



Issue Date: 24 June 2013

CASE NO.: 2013-LHC-01317

OWCP NO.: 07-189001

RSOL NO.: 0610-13-00977

IN THE MATTER OF

**ETHEL L. RICHARDSON,
Claimant,**

vs.

**HUNTINGTON INGALLS, INC.,
Employer**

ORDER APPROVING SETTLEMENT

Procedural Background

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act),¹ brought by Claimant against Employer. The matter was referred to the Office of Administrative Law Judges (ALJs) for a formal hearing on 8 May 13, after the District Director refused to approve an 8(i) settlement submitted by the parties on 18 Apr 13. On 16 May 13, the parties submitted an amended 8(i) settlement that indicated it involved a greater lump sum payment than the amount previously deemed insufficient by the District Director.

On 21 May 13, I conducted a conference call with counsel for both sides to determine what additional amount had been added. The parties indicated that the current settlement amount pending before me was only \$500 more than what the District Director had rejected.² I asked if they thought that was a sufficiently significant increase that it would have addressed the District Director's concerns and increased the probability of approval. They conceded that in all probability it would not have changed the District Director's position and, as a practical matter, did not reflect a meaningful increase at all.

¹ 33 U.S.C. §§901 *et seq.*

² The amount of the increase was from \$140,000 to \$140,500, or 0.35%.

When I asked why I should find it adequate, they joined in reviewing the state of the case. Employer's counsel expressed his expectation that Employer would be able to establish Claimant's condition had improved, with a corresponding increase in her post-injury wage earning capacity and decrease in disability benefits. He also noted that if the case went to hearing, Employer could always seek modification to further decrease her benefits. Claimant's counsel did not concede that would necessarily happen, but did say that his client recognized that was a possibility. He noted that for a number of reasons, she believed that a discounted lump sum was preferable to a delayed decision, periodic payments, and possible unfavorable modifications. Both counsel stated they believed that the District Director had failed to consider anything but a formulaic mathematical approach based largely on the assumption that Claimant would prevail on every issue. They also agreed to submit supplemental statements on the matter. When I learned that the Solicitor was going to appear in the case, I told the parties we would have another call and include her.

During that call on 23 May 13, Claimant and Employer revisited the arguments they had previously made to me in the first call. The Solicitor took the position that neither the District Director nor the ALJ was allowed to consider litigation risk or the Claimant's personal circumstances in assessing adequacy. She agreed that the approval authority could consider a dispute over average weekly wage or post-injury earning capacity and even use the Employer's proffered numbers for those. However, she insisted that the District Director or ALJ must then simply apply the actuarial tables and discount rate to find a minimum adequate amount. However, she also noted that she would have to make sure she was accurately stating the District Director's position and asked for leave to determine if she needed to more clearly state the argument in a written brief. She ultimately did file a written brief and both Claimant and Employer filed responses. In the meantime, I issued an order that served as an interim notice of deficiency to toll the 30-day period after which the settlement would be automatically approved.

Law

“Whenever the parties to any claim for compensation under this Act ... agree to a settlement, the ... administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. ... 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.”³

The settlement application must be a self-sufficient document and include, *inter alia*, the reason for the settlement, the issues which are in dispute, and a statement explaining how the settlement amount is considered adequate. In reviewing the application, the adjudicator must determine whether the amount is adequate, considering all of the circumstances, including, where appropriate, the probability of success if the case were formally litigated.⁴

³ 33 U.S.C. § 908(i)(1).

⁴ 20 C.F.R. §702.241-243.

Positions of the Parties

The petition for settlement submitted to me described Claimant's initial shoulder injury on 12 Jul 10 and subsequent related medical history. It noted that her average weekly wage was \$1,128.01 and that she had been paid temporary total disability for: 13-14 Jul 10; 28 Jul 10 – 9 Aug 10; 11 Aug 10 – 14 Sep 10; and 13 Jan 11 – 20 Apr 11. It indicated that labor market surveys in April and May 2011 revealed jobs paying between \$7.25 and \$8.00 per hour; that Claimant obtained employment from May – August 2011 paying \$8.00 per hour; that on 21 Apr 11, Employer decreased her disability payments to reflect a weekly, post-injury wage earning capacity of \$300; and that she is currently earning \$7.35 per hour. The petition also represented that Claimant had been discharged by her treating physician for the shoulder injury and that no further invasive care was recommended. It noted that the record included evidence of sub-maximum effort and symptom magnification and indicated Employer would seek to show she could have returned to her original job. The petition stated that the parties disputed the nature and extent of Claimant's disability; that Claimant understood the amount was based in part upon her representations that she is unable to return to her original job and recognized the risks of litigation; and that Claimant's agreement was not a result of duress and the amount is adequate, fair, and reasonable. The new agreement provided for \$140,500 in disability compensation and \$10,000 in future medical costs.

In his supplemental submission on 22 May 13, Claimant's Counsel moved for approval, noting that his client "had authorized" him to say: (1) She was concerned that she might fail to reach her actuarial age and if that were the case, her heirs would lose the benefit of the remainder of any lump sum; (2) A lump sum payment would help her support her family and meet many current debts and obligations; (3) Since she has returned to work, any increase in pay would decrease her future benefits; and (4) She is fully aware of the full value of her claim, but in consideration of these factors, requests approval of the settlement.

In her brief of 7 Jun 13, the Solicitor appears to have modified her previous position that I may not consider litigation risk or personal circumstances in determining the adequacy of a proposed settlement. However, she still urges disapproval of the application, arguing that the parties have failed to establish that the amount is adequate.⁵ She first observes that "there is no suggestion in the record that [Claimant] will ever be capable of returning to work ... [in] the position she held ... at the time of her injury"⁶ and that Claimant understood the settlement to be based upon her representation that she could no longer do so. The Solicitor then noted that Claimant is currently earning \$7.25 per hour, an amount consistent with Employer's vocational expert's estimated hourly wage range of \$7.25 - \$8.00. Applying that earning capacity to the average weekly wage and using Claimant's actuarial life expectancy and an 8% discount rate, the Solicitor calculated a minimum adequate amount of \$306,000.

⁵ The Solicitor noted that the application submitted to the District Director was void of any statement justifying a departure from an actuarial computation of adequacy. The original application submitted to the District Director is not before me and, given the *de novo* standard of review, would not have been relevant in any event. The question is not whether the application to the District Director was adequate, but whether the one before me is.

⁶ Sol. Brief p. 1.

The Solicitor also dismissed the reasons Claimant offered in support of the discounted settlement amount. She observed that although Claimant might not reach the expected actuarial date of demise, it was equally possible that Claimant could pass it and neither party had offered anything to justify Claimant's fear of an early death. The Solicitor noted that if such facts existed, but were of a "sensitive nature," Claimant could communicate them by telephone to the District Director and shield them from unnecessary disclosure. The Solicitor expressed similar concerns about the debts and obligations that Claimant cited as being of sufficient weight to justify taking a discount from periodic payments, offering as an example that fact that the Director doesn't know whether the pressing debt is a \$50,000 home mortgage pending foreclosure or a \$500 retail credit bill. Finally, the Solicitor observed that Claimant's suggestion that her post-injury earning might increase was entirely hypothetical and unlikely to actually happen.

The Solicitor concluded by discussing the possibility that neither counsel understands the mandated obligation to carefully review settlement applications and explaining that the Director is required by statute to question the parties and the terms of the application so as to ensure adequacy and absence of duress. The Solicitor emphasized that, by definition, the District Director must second guess attorneys who are advising claimants.

*Discussion*⁷

The ultimate issue here involves the statutory role of the Department in administering claims under the Act and the tension between the paternalistic role taken by the Department and the normal assumption that counsel advising claimants are competent and ethical. Claimant says she has been advised by her counsel and understands the risks and rewards of taking her case to a full hearing and (possibly) obtaining a compensation order for periodic future payments versus accepting an immediate, albeit significantly discounted, lump sum payment. She says that she has considered those risks and rewards in the context of her present personal circumstances (which she described in general) and wants to take the lump sum. The District Director insists that her explanation of her personal circumstances do not justify the discount she is accepting and argues that her application should not be approved until she provides more specific information and convinces the Department otherwise.

Of course, any information specific and persuasive enough to convince the adjudicator, in his or her role as regulatory "second guesser," that a claimant should take the money and run could as easily cause an employer to rethink its position, and take money off the table. The Director apparently believes that dilemma can be solved with *ex parte* communications and an implicit privilege. Whether that is a reasonable, or even legal, approach for him to take, it is clearly not an option for presiding Administrative Law Judges.

⁷ At the outset I note that the Solicitor's argument that there is nothing in the record that indicates any litigation risk that Claimant could be found capable of returning to work fails to take into account the parties' representation that there was evidence of sub-maximum effort and symptom magnification, and that Employer would seek to show she could have returned to her original job.

Moreover, it is critical to differentiate between represented and *pro se* claimants. The Act makes an important such distinction when it provides for the automatic approval of any settlement application by a represented claimant, if no action is taken within 30 days.⁸ That provision clearly indicates that applications submitted by counsel are entitled to some level of deference not due those submitted by *pro se* claimants. The Solicitor's argument, however, seems to suggest that as a second gesser, the Department must substitute its judgment for that of the claimant and her attorney.

Indeed, (assuming that the claimant is not demanding the submission against the advice of her counsel) the rejection as inadequate of a settlement submitted by counsel on behalf of his client sends a message to the claimant that her counsel is not competent enough to know the law and determine a minimally-adequate settlement or, in the even less-seemly alternative, knows the lump sum is inadequate, but is selling out his client's interests for a quick and easy attorney's fee. Either of the alternatives raises serious questions about the counsel's ethical conduct.

It also raises questions about what standard of review the statutory "second gesser" should apply to the decisions claimants make on the advice of counsel. If it is an abuse of discretion standard, (i.e., the Director wouldn't take the deal, but won't disapprove it unless the settlement discount is wholly unsupported by the record) a rejection clearly calls into question the conduct of the claimant's counsel on grounds of competency, conflict, or perhaps both.

On the other hand if the Department is to apply a *de novo* standard, it means that even though reasonable minds may differ (and the claimant's counsel's actions are totally competent and ethical), the Department's judgment as to what is best for a claimant prevails. The Solicitor relies heavily on the paternalistic nature of the Act, implementing regulations, and interpreting case law in support of her argument that the Department is obligated to second guess and exercise a veto power over the choices made by a claimant on the advice of counsel, essentially suggesting that the Department is required to act not only as a reviewing authority but in a quasi-*in loco parentis* role for the purposes of the claim.

Of course, the entire concept of a "standard of review" assumes that the reviewing authority has the same information as the initial decision maker. That is not normally the case in the Department's review of a settlement application and a major aspect of the fundamental dispute in this case. As previously noted, the Solicitor explains that the major impediment to obtaining approval remains Claimant's failure to provide sufficiently specific information to convince the Department that it should allow her to accept a significant discount of the amount it believes she could win at hearing.

Specifically, Claimant noted she had concerns that she could fail to reach her expected age and cut her payment stream short. The Solicitor says that she must tell the Department why she thinks she might die an early death. Claimant also said she had current obligations and debts that a lump sum would allow her to meet. The Solicitor responds that until she discloses the amounts and nature of those debts and obligations, the law will not allow her to accept the benefits (or risks) of her bargain. Similarly, it appears that the Solicitor will not consider her statement that she might have her pay increase in the future without some specific substantiation,

⁸ 33 U.S.C. § 908(i)(1).

perhaps looking for a confidential concession that she might be starting to feel better or that she is anticipating moving to a much higher paying job.

On the other hand, the type of very general reasons given by Claimant could easily be offered in support of virtually every settlement. Therefore, the real question raised by the Director's opposition to approval of this settlement application is whether the Department is allowed to consider the fact that a claimant is represented by counsel and presume that counsel is competent and ethical in accepting general assertions (I have current obligations and I fear I may die early) rather than detailed facts (my \$100,000 mortgage is in default and I have a high risk for heart disease) in justification of accepting a significant discount from the judgment value of the claim.

Of course, many claimants may be under financial pressure for a number of reasons unrelated to their injury, e.g. a child's tuition bills, an aging parents' need for support, or even a business opportunity; but that would not constitute duress that would invalidate a reasoned choice to accept a discounted lump sum. The concern that an employer will recognize that a claimant is under that kind of pressure and modify its offer accordingly is a valid one. However, a represented claimant will understand that and ultimately have to decide for him or herself whether the discount is worth the lump sum.

Moreover, what is a fair assessment of the litigation risk and expected value (litigation risk times judgment value) is extremely subjective. For example, in this case, the Solicitor argues that there is no risk that Employer could win an argument that Claimant could either return to her original job or find suitable alternative employment with no loss of wage earning capacity. I believe that the application is not so clear and there is some probability that it could happen that would have to be applied in determining the expected value of the claim. The individuals with the best assessment of litigation risk are Claimant and her counsel and, as with the life expectancy and future earnings issue, I do not believe Claimant or her counsel are obliged to explain to the Department the detailed specifics of the assessment of why she thinks she might lose her case.

I believe that even in its paternalistic context, the Act does afford a presumption of effective assistance of counsel. If it were not so, an application by a represented claimant would not be automatically approved 30 days after submission. Claimant's application appears to me to be knowing, intelligent, and voluntary; it was submitted on the advice of counsel after reflection and in consideration of the risks of litigation and her personal circumstances. It does not appear to be a consequence of any duress. Based on the representation of Claimant and her counsel I find that the proposed settlement is fair and adequate.

ORDER

In accordance with the terms of this settlement as enumerated and more fully set forth in the sworn petition executed by Claimant, **IT IS HEREBY ORDERED THAT EMPLOYER:**

(a) Pay to Claimant, Ethel Richardson, in a single lump sum payment of ONE HUNDRED FORTY THOUSAND FIVE HUNDRED DOLLARS AND 00/100 DOLLARS (\$140,500.00) upon the issuance of an Order approving this single lump sum payment. Over a 29.0 year life expectancy at a 6% discount, this equals \$87.58 per week; and that upon payment of this amount, the claimant shall not be entitled to any further compensation benefits, past, present or future, as a result of this injury while employed by Huntington Ingalls Incorporated - Pascagoula Operations.

(b) Pay to claimant, Ethel Richardson, the sum of TEN THOUSAND DOLLARS AND 00/100 (\$10,000.00) as full and final settlement representing payment for future medical expenses; and that upon payment of this amount, the claimant shall not be entitled to any further medical benefits for future medical expenses, as a result of this injury while employed by Huntington Ingalls Incorporated - Pascagoula Operations.

(c) Pay to Claimant's attorney a fee that is determined to be reasonable and necessary, and meets the requirements of Section 928 of the Act and interpreting case law in accordance with the itemized fee petition attached hereto, in an amount not to exceed \$10,000.00.

(d) Is hereby fully and forever released and discharged, in accordance with the provisions of Section 908(i) of the Longshore and Harbor Workers' Compensation Act, from any and all liability as stated above on account of injuries allegedly received by claimant, and all claims be, and the same hereby are, dismissed with prejudice.

ORDERED this 24th day of June, 2013 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge