BRB No. 10-0129

RALPH BOMBACK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	DATE ISSUED: 10/19/2010
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carriers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Amended Decision and Order Approving 8(i) Settlement, Approving and Awarding Section 8(f) Relief of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

James P. Aleccia and Marcy K. Mitani (Aleccia, Socha & Mitani), Long Beach, California, for Marine Terminals Corporation and Signal Mutual Indemnity Association.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Amended Decision and Order Approving 8(i) Settlement, Approving and Awarding Section 8(f) Relief (2009-LHC-0499, 0500, 0501, 0502) of Administrative Law Judge Jennifer Gee rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged that he: (1) injured his right knee while stepping down from a bus at work on December 12, 2002; (2) sustained a continuous traumatic injury to his neck through January 27, 2003, as a result of work-related repetitive movements of his neck; (3) sustained an injury to his right leg on June 3, 2003, while at home, as a result of the previous work injury to his leg; and (4) sustained continuous traumatic injuries to his right knee and neck attributable to his job duties from October 11, 2004, through April 5, 2006, his last day of work prior to undergoing cervical spine surgery.[1] Employer voluntarily paid claimant temporary total disability benefits from April 6 through October 27, 2006, and permanent partial disability benefits thereafter.

Prior to the formal hearing, the administrative law judge was informed that claimant intended to settle some of his claims with employer and both carriers pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). Additionally, the administrative law judge was informed that Signal planned to pursue Section 8(f) relief, 33 U.S.C. §908(f), related to its liability for the cervical injury sustained by claimant while it was on the risk, *i.e.*, the continuous traumatic injury to his neck attributable to his job duties from October 11, 2004, through April 5, 2006. In response to Signal's application for Section 8(f) relief, the Director stated that "in the event that [the administrative law judge] determines that an award of benefits for permanent disability in connection with claimant's neck injury (excluding a nominal award) is appropriate, [he] agrees to the application of Section 8(f) and to payment by the Special Fund, in accordance with the Act."

[1] Employer was insured by Majestic Insurance Company (Majestic) at the time claimant sustained his first three injuries, and by Signal Mutual Indemnity Association (Signal) at the time of claimant's last claimed injury.

In her amended decision, the administrative law judge approved claimant's settlements with both Majestic and Signal based on her review of the settlement agreements in terms of their supporting documents, as they "appear[ed] to be reasonable, adequate and not the result of duress."[2] Amended Decision and Order at 3. The Signal settlement was only for medical benefits, *see* n.2, so in order to preserve its claim for Section 8(f) relief, Signal separately entered into stipulations with claimant on the disability claims.[3] Acknowledging that stipulations are not binding on the Special Fund unless they are supported by substantial evidence and in accordance with law, the administrative law judge summarily found that the stipulations offered by Signal and claimant are supported by substantial evidence and in accordance with law. Amended Decision and Order at 4. Thus, the administrative law judge awarded claimant benefits for a seven percent impairment to the right knee pursuant to the schedule and ongoing permanent partial disability benefits for a loss of wage-earning capacity for the neck injury, in the amount of $875 per week from September 30, 2006, pursuant to the stipulations. 33 U.S.C. §908(c)(2), (21).

Addressing Signal's application for Section 8(f) relief, the administrative law judge reviewed the medical evidence and found that employer/Signal established that claimant had a manifest, pre-existing permanent partial disability, *i.e.*, the right knee and cervical spine conditions that preceded the most recent injury between October 11, 2004, and April 5, 2006, and that claimant's current permanent partial disability due to the neck condition is substantially greater than it would have been if claimant did not have these pre-existing disabilities. Consequently, the administrative law judge granted Signal's application for Section 8(f) relief.

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[2] Employer and Majestic agreed to pay claimant, in addition to amounts previously paid, the lump sum of $12,000, as well as $8,000 for attorney's fees, to discharge their liability as a result of claimant's first three alleged injuries. Employer and Signal agreed to pay claimant $15,000 for future medical care and treatment of his injuries in discharge of its liability for medical benefits. In addition, Signal and claimant agreed to a stipulated compensation order entitling claimant to $21,110.74 for a seven percent impairment of claimant's right knee, and for ongoing permanent partial disability benefits in the amount of $875 per week for the cervical injury commencing September 30, 2006, less a credit for such benefits already paid, as well as $20,000 in attorney's fees.

[3] Pursuant to Section 8(i)(4) of the Act, 33 U.S.C. §908(i)(4), employer is prohibited from receiving Section 8(f) relief after a disability claim has been settled pursuant to Section 8(i). *See Cochran v. Matson Terminals, Inc.*, 33 BRBS 187 (1999).

On appeal, the Director challenges the administrative law judge's approval of the Section 8(i) Signal settlement of $15,000 for future medical benefits, as well as her compensation order awarding permanent partial disability benefits predicated on the parties' stipulations. Employer has filed a response brief, urging affirmance of the administrative law judge's decision. Claimant has not responded to the appeal.

Adequacy of Signal Settlement

The Director, in his capacity as administrator of the Act, *see generally Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (*en banc*); 20 C.F.R. §802.201(a), contends that the administrative law judge erred in summarily approving claimant's settlement of his future medical benefits claim with employer/Signal for $15,000 without explaining how this dollar figure is adequate.[4] The Director states that since the medical evidence indicates claimant may have to undergo future surgeries on his right knee, the administrative law judge should have addressed whether the $15,000 provided by the proposed settlement agreement will adequately compensate claimant for his future medical treatment and expenses. The Director further avers that the regulatory criteria for a settlement application were not satisfied in this case.

Section 8(i)(1) states:

> Whenever the parties to any claim for compensation under this chapter, 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.

[4] The Director has not raised any contentions with regard to the administrative law judge's approval of the settlement agreement reached by claimant, employer, and insurer Majestic.

33 U.S.C. §908(i)(1). The procedures governing settlement agreements are delineated in the Act's implementing regulations. *See* 20 C.F.R. §§702.241-702.243. Specifically, Section 702.242(a) states that the "settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file," and that it "shall be in the form of a stipulation signed by all parties." 20 C.F.R. §702.242(a.). Section 702.243(f) prescribes the manner by which an adjudicator "shall review the [settlement] application" to discern whether "the amount is adequate." 20 C.F.R. §702.243(f). Settlements may include future medical benefits if the parties so agree. 33 U.S.C. §908(i)(1); 20 C.F.R. §702.243(d). Where the settlement application covers medical benefits, the regulations require that it include "an itemization of the amount paid for medical expenses by year for the three years prior to the date of the application," and "an estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical treatment." 20 C.F.R. §702.242(b)(7).[5] Moreover, where medical benefits are being settled, the adjudicator must determine the adequacy of the settlement in terms of "[t]he cost and necessity of future medical treatment." 20 C.F.R. §702.243(f)(4).

In this case, the administrative law judge stated she "reviewed the Signal Settlement and its supporting documents," and she summarily approved it because she found that it "appears to be reasonable, adequate and not the result of duress." Amended Decision and Order at 3. Absent from the administrative law judge's approval of the settlement agreement is any discussion as to whether the $15,000 provided for future medical benefits actually is adequate. With regard to the work injuries, the settlement application states that employer had paid decreasing medical expenses relating to claimant's injuries over the last three years, *i.e.*, $1,906.14 in 2007, $1,606.22 in 2008, and no such expenses for 2009 through the date of the agreement in August 2009. *See* 20 C.F.R. §702.242(b)(7). The parties' belief that the settlement amount is adequate is based solely on these limited payments. *See* Settlement at 5-6. The medical documents accompanying the settlement application, however, discuss the likelihood of claimant's need for future treatment. Specifically, in his January 16, 2008, report, Dr. Warden noted that "arthroscopic surgery is certainly a possibility" with regard to claimant's right knee condition, as well as "further open surgery including but not limited to tibial osteotomy or total knee arthroplasty."[6] EX 4. Dr. London's January 8, 2009, report states that

[5] The regulation states that this requirement may be waived by the adjudicator for good cause shown. This waiver did not explicitly occur in this case, nor was there any good cause discussion.

[6] Dr. Warden also added that although continuing care is not necessary as of his report of January 16, 2008, it is likely that claimant will need treatment in the future. EX 4.

claimant should have access, as needed, to future medical treatment including right knee arthroscopic surgery, meniscectomy, and chondroplasty. EX 2.

Where claimant seeks to terminate his compensation claim for a sum of money, the Section 8(i) settlement procedures, as delineated in the Act's implementing regulations, must be followed. *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993) (Brown, J., dissenting); 20 C.F.R. §§702.241-702.243. The implementing regulations ensure that the approving official has the information necessary to determine whether the settlement application is inadequate or procured by duress. *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991). Among the requirements is that the settlement application include a statement explaining how the settlement amount is considered adequate, 20 C.F.R. §702.242(b)(6), and where, as in this case, the settlement application covers medical benefits, it must include estimates as to the claimant's need for future medical treatment and the costs associated with such treatment, 20 C.F.R. §702.242(b)(7). Moreover, as employer challenged the work-relatedness of claimant's injuries, *see* Settlement Application at 2, 5, Section 702.243(f) directs that the adjudicator should also consider, in determining whether the amount of the settlement is adequate, "the probability of success if the case were formally litigated." 20 C.F.R. §702.243(f); *see generally Bonilla v. Director, OWCP*, 859 F.2d 1484, 21 BRBS 185(CRT) (D.C. Cir. 1988), *amended*, 866 F.2d 451 (D.C. Cir. 1989).

As the record reflects claimant's potential need for future medical treatment for his right knee condition, the parties should have included in the settlement application "an estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical treatment" which would enable the administrative law judge to explicitly determine whether the $15,000 agreed upon by the parties represents an adequate amount to cover claimant's future medical expenses. As the administrative law judge summarily found the settlement adequate without considering claimant's need for future medical treatment or "the probability of success if the case were formally litigated," her approval of the medical benefits settlement is vacated and the case is remanded for further consideration.

In reaching this disposition, we reject employer's contention that the $15,000 settlement explicitly accounted for the facts that claimant has collateral medical insurance through the ILWU-PMA Welfare Plan and that claimant received $6,000 for future medical care in the settlement agreement with employer/Majestic. First, the parties must indicate that claimant's additional medical insurance will pay for a work-related condition. *See* 20 C.F.R. §702.242(b)(8) (the parties need to identify "any collateral source available for the payment of medical expenses"). Second, although the contention concerning the Majestic settlement is relevant, it is not contained in the parties'

settlement application which must be a self-sufficient document.[7] 20 C.F.R. §702.242(a). Consequently, on remand, the administrative law judge must determine whether the settlement agreement complies with the regulations by adequately documenting claimant's need for future treatment as well as the cost for such services. If so, she must then make an explicit determination whether $15,000 represents an amount which is adequate for those purposes. 20 C.F.R. §702.243(f).

Parties' Stipulations and Section 8(f) award

The Director next argues that the administrative law judge erred in approving an agreed compensation order based on stipulations which are not supported by substantial evidence and/or are not in accordance with law. The Director contends, therefore, that the stipulations cannot support the award of Section 8(f) relief.[8] It is well-established that stipulations between an employer and claimant affecting the liability of the Special Fund are not binding on the Special Fund, absent the participation of the Director. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Brady v. J. Young & Co.*, 17 BRBS 46, *aff'd on recon.*, 18 BRBS 167 (1985); *see also Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998). In this regard, an administrative law judge may find stipulations binding as between claimant and employer, but reject them with regard to the claim for Section 8(f) relief, which is essentially a separate case involving employer and the Special Fund. *Id.*;

[7] Employer's contention that its agreement to obtain Medicare's approval of a set-aside trust in the settlement application, which it alleges may ultimately result in claimant receiving an amount greater than the $15,000 provided by the settlement, is not relevant to the current settlement application, as Medicare and Medicaid are not acceptable collateral sources of medical care. Medicare requires pre-approval of workers' compensation settlements if either one of the following is true: 1) Any settlement, regardless of amount, if the claimant is currently entitled to Medicare; or 2) Any settlement greater than $250,000, AND the claimant may reasonably expect to become eligible for Medicare within 30 months of the settlement date. Claimant, whose date of birth is February 2, 1949, is not yet 65 years old and, thus, does not appear to be currently entitled to Medicare. Moreover, even if Medicare is applicable, there is no requirement that the adjudicatory officer require the parties to obtain Medicare pre-approval nor can she deny the settlement as inadequate for failure to obtain such approval. *See* http://www.dol.gov/owcp/dlhwc/lspm/lspm3-501.htm .

[8] We note that the Director does not contest the administrative law judge's findings that employer/Signal has established the elements for entitlement to Section 8(f) relief. *See* 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep't of Labor* [*Quan*], 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000).

see also Truitt v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 79 (1987). In addition, stipulations between the private parties are not binding when they evince an incorrect application of law. *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). Furthermore, stipulations are offered in lieu of factual evidence, but they must accord with law. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

Scheduled award for knee injury

The Director maintains that the administrative law judge's approval of the parties' stipulation to a seven percent permanent impairment of claimant's right leg cannot be affirmed as the record lacks any evidence that claimant has this degree of impairment of the right knee. The Director thus contends that the stipulation is not in accordance with law.[9]

In their application for a stipulated compensation order, the parties stipulated that "Claimant shall receive a 7 % permanent impairment award totaling $21,110.74 and payable as a lump sum, for the alleged cumulative trauma injury to his right knee," based on Dr. London's opinion that the portion of the knee injury attributable to the injury for which Signal is liable is seven percent. Joint Stipulations at 2. The administrative law judge summarily stated that she was accepting this stipulation as it is "supported by substantial evidence and in accordance with law." Amended Decision and Order at 4.

We cannot affirm the administrative law judge's summary approval of this stipulation as, contrary to her finding, it is not supported by substantial evidence or in accordance with law. The stipulation fails to account for the aggravation rule and there is no medical opinion of record that claimant's total knee impairment is seven percent. Under the aggravation rule, if an employment injury aggravates, accelerates, or combines with a pre-existing impairment, the entire resulting disability is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). In this case, claimant alleged he sustained an injury to his right knee on December 12, 2002, while employer was insured by Majestic, and additional cumulative trauma to

[9] The Director's arguments raise a legal challenge to the propriety of the agreement as to the degree of impairment, and thus, may be raised before the Board. *See generally Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *Brown v. Bethlehem Steel Corp*., 20 BRBS 26 (1987), *aff'g on recon.* 19 BRBS 200 (1987), *aff'd in part and rev'd in part sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

that knee while Signal was on the risk through April 5, 2006. Thus, as claimant's knee condition pre-existed the injury with Signal, Signal is liable for the totality of claimant's knee condition under the aggravation rule and not just for the portion that occurred as a result of the later injury. *Id.* The record in this case contains separate assessments as to the degree of impairment of claimant's right lower extremity of 41 percent by Dr. Warden, as of January 16, 2008, and of 16 percent by Dr. London, as of January 8, 2009. Consequently, based on the aggravation doctrine, employer is liable for the total impairment of claimant's right lower extremity. Thus, there is neither substantial evidence nor legal foundation for a stipulation of a seven percent impairment. *Id.*

Moreover, under the *Nash* credit doctrine, an employer is allowed a credit for prior payments under the schedule, 33 U.S.C. §908(c)(1) – (19), where claimant sustains an aggravating injury resulting in an increased schedule award. Specifically, the credit doctrine allows an employer to take a credit for the amount of a prior scheduled award against its liability for permanent partial disability benefits resulting from an injury to the same scheduled member. *Nash*, 782 F.2d at 520-521, 18 BRBS at 53-54(CRT). This is a dollar-for-dollar credit, and not a percentage based credit. *Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1988). In its response brief, employer argues that it is entitled to a *Nash* credit for the $6,000 claimant received for the knee injury as a result of the Majestic settlement and adds that its entitlement to that credit has been accounted for in the stipulated amount for the scheduled injury of $21,110.74. Employer's position, however, was not made evident by the parties' stipulations or accompanying documentation. The administrative law judge did not address whether employer/Signal would be entitled to a credit for any amount of compensation paid by employer/Majestic with regard to claimant's prior right knee injury.[10]

The Director also properly contends that claimant is limited to a scheduled award only if he is partially disabled, which can be ascertained only if he returns to his usual work or to suitable alternate employment. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). The parties did not stipulate to the existence of suitable alternate employment nor did employer submit evidence of such, and thus, the predicate for the partial disability award is legally absent. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). A scheduled award commences only if claimant is both permanently and partially disabled.

[10] The settlement agreement between claimant and employer/Majestic provided payment of a lump sum of $12,000 to resolve the claims filed with regard to these injuries. The parties agreed that claimant was to receive $6,000 "for permanent disability for 2 % of the knee" and "$6,000 for future medical" benefits. *See* Letter dated July 1, 2009, from Employer's/Majestic's Attorney to Claimant's Counsel.

Id. As the administrative law judge did not address the parties' stipulations in terms of the aggravation rule, the credit doctrine, or whether suitable alternate employment is established, the stipulations evince an incorrect application of law. The administrative law judge therefore erred in summarily accepting them.[11] Consequently, on remand, the administrative law judge must fully consider the extent of claimant's disability due to his knee impairment and employer's entitlement to a credit.[12] *Puccetti*, 24 BRBS 25; *McDevitt v. George Hyman Constr. Co.*, 14 BRBS 677 (1982).

Unscheduled Section 8(c)(21) award for cervical injury

The Director argues that the parties' stipulation, that claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(21) of $875 per week commencing September 30, 2006, for his cervical injury, and the administrative law judge's corresponding award, are not supported by substantial evidence or in accordance with law. The Director contends that evidentiary support is lacking for the stipulations that claimant's condition was permanent by September 30, 2006, that suitable alternate employment was established by September 30, 2006, and that claimant's compensation rate is $875 per week. This stipulation directly affects the Special Fund because it concerns the commencement date for the Special Fund's liability and the amount of benefits for which it is liable. *See Brady*, 17 BRBS at 54.

On the issue of benefits for the cervical injury, the parties stipulated "that claimant shall receive permanent partial disability benefits at the rate of $875 per week, retroactive from September 30, 2006, to present and continuing into the future, subject to modification." Joint Stipulations at 2. As the administrative law judge found the elements of Section 8(f) entitlement satisfied, she held employer liable for "permanent partial disability benefits in the amount of $875 per week from September 30, 2006, for 104 weeks beginning September 30, 2006," with the Special Fund assuming liability for the payment of the ongoing benefits relating to the cervical spine thereafter. *See* Amended Decision and Order at 9-10; Notice of Errata and Corrections at 1.

[11] Thus, we reject employer's contention that the parties can "compromise" the degree of claimant's knee impairment. *See generally Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

[12] The administrative law judge may give the parties the opportunity to amend their stipulations so that they accord with law. In addition, as the Director contends, the administrative law judge should address whether the stipulated compensation rate is correct in terms of the applicable maximum rate. 33 U.S.C. §906.

We vacate the administrative law judge's findings insofar as they bind the Special Fund and remand for specific determinations by the administrative law judge as to whether the parties' stipulations are supported by substantial evidence. As the Director correctly argues, to the extent that the stipulation fixes September 30, 2006, as the date upon which claimant's total disability became partial, the stipulation is contrary to law, for the date of permanency does not alter the extent of claimant's disability. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on reconsideration). Rather, partial disability commences on the date that suitable alternate employment is shown to be available. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT). The record in this case does not contain any evidence of suitable alternate employment or explanation as to why the extent of claimant's disability changed from total to partial as of September 30, 2006. In addition, the Director correctly notes that there is contradictory evidence regarding the date of maximum medical improvement.[13] In this regard, while the administrative law judge adopted the parties' stipulation that claimant reached maximum medical improvement as of September 30, 2006, based on Dr. London's opinion, the record contains the opinions of Dr. Pradhan, who stated that claimant reached permanency on November 16, 2007, and Dr. Warden, who stated that claimant reached maximum medical improvement as of January 16, 2008. EXs 3, 4; *see, e.g., Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The administrative law judge must discuss this conflicting evidence because the date of maximum medical improvement affects when the Special Fund's liability commences. *See* 33 U.S.C. §908(f). Moreover, neither the stipulations nor the administrative law judge's compensation order provides any explanation as to how the parties arrived at a compensation rate of $875 per week. In this regard, while the parties stipulated to claimant's pre-injury average weekly wage, *i.e.*, $3,023.82, there is no stipulation or supporting evidence as to claimant's post-injury wage-earning capacity. *See* 33 U.S.C. §908(h).

[13] Employer argues that the parties' stipulations as to the September 30, 2006, date of maximum medical improvement and claimant's entitlement to a permanent partial disability award for his cervical injury of $875 per week, were reached after negotiations between itself and claimant, who was represented by counsel, and thus, they are sufficiently documented. Employer further adds that *Rinaldi*, 25 BRBS 128, and *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT), are distinguishable since those cases do not involve mutual agreements reached by the parties. Contrary to employer's arguments, as these issues are relevant to Section 8(f), the parties' stipulations cannot, without the Director's participation, be binding upon the Special Fund. *Brady*, 17 BRBS 46.

The administrative law judge's summary acceptance of the parties' stipulations concerning the cervical injury cannot stand as they affect the liability of the Special Fund. Consequently, while we affirm the administrative law judge's determination that claimant is entitled to an award of disability benefits for his cervical injury, as well as her finding that employer has established the requisite elements for entitlement to Section 8(f) relief,[14] we cannot affirm her finding as to the date upon which the Special Fund shall assume liability for such benefits. In light of the absence of specific findings regarding the dates claimant reached maximum medical improvement and claimant's post-injury wage-earning capacity, the administrative law judge's finding that the Special Fund shall assume liability for claimant's permanent partial disability benefits relating to his cervical injury in 104 weeks from September 30, 2006, is vacated, and the case is remanded for further consideration of the issues directly affecting the date of liability of the Special Fund.[15]

[14] The administrative law judge's finding that employer satisfied the elements of for establishing its entitlement to Section 8(f) relief is affirmed as unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[15] The parties stipulated that the scheduled award was to be paid in a lump sum. *See* Stipulations at 2. If, on remand, any new scheduled award is to be paid weekly for the duration of the award, the administrative law judge should ensure that the payments for the scheduled award and unscheduled awards do not exceed the maximum compensation rate allowable under the Act. *See I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Padilla v. Pedro Boat Works*, 34 BRBS 49 (2000); *see also Korineck v. General Dynamics Corp.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987) (claimant not entitled to a scheduled award if it is determined that he is permanently totally disabled as an award of permanent total disability benefits presupposes a permanent loss of all earning capacity).

Accordingly, the administrative law judge's approval of the settlement between claimant and employer/Majestic is affirmed as unchallenged on appeal. The administrative law judge's approval of the Section 8(i) settlement between claimant and employer/Signal of claimant's claim for future medical benefits is vacated. The scheduled award for claimant's right knee injury based on the parties' stipulations is also vacated. In addition, the administrative law judge's findings that claimant is entitled to disability benefits for his cervical injury and that employer has established the requisite elements for entitlement to Section 8(f) relief are affirmed, but her finding as to the date upon which the Special Fund shall assume liability and the amount of such benefits are vacated. The case is remanded for further consideration of these issues consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge