When are claimant and defense counsel adequate to propose settlements in Longshore cases?

By Matthew Fisher and Scott P. Kennedy • April 8, 2015

Often viewed as "paternalistic" in nature, the Longshore and Harbor Workers Act requires oversight by the agency and courts to protect claimants who are "willing to waive lifetime claims for an immediate payment."[1] A recent case and subsequent guidance regarding settlement review now require that "considerable weight be given to the views of the claimant and his counsel."[2]

In *Ethel L. Richardson v. Huntington Ingalls, Inc.*,[3] despite claimant and defense counsel arriving at a proposed settlement amount, a Department of Labor District Director reviewed the settlement and issued a Deficiency Notice. The Director denied the settlement application on the basis the settlement was not adequate because the calculated present value of the claim was more than twice the $140,000 settlement amount. However, Section 8(i)[4] makes no effort to define an "adequate" settlement.

When the parties exercised their right to request that the matter be referred to the ALJ, they agreed to a new proposed settlement of $140,500—just $500 more than the original amount. Administrative Law Judge Patrick M. Rosenow approved the new settlement, despite the Director's opposition.

In his opinion, Judge Rosenow stated that the Act contains "tension between the paternalistic role taken by the Department and the normal assumption that counsel advising claimants are competent and ethical," and that the claimant and her counsel were in the best position to asses her litigation risk. Judge Rosenow also observed that the Act makes a critical distinction between claimants represented by counsel and pro se claimants whose settlements must be explicitly approved.

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Upon appeal by the Director to the Benefits Review Board, the Director argued that the ALJ erred in deferring to claimant's counsel and that the ALJ did not have sufficient evidence to determine that adequacy had been satisfied. The Board held that the ALJ had not abused his discretion in approving the parties' settlement. The Board rejected the Director's arguments that settlement approval requires an actuarial analysis, and suggested that an informed compromise between represented parties should receive deference.

The subsequent guidance bulletin issued by the Director indicates that "considerable weight must be given to the views of the claimant and his

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counsel as to the adequacy of the settlement amount. In particular, their opinion regarding the risks of litigation . . . should be respected" unless there is contradictory information in the file or application.[5] If the claimant is unrepresented, "the District Director should attempt to ensure that the claimant fully understands the potential value of the claim," and "must also determine whether the proposed settlement is adequate given the particular circumstances of the case." ■

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[1] *Oceanic Butler Inc., v. Nordahl*, 842 F.2d 773, 778 (5th Cir. 1988)

[2] LHWCA Bulletin No. 14-05 (September 17, 2014)

[3] *Ethel L. Richardson v. Huntington Ingalls, Inc.,* 48 BRBS 23 (May 22, 2014)

[4] 33 U.S.C. Section 908(i)(1)

[5] LHWCA Bulletin No. 14-05 at 4

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