

BRB No. 98-1368

ALCADIO GUERRERO)	
)	
Claimant-Respondent)	
)	
v.)	
)	
EAGLE MARINE SERVICES, LIMITED)	DATE ISSUED: <u>July 6, 1999</u>
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Approving Settlement, Awarding Benefits and Attorney Fees of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Robert H. Madden (Madden & Crockett, LLP), Seattle, Washington, for self-insured employer.

Andrew D. Auerbach (Henry L. Solano, Solicitor of Labor; Carol A. 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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Approving Settlement, Awarding Benefits and Attorney Fees (98-LHC-703) of Administrative Law Judge Daniel L. Stewart 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, a mechanic with employer since 1986, filed a claim for a work-related hearing loss on March 3, 1997. On January 27, 1997, claimant underwent an audiometric evaluation, the results of which revealed a 15.6 percent binaural hearing impairment. On June 22, 1998, employer and claimant sought approval of a settlement agreement from the administrative law judge. The administrative law judge approved the settlement for \$16,834.65, representing a 10 percent binaural impairment, and incorporated it into his Decision and Order after finding that the settlement is adequate, was not procured by duress, and substantially conforms with the requirements of Section 8(i)(1) of the Act, 33 U.S.C. §908(i)(1), and 20 C.F.R. §§702.241-702.243. The administrative law judge also discharged employer from liability for past and future medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, the Director challenges the administrative law judge's approval of the parties' settlement agreement. Employer filed a response brief to which the Director replied. Claimant has not responded to this appeal.

The Director initially contends that the administrative law judge's approval of the parties' settlement violates Section 15(b) of the Act, 33 U.S.C. §915(b), as well as Section 702.241(g), 20 C.F.R. §702.241(g), inasmuch as the settlement attempts to settle claims not yet in existence. The Director relies on the first paragraph of the settlement in support of his contention which reads:

I, ALCADIO GUERRERO, the claimant in this matter, for and in consideration of the sum of \$16,834.65 my attorneys' fees and costs in the amount of \$1,010.50 when approved by the Administrative Law Judge, do hereby release, discharge, and forever acquit . . . the employer, . . . "APL", from any and all loss, damage, or injury, including *but not limited to*, claims for disability compensation arising out of or in any way connected with *any* injury, disability, illness and/or disease which I may have sustained as a result of my employment with APL, up to and including January 27, 1997, during which employment I worked at the premises of APL in Seattle as a mechanic and I was exposed to injurious levels of noise. (emphasis in italics is the Director's)(Settlement and Release, p.1)

In response, employer asserts that the settlement does not settle claims not yet in existence and cites in support of its position the following portions from the settlement:

[T]his full settlement and release covers all loss, damage, injury, illness or disease whatsoever, whether to my head, ears or any parts or functioning thereof, including, but not limited to, the ability to hear, *which I have sustained or might sustain as a result of my exposure to injurious levels of noise through the date of January 27, 1997 while I was employed by APL* (emphasis in italics is employer' s)(Settlement and Release, page 2, paragraph 0.4)

[T]his Agreement covers and includes, without limitation, all claims I have made or might be entitled to make, either at this time or in the future, for any and all types of disability compensation *resulting from my exposure to noise through the date of January 27, 1997* (emphasis in italics is employer' s)(Settlement and Release, page 2, paragraph 0.6)

Section 8(l)(3) of the Act, 33 U.S.C. §908(l)(3), states, "A settlement approved under this section shall discharge the liability of the employer or carrier, or both." 33 U.S.C. §908(l)(3)(1994). Section 702.241(g) limits the settlement to the rights of the parties and to claims then in existence. See *Cortner v. Chevron Int'l Oil Co., Inc.*, 22 BRBS 218 (1989); 20 C.F.R. §702.241(g). Section 15(b) of the Act prohibits an employee from waiving his right to compensation and invalidates any attempts to do so, unless the parties have complied with Section 8(l) of the Act. See *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988), *aff' g* 20 BRBS 18 (1987); *Gutierrez v. Metropolitan Stevedore Co.*, 18 BRBS 62 (1986); 33 U.S.C. §915(b).

We affirm the administrative law judge' s approval of the parties' settlement as the settlement as a whole indicates the parties' intention to settle only the claim for the hearing loss in existence at the time of the settlement. Paragraphs 0.4 and 0.6, cited by employer and set forth above, state that the settlement covers all claims which claimant sustained or might sustain as a result of injurious noise exposure through January 27, 1997. In addition, paragraph 0.7.2 identifies the settled claim in the case as dated March 3, 1997. Paragraph 0.7.6 (0.7.6.1-0.7.6.2) summarizes claimant' s medical condition regarding an audiogram administered on January 27, 1997, and details the results of the audiogram. Paragraph 0.7.7 compromises claimant' s hearing loss as a 10 percent binaural hearing impairment, the equivalent

of 20 weeks of compensation. Thus, the administrative law judge's approval of the settlement is limited to the hearing loss claim before him. See *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84, 88 (1993); see also *Kelly v. Ingalls Shipbuilding, Inc.*, 27 BRBS 117, 120 (1993); *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 235 (1993). Assuming, *arguendo*, as the Director contends, that the settlement could be construed as attempting to settle claims not yet in existence, employer has made it clear in its response brief that the intent of the settlement is to settle only claimant's claim for hearing loss allegedly caused by noise exposure while working for employer up to the time of the filing audiogram on January 27, 1997.¹ See Emp. Br. at 4-5. As the approved settlement is so limited, we affirm the administrative law judge's decision.

The Director next contends that the administrative law judge erred by discharging employer from liability for future medical benefits as it is contrary to the parties' settlement, which provides in relevant part at page 3, paragraph 0.8, "APL will remain responsible for claimant's reasonable and necessary future medical expenses arising out of this injury to the extent it may be liable for such expenses under the Act."² Employer agrees with the Director's challenge to the administrative law judge's order discharging it from future medical benefits and has no objection to the Board modifying the administrative law judge's order to reflect that employer is responsible for future medical expenses. Consequently, we modify the administrative law judge's order to hold employer responsible for the payment of claimant's reasonable and necessary future medical expenses in accordance with the parties' settlement agreement.

¹Employer states that this agreement does not settle any past or future potential claims for injuries other than hearing loss nor does it settle any future claims for hearing loss aggravation that may be based on noise exposure while working for employer after January 27, 1997. Emp. Br. at 4-5. Moreover, to the extent that the parties' agreement may have attempted to settle a claim not yet in existence, we note that this agreement could not preclude claimant from pursuing such a claim.

²In his Decision and Order, the administrative law judge incorrectly stated that the parties' settlement indicated an agreement to resolve claimant's claim for past and future compensation and medical benefits. Decision and Order at 2. The administrative law judge then ordered employer to pay claimant a lump sum of \$16,834.65, in settlement of all past and future disability compensation and medical care, *see* Decision and Order at 2, n. 1, and stated that payment of the sum shall discharge employer of all liability for past and future compensation, medical care and treatment, and attorney's fees and costs. *Id.* at 3, n. 3.

Accordingly, the administrative law judge's Decision and Order Approving Settlement, Awarding Benefits and Attorney Fees is modified to reflect that employer remains responsible for the payment of claimant's future medical benefits. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge