

BRB No. 02-0606

MICHAEL HANSEN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MATSON TERMINALS, INCORPORATED)	
)	
and)	
)	
JOHN MULLEN & COMPANY)	DATE ISSUED: <u>APR 17, 2003</u>
FRANK GATES ACCLAIM)	
)	
Employer/Carriers- Petitioners)	DECISION and ORDER

Appeal of the Order Approving Settlement and the Order Denying Motion to Reconsider Approval of Settlement of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Preston Easley, San Pedro, California, for claimant.

Wesley M. Fujimoto and Bryan P. Andaya (Imanaka, Kudo & Fujimoto), Honolulu, Hawaii, for employer/carriers.

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

PER CURIAM:

Employer appeals the Order Approving Settlement and the Order Denying Motion to Reconsider Approval of Settlement (2002-LHC-472, 473, 474) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers= Compensation Act, 33 U.S.C. 901 *et seq.* (the Act). We must affirm the administrative law judge=s findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. '921(b)(3); *O=Keeffe v. Smith, Hinchman*

& Grylls Associates, Inc., 380 U.S. 359 (1965). The Board heard oral argument in this case on January 27, 2002, in Pasadena, California.

The essential facts underlying the contested issues are not in dispute. Claimant, while employed by employer as a laborer, sustained work-related injuries on September 30, 1993, October 3, 2000, and June 12, 2001. In early February 2002, the parties reached an agreement regarding the settlement of claimant=s claim for benefits under the Act. As a result of this agreement, the terms of which called for claimant to receive a lump sum payment of \$162,500, the formal hearing scheduled for February 15, 2002, was cancelled, and employer=s counsel undertook the preparation of the settlement agreement. In March 2002, prior to its submission of the settlement agreement to claimant and his counsel, employer received a Arumor@ that claimant was being considered for longshore employment. Employer subsequently contacted claimant=s counsel who, after consulting with claimant, informed employer that claimant might indeed return to longshore employment upon a release from his physician. The settlement agreement was thereafter faxed to claimant=s counsel. Claimant signed the settlement agreement and returned it to employer=s counsel. Employer, whose Human Resources Department was unable to verify claimant=s employment status, and its two carriers executed the settlement agreement on April 8 and 12, 2002, respectively, and forwarded it along with the appropriate attachments to the administrative law judge for approval pursuant to Section 8(i) of the Act, 33 U.S.C. '908(i). On April 23, 2002, the administrative law judge issued an Order approving the executed settlement agreement.

Employer subsequently asserted that it became aware, on April 25, 2002, of claimant=s re-employment and, on April 26, 2002, it filed with the administrative law judge a Motion to Disapprove Settlement Agreement and/or to Reconsider Approval of Settlement. Following the submission of briefs and a May 10, 2002, telephone

¹Claimant historically was employed through the firm of McCabe, Hamilton & Renny, an employment firm which supplied employer with longshore employees. In the instant case, it is not disputed that this firm contacted claimant in March 2002 and offered him, pursuant to his union seniority, a position as a wharf gang member. On or about March 25, 2002, claimant accepted McCabe=s offer of employment and commenced working for employer as a wharf gang member. There is no dispute in this case that employer and its carriers are responsible for any benefits due claimant under the Act as a result of his work-related injuries.

²Employer=s counsel contends that claimant=s counsel informed him that claimant was considering returning to longshore employment as a clerk. This contention is disputed by claimant=s counsel, who avers that he informed employer=s counsel that claimant might return to work as a wharf gang member.

conference call with the parties, the administrative law judge issued an Order Denying Motion to Reconsider Approval of Settlement on May 14, 2002.

On appeal, employer challenges the administrative law judge's approval of the parties' executed settlement agreement, asserting that the settlement should be set aside as claimant returned to longshore employment in violation of a term of the agreement. Claimant responds, asserting that the settlement agreement contains no provision for a penalty should claimant return to work prior to its approval.

Section 8(i) of the Act, as amended in 1984, 33 U.S.C. '908(i), 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 rights 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. Those regulations require, *inter alia*, that the settlement application be signed by all parties, 20 C.F.R. '702.242(a), and that a complete application be submitted to the district director or administrative law judge, 20 C.F.R. '702.243(a). Absent contrary provisions in the contract, executed settlement agreements which have been submitted for administrative approval are binding upon the employer and insurer and are not subject to rescission at their election. *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT)(5th Cir. 1988), *aff=g*, 20 BRBS 18 (1987). In *Nordahl*, the court held the insurer bound by an agreement to pay an employee \$75,000 for permanent total disability notwithstanding the employee's death following execution of the agreement but prior to its approval. The United States Court of Appeals for the Fifth Circuit reasoned in *Nordahl* that the *A promise to pay if approval is granted* is valid and binding when made, and nothing in the statute authorizes its rescission by the carrier. @ *Id.*, 842 F.2d at 780, 21 BRBS at 39(CRT)(emphasis in original). The court added that the insurer also did not contractually reserve the right to withdraw, stating that there is no statutory or other reason why a carrier cannot bargain for a right of rescission prior to approval in the settlement agreement. Thus, since employers and insurers enjoy no statutory rescission rights, they must create an express contractual right of withdrawal in the settlement agreement itself should they wish to reserve the ability to rescind an

³On May 22, 2002, employer filed with the Board a Motion to Stay Payment on the Settlement Agreement. In an Order dated June 6, 2002, the Board denied the motion, finding employer's contention that it will not be able to recoup sums paid to claimant pursuant to the settlement should it prevail on appeal failed to establish an Airreparable injury @ as required by Section 21(b)(3) of the Act, 33 U.S.C. '921(b)(3).

agreement during the pre-approval period. See 842 F.2d at 782, 21 BRBS at 41(CRT).

In the instant case, employer cites Section III, subsection G, of the executed settlement agreement and, relying upon the Fifth Circuit's decision in *Nordahl*, contends that the clear and unambiguous terms of that agreement expressly restrict claimant from returning to longshore employment. Specifically, employer avers that the settlement agreement contains a bargained-for specific provision which preserved its interests in ensuring that Claimant does not return to work soon after the settlement. See Employer's brief at 13. Pursuant to this interpretation of the agreement, employer argues that, since it is undisputed that claimant returned to work in March 2002, the administrative law judge erred in approving the executed agreement which was forwarded to him in April 2002.

Our consideration of employer's initial contention of error must commence with an examination of the disputed section of the settlement agreement relied upon by employer. Section III, subsection G, of the settlement agreement states:

The Employer's agreement to pay this large sum of money in settlement is based upon the Claimant's representations that his injuries will prevent him from returning as a laborer in the longshore industry. The Claimant's position in this regard is supported by the opinions of Drs. Smith and Okamura.

Accordingly, if the Claimant returns to work as a laborer in the longshore industry after this settlement agreement is approved, and suffers a re-injury or permanent aggravation of any alleged injury which is the subject matter of this settlement, then the parties agree that the subsequent employer will be entitled to a credit toward any future claim for permanent partial disability benefits, permanent total disability benefits or medical benefits from the monies paid as a result of this 8(i) settlement.

Application for Approval of Agreed Settlement at 11.

⁴The court in *Nordahl* held, however, that a claimant may withdraw from a submitted but unapproved settlement, based on statutory provisions prohibiting claimants from waiving their rights under the Act absent an approved settlement agreement. See 33 U.S.C. "915(b), 916.

While employer is correct in relying upon the Fifth Circuit's decision in *Nordahl* for the proposition that an employer may bargain for the inclusion of an express reservation of a right of rescission in a settlement agreement, such language is simply not present in the instant agreement. Rather, the parties' settlement agreement addresses only the remedy available to employer should claimant Areturn to work as a laborer in the longshore industry after the settlement is approved,⁵ and the remedy it provides is not rescission of the agreement but a credit to be applied to any future claim for benefits. See Settlement Application at 11. Contrary to employer's position on appeal, the presence of an express right of rescission in a settlement agreement is required in order for employer to protect its interests should a specific contingency arise. See *Nordahl*, 842 F.2d at 782, 21 BRBS at 41(CRT). The settlement agreement in this case, however, does not specifically provide employer with a right of rescission should some specific event occur prior to approval by the administrative law judge.

Moreover, contrary to employer's contention, the language cited above does not state the agreement is contingent upon claimant's not returning to longshore work as a laborer, nor does it attempt to prohibit claimant from doing so. Rather, that section anticipates that claimant might attempt a return to work, explicitly providing that should claimant do so and be re-injured, a subsequent employer would be entitled to a credit toward a future claim. Accordingly, as the executed settlement agreement sets forth no express right of rescission for employer and contains no express provision allowing employer to escape from its agreement to pay if claimant were to return to work, we reject employer's contention that the administrative law judge erred in not setting aside the agreement.

⁵Employer acknowledged as much when it conceded to the administrative law judge that Athe language in this [agreement] does not specifically provide for an escape mechanism such as a right of refusal. . . .⁶ See Employer's April 26, 2002 brief to the administrative law judge at 10; see also Employer's brief to the Board at 18; Oral Argument Tr. at 22.

⁶We note that this language attempts to address claimant's actions after approval of the settlement, whereas *Nordahl* explicitly refers to an employer's ability to include a provision allowing its escape from an agreement during the pre-approval period.

⁷Employer's related argument that it entered into the instant agreement based upon claimant's representation that he could not return to work as a laborer, and that claimant's return to work was thus a material breach of the agreement must also be rejected. First, the agreement provides additional reasons for settlement,

Employer additionally contends that the administrative law judge erred in determining that a member of wharf gang is not a laborer under the terms of the executed settlement agreement, and that claimant, therefore, made no misrepresentations to employer. Employer asserts that notwithstanding different job titles and seniority classifications, the longshore positions of wharf gang member and laborer contain similar physical requirements and duties, and any distinction in these job titles is therefore a distinction without a difference. Thus, employer contends that claimant's return to work in a wharf gang member position in March 2002 invalidated the proposed settlement agreement. We reject this argument.

On reconsideration before the administrative law judge, both parties submitted declarations addressing employer's contention that claimant had returned to work as a laborer in March 2002. Claimant, in a declaration dated April 29, 2002, stated that his union seniority had allowed him the opportunity to return to work as a member of a wharf gang, a position which he described as far less physically demanding than his previous work as a laborer. Additionally, claimant acknowledged that while he had engaged in lashing activities on two occasions following his return to work as a member of a wharf gang, his union seniority allowed him the opportunity to avoid working with turnbuckles and lashing rods. On May 8, 2002, employer submitted to the administrative law judge a declaration from Derrick Urabe, its industrial relations manager, which stated that the physical requirements and duties of wharf gang members and laborers are similar. Thereafter, on May 10, 2002, the parties held a conference call with the administrative law judge, regarding employer's pending motion for reconsideration. On May 14, 2002, the administrative law judge issued an Order Denying Motion to Reconsider Approval of

stating that it is the parties' intention to settle claimant's claim rather than risk long, drawn out, and unpredictable litigation on the disputed issues of compensability, the nature and extent of claimant's disability, claimant's average weekly wage, and future medical benefits. Settlement Agreement at 12. Moreover, employer knew of claimant's intention to return to work prior to its execution of the agreement, *supra* at 2-3, n.2, and could have declined to sign the agreement. See *O'Neil v. Bunge Corp.*, 36 BRBS 25 (2002). Finally, employer's argument that claimant's return to work denied it the benefit of the bargain is misplaced since, as noted by the Fifth Circuit in *Nordahl*, settlements are essentially a gamble: claimant's gamble, *inter alia*, that the injury will not be as debilitating as the carrier expects, while the carrier gambles, *inter alia*, that claimant will have less earning capacity on the open labor market than they expect or that claimant has applied an overly optimistic discount rate in evaluating his future rights. *Nordahl*, 842 F.2d at 781-782, 21 BRBS at 40(CRT).

Settlement wherein he fully addressed employer=s contentions. Specifically, the administrative law judge stated:

Based on my discussion with counsel during the conference call, there is no dispute that the claimant has returned to work at the employer=s facility as a member of a wharf gang. The parties also do not dispute that prior to his latest work-related injury, claimant had worked for employer as a laborer. Finally, the parties agree that laborer is a different job classification than member of a wharf gang. Since laborer and wharf gang member are different positions, claimant has not returned to work as a laborer. Accordingly, claimant has made no misrepresentation to employer, and the basis of the agreement as stated in Section G has not been undermined. Therefore, there is no cause to vacate the settlement agreement, and employer=s motion is denied.

Order Denying Motion to Reconsider Approval of Settlement at 2.

We affirm the administrative law judge=s decision to deny employer=s motion for reconsideration. Employer in its brief on appeal does not challenge the administrative law judge=s statements that the parties agreed that laborer and wharf gang member are separate job classifications during the May 10, 2002, conference call. Rather, employer argues that the term Alaborer@ used in the agreement is a general term referring to Aa person engaged in work that requires bodily strength rather than skill or training,@ *citing* Webster=s Encyclopedic Unabridged Dictionary 1072 (1996), and the jobs are the same in that they require the same degree of physical exertion. Given the parties= agreement that separate wharf gang member and laborer positions exist, we cannot say the administrative law judge erred in

⁸During the oral argument of this case, employer=s counsel stated that he would dispute the administrative law judge=s statements that the parties agreed during the May 10 conference call with the administrative law judge that laborer and wharf gang member are different job classifications, asserting that under the general common use of the word Alaborer,@ the jobs are the same. Counsel conceded, however, that he did not participate in that conference call. See Oral Argument Tr. at 24-26.

⁹In addition to the agreement on the conference call relied on by the administrative law judge, in their sworn declarations both claimant and Mr. Urabe described separate positions of wharf gang member and laborer, although they differed in describing the degree of exertion required in each position.

interpreting the agreement as referring to a specific position as a laborer. Accordingly, the administrative law judge=s determination that claimant did not return to work as a laborer in March 2002, based on the parties= agreement that laborer and wharf gang member are two different positions, is rational, and his consequent finding that claimant thus made no misrepresentation to employer undermining the vacating of the settlement agreement is affirmed. *See generally Downs v. Texas Star Shipping Co., Inc.*, 18 BRBS 37, *aff=d sub nom.*, *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT)(5th Cir. 1986).

Accordingly, the administrative law judge=s Order Approving Settlement and Order Denying Motion to Reconsider Approval of Settlement are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge