BRB No. 10-0425

MOHAMMED AITMBAREK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS	)	
	)	
and	)	
	)	
WORLDSOURCE, A DIVISION OF CHARTIS INSURANCE	)	DATE ISSUED: 12/23/2010
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Compensation Order Approving Stipulations and Awarding Attorney Fees, the Order Granting Claimant's Motion for an Interim Order Pending Resolution of the Director's Motion for Reconsideration, and the Ruling on Director's Motion for Reconsideration of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Michael Marmer (Samuelsen, Gonzalez, Valenzuela & Brown, L.L.P.), San Pedro, California, for employer/carrier.

Ann Marie Scarpino (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs, (the Director) appeals the Compensation Order Approving Stipulations and Awarding Attorney Fees, the Order Granting Claimant's Motion for an Interim Order Pending Resolution of the Director's Motion for Reconsideration, and the Ruling on Director's Motion for Reconsideration (2009-LDA-00225, 2009-LDA-00226) of Administrative Law Judge Kenneth A. Krantz rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 was injured twice while working for employer as a linguist in Iraq. On June 23, 2005, claimant was in an armored personnel carrier on a combat mission when the carrier was thrown into the air. Claimant injured his lower back. He returned to work, but the symptoms worsened and he underwent a laminectomy in Morocco later in 2005. He returned to work for employer, and on January 9, 2006, while on foot patrol with a military unit, he re-injured his lower back and broke his ankle when the unit came under attack. Claimant underwent ankle stabilization surgery with screws on January 29, 2006, and had the hardware removed in May 2006. He underwent a lumbar fusion in March 2007.

Claimant and employer drafted stipulations and sought a compensation order based on them. They agreed that claimant has a 15 percent impairment of his right lower extremity as a result of the ankle injury and a 23 percent impairment of the whole man as a result of his lumbar spine condition. They agreed that claimant's average weekly wage is $2,136.50 and that he is entitled to the maximum compensation rate in effect as of his January 9, 2006, injury which they set forth as $1,030.78.[1] The parties stated that employer paid temporary total disability benefits from January 21, 2006, through February 3, 2007, the date they agreed claimant's back condition reached maximum medical improvement, and all reasonable and necessary medical expenses. Claimant currently is not working, but the parties agreed that employer could show available suitable alternate employment with wages ranging from $25,000 to $100,000 per year for linguist positions. Therefore, they agreed that claimant is entitled to permanent partial disability benefits for his back injury beginning February 4, 2007, pursuant to Section 8(c)(21) at a rate of $600 per week and permanent partial disability benefits pursuant to Section 8(c)(2) for his ankle for 43.2 weeks beginning July 28, 2006. 33 U.S.C.

[1]The Director argues that this figure is incorrect. *See* discussion, *infra*.

§908(c)(2), (21). They noted that claimant waived his entitlement to interest, that reasonable and necessary medical care remains available to claimant, and that claimant's counsel is entitled to a fee not to exceed $8,000.

The administrative law judge accepted the parties' stipulations and entered an award on September 3, 2009, based thereon. Because the Director stated he would not oppose employer's application for Section 8(f), 33 U.S.C. §908(f), relief for compensation for claimant's 2006 back injury, the administrative law judge also found that the Special Fund will commence the payment of permanent partial disability benefits under Section 8(c)(21) after employer has paid benefits for 104 weeks. The administrative law judge awarded claimant's counsel a fee of $6,969.60 pursuant to his fee application and the stipulations.

The Director filed a motion for reconsideration, and the private parties filed responses. Claimant also moved for the issuance of an interim order awarding benefits payable by the Special Fund pending resolution of the Director's motion. In an interim order, the administrative law judge granted claimant's motion and ordered the Special Fund to commence disability payments on December 1, 2009. The administrative law judge also ordered claimant and employer to notify him of the status of the claim for the June 2005 back injury.

On February 24, 2010, the administrative law judge ruled on the Director's motion for reconsideration. He stated that, in response to the Director's argument that claimant is entitled to additional compensation for his June 23, 2005, injury, both claimant and employer advised that the compensation set forth in the stipulations accounted for all of claimant's injuries. The administrative law judge incorporated the parties' response into his decision on reconsideration.[2] The administrative law judge also granted the motion to clarify that claimant's back condition from the injury on January 9, 2006, reached maximum medical improvement on February 3, 2007, while the ankle condition from the injury on that same date reached maximum medical improvement on July 28, 2006. The administrative law judge deemed moot the Director's request for the compensation order to be amended to include a "schedule" of payments, as the parties indicated to the administrative law judge that employer had made all payments for which it was liable, and the Special Fund was now paying claimant's benefits. The administrative law judge rejected the Director's argument that the compensation order is contrary to law because it allowed claimant to waive his entitlement to interest. The Director appeals the

[2]The administrative law judge did not address the Director's argument that payments were made based on an incorrect maximum compensation rate.

administrative law judge's three orders, and employer responds, urging affirmance. Claimant has not responded to this appeal.

The Director contends the administrative law judge erred in approving the stipulations as they are not supported by substantial evidence and do not accord with law. The Director asks the Board to vacate the administrative law judge's decisions and remand the case for him to reconsider whether claimant has been paid in full, addressing claimant's entitlement to compensation for the 2005 back injury, the proper maximum compensation rate, and the onset of payment for claimant's two partial disabilities. The Director also contends that claimant cannot waive his right to interest on untimely paid benefits.

Well-established law provides that stipulations between private parties offered in lieu of factual evidence are not binding on any party if they evince an incorrect application of law. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). In addition, stipulations between an employer and a claimant which affect the liability of the Special Fund are not binding on the Special Fund absent the participation of the Director. *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 to the private parties but reject them with regard to the claim for Section 8(f) relief, which is essentially a separate case involving the employer and the Special Fund. *Id.*; *see also Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987). Moreover, although the Director did not participate before the administrative law judge, he has standing to appeal the administrative law judge's order based on the stipulations because he may challenge before the Board erroneous legal and factual determinations which affect the proper administration of the Act. 33 U.S.C. §921(b)(3); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (*en banc*); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on recon.*, 22 BRBS 430 (1989); 20 C.F.R. §802.201(a).

Benefits for the June 2005 back injury

The Director first contends the parties' stipulations do not account for benefits for claimant's June 23, 2005, back injury. The Director argues that the parties' assertions that claimant was fully paid for this injury are insufficient to establish that claimant received disability compensation for this injury. We agree. The stipulation agreement describes the June 23, 2005, injury and the subsequent medical treatment claimant obtained. However, with regard to "compensation paid," the agreement states only that employer "paid temporary total disability benefits at the maximum rate from January 21,

2006, to February 3, 2007." Agreement at 4. The agreement further states that claimant is entitled to permanent partial disability benefits under Section 8(c)(21) from February 4, 2007, and continuing for 104 weeks if employer is granted Section 8(f) relief. *Id.* at 7. Although employer agreed to pay necessary and reasonable medical care for the work injuries sustained on both dates, Agreement at 7, there is nothing in the agreement or the attached exhibits that indicates claimant received disability benefits specifically for the June 23, 2005, injury. Further, Section 15(b) of the Act, 33 U.S.C. §915(b), provides that a claimant may not waive his right to compensation under the Act, and Section 16 of the Act, 33 U.S.C. §916, provides that there may be no release or commutation of compensation except as provided by the Act. The only exception to the provisions of Sections 15(b) and 16 is a valid and approved agreement pursuant to Section 8(i), 33 U.S.C. §908(i), *see, e.g., McNeil v. Prolerized New England Co.*, 11 BRBS 576 (1979), *aff'd sub nom. Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 302, 12 BRBS 809 (1st Cir. 1980), and this case does not involve a Section 8(i) agreement.[3] As claimant had surgery in 2005 for his June 2005 back injury, he is entitled to appropriate disability benefits under the Act. 33 U.S.C. §§908, 920(a). The stipulations are silent on the matter and do not account for any compensation due to disability claimant incurred for the 2005 injury prior to the January 2006 injury. Consequently, the administrative law judge erroneously accepted the stipulations for the purpose of establishing that claimant was paid compensation for his 2005 injury. We remand the case to the administrative law judge for him to accept evidence and make proper findings of fact or to allow the parties to submit proper, legally sound, stipulations, on which to base his compensation order. *See Harris v. Marine Terminals Corp.*, 8 BRBS 712 (1978). On remand, therefore, the administrative law judge must address the extent of claimant's disability, and his entitlement to benefits, due to the 2005 back injury.

Proper Compensation Rate

The Director contends that the maximum compensation rate set forth by the parties in the stipulations and approved by the administrative law judge is incorrect. We agree. The parties stated that claimant's average weekly wage, as of January 9, 2006, was $2,136.50. As the calculated compensation rate, $1,424.34, exceeds the Section 6(b)(1) maximum compensation rate, 33 U.S.C. §906(b)(1), the parties agreed claimant would be paid at the maximum rate as of January 9, 2006. The terms of the agreement set forth the maximum compensation rate as $1,030.78, Agreement at 8; however, the maximum

[3] In a letter dated July 31, 2009, employer informed the administrative law judge that the parties incorrectly labeled the stipulations as a Section 8(i) agreement and that it should properly be titled "Stipulations of Fact with Request for Compensation Order."

compensation rate as of January 9, 2006, was $1,073.64.[4] As employer agreed to pay claimant's scheduled permanent partial disability benefits for his ankle injury at an incorrect rate, this stipulation also evinces an incorrect application of law. *See Clefstad v. Perini North River Assoc.*, 9 BRBS 217, 224 (1978) (an agreement tied to rates in the Act requires the rates to be correct). On remand, the administrative law judge must correct this error as well as any error regarding the effect of an incorrect rate on employer's liability for temporary total disability benefits for the 2006 injuries.

Interest

The Director next contends the administrative law judge erred in approving the stipulation in which claimant waived his entitlement to interest on the past-due compensation because interest is mandatory and cannot be waived. The administrative law judge rejected the Director's assertion and found that, because this was not a contested case, claimant is permitted to waive his entitlement to interest. The Director argues that the administrative law judge erred in relying on *Hernandez v. Sealand Service, Inc.*, 9 BRBS 1076 (1978), and *Clefstad*, 9 BRBS 217, to so find because those cases involved settlements under Section 8(i) of the Act, 33 U.S.C. §908(i), whereas this case involves a stipulated compensation order. As an award of interest is mandatory in appropriate cases, the Director asserts that the approved stipulation in this case is contrary to law.

It is axiomatic that, under the Act, interest is mandatory and cannot be waived in contested cases. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972). However, interest may be waived by the parties as an item of compromise in a settlement agreement under Section 8(i), 33 U.S.C. §908(i). *Clefsted*, 9 BRBS 217; *see also D.G. [Graham] v. Cascade General Corp.*, 42 BRBS 77 (2008) (parties can waive claimant's entitlement to Section 14(f) assessment in Section 8(i) settlement). In *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982), following a hearing, the administrative law judge awarded benefits. He did not award interest because claimant stated he was not seeking interest. The Board stated "when claimant proceeds to a hearing, interest, like any other compensation due, cannot be waived." *Byrum*, 14 BRBS at 837 (citing *Harris*, 8 BRBS at 714);[5] *see also*

[4]The rates can be found at http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm. *See also* A BRBS 3-175 (Notice No. 120, dated September 7, 2005).

[5]In *Harris*, a hearing was held to determine the nature/extent of the claimant's disability. The administrative law judge awarded permanent total disability benefits. In his decision, he noted that the parties' stipulations did not address the claimant's

Canty v. S.E.L. Maduro, 26 BRBS 147, 157 (1992). To the contrary, in *Clefstad*, after a brief hearing where the parties informed the administrative law judge that they had reached an agreement and sought an award of temporary total disability and permanent partial disability benefits, the administrative law judge accepted the parties' stipulations, including those which stated no interest or Section 14(e) assessment would be paid, and closed the record without taking testimony or documentation. He issued an order embodying the terms of the parties' agreement. The Board interpreted the stipulations as a Section 8(i) settlement because there was a "clear" agreement between the parties, held that the administrative law judge can approve Section 8(i) settlements, and stated that the parties can compromise any point in a settlement, including interest and additional compensation, subject to approval. *Clefstad*, 9 BRBS at 220-225. In *Hernandez*, the Board stated that in certain circumstances assessments and interest are mandatory. Because it was unclear whether the parties were pursuing an "agreement" or a "settlement," the Board remanded the case for the district director to address all issues, including whether interest was due. *Hernandez*, 9 BRBS at 1077-1079.

The parties to this case were unambiguous: their agreement was comprised of stipulations to be approved and incorporated into a compensation order. *See* 33 U.S.C. §908(i)(4) (Section 8(f) prohibited after Section 8(i) agreement); *see* n.3, *supra*. Stipulations must be in accordance with law. *Ramos*, 34 BRBS 83. The parties cannot "compromise" issues via stipulations as they would in a Section 8(i) settlement, because a claimant cannot waive his right to compensation outside of the Section 8(i) framework. *See, e.g., Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). Under the Act, interest is mandatory except if waived under a Section 8(i) settlement. *Clefstad*, 9 BRBS 217. As this case does not involve a Section 8(i) settlement, and a claimant cannot waive his compensation unless Section 8(i) applies, the administrative law judge's approval of a stipulation that waives claimant's entitlement to interest is contrary to law. Therefore it was improper for the administrative law judge to accept such a stipulation. On remand, any order approving stipulations of the parties must reflect claimant's entitlement to interest, as appropriate.

Concurrent Awards/Schedule of Payments

The Director contends the administrative law judge erred in refusing, on reconsideration, to set forth a "schedule" for the payment of claimant's concurrent

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entitlement to interest or a Section 14(e) assessment, so he found that claimant waived that entitlement. The Board reversed this finding, stated that such an additional assessment is mandatory, and remanded the case for the parties to submit proper stipulations or evidence so that the administrative law judge could make findings. *Harris*, 8 BRBS at 713-714.

awards for the injuries that occurred in 2006 and in deeming the request moot because the parties "agreed" claimant had been paid in full. The Director asserts that, even if employer has made all its payments under the agreement, the administrative law judge is required to "order" the payment of benefits so that the total amount of compensation due by employer or the Special Fund, including any interest and assessments, can be calculated. Because the administrative law judge has ordered the Special Fund to pay benefits,[6] the Director argues that the specific awards for specific periods of time are necessary to determine the date the Special Fund is to commence payments.[7]

The Director also contends that the parties' stipulations must comply with the law governing concurrent awards. Specifically, the Director cites error in awarding claimant temporary total disability and permanent partial disability benefits at the same time in this case. Although claimant is entitled to scheduled permanent partial disability benefits for his ankle injury, the Director argues that claimant cannot receive those benefits beginning July 29, 2006, because they would overlap with the temporary total disability benefits claimant was owed through February 3, 2007. Rather, the Director asserts, claimant's scheduled benefits may not commence until February 4, 2007, when the parties agreed that claimant became permanently partially disabled due to his back injury. Agreement at 7. However, that is the same date the administrative law judge ordered claimant's permanent partial disability benefits of $600 per week for his back to commence. The Director argues that if compensation for both permanent partial disabilities is paid concurrently, the total weekly amount exceeds the maximum compensation rate set forth in Section 6(b)(1). We agree that the administrative law judge must clarify the awards due claimant.

An award under the schedule may not coincide with an award of temporary total disability benefits. *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956); *Byrd v.*

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[6]The Director does not challenge claimant's entitlement to benefits or employer's entitlement to Special Fund relief for benefits for claimant's back injury. We affirm those findings. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[7]In his Interim Order, the administrative law judge ordered the Special Fund to commence payment on December 1, 2009. As the Special Fund's liability does not commence until the employer has paid its liability in full, for all temporary benefits and 104 weeks of permanent partial disability for the 2006 back injury, and as the Director argues that claimant has not been paid in full, he asserts that the December 1, 2009, commencement date may be incorrect. Employer asserts that it has paid all benefits for which it is liable, but it acknowledges that a payment schedule may be significant in ascertaining the date the Special Fund is to commence payments.

J.F. Shea Constr. Co., 18 BRBS 48 (1986), *aff'd mem.*, 802 F.2d 1483 (D.C. Cir. 1986) (table); *James v. Bethlehem Steel Corp.*, 5 BRBS 707 (1977). Rather, the schedule award lapses during total disability and resumes when total disability is terminated. *Bogden v. Consolidation Coal Co.*, 44 BRBS 43 (2010); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.4 (1985). Therefore, any stipulations pertaining to the payment of both temporary total disability and permanent partial disability benefits may not contain overlapping dates. *Id.* When the claimant's injuries are each partially disabling, the claimant is entitled to concurrent awards provided the amount paid does not exceed what the claimant would receive if he were permanently totally disabled. *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Bogden*, 44 BRBS 43. If the concurrent partial awards exceed the total disability rate, then the unscheduled award should be given priority and paid in full while the scheduled benefits would be pro-rated and paid out over a longer period of time until they are paid in full. *Bogden*, 44 BRBS 43; *Padilla v. San Pedro Boat Works*, 34 BRBS 49, 53 (2000); *see also Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

Although the parties stated that employer fully paid the benefits for which it is liable, and the Special Fund is now paying claimant's benefits, the Director is correct in asserting that the administrative law judge should have set forth the types of benefits due claimant for each time period. This would have ensured claimant's receipt of the full amount of compensation for his 2006 back and ankle injuries, including employer's payment for 104 weeks of permanent partial disability for the back injury, as well as ensuring that employer paid the full amount owed for temporary disability for the 2005 and 2006 injuries and that the Special Fund commenced its payments at the proper time. 33 U.S.C. §908(f); *Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96 (1989). As claimant sustained two permanent partial disabilities as a result of the 2006 incident, he is entitled to benefits for both; therefore, any approved stipulation and award of benefits on remand must comply with the law for concurrent awards.[8] *See Price*, 382 F.3d 878, 38 BRBS 51(CRT); *Green*, 185 F.3d 239, 33 BRBS 139(CRT); *Bogden*, 44 BRBS 43; *Padilla*, 34 BRBS 49. Moreover, we note that the parties' stipulations indicate that claimant is entitled to permanent partial disability compensation for his 2006 back injury commencing February 4, 2007, but that claimant underwent work-related back surgery in March 2007. On remand, the administrative law judge also must address this fact, as claimant's back condition may not have reached maximum medical improvement prior to

[8]The administrative law judge's compensation order also must include an "order" directing employer and the Special Fund to pay claimant benefits. *See* 5 U.S.C. §557(c); 33 U.S.C. §919(c); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990); 20 C.F.R. §702.348. It is unnecessary to obtain the consent of the parties before doing so, as issuing an order is a duty of the administrative law judge. *See generally Hoodye*, 23 BRBS 341.

his undergoing surgery for the work-related back injury. *See Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005); *Kuhn v. Associated Press*, 16 BRBS 46 (1983). Claimant may be entitled to additional total disability benefits after this surgery, during which time the schedule award would lapse. *Bogden*, 44 BRBS 43.

Accordingly, the administrative law judge's Orders are vacated, and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge