BRB No. 07-0766

M.T.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 02/29/2008
	)	
Employer/Group Self-Insurer-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order – Approving Settlement of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

James W. McCready, III (Seipp, Flick & Kissane, L.L.P.), Miami, Florida, for employer/group self-insurer.

Matthew W. Boyle (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order – Approving Settlement (2007-LHC-1094) of Administrative Law Judge Lee J. Romero, 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 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 worked for employer as a lasher at the Port of Houston. On July 7, 2003, he was injured when a lashing rod struck his shoulder, and he later underwent right shoulder arthroscopy, decompression and debridement. Following convalescence and physical therapy, claimant returned to full-duty work on May 26, 2004. Claimant continued to have shoulder problems and underwent a second surgery on June 6, 2005. He returned to full-duty work on January 23, 2006. Because claimant had continuing pain and the doctor opined it was due to a cervical problem, which employer disputed, the parties agreed to settle the claim.

The parties agreed that employer would pay claimant $25,000 to resolve all issues related to the shoulder injury, $5,000 of which is for future medical expenses. Employer also agreed to pay claimant's counsel an attorney's fee of $5,000. In addition, $20,000 of the settlement "shall be designated as a credit toward any compensation benefits owed" if claimant were to strain, sprain, or re-injure his right shoulder or neck while working for any of the members of the Signal Mutual Indemnity group during the 30 months following the approval of the agreement.[1] On May 11, 2007, the administrative law

[1]The provision specifically states, Settlement at 5-6 (emphasis in original):

> The parties further agree that TWENTY THOUSAND DOLLARS ($20,000.00) of this agreed settlement shall be designated as a credit toward any compensation benefits owed in the event that the Employee files certain Longshore and Harbor Workers' Compensation Act injury claims in the future. This credit shall be valid for a period of Thirty (30) months after the District Director has signed the agreement. * * * Since the present case does not involve the same class of disability addressed in [*Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*)], the parties hereby establish by contract the right of any Member of Signal Mutual Indemnity, Ltd. to take credit for up to $20,000.00 of this agreed settlement toward compensation owed as a result of any spraining or straining injury to the Employee's right shoulder or neck. This credit

judge approved the parties' settlement agreement.[2] The Director appeals the approval, and employer responds, urging affirmance. Claimant has not responded to this appeal.

The Director challenges the parties' settlement, contending the credit provision in the agreement violates Section 8(i) of the Act, 33 U.S.C. §908(i), and Section 702.241(g) of the regulations, 20 C.F.R. §702.241(g), because it affects the rights of the parties and claims not yet in existence and gives rise to an extra-statutory credit. Employer disputes this contention and argues that the settlement merely prevents claimant from obtaining a double recovery should he re-injure his shoulder. Section 8(i)(1) of the Act provides for the settlement of claims under the Act. Claimants are not permitted to waive their rights to compensation under the Act except through settlements approved in accordance with Section 8(i). *See* 33 U.S.C. §915; *O'Neil v. Bunge Corp.*, 365 F.3d 820, 38 BRBS 7(CRT) (9th Cir. 2004); *Hansen v. Matson Terminals, Inc.*, 37 BRBS 40 (2003); *see generally Henson v. Arcwel Corp.*, 27 BRBS 212 (1993). Section 702.241(g) of the promulgating regulations, 20 C.F.R. §702.241(g) (emphasis added), provides:

> An agreement among the parties to settle a claim is *limited to the rights of the parties and to claims then in existence*; settlement of disability compensation or medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits.

> applies to any Member because Signal Mutual is an authorized group self-insurer in which the Members share their liabilities under the Longshore and Harbor Workers' Compensation Act. This credit would apply to any straining or spraining injury to the Employee's right shoulder or neck, whether such injury is deemed "new" or an "aggravation of a pre-existing condition." The credit would not be applicable only if the subsequent injury was caused by a specific provable event (such as a collision causing damage to a container or vehicle) *and* such event caused an objectively provable change in the Employee's bodily frame or structure (such as a fracture, dislocation, paralysis, muscle tears or herniated disc). Nothing about this agreement shall serve to diminish in any way the rights of Signal Mutual or their individual members under the terms of the LHWCA in the event that the Employee claims a subsequent work-related injury with any Member.

[2]Previously, the district director declined to approve the settlement because of the contingent credit provision and a lack of supporting medical documentation. *See* Decision and Order at 2.

See Clark v. Newport News Shipbuilding & Dry Dock Co., 33 BRBS 121 (1999) (McGranery, J., concurring); *Cortner v. Chevron International Oil Co., Inc.*, 22 BRBS 218 (1989).

The Board recently addressed a similar credit provision in a settlement in *J.H. v. Oceanic Stevedoring Co.*, __ BRBS __, BRB No. 07-0430 (Jan. 31, 2008). In that case, the Board held that the terms of the settlement agreement, which provided for a credit to any of the Signal Mutual group members should the claimant return to longshore work and suffer an aggravation or a new injury, were contrary to law. Specifically, the Board held that as the provision applied where claimant sustained a new injury or aggravation after approval of the settlement, it applied to an injury which had not yet occurred. Moreover, any credit granted to a subsequent employer would affect the claimant's right of full recovery in a potential future claim. Thus, the settlement affected claims and rights which were not yet in existence in violation of Section 702.241(g) of the regulations. The Board also noted that other Signal Mutual members were not parties to the claim so they could not properly be parties to the settlement. *J.H.*, slip op. at 4-5. Further, the Board explained that the credit provision in the parties' agreement was not encompassed by any existing statutory or extra-statutory credit scheme, *see* 33 U.S.C. §§903(e), 914(j), 922, 933(f); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*), and it declined to expand the credit doctrine to allow this particular type of credit. *J.H.*, slip op. at 8 (citing *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002)).

Although the credit provision here differs from the one in *J.H.* in that it limits the type of injuries to which the credit applies and it sets an expiration date for application of the credit, it nevertheless applies by its very terms to potential future injuries not in existence at the time of the settlement and it limits claimant's right to a full recovery should he sustain an additional injury.[3] Moreover, similar to the provision in *J.H.*, it names other Signal Mutual members as potential beneficiaries of the credit. Thus, the settlement is not limited to the rights of the parties and the claims then in existence. *J.H.*, slip op. at 4-5. In addition, the credit provision in the settlement attempts to expand the credit doctrine beyond its currently accepted application.[4] *See J.H.*, slip op. at 8; *see also*

[3]Unlike the claimant in *J.H.*, claimant herein has returned to work.

[4]In addition, as the Director notes, if the $20,000 credit is taken, and the $5,000 payment for medical benefits is subtracted from the $25,000 settlement recovery, employer would ultimately pay no compensation toward claimant's current disability. Thus, the settlement amount would be zero and would be inadequate, warranting a rejection of the settlement under Section 8(i). *See* Dir. Brief at 5 n.2; Settlement Application.

I.T.O. Corp. v. Director, OWCP [Aples], 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989). Therefore, for the reasons set forth in *J.H.*, we vacate the administrative law judge's approval of this settlement, and we remand the case to the administrative law judge for further proceedings necessary to the resolution of this claim.

Accordingly, the administrative law judge's Decision and Order - Approving Settlement is vacated. The case is remanded for further proceedings.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge