

ALBERT BEVILACQUA)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SUN SHIP, INCORPORATED)	DATE ISSUED:_____)
)	
and)	
)	
TRAVELER'S INSURANCE COMPANY)	
)	
Employer/Carrier-)	
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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Steven A. Reed (Pepper, Hamilton & Scheetz), Philadelphia, Pennsylvania, for employer/carrier.

Carol B. Feinberg (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Approving Settlement (90-LHC-1175) of Administrative Law Judge Paul H. Teitler 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 was exposed to asbestos while working for employer as a painter at its shipyard from 1958 to 1979. In a report dated September 30, 1987, Dr. Giudice diagnosed claimant as having pleural and parenchymal asbestosis attributable to asbestos exposure. Dr. Giudice noted that because of claimant's exposure, he was at an increased risk of developing malignancies including lung cancer, gastro-intestinal cancer, laryngeal cancer and mesothelioma. Dr. Giudice stated that he had discussed the situation with claimant and that he is fully aware of the possible consequences of asbestos exposure. Although Dr. Giudice did not state that claimant required active medical treatment at that time, he noted that claimant should have annual x-rays, pulmonary function and sigmoidoscopic examinations and undergo timely medical check-ups as concerns arose. Finally, Dr. Giudice stated that claimant's prognosis must remain guarded in view of his lifelong potential for asbestos-related malignancy as well as the significant restriction noted on his pulmonary functions.¹

Claimant sought compensation under the Act, alleging that he sustained injury to his lungs as a result of his work-related asbestos exposure. After the case was referred to the Office of Administrative Law Judges, claimant and employer entered into a proposed settlement agreement, in light of the conflicting medical evidence, providing for claimant's receipt of a lump sum of \$8,400.25, and claimant's attorney's receipt of a fee of \$2,000, plus costs of \$199.75. On September 26, 1990, the administrative law judge issued a Decision and Order in which he approved the parties' proposed settlement, concluding that the agreement is fair and in claimant's best interest, and was not procured by duress.

On appeal, the Director asserts that the administrative law judge exceeded the scope of his authority in approving the proposed settlement agreement because the parties' settlement is not in accordance with 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 discharges employer from potential liability for claims not yet in existence. Additionally, the Director contends that the settlement agreement violates the provisions of Section 15(b) of the Act, 33 U.S.C. §915(b), which provides that an employee cannot agree to waive compensation. Employer responds urging affirmance and arguing that the settlement agreement, which discharges employer's liability for all actions or causes of action other than survivor's benefits, is valid under the Act, and that any worsening of claimant's asbestos-related disease would be part of the same released claim and not a new claim. Claimant has not responded to the Director's appeal.

¹Dr. Bresnitz, who examined claimant on behalf of the Office of Workers' Compensation Programs, submitted the opinion that claimant has bilateral pleural plaques secondary to asbestos exposure and "possible early asbestosis" but stated "there was no evidence of asbestos-related disease on physical examination." Dr. Epstein, who examined claimant on behalf of employer, opined that claimant has asbestos-related pleural plaques but does not have asbestosis or a work-related impairment.

The Director specifically takes issue with the language in paragraph 9 of the Decision and Order Approving Settlement which provides in pertinent part:

It is specifically understood and agreed that the Claimant, Albert Bevilacqua, by this settlement, releases, renounces and settles with Sun Ship and all related Sun companies *all actions or causes of action related to the instant actions*.

Decision and Order at 2 (emphasis added). The Director maintains that this language violates the provisions of Section 8(i) of the Act and Section 702.241(g) of the regulations because it discharges employer from potential liability for claims not yet in existence, thereby waiving claimant's right to compensation in violation of Section 15(b) of the Act.

We agree with the Director that the settlement proposed by the parties and approved by the administrative law judge contains language which is not acceptable under Section 8(i) and its implementing regulations. *See generally Kelly v. Ingalls Shipbuilding, Inc.*, 27 BRBS 117 (1993). Section 8(i), as amended in 1984, provides in pertinent part:

Whenever the parties to any claim for compensation under this Act, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress.

33 U.S.C. §908(i)(1988). Section 702.241(g) of the Act's implementing regulations states:

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 settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits.

20 C.F.R. §702.241(g)(emphasis added).

Section 702.241(g) of the regulations explicitly states what is implicit under the statute--that settlement of a claim is "limited to the rights of the parties and to the claims then in existence." *See Cortner v. Chevron International Oil Co., Inc.*, 22 BRBS 218 (1989). Thus, in *Cortner*, where the claimant filed a claim for bilateral hernias and asbestos-related disease and was alive at the time of the settlement, the Board vacated the settlement which discharged employer from all claims for compensation, medical benefits, survivor benefits, and death benefits. The Board held that Section 8(i) of the Act and Section 702.241(g) of the regulations prohibited the settlement of potential future survivor claims which would not arise until the death of the injured worker. *See Cortner*, 22 BRBS at 220. In contrast to *Cortner*, the Board has, in cases involving settlements of claims for a work-related hearing loss, construed those settlements as only applying to the hearing loss claim for which benefits were sought where the settlement agreement as a whole clearly indicated a compromise

settlement of the hearing loss in existence at the time of the settlement. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993); *Kelly*, 27 BRBS at 120. In *Poole*, therefore, the Board affirmed the administrative law judge's decision to specifically limit a settlement to the present claim, noting that claimant was a retiree and was unlikely to return to the workforce. *See Poole*, 27 BRBS at 235. Similarly, in *Kelly*, the Board affirmed the administrative law judge's approval of a settlement, noting that claimant had not worked for employer since 1959, could not file a future hearing loss claim against employer in the absence of future injurious exposure, and that a death benefits claim relating to an occupational hearing loss is unlikely. *See Kelly*, 27 BRBS at 120.

Although the parties' agreement in this case does not attempt to discharge any future survivor or death claims and, in fact, employer concedes in its response that the agreement does not purport to do so, we agree with the Director that the language contained in paragraph 9 of the parties' agreement nonetheless is overbroad because it discharges employer from liability for future claims not yet in existence. We note that Dr. Giudice's report specifically stated that claimant has an increased risk of developing cancer as a result of his asbestos exposure. Because the settlement agreement purports to relieve employer from liability for "all related actions or causes of action related to the instant action," it would preclude claimant from obtaining compensation and medical benefits from employer if he were to develop asbestos-related cancer in the future. The settlement agreement as a whole cannot logically be construed as being limited to the claim for claimant's pulmonary condition which is "currently in existence" and therefore violates Section 8(i) of the Act and Section 702.241(g) of the regulations prohibiting the settlement of potential future claims.

Moreover, we agree with the Director that the proposed settlement violates Section 15(b) of the Act which prohibits an employee from waiving his right to compensation and invalidates any attempts to do so. 33 U.S.C. §915(b). The United States Court of Appeals for the Fifth Circuit has stated that a claimant's agreement to accept compensation pursuant to a submitted but unapproved settlement is invalid under Section 15(b) because it is an agreement to waive compensation. *See generally Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988), *aff'g* 20 BRBS 18 (1987). Once approved, pursuant to Section 8(i), settlement agreements are binding and Section 15(b) no longer applies. *See generally Guitierrez v. Metropolitan Stevedore Co.*, 18 BRBS 62 (1986) (Section 8(i) is a narrow exception to Section 15(b)). Settlement procedures must be followed to effect a waiver of compensation. In the instant case, the attempt to settle claims not yet in existence violates Section 8(i) and therefore contravenes Section 15(b). Consequently, we vacate the administrative law judge's Decision and Order approving the parties' settlement. The case is accordingly remanded for the administrative law judge to take further action necessary to the resolution of this claim.

Accordingly, the administrative law judge's Decision and Order Approving Settlement is vacated, and the case is remanded for further proceedings as the parties require to dispose of the claim.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge