BRB No. 97-1151

JOSEPH STRIKE, JR. Claimant v. S. J. GROVES AND SONS and NATIONAL UNION FIRE INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Eugene Mattioni and Francis X. Kelly, Philadelphia, Pennsylvania, for employer/carrier.

Mark Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (93-LHC-2698) of Administrative Law Judge Stuart A. Levin 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).[1] 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).

Claimant was a pile driver for employer. On October 7, 1987, a scaffolding collapsed and he fell into the water 45 feet below, injuring his back. Employer voluntarily paid benefits from October 8, 1987, through August 30, 1993. Emp. Ex. 17.[2] On October 21, 1992, employer filed an application for Section 8(f), 33 U.S.C. §908(f), relief with the district director on the grounds that claimant had a pre-existing "disability" of limited education and intelligence, which, when combined with his work injury, makes him substantially more disabled. Exh. A.[3] The district director denied the application, finding it was not fully documented and finding that employer had not satisfied the contribution element necessary for Section 8(f) relief. The district director granted employer 30 days in which to formally accept or reject the determination. Exh. B. The case then came before the Office of Administrative Law Judges (OALJ).

The Director filed an appearance before the OALJ on July 20, 1993, and thereafter, on July 23, 1993, he filed an LS-18 Pre-Hearing Statement, asserting the absolute defense provided by Section 8(f)(3), 33 U.S.C. §908(f)(3) (1994), against employer's application for Section 8(f) relief. The Director noted, however, that he would not be represented by counsel at the hearing. Exh. D. Five days later, on July 28, 1993, employer filed its Pre-

[1]The Director has filed a motion for summary reversal of the administrative law judge's decision and for an expedited decision. We hereby deny the motion for expedited decision as moot, and we deny the motion for summary reversal, as the issue presented is novel and requires a full discussion.

[2]The transcript of the formal hearing in this case is missing. However, as the issue before the Board is purely legal, the transcript is not necessary to the resolution of this case.

[3]Exhibits identified as "Exh. _" refer to attachments to employer's application for Section 8(f) relief.

Hearing Statement which indicated that one of the many issues to be addressed by the administrative law judge was the applicability of Section 8(f). Exh. C. The hearing, which was originally scheduled for August 17-18, 1993, was delayed by continuance. On December 7, 1993, employer deposed claimant and first learned he had sustained an injury on August 6, 1986. The next day, employer filed a Supplemental Pre-Hearing Statement, offering different grounds for Section 8(f) relief. Exh. E. The formal hearing was held on December 28, 1993, and the Director was not represented by counsel. Exh. H.

In January 1994, employer received the documents it subpoenaed from the hospital based on claimant's deposition testimony. The records revealed an August 1986 injury and treatment thereof and also a pre-existing degenerative back condition. Exh. G. In July 1994, claimant and employer settled the claim for benefits for a total of $333,648 (this figure includes disability benefits, future medical benefits and an attorney's fee), and they filed a settlement application with the administrative law judge pursuant to Section 8(i), 33 U.S.C. §908(i) (1994). The terms of the settlement specifically provided:

> The parties by agreement have settled all claims for compensation and medical benefits; the employer reserving its rights against the Department of Labor pursuant to 8(f) of the Act. Evidence will be submitted to solely decide the issue of 8(f) for decision by Judge Levin.

Emp. Ex. 43; Exh. I-J. On August 17, 1994, the administrative law judge issued an order remanding the case to the district director for implementation of the settlement terms. He noted that the Director had been sent but had not commented on the settlement application, and he found that pursuant to Section 8(i), the settlement application had been "deemed approved" by virtue of the expiration of 30 days. *See* 33 U.S.C. §908(i)(1) (1994).

In late August 1994, employer filed additional evidence and a new application for Section 8(f) relief with the administrative law judge, including proposed findings on the issue of its entitlement to Section 8(f) relief. On August 26, 1994, the Director responded, asserting that Section 8(f) relief was foreclosed by virtue of Section 8(i)(4), 33 U.S.C. §908(i)(4) (1994). Thereafter, employer argued that the Director's failure to object during the 30 days after the settlement application was presented effectively waived his right to rely on Section 8(i)(4). The administrative law judge permitted employer and the Director to brief their respective positions, and he rendered a decision in April 1997. The administrative law judge found that the Director was estopped from asserting Section 8(i)(4) due to his inaction during the 30-day period. Decision and Order at 4. The administrative law judge also found Section 8(f)(3) inapplicable because, although employer had submitted an incomplete Section 8(f) application to the district director, the district director failed to fix a date for submission of a fully documented application. Thus, he concluded that presentation of a fully documented application to his office suffices. Decision and Order at 6-7. Accordingly, the administrative law judge next addressed the merits of employer's application for Section 8(f) relief and found that employer is entitled to relief from the Special Fund, limited to the amount of benefits under the settlement. Decision and Order at 7-9. The Director appeals the administrative law judge's decision, and employer responds, urging affirmance.

The Director first contends that the administrative law judge erred in considering employer's Section 8(f) application after it entered into a Section 8(i) settlement. Specifically, the Director argues that he did not waive his right to assert, nor should he be estopped from asserting, Section 8(i)(4) by virtue of his decision not to respond to the settlement application within 30 days of its filing.[4] Employer counters, asserting that the Director was a party to the case, he knew Section 8(f) relief was at issue, and yet he failed to come forward in a timely fashion and object to the terms of the settlement. Further, employer argues that the Director's interpretation of Section 8(i)(4) bars employers from ever entering into Section 8(i) settlements when Section 8(f) is at issue. Finally, employer avers that the Special Fund benefits from the settlement in this case, as its liability is limited to the terms of the settlement, whereas without such agreement the Fund would be liable for many years to come. In reply, the Director argues that there are no inconsistencies between Section 8(i)(1) and (4), as employer alleges, and that settlements can be entered into in cases involving Section 8(f) provided the agreements are made after a determination concerning the applicability of Section 8(f). The Director also maintains that Section 8(i)(4) creates an automatic exemption from liability for the Special Fund when an employer enters into a Section 8(i) settlement without first resolving the Section 8(f) issue.

Section 8(i) of the Act permits the parties in a case to dispose of the claim via a 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). Section 8(i)(4) of the Act was added by the 1984 Amendments, and it provides:

> The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

[4]The Director argues that cases which have permitted estoppel against the government have been reversed, and he argues that employer has not satisfied the requirements for estoppel. Dir. Brief at 11-12; *see generally Ingalls Shipbuilding, Inc. v. Director, OWCP,* 976 F.2d 934, 26 BRBS 104 (CRT)(5th Cir. 1992). As the issue before us may be resolved on narrower grounds, we decline to address this aspect of the Director's argument.

33 U.S.C. §908(i)(4) (1994). Prior to the enactment of the 1984 Amendments, the Board held that an employer could seek Section 8(f) relief after entering into a Section 8(i) settlement with a claimant, but that a settlement between an employer and a claimant which affects the liability of the Special Fund is not binding on the Fund absent the participation of the Director. *Brady v. J. Young &* Co., 17 BRBS 46, *aff'd on recon.*, 18 BRBS 167 (1985); *Younger v. Washington Metropolitan Area Transit Authority*, 16 BRBS 360 (1984). In *Brady*, the Board specifically stated that "Section 8(i)(4) will preclude post-settlement Section 8(f) relief in the future. . . ." *Brady*, 17 BRBS at 52.[5] Additionally, the Board has stated that Section 8(i)(4) was enacted to prevent employers from seeking relief from the Special Fund after reaching a settlement with a claimant in a case that otherwise would be assigned to the Special Fund.[6] *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993) (citing H.R. CONF. REP. No. 1027, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 2783-2784). Thus, the language of Section 8(i)(4) unambiguously protects the Special Fund from liability after an employer enters into a Section 8(i) settlement with a claimant.

The issue in this case is whether the Director waived his right to rely on Section 8(i)(4). The administrative law judge first stated that the settlement agreement herein "did not directly affect the liability" of the Special Fund, *i.e.*, it merely reserved employer's right to later seek Section 8(f) relief. The administrative law judge then relied on the fact that the Director was informed of the terms of the settlement and employer's intent to pursue Section 8(f) relief but failed to take action against the settlement. Further, he determined

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[5]In *Brady*, the Board discussed Section 8(i)(4) but held it inapplicable to settlements entered into prior to September 28, 1984, based on the language of Section 28(e)(1) of the 1984 Amendments and the inequity of a retroactive application. *Brady*, 17 BRBS at 52, 18 BRBS at 169-170.

[6]The conference report discussing new Section 8(i)(4) states:

> [T]he conferees would prohibit an employer/carrier, after reaching a settlement with a claimant in a case which would otherwise be assigned to the special fund, from subsequently seeking relief from the special fund. *** The fund [ ] shall not be liable for the reimbursement of the costs of any settlement or for the costs of any voluntary payments of compensation made by the employer prior to a settlement. This provision is intended specifically to overturn the administrative law judge's decision in *Brady v. J. Young & Company*, 16 BRBS 31, (ALJ) (1983) [which was affirmed in relevant part on appeal to the Board].

H.R. Conf. Rep No. 1027, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C. A.N. 2782-2783.

that the Director was a party in interest (to protect the interests of the Special Fund), and as such had a duty to object to any settlement terms he believed to be improper. The administrative law judge then reasoned that since the Director was afforded the full 30 days to object to the settlement application, but failed to do so, he waived his right to object and is estopped from relying on Section 8(i)(4). Decision and Order at 3-4.

We reverse the administrative law judge's conclusion that Section 8(i)(4) is inapplicable in this case. Initially, the administrative law judge erred in distinguishing this case on the basis that the settlement herein does not "directly affect" the Special Fund because it did not purport to hold the Special Fund liable for benefits or stipulate to facts affecting the merits of Section 8(f) applicability. Decision and Order at 3. Despite the fact that the settlement terms reserved employer's right to seek Section 8(f) relief and did not attempt to establish the Fund's liability, the settlement itself does affect the Special Fund's liability, as such liability is derivative of employer's liability. We note one of employer's arguments for affirming the administrative law judge's decision is that the Special Fund reaps the benefit of the settlement in this case by limiting its liability to the amount in the settlement. While such a result appears beneficial, it could be detrimental to the Fund, especially if claimant's entitlement to benefits is questionable because, by virtue of the settlement, claimant's entitlement to benefits was not litigated. Issues such as the nature and extent of disability, average weekly wage, and causation, among others, have a direct bearing on the Fund's liability, and those issues were not resolved by a factfinder. *Brady*, 17 BRBS at 53-54. Consequently, as the Fund's liability for benefits is derivative of employer's liability, any agreements between claimant and employer on those issues cannot be determinative with regard to the existence or extent of liability of the Special Fund. *Id.*

Additionally, contrary to the administrative law judge's conclusion, Section 8(i)(4) does not impose a duty on the Director to raise objectionable settlement terms. Unlike the absolute defense imposed by Section 8(f)(3), implementation of Section 8(i)(4) requires no action on the Director's part. Rather, Section 8(i)(4) automatically prohibits the Special Fund from being held liable for reimbursement of sums paid voluntarily or under the terms of a settlement between the parties, and the purpose of that section is to prevent employers from seeking post-settlement Section 8(f) relief. Thus, a settlement provision purporting to reserve employer's right to later seek Section 8(f) relief or to set the Fund's liability is void as a matter of law. The implementing regulations of Section 8(i), Sections 702.241-702.243, 20 C.F.R. §§702.241-702.243, specify the contents of a proper settlement application and the procedure for obtaining approval. Contrary to both employer's assertion and the administrative law judge's conclusion, these sections do not mandate action by the Director. Indeed, the only action required during the 30 post-filing days is that of the district director or the administrative law judge either approving or disapproving the settlement application. *See* 20 C.F.R. §702.243.

A comparison of the terms of Section 8(i)(4) and its implementing regulations with those of the affirmative defense of Section 8(f)(3) and its implementing regulation, 20 C.F.R. §702.321, readily demonstrates the verity of our conclusion. Section 702.321

provides in no uncertain terms that if the Director believes an employer has failed to present a complete application for Section 8(f) relief, he must so state, and such a defense "is an affirmative defense which must be raised and pleaded by the Director." 20 C.F.R. §702.321(b)(3); *see also Abbey v. Navy Exchange*, 30 BRBS 139 (1996). In contrast, Section 8(i)(4) states only that the Special Fund "shall not be liable" for reimbursement of sums paid pursuant to a Section 8(i) settlement. Thus, while the Director has a duty to raise the Section 8(f)(3) defense, he need not assert Section 8(i)(4), as that section is mandatory and self-executing.[7]

In this case, employer's first application for Section 8(f) relief was denied and the arguments therefor later abandoned. After deposing claimant, attending the hearing, and receiving hospital records, claimant and employer agreed to settle the disability claim in July 1994, and the settlement was deemed approved. The Director was not a party to the settlement. The following month, employer submitted an application for Section 8(f) relief. The Act is clear: the Special Fund cannot be liable, pursuant to Section 8(f), for amounts employer agreed to pay pursuant to a Section 8(i) settlement with claimant. 33 U.S.C. §908(i)(4) (1994); *Dickinson*, 28 BRBS at 84; *Brady*; 17 BRBS at 52. Therefore, inasmuch as the settlement provision reserving employer's right to seek Section 8(f) relief is void as a matter of law, we reverse the administrative law judge's conclusion that Section 8(i)(4) does not bar employer's claim for Section 8(f) relief, and we hold that employer is not entitled to relief from the Special Fund.[8]

Accordingly, the administrative law judge's Decision and Order is reversed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

[7]Another self-executing rule, for example, is the prohibition against modification of settlements: "This section [which authorizes the modification of awards] does not authorize the modification of settlements." 33 U.S.C. §922; 20 C.F.R. §702.373(a). Thus, a provision in a settlement application permitting modification of the settlement if conditions later warrant it would be void by virtue of the language of the Act and would not require action by any party to make it so.

[8]In light of our holding herein, we need not address the Director's remaining arguments.

REGINA C. McGRANERY
Administrative Appeals Judge