

8.10 SECTION 8(i) SETTLEMENTS

8.10.1 Generally

Section 8(i) of the LHWCA provides:

(1) 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. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

(2) If the deputy commissioner disapproves an application for settlement under paragraph (1), the deputy commissioner shall issue a written statement within thirty days containing the reasons for disapproval. Any party to the settlement may request a hearing before an administrative law judge in the manner prescribed by this Act. Following such hearing, the administrative law judge shall enter an order approving or rejecting the settlement.

(3) A settlement approved under this section shall discharge the liability of the employer or carrier, or both. Settlements may be agreed upon at any stage of the proceeding including after entry of a final compensation order.

(4) The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

33 U.S.C. § 8(i).

[ED. NOTE: The settlement of the underlying claims for the injured worker and a widow are separate. See, Abercrumbia v. Chaparral Stevedores, 22 BRBS 18 (1988) aff'd on recon. 22 BRBS 18 (1989) (A worker's claim for disability benefits and a survivor's claim for death benefits involve two separate and distinct rights.) ; Hampton Roads Stevedoring Corp. v. O'Hearne, 184 F.2d 76, 79 (4th Cir. 1950) ("When death occurs, a new cause of action arises."); International Mercantile

Marine Co. v. Lowe, 93 F. 2d 663, 664 (2d. Cir. 1938), cert. denied, 304 U.S. 565 (1938). See also *Travelers Ins. Co. v. Toner*, 190 F.2d 30 (D.C. Cir. 1951), cert. denied, 342 U.S. 826 (1951).]

The 1984 Amendments to the LHWCA completely reshaped the framework of Section 8(i). These modifications were, in part, given retroactive effect to cases pending on the date of enactment. Other subsections (e.g., Section 8(i)(4)) did not effect cases then pending but, rather, applied only to future cases. As a result, the LHWCA as it currently reads will apply to the vast majority of cases to be reviewed by the Office of Administrative Law Judges. Therefore, the discussion presented below will focus on the post-1984 LHWCA, regulations, and jurisprudence. See *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 776-77 n.3, 21 BRBS 33 (CRT) (5th Cir. 1988), for a comprehensive review of the legislative development of Section 8(i).

Section 8(i) allows for the disposal of claims vis-a-vis settlement agreement. The employer/carrier's liability will not be discharged unless the settlement agreement is approved by a district director or an administrative law judge. Such approval must be granted within 30 days from the date of submission, unless the agreement was procured through duress or is found to be inadequate. If the parties are represented by counsel, the settlement agreement will be deemed automatically approved if no action is taken after 30 days.

If a district director disapproves the settlement, any party may request a hearing before a judge. The ALJ shall then issue an order approving or rejecting the settlement. When one district director disapproves a Section 8(i) settlement, a second district director is without authority to rule on the same settlement agreement, pursuant to 20 C.F.R.. § 702.242. *Towe v. Ingalls Shipbuilding, Inc.*, 34 BRBS 102 (2000).

An approved settlement agreement discharges the liability of the employer/carrier. A settlement may be reached at any time, including after the entry of a final compensation order.

The Special Fund will not be liable for any portion of the settlement agreement reached between the claimant (or his dependents) and the employer/carrier. Nor will the Special Fund be liable for any voluntary payments by the employer/carrier prior to the settlement agreement.

Where the administrative law judge issues a compensation order under the LHWCA ratifying a settlement agreement, a "formal award" should be deemed to have been made and therefore the injured party can no longer bring a Jones Act suit for the same injuries. *Sharp v. Johnson Bros. Corp.*, 26 BRBS 59 (CRT) (5th Cir. 1992). But see Topic 1.4.6 "Jurisdictional Estoppel".

8.10.2 Persons Authorized

A claimant may only settle those claims in existence at the time of the agreement. Thus, the **agreement may not preclude all future claims** if the claims contemplated by the agreement are not vested in the claimant at the time of settlement. 20 C.F.R. § 702.241(g). See *Cortner v. Chevron International Oil Co., Inc.*, 22 BRBS 218 (1980); see generally *Abercrombia v. Chaparral*

Stevadores, 22 BRBS 18 (1988), order on recon., 22 BRBS 18.4 (1989); In reviewing a proposed settlement agreement, the district director or administrative law judge must be cognizant of loosely worded, broad terms covering settlement of future claims.

A Section 8(i) settlement does not cover an injury not specifically enumerated, even if the agreement includes language designed to encompass future claims. Clark v. Newport News Shipbuilding and Dry Dock Co., 33 BRBS 121 (1999).

In Dickinson v. ADDSCO, 28 BRBS 84, (1994), however, the Board stated:

Contrary to the Director's contention, the discharge of employer's potential liability for death benefits contained in the settlement agreement does not warrant the invalidation of the entire settlement agreement. The settlement agreement as a whole clearly indicates the parties' intention to settle the claim for a 15 percent binaural hearing loss in existence. Under these circumstances, we conclude that the administrative law judge's approval of the settlement is limited to the hearing loss claim before him.

In a footnote, the Board went on to explain that in a response brief the employer had conceded that the reference to death benefits contained in the settlement agreement was inadvertent and unintended, and that the parties, in accordance with Section 20 C.F.R. § 702.241(g) of the regulations, sought only to release claims related to the claimant's occupational hearing impairment and did not contemplate releasing a claim not yet in existence. Id.

The settlement of a related non-longshore action will not bar a later claim brought under the LHWCA, unless the settlement meets the requirements of Section 8(i). Ryan v. Alaska Constructors, 24 BRBS 65 (1990) (claimant's claim under LHWCA was not barred by a previous settlement of a Jones Act claim entered into with his employer, involving the same injury); see also Harms v. Stevedoring Servs. of America, 25 BRBS 375 (1992).

The reverse, however, is not true. Where a plaintiff pursued a Jones Act claim after having reached a settlement under the LHWCA for the same injuries, the **Fifth Circuit** affirmed the district court's decision that the entry of an order by the judge constituted a finding that the injuries were compensable under the LHWCA. Sharp v. Johnson Bros. Corp., 973 F.2d 423, 26 BRBS 59 (CRT) (**5th Cir.** 1992), cert. denied, 508 U.S. 907 (1993). The **Fifth Circuit** found that where the judge issues a compensation order under the LHWCA ratifying a settlement agreement, a "formal award" should be deemed to have been made, and the injured party no longer may bring a Jones Act claim. See Southwest Marine v. Gizoni, 502 U.S. 81, 26 BRBS 44 (CRT) (1991). By seeking and acquiescing to the findings, the **Fifth Circuit** found that the plaintiff was collaterally estopped from contesting LHWCA coverage. The **Ninth Circuit** position, however, is at variance. See Topic 1.4.6 "Jurisdictional Estoppel."

[ED. NOTE: Query: In light of Sharp and Ryan will the day come when a settlement of a Jones Act claim will bar a claim under the LHWCA? The answer to this question may well depend on the specific factual situation as well as the specifics of the settlement language.]

A death benefits claim shall be treated separately from the settlement of a compensation claim. Even where the claimant dies prior to the approval of the Section 8(i) settlement agreement, the claims are addressed independently. Nordahl, 842 F.2d at 786 (claimant's widow's death benefits claim was completely separate from the settlement and resolution of her husband's disability benefits case, and the settlement of the disability case had no bearing on the outcome of her death benefits claim).

The **Fifth Circuit** asserted in Nordahl that the amount received in a disability claim settlement will not be deducted from any death benefits claim that may be awarded later. Id. Further, as of 1987 (the effective date of the applicable regulations), "no compromise of death benefits can be included in a settlement of disability claims unless they too have vested in the spouse as a result of death of the uncompensated disability claimant." Id. (citing 20 C.F.R. § 702.241(g)). Section 702.241(g) of the regulations "explicitly prohibits settlement or compromise of the right to death benefits before it arises, i.e., before the death of the injured worker." Id. See 20 C.F.R. § 702.241(g).

In Estate of Moreno v. John Blutworth Marine, 26 BRBS 42 (ALJ) (1992) the judge found that a settlement will be deemed "inadequate" and procured by misrepresentation of a material fact wherein the fact that the employee is terminally ill is withheld from the employer/carrier.

The Board has held that a death benefits claim is distinguishable from a disability benefits claim. Cortner v. Chevron Int'l Oil Co., Inc., 22 BRBS 218, 220 (1989) (claimant's spouse could file a death benefits claim even though she signed her husband's settlement agreement). The Board explained that

[d]uring the employee's lifetime, [the spouse] has no right to file a claim for benefits and the statute does not authorize a person who is not a party to a disability claim to settle any potential or future survivor's claims. The amendments to Section 8(i) allow for the settlement of actual claims for benefits brought by survivors following the death of the employee. It is not until death occurs that the right to benefits arises and the potential beneficiaries are identified.

Id.

Further, 20 C.F.R. § 702.241(g) complements this provision of Section 8(i) in that "it implicitly states what is implicit in the statute--that settlement of a claim is limited to the rights of the parties and to claims then in existence." Id. (quotation omitted). Since a dependent does not

possess a vested right until death occurs, the settlement of a disability benefits claim by the claimant will not bar a subsequent death benefits claim.

Similarly, a Section 8(i) settlement cannot release the employer/carrier from potential liability for claims not yet in existence. Language completely releasing and discharging the employer/carrier from "all demands, actions, claims or rights to compensation which the claimant now has, or which may hereafter accrue" is **impermissible** and will not be approved. Lloyd v. Eller & Co., BRB No. 91-1370 (unpublished) (July 27, 1992) (emphasis added).

8.10.2(a) Jurisdiction over Settlement proceedings

Settlements are properly under the jurisdiction of both the district directors and the Office of Administrative Law Judges. Their jurisdictional grant flows from the Administrative Procedure Act which provides that "The agency shall give interested parties opportunity for...the submission and consideration of facts, argument, offers of settlement..." Clefstad v. Perini North River Associates, 9 BRBS 217,221 (1978); 5 U.S.C. §554(c)(1); 5 U.S.C. §556(c)(6).

The jurisdiction to hear and approve settlement offers is not concurrent in both offices. It initially rests with the district directors during the informal, pre-hearing, period. During this period the district director is wearing an administrative "hat" under which the district director's job includes approval or disapproval of settlements. Clefstad, 9 BRBS at 221. Once the case has been transferred to the Office of the Administrative Law Judges (OALJ) the district director's jurisdiction ends and sole jurisdiction resides with the OALJ. Id. However, "[w]here a case is pending before the ALJ but not set for a hearing, the parties may request the case be remanded to the district director for consideration of the settlement." 20 C.F.R. §702.241(c). The **Fifth Circuit** has made it clear in the *dicta* to Boone II that the authority to act pursuant to a claim transfers to the administrative law judge once there is a request for a hearing submitted to the district director. Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone], 102 F.3d 1385, 1389 (**5th Cir.** 1996), withdrawing 81 F.3d 561 (**5th Cir.** 1996), vacating and remanding, 28 BRBS 119 (1994) (Decision and Order on Recons.) (en banc) (Brown, J., concurring); Clefstad, 9 BRBS at 222. The District Director's authority to act will not be revived until such time as the claim is remanded back to his office.

8.10.3 Structure of Settlement

According to 20 C.F.R. §§ 702.242(a) and 702.242(b)(1), the settlement application must be a "self-sufficient" document that can be evaluated without reference to the administrative file, should be in the form of a stipulation signed by the parties, and must contain a full description of the settlement agreement. As a matter of law, an oral settlement agreement of a longshore claim made prior to the death of an employee is not binding on the parties. Estate of Moreno v. John Bludworth Marine, 26 BRBS 42 (ALJ) (1992).

Specifically, the settlement application must contain:

- (1) a full description of the terms of the settlement, which shall include the amounts to be paid to the claimant and itemized attorney fees (if appropriate; See Topic 8.10.7, infra);
- (2) the reason for the settlement and any disputed issues;
- (3) the claimant's date of birth (and any dependents' dates of birth if appropriate);
- (4) information on the claimant's ability to work, including his profile;
- (5) a current medical report that fully describes an injury-related impairment, as well as any unrelated conditions, and a statement regarding maximum medical improvement;
- (6) a statement explaining why the settlement amount is considered adequate;
- (7) a statement itemizing past medical expenses (e.g., past 3 years), along with the need for, and forecasted cost of, future medical expenses (if applicable) (these requirements may be waived by the district director or judge); and
- (8) information on any collateral source available for the payment of medical expenses.

Norton v. National Steel & Shipbuilding Co., 25 BRBS 79, 85-86 (1991); McPherson v. National Steel & Shipbuilding Co., 24 BRBS 224, 226 (1991), rehearing en banc, 26 BRBS 71 (1992); Lawrence v. Toledo Lake Front Docks, 21 BRBS 282, 284 (1988).

In Lawrence, the Board held that the district director's award of a lump sum payment could not be considered a settlement because the order did "not provide for the complete discharge of the employer's liability for payment of compensation, but rather state[d] that the file will be closed 'subject to the limitations of the Act or until further Order of the [district director].'" Lawrence, 21 BRBS at 284. The parties' intent was irrelevant in this instance. In McPherson, 24 BRBS at 227, the Board stated that "[T]he provision that an application contain a statement justifying its adequacy requires specific information justifying the amount agreed to by the parties...." Failure to submit a complete application will toll the 30-day time period for the automatic approval of the settlement. Norton, 25 BRBS at 85-86; McPherson, 24 BRBS at 228 (a proposed settlement was not automatically approved where the district director found it deficient 94 days after having received the proposed settlement).

In Nelson v. American Dredging Company, 143 F.3d 789 (3rd Cir. 1998), the **Third Circuit** held that the ALJ was correct in refusing to enforce a “settlement agreement” where, at most, there was only an “agreement in principle” to settle. The circuit court found that the parties never complied with the applicable regulations which describe in detail the procedures for, and the necessary content of, settlement applications under the LHWCA.

The Board has held that there is no requirement under the LHWCA that a specific statement be made within a settlement agreement that it is made pursuant to Section 8(i). Diggles v. Bethlehem Steel Corp., 32 BRBS 79 (1998).

Evidence submitted for the purpose of proving different and/or additional terms to the written settlement agreement is inadmissible. For instance, a party may not proffer evidence regarding the binding effect of an alleged verbal agreement. Thus, the combination of the regulations and the LHWCA make application of the parole evidence rule unnecessary. Norfolk Shipbuilding & Drydock Corp. v. Nance, 858 F.2d 182, 186, 21 BRBS 166 (CRT) (4th Cir. 1988), cert. denied, 492 U.S. 911 (1989). In Nance, the employer attempted to proffer evidence to prove that, as part of the settlement, the claimant's employment would be terminated. (See also Topic 48(a), *infra*, for this case's discussion of retaliation under Section 48(a) of the LHWCA.)

The parties may submit a settlement agreement covering solely compensation, solely medical benefits, or both compensation and medical benefits combined. 20 C.F.R. § 702.243(d). Where the parties desire to combine compensatory and medical benefits in a single settlement agreement, disapproval of one of the provisions will nullify the **entire** agreement. The parties may avoid this result by inserting a provision in the agreement which indicates that they agree to settle each portion independently. McPherson, 24 BRBS at 226-27 (claimant's representative signed the disability provision of the claim but not the medical benefits provision, thus subjecting the entire agreement to disapproval by the district director); 20 C.F.R. § 702.243(e). However, the separation clause should be used in conjunction with a clear delineation of what amounts apply to each category.

Lump sum payments are not required. Poole v. Ingalls Shipbuilding, Inc., 27 BRBS 230 (1993).

For there to be an enforceable Section 8(i) settlement, there must be a submission and approval of formal documents. When the parties reach a “settlement” via facsimile, and the claimant dies before the parties could prepare a formal Section 8(i) application, there is no enforceable settlement. See Estate of Henry v. Coordinated Caribbean Transport, 32 BRBS 29 (1998).

8.10.4 Time Frame

The district director or judge has 30 days to approve or disapprove the proposed settlement agreement. This period is calculated from the day after receipt, unless the parties are otherwise notified. If the last day falls on a weekend or holiday, the next regular business day will be counted.

20 C.F.R. § 702.241(f); 20 C.F.R. § 702.243(b). If the parties are represented by counsel, however, the settlement shall be deemed approved unless specifically disapproved within 30 days after receipt of a complete application. 20 C.F.R. § 702.243(b).

The parties may request that the case be remanded to a district director or a judge while it is pending at any level (e.g., administrative law judge, Benefits Review Board, circuit court) for review of a proposed settlement. The 30-day time period begins when the case is received by the district director or judge. 20 C.F.R. § 702.241(c).

The 30-day time period for automatic approval of a Section 8(i) settlement agreement only applies where both parties are represented by "**counsel**" as defined in 20 C.F.R. § 702.241(h), i.e., "any attorney admitted to the bar of any state, territory or the District of Columbia." Thus, a claims adjuster in a legal department, whose job duties include negotiating settlements of disputed liability, does **not** qualify as "counsel" for purposes of this provision. McPherson, 24 BRBS at 227-28.

8.10.5 Approval

As part of the 1984 Amendments to Section 8(i), Congress expressly empowered administrative law judges, in addition to district directors, to approve settlement agreements. The jurisdiction to approve a settlement is not concurrent. Prior to the assignment of the case to the OALJ the district director has the authority, following the assignment of the case the sole authority rests with the administrative law judge until such time as it is remanded to the district director. Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone], 102 F.3d 1385, 1389 (**5th Cir.** 1996), withdrawing 81 F.3d 561 (**5th Cir.** 1996), vacating and remanding 28 BRBS 119 (1994) (Decision and Order on Recons.) (en banc) (Brown, J., concurring). This amendment was in direct response to the **Fifth Circuit's** interpretation of the pre-1984 LHWCA, which held that administrative law judges lacked authority to approve Section 8(i) settlements.

The amendment granting this authority was made retroactive, i.e., it applied to cases pending on the date of enactment. Downs v. Director, OWCP, 803 F.2d 193, 198 n.10, 19 BRBS 36 (CRT) (**5th Cir.** 1986) (court acknowledged that Section 8(i) "clearly overrules" its decision in Ingalls Shipbuilding Division, Litton Systems v. White, 681 F.2d 275 (**5th Cir.** 1982), overruled in part on other grounds, Newpark Shipbuilding & Repair v. Roundtree, 723 F.2d 399 (**5th Cir.** 1984) (en banc), cert. denied, 469 U.S. 818 (1985)); Zierner v. Stone Boat Yard, 21 BRBS 74 (1988); Georges v. Todd Shipyards Corp., 20 BRBS 32 (1987); Blake v. Hurlburt Field Billeting Fund, 17 BRBS 14 (1985).

Claims examiners do not possess authority to approve settlement agreements. Norton, 25 BRBS at 84-85 (claims examiner's approval of "Withdrawal of Claim" agreement deemed complete legal nullity and without effect).

Under the 1984 Amendments to the LHWCA, the standard by which a district director or ALJ shall judge a settlement is whether it is "**adequate**" and "**not procured by duress.**" Although

the guarantee of protection of a claimant's interests were not extinguished entirely by the 1984 modification of standards, i.e., the court no longer considers the "best interests" of a claimant, the "paternalistic limits [were] lessened." Nordahl, 824 F.2d at 777. So long as the settlement is adequate and not procured through duress must be approved. Luna v. Army and Air Force Exchange Service, BRB Nos. 91-762 and 91-762A (May 30, 1996) (unpublished) (the district director does not have the authority to refuse acceptance because he does not agree with the wording or conditions). If this standard is met, the claimant will be precluded from seeking further benefits under the LHWCA for that injury. Olsen v. General Eng'g & Mach. Works, 25 BRBS 169, 171-72 (1991) (claimant was precluded from seeking rehabilitation services following an order approving his Section 8(i) settlement).

The **Fifth Circuit** explained that "any fair reading of the changes reveals that the policy was to strengthen worker protection against unwise settlement, while making approval mandatory, absent clear prejudice to future support for the worker and his or her dependents." Nordahl, 824 F.2d at 777. Thus, the protection afforded by the LHWCA is provided in the form of a change from a subjective evaluation of the claimant's "best interest" to one of "actuarial adequacy," i.e., an objective standard. Id. at 778.

In reviewing the settlement agreement, the district director or judge shall determine whether the amount is **adequate**. In doing so, he or she should consider all of the circumstances, including the probability of success if the case were litigated. The following criteria, although not an exhaustive list, should be considered:

- (1) the claimant's age, education and work history;
- (2) the degree of the claimant's disability or impairment;
- (3) the availability of the type of work the claimant can do; and
- (4) the cost and necessity of future medical treatment (where appropriate). 20 C.F.R. § 702.243(f).

Thus, although Congress specifically eliminated the term "best interests" as the standard to be employed, the district director or administrative law judge could probably accomplish the same result "objectively" through use of the above criteria. Note, however, that any discussion of "adequacy" must be tied to the actual settlement terms and facts. For example, the judge must decide whether a specific sum is "adequate" for future surgeries indicated in submitted medical reports.

In cases being paid pursuant to a final compensation order, where no substantive issues are in dispute, a settlement amount not equaling the present value of future compensation payments commuted, computed at the specified discount rate, must be considered inadequate. The parties have the opportunity, however, to show that the amount is, in fact, adequate. 20 C.F.R. § 702.243(g).

[ED. NOTE: 20 C.F.R. 702.243(g) references the auctions of 52-week Treasury Bills. However, the Treasury Department ceased the one-year auction as of February 2001. An alternative computation method has been suggested by OWCP. OWCP currently uses the weekly average one year constant maturity Treasury yield as published by the Federal Reserve System for the week proceeding the date of judgment. The current rate, in this regard, can be found at www.federalreserve.gov/releases/h15/current. Rates for past periods can be found at: www.federalreserve.gov/releases.H15/data/wf/tcmly.txt.]

If a district director or judge disapproves a proposed settlement agreement, he or she shall serve on all parties a written statement or order containing the reasons for the disapproval. 20 C.F.R. § 702.243(c). If a district director disapproves a proposed settlement agreement, any party to the agreement may request a hearing before a judge or submit an amended application to the district director. 20 C.F.R. § 702.243(c).

If a district director disapproves the settlement, any party may request a hearing before a judge. The ALJ shall then issue an order approving or rejecting the settlement. When one district director disapproves a Section 8(i) settlement, a second district director is without authority to rule on the same settlement agreement, pursuant to 20 C.F.R. § 702.242. Towe v. Ingalls Shipbuilding, Inc., 34 BRBS 102 (2000).

If the matter is referred to an ALJ, the issue becomes whether the application does, in fact, contain the requisite information for approval. The 30-day time period for automatic approval is tolled during this review. McPherson, 24 BRBS at 226 (after 94-day delay, district director found proposed settlement agreement to be deficient). If the judge disapproves the settlement agreement following a hearing, the parties may submit a new application, appeal to the Benefits Review Board, or proceed with a hearing on the merits of the claim. 20 C.F.R. § 702.243(c).

A Section 8(i) settlement, when approved, is the equivalent of a final adjudication as to the nature and extent of the claimant's injuries and the resulting liability assigned to the employer/carrier. Once the settlement is approved, the claimant is collaterally estopped from attacking the settlement. Vilanova v. United States, 851 F.2d 1, 6, 21 BRBS 144 (CRT) (1st Cir. 1988), cert. denied, 488 U.S. 1016 (1989) (settlement reached between claimant and employer was an administrative finding that claimant's injuries were compensable under LHWCA; by entering into settlement agreement, claimant chose not to contest coverage under LHWCA— because claimant did not choose to raise issue before DOL, he could not do so at subsequent hearing before the courts); Hoey v. Owens-Corning Fiberglass Corp., 23 BRBS 71, 73-74 (1989) (claimant's previous settlement, which included finding that he was permanently totally disabled, barred subsequent claim for permanent total disability filed due to further medical development related to asbestos exposure). See Sharp, 973 F.2d 423, 26 BRBS 59 (CRT).

An employer/carrier's liability is not discharged until the settlement is approved or disapproved by a decision and order issued by a district director or an ALJ. The one exception to this rule is in the case of the automatic approval provision noted above. 20 C.F.R. § 702.243(b).

The district director or judge must immediately serve by certified mail on all parties notice of any deficiency within the proposed settlement agreement. *Id.* The 30-day time period will be tolled until the deficiency is corrected.

8.10.6 Withdrawal of Claim/Settlement Agreement

A withdrawal of a claim may only be obtained for a proper purpose and when the withdrawal is in the claimant's best interests. *Henson v. Arcwell Corp.*, 27 BRBS 212 (1993). The Board has determined that the withdrawal of a claim in exchange for a sum of money is not a "proper purpose." "Where [a] claimant seeks to terminate his compensation claim for a sum of money, Section 8(i) settlement procedures must be followed." *Norton*, 25 BRBS at 83-84 (citations omitted) (claimant's subsequent claim was not barred by earlier "Withdrawal of Claim" agreement that was approved by claims examiner). (See Topic 8.11, *infra*, for a complete discussion of Withdrawal of Claim.)

The employer/carrier does not have the right to unilaterally withdraw from a settlement agreement that has been submitted to a district director or judge for approval. *Nordahl*, 842 F.2d at 773 (claimant died approximately one week after his settlement agreement was submitted to district director and employer attempted to unilaterally withdraw the settlement agreement prior to its approval); *Maher v. Bunge Corp.*, 18 BRBS 203, 204-05 (1986) (An "employee's death does not terminate the [district director's] authority to approve the settlement agreement.").

The **Fifth Circuit** noted that each of the parties has different rights under the settlement agreement. "The claimant's obligation under the contract--to accept the sum agreed upon and to waive the lifetime compensation otherwise payable under the terms of the LHWCA--is invalid when made and cannot become binding until and unless the contract is administratively approved." *Nordahl*, 842 F.2d at 779. This analysis is contrasted to that applied to the employer/carrier's rights: "The [employer/carrier's] obligation under the agreement--to pay the designated sum in exchange for a release of the liability that would otherwise result under the LHWCA's terms--is not rendered invalid by anything in the [LHWCA]." *Id.* The court acknowledged, however, that the employer/carrier's obligation is contingent upon the settlement being approved by a district director or judge. *Id.* at 780.

The consideration for the claimant's promise, as described above, is judged at the time the promise is made. The **Fifth Circuit** has explained that:

Though governing legal standards (such as administrative disapproval) may make a promise (to release future benefits upon receipt of an approved lump-sum payment) void or voidable, there is nothing that makes that promise invalid consideration at the time it is made. Restatement (Second) of Contracts § 78. And as long as there is valid consideration, there is nothing requiring mutuality of bargain even in unregulated contracts. *Id.* § 79.

Nordahl, 842 F.2d at 780. Thus, the LHWCA does not permit rescission by the employer/carrier after they offer the claimant the promise to pay if approval is granted. Id. In contractual terms, the settlement agreement reached between the parties is subject to a condition precedent, the condition being administrative approval.

Finally, the **Fifth Circuit** acknowledged the asymmetry of treatment afforded the parties in a Section 8(i) settlement agreement. Specifically, the claimant may rescind the agreement at any time prior to administrative approval, so long as either the district director or the judge agrees that the request is within conformance with §702.225(a). Downs v. Ingalls Shipbuilding, Inc., 30 BRBS 99,100 (1996); Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone], 102 F.3d 1385, 1398 (**5th Cir.** 1996), withdrawing 81 F.3d 561 (**5th Cir.** 1996), vacating and remanding 28 BRBS 119 (1994) (Decision and Order on Recons.) (en banc) (Brown, J., concurring); Porter v. Kwajalein Services, Inc., 31 BRBS 112 (1997) aff'd on recon., 32 BRBS 56 (1998) (claimant can not unilaterally rescind the settlement **after it was approved** by the administrative law judge. Only “possible” option for reconsideration is within 10 days of the settlement’s approval.).

[ED. NOTE: But see Topics 8.10.8.1 and 8.10.8.2, infra]

The general practice is to have the request for dismissal filed with the district director; however, if the case has been assigned to an ALJ then the judge must rule on the motion as the district director retains no authority to act on the claim once an application for a hearing before an ALJ has been filed. This is contrasted with the employer/carrier which is bound by the agreement after it is submitted for approval. Nordahl, 842 F.2d at 781 ("The unambiguous purpose of allowing Claimants to withdraw from submitted, but unapproved, settlements and of the approval requirement itself ... clearly is protection of the claimant's, and the public's, interest in preserving them and their families from destitution and consequent reliance on the taxpaying public.").

The only exception to this rule is that the employer/carrier may bargain for a provision in the agreement that expressly allows the employer/carrier to rescind the agreement prior to approval. Id. at 782. The asymmetry of treatment existed prior to 1984 and was carried through by the 1984 Amendments. Id. at 781.

The situation described above is contrasted to the scenario where the Section 8(i) settlement agreement has been signed by the parties but is not yet submitted for approval. In that instance, the employer/carrier may unilaterally rescind the agreement. Fuller v. Matson Terminals, 24 BRBS 252, 255 (1991) (valid settlement agreement did not exist because employer rescinded settlement after claimant died, but prior to agreement being submitted to district director or ALJ).

In Hargrove v. Strachan Shipping Co., 32 BRBS 11, aff'd on recon. 32 BRBS 224 (1998), Claimant sought withdrawal of his claim for benefits “after the parties seemingly reached an agreement as to the amount of compensation.” The ALJ denied the request upon concluding that “no settlement agreement was submitted for approval, and no compensation order was issued approving the settlement or adjudicating claimant’s claim.” Fourteen years later, Claimant sought additional

compensation and medical benefits for disability arising out of the 1971 injury. The Board held that a “withdrawal request ... based on the exchange of a sum of money is not a valid purpose for withdrawal.” As a result, because the original claim had never been finally adjudicated, i.e., no settlement approved or withdrawal request granted, the Board held that the ALJ erred in “finding that he could not ‘reopen’ the claim”

8.10.7 Attorney Fees (see also Topic 28, *infra*)

If the parties desire to settle attorney's fees as part of the complete settlement agreement, either a petition for attorney's fees or a fully itemized table of hours must be included with the proposed settlement as required by 20 C.F.R. § 702.132. 20 C.F.R. § 702.242(b)(1); Carswell v. Wills Trucking, 13 BRBS 340, 343 (1981). If the settlement agreement is automatically approved due to inaction after 30 days, as provided in 20 C.F.R. § 702.241(d), it shall also be considered approved within the meaning of Section 28(e). 20 C.F.R. § 702.241(e).

8.10.8 Finality of Settlement

8.10.8.1 Section 22 Modification

In addition to the 1984 Amendments affecting Section 8(i), Congress also modified Section 22. A new final sentence was added to that section which provides: "This section does not authorize the modification of settlements." Unlike the amendments to Section 8(i), the Section 22 amendment was not made retroactive, i.e., it did not apply to claims pending on the date of enactment. The **Fifth Circuit** has reasoned that:

To allow reopening of final settlements through [Section 22] actions could create uncertainty as to an employer's release from liability and thereby promote reluctance to settle claims. Such a result would frustrate the very purpose of [Section 8(i)], i.e., the fair and just settlement of claims in the employee's best interest.

Downs v. Director, OWCP, 803 F.2d 193, 200 (**5th Cir.** 1986).

Following the acceptance of payments associated with an approved pre-1984 settlement, the claimant in Downs unsuccessfully moved for reconsideration on two occasions and then filed a Section 22 modification request. Although the court acknowledged that this case did not involve a post-amendment settlement, its reasoning applies to post-amendment cases. The court went on to state that "the approval safeguards of [Section 8(i)] adequately protect the injured employee from overreaching and ignorance during settlement negotiations so that [Section 22] modifications are not necessary." Id.

Following the **Fifth Circuit**, the **District of Columbia Circuit** noted that the amendment to Section 22 did not alter the pre-1984 meaning of Section 22. Rather, "the amendment merely

made express ... the meaning of [Section 22], as enacted and reenacted since 1927." Bonilla v. Director, OWCP, 859 F.2d 1484, 1485-86, 21 BRBS 185 (CRT) (**D.C. Cir.** 1988) (claimant sought to modify approved pre-1984 settlement via Section 22 modification). See also Olsen, 25 BRBS at 171; Lambert v. Atlantic & Gulf Stevedores, 17 BRBS 68 (1985). (See also Topic 22, infra, Modification of Awards.) The Board has held that Section 8(i) settlement agreements are final under the LHWCA and may not be reopened pursuant to Section 22, even in its pre-1984 form or for equity. Rochester v. George Washington University, 30 BRBS 233, 235 (1997); see also Bonilla v. Director, OWCP, 859 F.3d 1484, 1486, 21 BRBS 185, 188 (CRT) (**D.C. Cir.** 1988), amended, 866 F.2d 451 (**D.C. Cir.** 1989); Downs v. Director, OWCP, 803 F.2d 193, 201, 19 BRBS 36, 45 (CRT).

In Rochester, while addressing whether or not the Board had the “equitable power” to reopen a settlement the Board noted that it is not a “court.” Kalaris v. Donovan, 697 F.2d 376, 381 (**D.C. Cir.**), cert. denied, 462 U.S. 1119 (1983); see also Metropolitan Stevedore Co. v. Brickner, 11 F.3d 887, 27 BRBS 132 (CRT) (**9th Cir.** 1993). The Board stated:

The “subject matter jurisdiction of the [administrative law judge] and the Benefits Review Board is confined to a right created by Congress” and the Board does not “possess all ordinary powers of the district court.” Schmit v. ITT Federal Electric Int’l, 986 F.2d 1103, 1109, 26 BRBS 166, 173 (CRT) (**7th Cir.** 1993); see generally Washington Legal Foundation v. U.S. Sentencing Commission, 17 F.3d 1446, 1448-49 (**D.C. Cir.** 1994). Thus, the Board does not have the “equitable” power to overturn the settlement agreement of the parties or the compensation order approving same, as the Board’s authority is statutory.

Rochester, 30 BRBS at 235.

While there is no definite holding that Section 8(i) settlements are final when approved and filed, one can readily reach such a conclusion. This naturally excludes settlements set aside because of fraud or duress, or arguably, because of lack of mental capacity. See generally Topic 8.10.8.2, infra.

The language of Section 8(i) itself supports such a conclusion: “No liability of any employer, carrier, or both for medical disability, or death benefits shall be discharged unless the application for settlement is approved by the [district director] or administrative law judge.” 33 U.S.C. 908(i). Thus, approval is equivalent to discharge of liability.

Also, Section 8(i)(3) is noteworthy: “A settlement approved under this section shall discharge the liability of the employer or carrier, or both. Settlements may be agreed upon at any stage of the proceeding including after entry of a final compensation order.” Again, implicit in this language is the fact that a settlement is equivalent to discharge.

The Regulations also support this view: “The liability of an employer/insurance carrier is not discharged until the settlement is specifically approved by a compensation order issued by the

adjudicator.” 20 C.F.R. §702.243(b). Settlement is defined as fixing or resolving conclusively, to make or arrange for final disposition. Black’s Law Dictionary 1231 (5th ed. 1979).

[Editor’s Note: One can argue that without the expectation of finality, parties would not embrace the settlement process.]

If settlements are not, *per se*, final when approved and filed, arguments can be made that the general 10 day rule for requesting reconsideration (20 C.F.R. §802.206) or the 30 day rule for appealing (Section 21(a)) would be effective. Section 802.206 refers to having 10 days to file for reconsideration after the date of the “decision and order” being filed. Section 21(a) speaks in terms of a “compensation order” becoming effective when filed. The regulations governing settlements also speak in terms of a settlement being approved by a “compensation order issued by the adjudicator.” 20 C.F.R. §702.243(b).

[ED. NOTE: Though a settlement may not be modified using Section 22, Diggles v. Bethlehem Steel Corp., 32 BRBS 79 (1998) and Porter v. Kwajalein Services, Inc., 31 BRBS 112 (1997), aff’d on recon., 32 BRBS 56 (1998); one administrative law judge has held that it may be modified under a Section 21 motion for reconsideration. Hamilton v. Maersk Container Services, 32 BRBS 579 (ALJ) (1998). There are situations where the Board has found that a “settlement,” approved by the district director, should be subject to a Section 22 modification for a change in condition. Narvell v. Bethlehem Steel Corp., (BRB No. 92-731)(Dec. 29, 1994)(Unpublished). The Board reasoned that there was an incomplete discharge of the employer’s liability and no finding of the award’s adequacy so it did not constitute an 8(i) settlement which would be outside of the scope of a modification order. In Floyd v. Penn Terminals, Inc., (BRB No. 98-1556)(Aug. 4, 1999)(Unpublished), the Board vacated the ALJ’s Decision and Order Approving a Section 8(i) Settlement based on the fact that the application lacked a statement as to why the proposed settlement was adequate as required by Section 702.242(b)(6). The Board found the application in Floyd to be deficient as a matter of law and unable to receive approval. McPherson v. National Steel & Shipbuilding Co., 24 BRBS 224 (1991), aff’d on recon. en banc, 26 BRBS 71 (1992).]

8.10.8.2 Setting Aside Settlements

Settlements can be set aside if procured through fraud or duress. By inference from Section 11 of the LHWCA, settlements seemingly can also be set aside if the claimant lacks the mental capacity to comprehend what a settlement entails, unless the claimant has a court appointed guardian or representative. The language of Section 11 fits with the policy of setting aside Section 8(i) settlements for fraud or duress. If the claimant lacks the requisite mental capacity to understand the settlement, then one can reasonably argue that it will have been signed under pressure and a lack of understanding which amount to the functional equivalent of duress.

[Editor’s Note: The personal representative noted above should be distinguished from the claimant’s legal representative or attorney.]

Thus, unless there is a court appointed guardian, **if there is an allegation of mental disability/disorder, or if the claimant's mental condition is noted in the submitted documentation**, the judge should request a psychiatric/psychological report stating that the claimant does have the requisite mental capacity to comprehend and enter into the Section 8(i) settlement. Such report should also state that the claimant has the ability to administer a lump sum settlement, unless, a guardian or trust fund is utilized.

Where a **settlement was linked with an LS-33 Section 33(g) waiver**, an ALJ has found the settlement to be a binding agreement which was not subject to disapproval and therefore, had to be reinstated. Casciani v. St. John's Shipyard, ALJ Case No. 2000-LHC-2595(June 14, 2001). Here the ALJ found that the employer's execution of the LS-33 Section 33(g) waiver was inextricably intertwined with a Section 8(i) settlement. Although the waiver itself contained no contingency, the judge found that the parties mutually intended to enter into a settlement which embodied the employer's waiver of its lien against the proceeds of the third-party settlement along with a payment to the claimant. Besides finding that the settlement was binding the ALJ found that the LS-33 was to also remain in full force and effect with respect to the proceeds fo the third party settlement.

[ED. NOTE: In Casciani, there had been temporary procedural problems involving the third-party settlement. Eventually, not only were these resolved, but there was an additional "bad faith" settlement for an additional \$750,000 pursuant to a cause of action arising out of the third party's handling of the claim, not the underlying basis for the claim.]

8.10.9 Section 8(f) Relief

Where a claimant and employer/carrier enter into a Section 8(i) settlement, and the claimant suffers a subsequent injury that would provide the employer/carrier with Section 8(f) relief, the Special Fund receives the **credit** for the previous settlement, not the employer/carrier. By granting the credit to the employer/carrier, the employer/carrier would be able to avoid liability for the additional loss associated with the claimant's subsequent injury.

Allowing the Special Fund to apply the credit against its liability acknowledges that the settlement was for the first claim, the percent of which the Special Fund is liable. Davis v. General Dynamics Corp., 25 BRBS 221, 227 (1991) (employer sought credit for a previous settlement for a hearing loss claim that would have allowed it to escape the liability associated with claimant's subsequent claim for increased hearing loss).

The Board has addressed the issues of an employer/carrier's ability to seek Section 8(f) relief after entering into a Section 8(i) settlement with the claimant, and whether the Special Fund may be held liable under the terms of that Section 8(i) settlement. As the Board noted, the 1984 Amendments added Section 8(i)(4) to the LHWCA, which holds, in part, that:

The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement....

Brady v. J. Young & Co., 17 BRBS 46, 49 (1985).

Thus, Section 8(i)(4) will preclude post-settlement Section 8(f) relief after the date of enactment. See also Brady v. J. Young & Co., 18 BRBS 167, 170-71 n.5 (1985) (affirming on reconsideration decision regarding lack of retroactive effect of § 8(i)(4)). The Board went on to state, however, that the provision does not apply to cases that were pending on [appeal on] the date of enactment, i.e., the subsection was not afforded retroactive application. Brady, 17 BRBS at 52. Specifically, the Board stated "[w]e hold that in pending cases not affected by the provisions of the 1984 Amendments to the Act employer may seek Section 8(f) relief before an administrative law judge after entering into a settlement with claimant, but such a settlement is not controlling on the special fund's liability if Section 8(f) relief is obtained." Id. at 49.

Therefore, for cases pending on the date of enactment, "an [employer/carrier] may enter into a binding settlement with the claimant resolving all issues regarding [employer/carrier's] liability to claimant, while retaining the ability to pursue Section 8(f) relief before an administrative law judge." Id. at 53.

In Brady, a case pending when the 1984 amendments were enacted, the Board noted that any settlement reached between the employer/carrier and the claimant binds only those parties unless the Director participates in the settlement negotiations. Brady, 17 BRBS at 53; Byrd v. Alabama Dry Dock and Shipbuilding Corp., 27 BRBS 253 (1993) (ALJ can not bind the Special Fund in an 8(i) settlement unless the Director is made a party to the case).

JED. NOTE: *A careful reading of the ALJ's opinion in Byrd indicates that there was an adjudication of the compensation issue in Byrd and that only the issue of medical benefits was intended to be settled. Byrd v. Alabama Dry Dock and Shipbuilding Corp., (Docket No. 91-LHC-262)(1991)(Unpublished). The parties (claimant and self-insured employer) filed a "Joint Stipulation of Suggested Findings of Fact and Conclusions of Law which was supplemented by a filing entitled "Joint Submission of Evidence and Joint Waiver of Formal Hearing." Both filings showed service upon the Regional Solicitor and the District Director. No formal objections were filed. The ALJ adopted the stipulations, findings of fact and conclusions of law. The joint stipulation also contained an agreement to settle the claimant's claim for future medical benefits. This agreement was treated as a Section 8(i) settlement agreement. (Medicals can be settled without settling compensation.)]*

"[T]he controversy between [employer/carrier] and the Director, as guardians of the special fund, is a totally separate matter in which claimant has no interest.... There is therefore no legal conflict created in allowing an [employer/carrier] who [has] settled all disputes with claimant to assert [its] rights against the special fund." Brady, 17 BRBS at 53. The Director, however, is not

bound by the terms of the settlement agreement reached between the claimant and employer/carrier. As such, the employer/carrier must place all aspects of entitlement, i.e., not only the Section 8(f) issue, before the judge for resolution. *Id.* at 54-55. (See also Topic 8.7.0, *supra*, Disability: Limitation of Compensation.)

In Strike v. S.J. Groves and Sons, 31 BRBS 183 (1997), *aff'd mem. sub nom. S.J. Groves & Sons v. Director, OWCP*, 166 F.3d 1206 (3d Cir. 1998) (Table), a Section 8(i) settlement case, the Board expanded on the rationale in Brady. Liability for the Special Fund is directly tied into the employer's liability following the outcome of a trial. The basis for this liability revolves around the issues of nature and extent of liability, average weekly wage, and causation. As a result these issues must be litigated in order for the Fund to be responsible, as the case law recognizes that the Fund should only be liable where all ambiguity has been resolved by a fact finder. The Board went on to state that unlike the absolute defense of Section 8(f)(3), the Director is not required to take direct action to oppose the **settlement** under Section 8(i)(4). As a matter of law, Section 8(i)(4) voids settlement provisions either reserving or setting liability on the Fund.

In Cochran v. Matson Terminals, Inc., 33 BRBS 187 (1999), the Board found that where a Section 8(i) settlement is entered into, no Section 8(f) relief is allowed. "An employer enters into a settlement agreement at the time the parties execute the document, and not at the time it is administratively approved." In Cochran the Board rejected the employer's argument that Strike applies only where Section 8(f) is requested after the settlement is approved. In Cochran, the simultaneous submission of a settlement agreement and the stipulations and exhibits in support of the employer's claim for Section 8(f) relief foreclosed the ALJ's consideration of the request for Section 8(f) relief. There is no mechanism in the LHWCA to permit the tolling of the 30 day automatic approval period while the ALJ adjudicates a claim for Section 8(f) relief. Cochran at 191.

In Nelson v. Stevedoring Services of America, (BRB No. 99-1056)(May 10, 2001)(Unpublished), *re-affirm'g*, 34 BRBS 91 (2000), the Director was provided the opportunity to defend, and in fact, conceded the liability of the Special Fund prior to the time that a settlement agreement was entered into by the parties. The Board originally held that the purpose of Section 8(i)(4) had been satisfied and the employer was entitled to Section 8(f) relief. In Nelson the Director made his pre-hearing concession when he thought the case in chief was going to be decided at hearing. Soon after the hearing began, the proceedings turned into a settlement conference. Subsequently the ALJ approved the settlement agreement and awarded Section 8(f) relief. The Board had found that the Director was now precluded by equitable estoppel from altering his position which he had consciously made and articulated to the ALJ well before the time the Section 8(i) agreement was made. (The conditions precedent for conceding the employer's entitlement to Section 8(f) relief stated by the Director were met during the ensuing "adjudication" of this case.)

On Reconsideration, the Director argued that the agreement was not a stipulation, but rather was a settlement and therefore, the employer's settlement of its liability extinguished, as a matter of law, the Special Fund's derivative liability pursuant to Section 8(i)(4). In re-affirming its original ruling, the Board held that even if the ALJ's decision was an approval of a settlement (rather than approval of stipulations), "the peculiar facts of this case nevertheless support the [ALJ's] finding that Section 8(f) relief is appropriate."

[ED. NOTE: In Nelson, the Board opined that an order based on stipulations accepted into the record is subject to "normal standards of proof." See also, Director v. Coos Head Lumber & Plywood Co. (Ibarra), 194 F.3d 1032 (9th Cir. (1999), originally unpublished at 156 F. 1236 (9th Cir. 1998)(table); E. P. Paup Company v. Director, OWCP (McDougall), 999 F.2d 1341 (9th Cir. 1993) (agreements between an employer and a claimant that affect the liability of the special fund cannot be used against Director who is the only party with a real interest in protecting the financial integrity of the special fund).

Section 8(i) settlements are distinguishable from stipulations in another way. In Lawrence v. Toledo Lake Front Docks, 21 BRBS 282 (1988), the Board held that it was error below to construe the deputy commissioner's order as a Section 8(i) settlement. Rather than making findings regarding whether the compensation awarded was in the claimant's best interests or completely discharging the employer's liability, the order merely stated that the file would be closed "subject to the limitations of the Act or until further Order of the deputy commissioner." Thus, in Lawrence, the Board held that the order constituted an award based upon the agreements and stipulations of the parties pursuant to 20 C.F.R. § 702.315. Such awards [stipulations] are subject to Section 22 modification because they do not provide for the complete discharge of employer's liability or terminate claimant's right to benefits. See also Ramos v. Global Terminal & Container Services, Inc., 34 BRBS 83(2000)(compensation order issued by district director and based on stipulations can subsequently be modified via a § 22 modification request); Bonilla v. Director, OWCP, 859 F.2d 1484 (D.C. Cir. 1988); Downs, 803 F.2d 193; House v. Southern Stevedoring Co., 703 F.2d 87 (4th Cir. 1983), *aff'g* 14 BRBS 979 (1982); Stock v. Management Support Assocs., 18 BRBS 50 (1986).]

[ED. NOTE: For more on settlements and stipulations involving Section 8(f), see Topic 8.7.9.6 Section 8(f) Relief-- "The Effect of Settlements and Stipulations."]

8.10.10 Checklist for §8(i) Settlement Applications

_____ **Self-sufficient.**

_____ **A stipulation signed by all parties.**

_____ **Contains a brief summary of the facts.**

- | | |
|--|----------|
| a) description of the incident | yes / no |
| b) description of the nature of the injury | yes / no |
| c) degree of impairment | yes / no |
| d) degree of disability | yes / no |

_____ **Compensation.**

- | | |
|---|----------|
| a) summary of compensation paid, and | yes / no |
| b) compensation rate | yes / no |
| or | |
| c) Where no benefits have been paid the average weekly wage | yes / no |

_____ **Contains a full description of the terms of the settlement.**

- | | |
|--|----------|
| a) amount for compensation | yes / no |
| b) amount for medical benefits | yes / no |
| c) amount for survivor's benefits | yes / no |
| d) amount for attorney's fees | yes / no |
| - itemized in accordance with §702.132 | |

_____ **Contains the reason for the settlement and any issues still in dispute**

_____ **The Claimant's:**

- | | |
|--|----------|
| a) date of birth | yes / no |
| b) date of death, and a list of dependents
(<u>in a death benefits claim</u>) | yes / no |

_____ **The Claimant's employment status**

- | | |
|--|----------|
| a) claimant is working (or is capable of working) | yes / no |
| b) claimant's educational level, work history, other
factors that could effect future employability | yes / no |

_____ **Current medical report:**

- | | |
|---|----------|
| a) describes injuries relating to impairment | yes / no |
| b) describes any other unrelated conditions | yes / no |
| c) has maximum medical improvement been reached | yes / no |
| d) is there anticipated future disability or needed treatment | yes / no |

_____ **Statement of why settlement is adequate.**

_____ **Statement that the settlement was not procured under duress.**

_____ **If mental disability or incompetence alleged:**

- a) is there medical opinion/report as to claimant's capacity to understand the consequences of entering into a settlement yes / no
- b) is there an indication that the claimant can administer a lump sum settlement yes / no
- c) if the answer to a) or b) is negative, is there a court appointed guardian or personal representative, separate and distinct from the claimant's legal counsel yes / no

_____ **If medical benefits are covered in settlement then:**

- a) an itemized list of amounts paid for medical expenses in the three years prior to the date of the application yes / no
- b) an estimate of the claimant's need for future medical treatment and the cost of the treatment which should indicate the inflation factor and/or the discount rate yes / no

_____ **Information on any collateral sources available to pay medical expenses.**

Comments:

8.10.11 AGREEMENTS and CLAUSES RESTRICTING EMPLOYMENT

There has been a recent trend in Section 8(i) settlement agreements to add clauses voiding a claimant's right to return to previous employment, or other employment with the settling employer. Several variations have been put forward. For instance, one agreement has the claimant agreeing that he will resign his employment and not seek reinstatement or re-employment with the prior employer or any of its affiliates. Another version contains a proviso that if the claimant becomes able to perform longshore work in the future, and in fact performs such work for the employer, the claimant shall repay to employer a certain percentage of the lump sum previously given to the claimant in the settlement agreement. This version generally contains a "sliding scale" percentage to be re-paid, depending on when the claimant seeks re-employment.

These restrictive employment agreements generally include language to the effect that the claimant agrees that the settlement agreement approved in the matter is good and sufficient cause for the employer or any of its affiliates to reject any application for employment, reinstatement or re-employment submitted by the claimant. Similarly, it might state that "this provision is deemed fair and reasonable given that the settlement lump sum is based on the representation by the claimant that he is permanently precluded from performing longshore work in the future and that as a result, has suffered a permanent loss of wage earning capacity."

There is limited jurisprudence in this area. In Hanno v. Stevedoring Services of America, 29 BRBS 868(ALJ)(1995), the ALJ held that (1) such an agreement did not conflict with Section 22 of the LHWCA; (2) the settlement was not "inadequate" although it leaves the total monetary payment indeterminate, because it reduces the overall level of uncertainty by allowing for future contingencies concerning other relevant factor;. and (3) such an agreement does not indirectly authorize discrimination prohibited by the provisions of Section 48(a) of the LHWCA. Hanno was **not appealed**.

There is one published Board decision in which the Board did suggest in *dicta* that, if motivated by animus, the termination of a worker's employment can be found to have violated Section 48(a) even if the worker expressly agreed to the termination as part of a settlement agreement. Nance v. Norfolk Shipbuilding and Dry Dock Corp., 20 BRBS 109, 113 n.3 (1987), aff'd sub nom. 858 F.2d 182 (4th Cir. 1988), cert. den. 492 U.S. 911 (1989). In this regard, it is noted that the majority of the members of the **Fourth Circuit** panel that upheld the Board's decision in Nance specifically declined to address this aspect of the decision because there was no reference in the settlement documents to any agreement concerning termination of the claimant's employment. 858 F.2d at 185 n.4. Moreover, the one member of the panel who did address the issue vigorously disagreed with the Board's statement and set forth a detailed discussion which concluded that Subsection 8(i) agreements can lawfully contain provisions that would otherwise violate Section 48(a). Nance, 858 F.2d at 187-90.

The ALJ in Nance had found that the employer violated Section 48(a) of the LHWCA in that claimant's termination was discriminatory. He further found that the employer's concededly standard practice of seeking voluntary-quit agreements from employees obtaining settlements indicated the retaliatory intent necessary for there to be a Section 48(a) violation. In Nance, the ALJ had refused to allow the employer to submit evidence as to an alleged verbal agreement between the claimant and employer that claimant would quit his job after the approval of the Section 8(i) settlement. The ALJ had concluded that the parties' settlement application constituted an "integrated agreement incorporating into a single written memorial all prior negotiations" and that admission of the testimony which the employer sought to introduce was thus precluded by the parol evidence rule. However, testimony from the employer's officials which was allowed in, did indicate that the employer routinely sought to procure employees' agreements to quit voluntarily when entering into settlements of their work-related claims and that the reason for this was that employees who have pursued and sought settlements of their disability claims are generally regarded with disfavor.

[ED. NOTE: One can argue that "voluntary-quit" agreements fly in the face of the spirit of the LHWCA as well as of the Americans with Disability Act (ADA). The "second injury" provision of the LHWCA, Section 8(f), clearly shows the intent of the LHWCA is to keep injured workers in the labor force whenever possible. The ADA has a similar goal. Public policy generally supports such a conclusion. Looking at this issue in the broadest terms possible, if "voluntary-quit" agreements are legal, binding agreements under the LHWCA, several questions will need to be addressed in time. For instance, if a claimant eventually secures other "covered employment with another LHWCA employer and is again injured, how does one determine his suitable alternate employment or wage earning capacity in relation to the subsequent injury when there is a "contractual" yet non-realistic barrier to employment at his first LHWCA employer? More disturbingly, suppose after the claimant enters into the "voluntary-quit" agreement, he can not find any other employment (other than working for the employer he has now "contracted" out of working for), is his well-being now a general social concern? And finally, one must eventually address the question as to whether "duress" was involved in entering a Section 8(i) settlement containing a voluntary-quit clause in the first instance, especially when an employer makes it an iron clad rule, "no clause, no settlement."]

8.10.12 ALTERNATIVE DISPUTE RESOLUTION

The Office of Administrative Law Judges has instituted a **settlement judge procedure**. Detailed information regarding the OALJ settlement judge procedure is located on the OALJ Internet Home Page at <http://www.oalj.fol.gov>. Specifically, the authority to appoint a settlement judge is defined at 29 C.F.R. § 18.9. Both parties must agree to the appointment of a settlement judge. 29 C.F.R. § 18.9(e)(2). A **request for an appointment should be made jointly and in writing, on OALJ's official form**. The form can be found on the web site or requested from any field office. It should be forwarded to the appropriate District Chief Judge (or Associate Chief Judge if it is a Washington, D.C. area case) or his/her law clerk, along with a copy of the service sheet the parties have received in reference to the case. Once the request is made, the District Chief Judge (or Associate Chief Judge) will issue an Order of Appointment informing the appropriate parties as to the identity of the settlement judge. A firewall is kept between the settlement judge and the presiding judge (judge who will hear the case if the matter does not settle.).

All discussions between the parties and the settlement judge shall be **off-the-record**. The entire settlement process shall be **confidential and not discoverable**. See 29 C.F.R. § 18.9(e)(8).

Many settlement judges perform settlement **conferences** without the aid of the case file. However, in the event that the settlement judge wishes to view the case file, he/she must request it from the presiding judge (or the Chief Judge's law clerk if no presiding judge has been assigned). The preferred mode of settling cases is by way of telephone conference calls, often requiring more than one phone call. However, such convenience may, in reality, not be an option or the best choice for settling a particular case. Nonetheless, prior to the scheduling by the settlement judge of a personal settlement conference, the judge will contact the parties by way of a telephone conference call in order to make sure that the parties are serious about settlement. See 29 C.F.R. § 18.9(e)(7).

Upon conclusion by the settlement judge of his/her role, the presiding judge (or the Chief Judge if no presiding judge is appointed) shall be notified within seven days so that the matter may proceed (be it approval of the settlement agreement, assignment of the case, or scheduling of a hearing). See 29 C.F.R. § 18.9(e)(10).

A settlement agreement arrived at with the help of a settlement judge shall be treated by the presiding judge or Chief Judge as would be any other settlement agreement. See 29 C.F.R. § 18.9(e)(11). Accordingly, the proposed agreement shall be submitted to the presiding judge or the Chief Judge if no presiding judge is assigned. 29 C.F.R. 21 18.9(c).