BRB Nos. 90-1223
and 90-1223A

ROBERT JENNINGS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JONES WASHINGTON STEVEDORING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
RED SHIELD SERVICE COMPANY	)	
	)	
Employer/Carrier Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT	)	
	)	DECISION and ORDER on
Petitioner	)	RECONSIDERATION *EN BANC*

Appeals of the Decision and Order Upholding Settlement and the Order Denying Motion for Reconsideration of James J. Butler, Administrative Law Judge, United States Department of Labor.

Gerald L. Casey (Casey & Casey, P.S.), Port Orchard, Washington, and Mary Alice Theiler (Theiler, Douglas, Drachler & McKee), Seattle, Washington, for claimant.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for employer.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer has timely filed a Motion for Reconsideration *En Banc* of the Board's Decision and Order in *Jennings v. Jones Washington Stevedoring Co.*, BRB Nos. 90-1223/A (February 19, 1993)(unpublished). 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(a), (c); 802.407(b); 802.409. In its Decision, the Board reversed the administrative law judge's Decision and Order Upholding Settlement and Order Denying Motion for Reconsideration, and remanded the case to the administrative law judge for consideration of claimant's entitlement to disability benefits. We hereby grant employer's request to reconsider this case *en banc*, but deny the relief requested.

To recapitulate, on March 10, 1987, claimant, represented by counsel, and employer, represented by its claims examiner Steve Averill, entered into a proposed settlement agreement regarding an alleged work-related injury to claimant's back on June 20, 1986. Pursuant to this agreement, and at claimant's specific request, employer immediately issued a check to claimant for the agreed-upon sum of $4800; employer additionally agreed to pay $2900 for claimant's medical expenses, as well as claimant's attorney's fees and costs. The settlement agreement, along with a letter from claimant's attorney acknowledging that this amount had been paid to claimant by employer, was thereafter sent to the district director.[1] On March 22, 1987, claimant sent a letter to the district director, stating that he refused to accept the settlement as a "finalization" of his claim and requesting that his claim remain open. No action was taken by the district director regarding the settlement application, and the case was referred to an administrative law judge.

In his Decision and Order, the administrative law judge found that claimant's letter of March 22, 1987 did nothing to remove the settlement agreement from the automatic approval provision of Section 8(i)(1) of the Act, 33 U.S.C. §908(i)(1). After finding that both parties were represented by counsel at the settlement, the administrative law judge concluded that the March 10, 1987 settlement was automatically approved 30 days after it was signed, pursuant to Section 8(i)(1), and that, since the March 10, 1987 settlement was valid, a discussion of the merits of the case was not necessary. The administrative law judge then ordered employer to pay the agreed-upon medical expenses, attorney's fees and costs.
Thereafter, in a letter to the administrative law judge dated April 5, 1989, employer conceded that its representative at the settlement was not an attorney; following this communication, claimant and the Director filed a joint motion for reconsideration. In an Order dated October 25, 1989, the administrative law judge, without discussion, denied the motion for reconsideration.

On appeal, both the Director and claimant challenged the administrative law judge's determination that the March 10, 1987 settlement agreement was valid. Employer responded, arguing that claimant was properly estopped from its withdrawal of the fully executed settlement agreement since it paid to him the agreed-upon settlement funds.

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

Applying the decision of the United States Court of Appeals for the Fifth Circuit in *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988), the Board held that since it was uncontroverted that claimant expressly withdrew from the March 10, 1987 agreement within thirty days; *i.e.*, before it was administratively approved, his withdrawal precludes its approval thereafter, notwithstanding employer's tender of the agreed-upon amount.[2] Thus, the Board reversed the administrative law judge's determination that the settlement agreement was automatically approved pursuant to Section 8(i)(1), and remanded the case for consideration of the remaining issues raised by the parties.[3]

In its motion for reconsideration, employer argues that because of claimant's deceitful behavior, he should be estopped from being allowed to withdraw from the settlement agreement. Employer also argues that it is irrelevant that it was not represented by an attorney at the settlement, and that the purpose of Section 8(i) is to assure that *claimants* are represented by attorneys; employer contends that the Board's statements regarding this issue in *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992), are merely *dicta*.[4]

Inasmuch as employer's arguments on reconsideration were previously considered and rejected by the Board in its initial Decision and Order and employer has failed to make any persuasive argument as to why this determination is in error, the panel's determination is affirmed.

Accordingly, employer's motion for reconsideration *en banc* is granted, but the relief requested is denied.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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[2]The Board noted that since employer conceded that it was not represented by an attorney at the settlement agreement, the automatic approval provision of Section 8(i)(1) cannot apply. *See McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

[3]The Board additionally advised the administrative law judge to allow employer a credit for its prior voluntary payment of $4800, pursuant to Section 14(j), should the administrative law judge find additional compensation owing.

[4]In *McPherson*, the Board specifically held that since the employer's representative at the settlement was not an attorney as defined by Section 702.241(h) of the implementing regulations, 20 C.F.R. §702.241(h), employer was *not* represented by counsel, and reversed the administrative law judge's finding to the contrary. The Board noted, however, that the issue of whether the parties were represented by counsel was not determinative since the deficiencies in the settlement application rendered it incomplete as a matter of law. *See McPherson*, 24 BRBS at 228.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge