BRB No. 01-0541

EDWARD O'NEIL (Personal Representative of the Estate of RAYMOND O'NEIL)	)	
Claimant-Petitioner	)	
v.	)	
BUNGE CORPORATION	)	DATE ISSUED: March 15, 2002
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Stone, L.L.P.), Portland, Oregon, for claimant.

William M. Tomlinson and Jay W. Beattie (Lindsay, Hart, Neil & Weigler, L.L.P.), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-1012) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As a result of a work-related myocardial infarction suffered on March 18, 1980, Raymond O'Neil (decedent) was receiving permanent partial disability compensation pursuant to the Compensation Order of Deputy Commissioner Reginald J. Johnson issued August 2, 1983, when in 1998, the parties entered into negotiations to settle the claim. CXS 7-11. On September 29, 1998, employer's attorney forwarded to decedent's attorney a proposed Application for Approval of Agreed Settlement, providing for payment to decedent of $63,000 in settlement of all further liability for compensation and medical benefits, including $1,500 payable to decedent's counsel for attorney

fees. CX 12. Subsequently, by letter dated October 1, 1998, employer's attorney sent decedent's counsel a revised settlement agreement, which incorporated the minor language changes that had been requested by decedent's counsel. CX 13; CX 20 at 24-25. According to the affidavit of decedent's attorney, decedent informed his counsel by telephone that upon his return from a hunting trip he would come in to sign the settlement agreement. CX 18 at 4. Decedent, however, died on October 16, 1998, without having signed the proposed settlement agreement. By letter dated October 30, 1998, decedent's attorney advised the district director of decedent's death, stated that he was substituting decedent's estate as beneficiary to the settlement agreement reached by the parties, and submitted the settlement agreement for the district director's approval. CX 14; *see also* CX 18 at 4. By letter dated November 10, 1998, employer's attorney informed the district director of employer's position that as the settlement agreement proposed by employer was never signed by decedent, no settlement agreement was reached between the parties. CX 15. On February 10, 1999, the case was transferred to the Office of Administrative Law Judges for a hearing. CX 16; CX 17.[1]

In his Decision and Order, the administrative law judge, relying on *Henry v. Coordinated Caribbean Transport*, 204 F.3d 609, 34 BRBS 15(CRT)(5th Cir. 2000), *aff'g* 32 BRBS 29 (1998), concluded that because decedent died before signing the settlement agreement at issue, there was no enforceable settlement agreement which was properly executed by the parties in accordance with Section 8(i) of the Act, 33 U.S.C. §908(i), and its implementing regulations, 20 C.F.R. §§702.241-702.243. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, claimant challenges the administrative law judge's finding that there was not an enforceable settlement agreement between the parties. Employer responds, urging affirmance of the administrative law judge's determination that an enforceable settlement agreement did not exist between decedent and employer. For the reasons that follow, we affirm the administrative law judge's conclusion that an enforceable settlement agreement pursuant to Section 8(i) did not exist in the instant case.

[1]The parties agreed to waive a formal hearing, and the case was decided by the administrative law judge on the basis of the evidence and briefs filed by the parties. *See* Decision and Order at 1-2.

Section 8(i) of the Act, as amended in 1984, 33 U.S.C. §908(i)(1)(1994),[2] provides for the settlement of claims for compensation by a procedure in which an application for settlement is submitted for the approval of the district director or administrative law judge. Claimants are not permitted to waive their right to compensation except through settlements approved under Section 8(i). *See* 33 U.S.C. §§915, 916; *see generally Henson v. Arcwel Corp.*, 27 BRBS 212 (1993). The procedures governing settlement agreements are delineated in the implementing regulations at 20 C.F.R. §§702.241-702.243. The regulation at 20 C.F.R. §702.242 is detailed as to the prerequisites for a complete settlement application.[3] The failure to provide a complete application prevents the district director or the administrative law judge from ruling on the application, 20 C.F.R. §702.243(b), and also

---

[2]Section 8(i)(1), as amended in 1984, states:

> Whenever the parties to any claim for compensation under this chapter, 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 so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

33 U.S.C. §908(i)(1)(1994).

[3]Section 702.242 states; *inter alia*:

> (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.

20 C.F.R. §702.242(a).

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); *Henry*, 204 F.3d at 612, 613, 34 BRBS at 18(CRT), *aff'g* 34 BRBS 29; *Towe v. Ingalls Shipbuilding, Inc.*, 34 BRBS 102, 104-105 (2000); *Nelson v. American Dredging Co.*, 143 F.3d 780, 32 BRBS 115(CRT) (3d Cir. 1998); *Henson*, 27 BRBS 212; *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

In the case at bar, it is undisputed that at the time of decedent's death, a settlement agreement had been proposed which contained the negotiated positions of the parties, but that this document had not been signed by decedent nor had it been submitted to the district director or administrative law judge for approval in accordance with the requirements of 20 C.F.R. §§702.242(a), 702.243(a). Claimant contends on appeal that the final settlement agreement negotiated by the parties, although unsigned by decedent and not submitted for administrative approval prior to decedent's death, is an enforceable agreement. Claimant avers, in this regard, that the administrative law judge erred in relying on the decision of the United States Court of Appeals for the Fifth Circuit in *Henry*, 204 F.3d 609, 34 BRBS 15(CRT), to find that no enforceable settlement agreement existed as that decision, in claimant's view, is distinguishable on its facts.

In *Henry*, the employee and the employer reached an agreement to settle the employee's claim. A week later, the employee died. Unlike the situation presented in *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), however, no formal settlement application had been prepared and signed by the parties and submitted for approval prior to the employee's death.[4] The Board held that this factor was critical in distinguishing the two cases, and thus affirmed the administrative law judge's refusal to enforce the agreement.[5] *Henry v. Coordinated Caribbean Transport*, 32 BRBS 29 (1998).

---

[4]In *Nordahl*, the Fifth Circuit held that an employer cannot rescind a settlement agreement which has been signed by both parties and submitted to an appropriate official for approval prior to administrative action on the application, unless the settlement agreement itself permits withdrawal upon some condition precedent, such as the death of the employee. *See* discussion, *infra.*

[5]The Board's holding that no valid settlement agreement existed in *Henry* was premised on the fact that no settlement application had been executed and submitted for approval notwithstanding the parties' meeting of the minds with respect to the terms of the settlement. 32 BRBS at 31. *Compare Fuller v. Matson Terminals*, 24 BRBS 252 (1991)(Board affirmed finding no settlement prior to death where application was prepared but unsigned at time of death and administrative law judge found no meeting of the minds regarding the terms of the settlement).

The Fifth Circuit affirmed the Board's decision, stating that "[t]he prescribed settlement application is the *sine qua non* of the regulations, which carry out the statutory intent," 204 F.3d at 611, 34 BRBS at 17(CRT), and that the acceptance of the position that an agreement which failed to comport with the regulatory requirements was enforceable would permit the adjudicator to "enforce specific performance of improperly documented settlement agreements, to compel employers and their insurers to participate in the preparation of settlement applications, and *even to allow employees' counsel unilaterally to prepare, sign, and submit settlement applications.*" 204 F.3d at 612, 34 BRBS at 18(CRT) (emphasis added).[6] The court concluded that the district director "could not enforce an agreement that was not documented according to the regulations . . . ."[7] 204 F.3d at 613, 34 BRBS at 18(CRT).

Claimant argues that *Henry* is distinguishable on the basis that the parties' agreement in *Henry* was not embodied in a formal settlement application prior to the employee's death whereas, in the present case, such an application had been prepared although it had not been signed by decedent or submitted for administrative approval prior to his death. We do not agree that this factual distinction renders *Henry* inapposite to the instant case.[8] As set forth in the preceding discussion of the Fifth Circuit's opinion in *Henry*, the court emphasized that

[6]The *Henry* court also observed that "without [the employee's] signature, no fully compliant application could be filed." 204 F.3d at 611, 34 BRBS at 17(CRT).

[7]In *Henry*, the Fifth Circuit distinguished its previous holding in *Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT), stating that *Nordahl* was limited to only those settlement agreements that had been executed pursuant to the regulations and submitted for administrative approval prior to the employee's death. 204 F.3d at 612, 34 BRBS at 18(CRT).

[8]The instant case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, which has not addressed the issue raised in this case.

only a fully compliant application that had been executed and submitted for administrative approval prior to the employee's death is enforceable. *See* 204 F.3d at 611-612, 34 BRBS at 17-18(CRT). In this regard, the court specifically stated that an application lacking the employee's signature was not compliant, and that the district director therefore lacks the authority to permit an employee's attorney to sign and submit a settlement application after the death of the employee. *Id.* As the reasoning of the Fifth Circuit in *Henry* is compelling, we hold that the agreement reached by the parties in the instant case, which was not signed by claimant or submitted for administrative approval prior to his death, is not an enforceable settlement agreement under Section 8(i) of the Act. *See also* 20 C.F.R. §§702.241-702.243. We therefore affirm the administrative law judge's decision declining to enforce the proposed settlement agreement submitted by decedent's counsel.

We also reject claimant's contention that the administrative law judge erred in refusing to enforce the proposed agreement under common law contract principles. As previously discussed, Section 8(i) provides the only basis for settlement of claims under the Act; Sections 15(b) and 16 of the Act, 33 U.S.C. §§915(b), 916, prohibit the settlement of claims except in accordance with Section 8(i) and its implementing regulations. *See generally Henson*, 27 BRBS 212. As Section 8(i) and its implementing regulations explicitly set forth comprehensive procedures for the settlement of claims under the Act, there is no statutory omission requiring the application of common law contract principles to resolve this case. *See generally Nordahl*, 842 F.2d at 777 n.4, 21 BRBS at 36-37 n. 4(CRT).[9] We therefore affirm the administrative law judge's determination that decedent's counsel has not presented a valid settlement agreement which can be approved under Section 8(i).

Accordingly, the Decision and Order of the administrative law judge denying the claim for benefits is affirmed.

SO ORDERED.

[9]In arguing that employer is bound by the settlement to which it agreed, claimant avers that the purpose served by Section 8(i) is the protection of employees, and not employers. The Fifth Circuit in *Henry* acknowledged that the "paternalistic" regulations implementing Section 8(i) serve the interest of the employee, but stated that these regulations serve administrative convenience as well. 204 F.3d at 611, 34 BRBS at 17. Specifically, the court observed that the provision for a self-sufficient document signed by all parties "facilitates effective, protective review by the adjudicator." *Id.* Thus, the enforcement of only those settlement agreements which fully comply with the applicable regulations protects the efficacy of the administrative review process.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge