

BRB No. 91-1206

ROSCOE WARD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MAHER TERMINALS,)	DATE ISSUED:
INCORPORATED)	
)	
Self-insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

John D. Blomquist (Kenny & Stearns), New York, New York, for employer.

Marianne Demetral Smith (Judith E. Kramer, Acting Solicitor of Labor; Carol 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 and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-2386) of Administrative Law Judge Robert D. Kaplan dismissing 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 initially injured his back in a work-related accident on August 26, 1988. Claimant's treating physician and a reviewing physician stated that claimant was able to return to work as of April 17, 1989; thus, employer discontinued compensation payments. An Application for Settlement under Section 8(i) of the Act, 33 U.S.C. §908(i), was approved by the district director on April 24, 1989.¹ Claimant returned to work without medical restrictions on August 28, 1989 and alleges that he sustained an employment-related back injury on that date. Claimant sought permanent total disability benefits under the Act.

The administrative law judge dismissed the claim as he found it constituted an attempt to modify a previously approved Section 8(i) settlement. Decision and Order at 4; 33 U.S.C. §908(i). On appeal, claimant contends that the administrative law judge erred in failing to address whether claimant suffered a new injury on August 28, 1989, and thus, erred in addressing this claim as an attempt at Section 22, 33 U.S.C. §922, modification. The Director, Office of Workers' Compensation Programs, also urges the Board to vacate the administrative law judge's decision as claimant alleged he suffered a new employment-related injury in 1989, for which he may be entitled to benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

We agree with claimant and the Director that the administrative law judge erred in failing to address whether claimant suffered a new injury on August 28, 1989. The administrative law judge found that claimant had previously received \$55,000 for disability arising out of a back injury incurred in a work-related accident on August 25, 1988 pursuant to a settlement agreement approved by the district director under Section 8(i). The administrative law judge found that as the approved Section 8(i) settlement encompasses the specific permanent total disability claimed in the instant case, this claim constitutes an effort to modify the previous award, which is not subject to modification.

¹The settlement agreement stated that it resolved the dispute in regard to the claimant's degree of disability and likelihood of continuing disability arising out of the injury on August 26, 1988. ALJ Ex. 1.

As the administrative law judge correctly noted, Section 8(i) settlements are not subject to Section 22 modification. 33 U.S.C. §922 (1988); *see also Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). The administrative law judge inferred that claimant's contention was that the settlement resolved only a claim for temporary disability and does not preclude the current claim for permanent total disability. Decision and Order at 3. However, in this case, claimant stated that he was not seeking modification of the settlement for the previous injury, but alleged that a new injury aggravating his previous condition occurred on August 28, 1989, leaving him permanently totally disabled. *See generally Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem., sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

In the present case, it is undisputed that claimant returned to work on August 28, 1989. As the administrative law judge correctly noted, claimant now seeks benefits for permanent total disability resulting from an injury to his back allegedly sustained on that date. According to claimant's testimony, and the testimony of two corroborating witnesses, on August 28, 1989, claimant attempted to unlock a container from a chassis that was stuck shut. H. Tr. at 35, 142. As is the usual procedure, when he could not unlock the container with his hands, claimant tried to use a crowbar to loosen it. H. Tr. at 35-37, 142. He felt something happen to his back and fell to the ground in pain. H. Tr. at 37-38, 142-143, 179. His fellow workers helped him to a nearby shed so that an ambulance and the "safety man" could be called.² H. Tr. at 39, 107, 144-145, 180.

Dr. Lee, claimant's treating physician, reported on November 17, 1989 that claimant bent over to unhook a container and fell to the ground with severe pain in his back and legs. *See* Cl. Ex. 1(a). He noted that claimant's symptoms had not changed since his previous examination with the exception of more spasm noted in the back and more acuteness of the spasm which was noted. *Id.* Dr. Lee opined that claimant sustained an acute injury to the lower back region on August 28, 1989 and has re-aggravated his pre-existing injury. *Id.*

The record contains claimant's testimony, the testimony of two corroborating witnesses, and a medical report which indicate that claimant suffered a new harm or injury on August 28, 1989 when he returned to work. The administrative law judge found that claimant sought permanent total disability benefits which resulted from the work-related injury of August 26, 1988, but did not discuss this evidence of a new employment-related injury in dismissing this claim as an attempt to modify the previous settlement agreement. Decision and Order at 3. A settlement agreement is limited to the rights of the parties and to claims in existence at the time of the settlement. 20 C.F.R. §702.241(g); *see generally Cortner v. Chevron International Oil Co., Inc.*, 22 BRBS 218 (1989). There is evidence of record which, if credited, could establish that the present claim for permanent total disability benefits was not in existence at the time the parties entered into the settlement agreement and did not arise until the date of the new accident. Thus, we vacate the administrative law judge's finding that the approved Section 8(i) settlement encompasses the specific permanent

²The ambulance never came, but claimant drove himself to his treating physician's office. Dr. Lee could not see claimant that day, but gave him pain killers for overnight and saw him the next day.

total disability claimed in the instant case. Further, we vacate the administrative law judge's dismissal of the claim and remand the case for consideration of whether claimant sustained a second, compensable employment-related back injury on August 28, 1989 in light of the aforementioned evidence, and any other unresolved issues. *See generally Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

Accordingly, the Decision and Order of the administrative law judge dismissing the claim is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge