i) is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge