BRB Nos. 91-762
and 91-762A

JULIAN LUNA	)	
	)	
Claimant-	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
ARMY AND AIR FORCE	)	
EXCHANGE SERVICE	)	
	)	
and	)	
	)	
ESIS	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Disapproval of Settlement of Marilyn C. Felkner, District Director, United States Department of Labor.

David Pickering (Mayo & Pickering), Fort Worth, Texas, for claimant.

Yancey White and Paul Dodson (White, Huseman, Pletcher & Powers), Corpus Christi, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Disapproval of Settlement (OWCP No. 8-77448) of District Director Marilyn C. Felkner 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). The district director's determinations will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Claimant injured his back in 1983 while working as a forklift operator for employer. In 1991, claimant and employer submitted a stipulation of facts to the district director, in compliance with Section 8(i) of the Act, 33 U.S.C. §908(i) (1988), and Section 702.242 of the regulations, 20 C.F.R. §702.242, in which the parties agreed to settle the claim for a total of $29,632.20 plus an attorney's fee of $9,000.[1] The district director received the agreement on January 16, 1991, and the next day she notified the parties that the 30-day approval period of Section 8(i)(1), 33 U.S.C. §908(i)(1) (1988), is tolled because "the proposed language in Section 12 is not acceptable." Letter dated Jan. 17, 1991. Employer appeals and claimant cross-appeals the district director's disapproval of their settlement agreement.[2] The parties filed a joint brief on the issue.[3]

The parties contend the district director erred in rejecting their settlement agreement for reasons other than those set forth by the statute, 33 U.S.C. §908(i). Specifically, they argue that the district director may disapprove a settlement agreement, which otherwise complies with the regulations, only if it is inadequate or if it was procured under duress. *See* 33 U.S.C. §908(i)(1) (1988). The district director rejected the parties' agreement solely because she considered the language in paragraph 12 of the agreement unacceptable. Paragraph 12 provides:

> That it is agreed and stipulated by all parties that Employer's and Carrier's consent to this settlement is to be considered withdrawn, null and void at the time of Claimant's death if the Claimant dies before the settlement is approved by the Deputy Commissioner. No action by the Employer and Carrier shall be required to effect this withdrawal. It shall be automatic as of the moment of the Claimant's death;

[1]The settlement amount consists of $19,900 plus a waiver of employer's overpayment of $9,723.20 in temporary total and permanent partial disability benefits. The parties also stipulate that the settlement is adequate, the amount covers all compensation due for this injury, and employer and carrier are discharged from further liability.

[2]Section 702.243(c) of regulations provides that if a district director disapproves a settlement, the parties are to request a hearing before the administrative law judge or submit an amended settlement application to the district director. 20 C.F.R. §702.243(c); *see also* 33 U.S.C. §908(i)(2) (1988). In this case, however, the parties do not dispute any facts and they raise solely a legal issue. As the parties agree as to the facts and neither requests a hearing, we shall decide the legal issue presented.

[3]We hereby deny the parties' motion for oral argument. 20 C.F.R. §802.306.

Settlement Applic. at 5. Instead, the district director stated that language similar to the following would be more appropriate:

the Employer and their (sic) Insurance Carrier reserve their right to withdraw this settlement if the Employee dies prior to approval of the settlement[.]

Letter dated Jan. 17, 1991. Claimant and employer contend the district director violated Section 8(i) of the Act and interfered with their contractual rights by requiring them to edit a clause of their agreement in this manner.

Section 8(i)(1) of the Act states: "the deputy commissioner . . . shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. . . ." 33 U.S.C. §908(i)(1). Section 702.243(f) sets forth criteria for determining whether a settlement is "adequate," and Section 702.243(g) defines inadequate settlements. 20 C.F.R. §702.243(f), (g). There is no evidence in this case that the district director found the proposed settlement to be inadequate or procured by duress. Consequently, there is no statutory or regulatory deficiency permitting disapproval of the settlement herein. *See generally McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

A district director has the authority to approve a settlement even if the claimant dies prior to approval of the settlement; thus, an employer may not withdraw from the settlement solely because the claimant died. *Maher v. Bunge Corp.*, 18 BRBS 203 (1986). However, if the parties wish to provide for such a contingency in their agreement, they may. *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988). In *Nordahl*, the United States Court of Appeals for the Fifth Circuit, within whose appellate jurisdiction this case arises, held that an employer and its carrier can protect themselves by including in a settlement an express right of recision in the event the claimant dies during the pre-approval period. The court noted that nothing in Act prevents a settlement from containing such a clause. *Nordahl*, 842 F.2d at 782, 21 BRBS at 41 (CRT).

The parties to this case chose to include a clause which provides for automatic withdrawal of the settlement should claimant die prior to its approval. The language in paragraph 12 accomplishes this goal. As a settlement may be conditioned, provided it is in accordance with law, *see Sablowski v. General Dynamics Corp.*, 10 BRBS 1033 (1979), and as the automatic withdrawal clause is in accordance with *Nordahl*, the district director erred in failing to approve this settlement. Consequently, we vacate the disapproval of settlement, and we remand the case for further consideration of the settlement agreement.

Accordingly, the district director's decision is vacated, and the case is remanded for further consideration consistent with this opinion.[4]

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

NANCY S. DOLDER
Administrative Appeals Judge

[4]We reject the parties' request to hold the district director liable for the parties' attorney's fees and costs, as there is no authority in the Act for assessing such charges against an administrative body. 33 U.S.C. §§926, 928; *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).