BRB No. 99-384

PETER GONZALEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	DATE ISSUED: Dec. 23, 1999
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

David Utley (Devirian, Utley & Detrick), Wilmington, California, for claimant.

William N. Brooks, II (Law Offices of James P. Aleccia), Long Beach, California, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-347) of Administrative Law Judge Alexander Karst 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his right hand on January 23, 1997, while pulling the handle to the cover of a battery compartment on a bus. Claimant was referred to Dr. O'Hara, a hand specialist, who diagnosed a torn muscle and opined that claimant has a ten percent impairment to his right hand. Claimant sought permanent partial disability benefits under the Act. After the hearing on July 9, 1998, employer submitted a letter to the administrative law judge dated July 23, 1998, which stated that employer accepted liability for a ten percent

impairment of claimant's right hand. Claimant's counsel responded on July 28, 1998, requesting that the issue be held in abeyance until claimant's return on approximately August 3, 1998. Employer replied on July 29, 1998, that it would withhold payment of the scheduled permanent partial disability benefits until claimant's counsel had conferred with claimant. In a letter to the administrative law judge dated August 4, 1998, claimant responded to employer's letter, stating that he did not object to employer's post-hearing acceptance of liability for a ten percent impairment of the hand. In addition, he requested that the administrative law judge "retain jurisdiction with respect to attorney fees and costs," and raised a new issue regarding a violation of Section 49 of the Act, 33 U.S.C. §948a, which occurred after the hearing. Claimant also corresponded with employer on August 4, 1998, questioning the delay in the scheduled payment. Subsequently, employer submitted a letter to the administrative law judge dated August 14, 1998, withdrawing the previous correspondence and requesting a decision on the record.

The administrative law judge rejected claimant's contention that employer was bound by the "acceptance of liability" letter submitted post-hearing. He found that the letter was a stipulation and that as it was not submitted prior to the hearing, it was not binding on employer. In addition, the administrative law judge found that the weight of the more credible evidence shows that claimant's hand injury has not caused him any ratable permanent disability. Thus, the administrative law judge denied permanent partial disability benefits.

On appeal, claimant's assignment of error relates to the administrative law judge's refusal to accept employer's July 23, 1998 letter as a binding acceptance of liability. Claimant contends that the letter constituted admissions which should have been admitted into evidence and accepted by the administrative law judge or, in the alternative, a written offer to claimant "with respect to the issues referenced therein which was accepted by claimant by means of his attorney's letter dated August 4, 1998," thereby resolving said issues and no longer requiring the administrative law judge to resolve the issues. Claimant also argues that the letter constituted a withdrawal of controversion of the issues of the extent of his disability. Claimant does not contest the administrative law judge's finding that claimant has no ratable impairment. Employer responds, urging affirmance of the administrative law judge's decision.

Initially, we reject claimant's contention that the letter dated July 23, 1998, was a withdrawal of controversion pursuant to Section 702.351 of the regulations, 20 C.F.R. §702.351. Section 702.351 essentially assumes that the parties have decided to voluntarily dispose of the claim in a manner consistent with informal proceedings, thus obviating the need for a formal hearing on the issues. *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988). In the instant case, the letter was submitted after the parties had already formally presented the case to the administrative law judge, although a decision had not yet been

issued. Moreover, before the administrative law judge addressed the issue raised in the letter, namely the acceptance of liability, employer withdrew the previous correspondence and requested a decision on the record. Thus, as the parties were not in agreement, we hold that Section 702.351 is not applicable in this case. *Falcone*, 21 BRBS at 147; *Sans v. Todd Shipyards Corp.*, 19 BRBS 24, 28 (1986).

In addition, we reject claimant's contention that the letter constitutes a binding admission pursuant to Section 18.801(2), 29 C.F.R. §18.801(2). This subsection is a definition of statements which are not considered hearsay in administrative hearings, and is not applicable to find that employer in the instant case made a binding "admission." The section that does address admissions, 29 C.F.R. §18.20, outlines the discovery procedure to be followed prior to the hearing in order to request or deny admission of the truth of any specified relevant matter of fact. Any dispute regarding admissions is to be resolved at a prehearing conference or at a designated time prior to the hearing. 29 C.F.R. §18.20(d). Moreover, any matter admitted under this section is conclusively established unless the administrative law judge, on motion, permits withdrawal or amendment of the admission. 29 C.F.R. §18.20(e). As employer did not send the letter in question until after the hearing, and as the letter was withdrawn prior to a decision by the administrative law judge, we hold that this regulation is inapplicable in the instant case.

Claimant also contends that the letter of July 23, 1998, should be construed as an offer to settle the disputed issues, which claimant accepted by letter dated August 4, 1998, resulting in a binding contract. Although arguably an offer and acceptance was made here, because a claim may not be withdrawn in exchange for a sum of money, *see* 33 U.S.C. §915(b), as that would violate the Act's explicit prohibition of waiver of compensation, the parties must follow the settlement procedures of Section 8(i), 33 U.S.C. §908(i), if claimant wishes to withdraw his claim in return for a sum of money. *Norton v. National Steel & Shipbuilding Corp.*, 25 BRBS 79, 84 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd in pert. part on recon.*, 22 BRBS 430 (1989); *see also Jennings v. Lockheed Shipbuilding & Construction Co.*, 9 BRBS 212 (1978); 33 U.S.C. §§908(i), 915(b). Inasmuch as the correspondence between the parties cannot be construed as an agreement to settle the claim pursuant to Section 8(i), and as no settlement application was submitted to the administrative law judge in accordance with the regulations found at 20 C.F.R. §§702.241-702.243, we reject claimant's contention that the letter of July 23, 1998, was a binding settlement offer under the Act. *Cf. Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988)(In the absence of an express contractual provision, an employer has no right of rescission from a properly submitted Section 8(i) settlement prior to administrative action on the settlement). There is no other mechanism available under the Act to enforce a contract between the parties.

In conclusion, the letter from employer dated July 23, 1998, was submitted after the

administrative law judge had heard the testimony and received the evidence of record.[1] Before a decision was issued, employer withdrew the letter and requested a decision on the record. As claimant has identified no procedural error, and the case was properly before the administrative law judge for a decision, we affirm the administrative law judge's finding that the letter of July 23, 1998, was not a binding acceptance of liability and thus affirm the denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[1]The record was left open solely for a deposition by Dr. London, which was taken July 21, 1998.