



BRB No. 17-0030

JOSEPH PANEK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIGOR SHIPYARD, INCORPORATED	)	
	)	DATE ISSUED: <u>Oct. 30, 2017</u>
and	)	
	)	
CHARLES TAYLOR ADJUSTING	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order Dismissing Claim for Lack of Jurisdiction of William J. King, Administrative Law Judge, United States Department of Labor.

David B. Condon (Welch & Condon), Tacoma, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Dismissing Claim for Lack of Jurisdiction (2016-LHC-00704) of Administrative Law Judge William J. King 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 review the administrative law judge's decision in this matter under an abuse of discretion standard. *See generally Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5<sup>th</sup> Cir. 1988); *Richardson v. Huntington Ingalls, Inc.*, 48 BRBS 23 (2014).

The facts and procedural history of this case are not in dispute. Claimant was injured on March 15, 1991, when he was struck in the head by a 16-foot steel beam in the

course of his employment with employer.<sup>1</sup> Claimant filed a claim under the Act, for which the parties submitted a 31-page Section 8(i) Settlement Agreement on December 13, 1994. 33 U.S.C. §908(i). Under the settlement agreement, claimant received a lump sum payment of \$35,000,<sup>2</sup> which was in addition to the \$14,668 already paid. The agreement was signed by claimant, claimant's attorney, claimant's former attorney, and employer's attorney. Administrative Law Judge Lasky approved the agreement on December 15, 1995, finding that the settlement was neither inadequate nor procured by duress. The approval of the settlement was not appealed to the Board.

On January 29, 2016, claimant, represented by different counsel, filed a petition to set aside the final order approving the settlement agreement on the ground that claimant was mentally incompetent at the time he entered into the settlement agreement. In support of his petition, claimant pointed out that the settlement agreement noted he had been evaluated by two neuropsychologists who diagnosed cognitive deficits. Further, he relied on the opinion of his now-treating physician, Dr. Rice,<sup>3</sup> who stated that claimant's 1991 work injury "left him with profound cognitive and psychological sequelae which rendered him incapable of understanding the settlement agreement and that he was not competent to sign the agreement in December 1994." CX 4 at 3.

Administrative Law Judge King (the administrative law judge) issued an order to show cause why this matter should not be dismissed for lack of jurisdiction to set aside a final order approving a Section 8(i) settlement. Claimant and employer responded to the order to show cause. The administrative law judge dismissed the claim for lack of jurisdiction on September 30, 2016.

On appeal, claimant challenges the administrative law judge's dismissal of his claim, asserting the administrative law judge has equity jurisdiction to reopen a settlement agreement. Claimant asserts he was mentally incapable of understanding the settlement agreement at the time he executed it and that the administrative law judge has jurisdiction to set aside the settlement under such circumstances. Employer responds to claimant's appeal, asserting that the administrative law judge's decision should be affirmed. Claimant filed a reply brief.

Section 8(i) of the Act, 33 U.S.C. §908(i), provides for the complete discharge of an employer's liability for further compensation when an application for settlement is

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<sup>1</sup> At the time of the injury, employer was known as Todd Pacific Shipyards.

<sup>2</sup> This sum included medical benefits.

<sup>3</sup> Dr. Rice began treating claimant in 2009 for severe post-traumatic stress disorder and marked impairment in short-term memory and executive function.

approved by the district director or administrative law judge. A settlement agreement must be approved by the fact-finder within 30 days of the submission of the agreement, unless the settlement is inadequate, was procured by duress, or is not in conformance with the regulatory criteria. 20 C.F.R. §§702.241-702.242. If the parties are represented by counsel, the settlement will be deemed approved unless specifically disapproved within 30 days after receipt of a complete application. 20 C.F.R. §702.243. Settlements are not subject to the Act's modification provisions. 33 U.S.C. §922 ("This Section does not authorize the modification of settlements."); *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5<sup>th</sup> Cir. 1986); *Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998); *Rochester v. George Washington University*, 30 BRBS 233 (1997). Similarly, settlements cannot be unilaterally rescinded after they have been approved. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.*, 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP*, 176 F.3d 484 (9<sup>th</sup> Cir.) (table), *cert. denied*, 528 U.S. 1052 (1999); *c.f. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT); *Rogers v. Hawaii Stevedores, Inc.*, 37 BRBS 33 (2003) (settlements are subject to rescission by the claimant until approved). Case precedent with respect to Section 8(i) settlements contains dicta suggesting that a settlement may be re-opened as a matter of equity if a party establishes that the settlement was fraudulently secured. *Downs v. Texas Star Shipping Co., Inc.*, 18 BRBS 37, 39-40 (1986), *aff'd sub nom. Downs v. Director, OWCP*, 803 F.2d 193, 200 n.15, 19 BRBS 36, 45 n.15(CRT) (5<sup>th</sup> Cir. 1986).

In addressing claimant's motion to set aside the 1995 settlement agreement, the administrative law judge initially observed that references to equity jurisdiction in the cases cited by claimant were dicta and that equity jurisdiction has never been invoked to reopen a final settlement under the Act. The administrative law judge found that cases have consistently declined to reopen settlements based on equitable arguments and stated that, pursuant to Section 22, settlements are not subject to the Act's modification provisions. He concluded, therefore, that there is a long-held policy favoring finality of settlements.<sup>4</sup> Order at 3-4. Further, the administrative law judge found that claimant was represented at the time he signed the settlement agreement, and that, in approving the

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<sup>4</sup> In this regard, the administrative law judge cited, inter alia, the decision of the United States Court of Appeals for the Fifth Circuit in *Downs*, 803 F.2d 193, 19 BRBS 36(CRT), in which the court expressed concern that the reopening of final settlements could create uncertainty as to an employer's release from liability and thereby promote reluctance to settle claims, which would undermine Section 8(i)'s intent of furthering fair and just settlements. Further, in declining to reopen the settlement in *Downs*, the court "observe[d] that the approval safeguards of Section 908(i) adequately protect the injured employee from overreaching and ignorance during settlement negotiations so that section 922 modifications are not necessary." Order at 3 (citing *Downs*, 803 F.2d at 200, 19 BRBS at 44(CRT)).

settlement, Judge Lasky specifically found it to be neither inadequate nor procured by duress. The administrative law judge also found that “[t]he settlement was approved nearly twenty-two years ago based on medical and other evidence, much of which is no longer available,” and that it is “highly unlikely” that a decision today, which would be based on “incomplete contemporaneous evidence, faulty long-term memory, and conflicting expert conjecture” would yield a “more sound or just” result. *Id.* at 4. Therefore, as claimant’s then-attorney and Judge Lasky had the benefit of contemporaneous evidence and fresher memories, and given the long-held policy favoring finality of settlements, the administrative law judge determined that equity considerations militate against jurisdiction in this case. Accordingly, the administrative law judge denied claimant’s motion to set aside the settlement. *Id.*

We affirm the administrative law judge’s finding that equity would not be served in this case by reopening the settlement agreement. Claimant’s appellate brief cites *Downs*, 803 F.2d 193, 19 BRBS 36(CRT), and several unpublished Board cases which assumed, *arguendo*, that equity jurisdiction may exist under the Act in cases of fraud, duress or mental incapacity. However, on appeal, claimant has not set forth sufficient legal bases from which it might be determined that jurisdiction in fact exists. Moreover, in rejecting claimant’s motion to reopen, the administrative law judge adequately addressed equitable considerations, including delay, finality, the approval safeguards of Section 8(i), claimant’s representation by counsel at the time he entered into the settlement, and the limitations of both new and incomplete contemporaneous medical evidence. With the exception of an assertion that his being represented by counsel at the time of the settlement does not prevent the order approving the settlement from being set aside,<sup>5</sup> claimant’s appellate brief does not address these findings. *See Lambert v. Atlantic & Gulf Stevedores*, 17 BRBS 68 (1985). As claimant has not demonstrated that the administrative law judge abused his discretion in addressing relevant equitable considerations, we affirm the denial of claimant’s motion to rescind the 1995 Order approving the settlement agreement. *Porter*, 31 BRBS 112; *see also Richardson*, 48 BRBS 23.

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<sup>5</sup> Specifically, claimant asserts the fact that he was represented at the time the settlement was approved “does not eliminate the necessity that the claimant be competent to understand the settlement agreement,” and “does not eliminate the necessity that a settlement not be procured under duress which would be the case where a claimant was unable to understand the settlement due to mental incapacity.” Cl. Br. at 14. This contention assumes that claimant’s alleged mental incapacity is the only relevant equitable consideration. Further, claimant’s contention fails to address the administrative law judge’s finding that Judge Lasky found the settlement to be neither inadequate nor procured by duress and, in so finding, had the benefit of contemporaneous evidence.

Accordingly, the administrative law judge's Order Dismissing Claim for Lack of Jurisdiction is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge