BRB No. 13-0497

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| JAY MITRI | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| GLOBAL LINGUIST SOLUTIONS | ) | |
| | ) | |
| and | ) | |
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| ZURICH AMERICAN INSURANCE COMPANY | ) | DATE ISSUED: June 13, 2014 |
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| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
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| Petitioner | ) | DECISION and ORDER |

Appeal of the Order Vacating Interim Compensation Order, Approving Stipulations, Remanding Claim and Setting Time to File Claimant's Petition for Attorney's Fees and Costs, and the Order Denying Director's Motion for Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Brian C. Karsen (Barnett, Lerner & Karsen, P.A.), Fort Lauderdale, Florida, for claimant.

Robyn A. Leonard (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

Matthew W. Boyle (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: HALL, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Vacating Interim Compensation Order, Approving Stipulations, Remanding Claim and Setting Time to File Claimant's Petition for Attorney's Fees and Costs, and the Order Denying Director's Motion for Reconsideration (2012-LDA-00578) of Administrative Law Judge William Dorsey 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 injured his head, neck and shoulders on December 29, 2010, when he was a passenger in a small tank that collided with a dump truck during the course of his employment for employer as a linguist and cultural advisor in Iraq. Claimant continued to work for employer for the remainder of his contract. Thereafter, he returned to the United States. In November 2011, he filed a claim under the Act for his physical injuries and post-traumatic stress disorder. Employer controverted the claim. Claimant was evaluated by Dr. Dasig on March 29, 2012. Dr. Dasig diagnosed a head injury and chronic neck and shoulder pain, and he opined that claimant could not return to his former employment with employer.[1]

The case was transferred to the Office of Administrative Law Judges on June 28, 2012. Employer "rescinded" its controversion and began paying compensation for temporary total disability on March 13, 2013, based on an average weekly wage of $2,000 and the maximum compensation rate for fiscal year 2011, $1,256.84. 33 U.S.C. §§906(b), 908(b). Claimant filed a motion for summary decision, seeking total disability compensation from March 29, 2012 to March 13, 2013.

[1] Claimant complained of recurrent headaches, short-term memory loss and comprehension difficulties, and his family observed personality changes in the form of impatience and quickness to anger. *See* Interim Compensation Order at 3. Dr. Dasig reviewed an MRI brain scan that showed a lesion in the right frontal lobe, which he opined likely represented mild chronic white matter ischemic change and diffuse cortical atrophy. *See id*. at 2-3.

In his May 10, 2013 Interim Compensation Order, the administrative law judge acknowledged employer's rescission of its notice of controversion, and he granted claimant's motion for summary decision. The administrative law judge awarded claimant continuing compensation for temporary total disability and medical benefits from March 29, 2012, for his psychiatric injury. Thereafter, the parties filed a joint motion for reconsideration and/or to vacate the interim order. The parties then filed a motion that the administrative law judge approve their joint stipulations of fact and issue a compensation order pursuant to their stipulations. In his June 12, 2013 Order Vacating Interim Compensation Order [and] Approving Stipulations, the administrative law judge granted the parties' motion to vacate his interim order. He approved their stipulations that, inter alia, employer would pay ongoing temporary total disability benefits and provide medical benefits for claimant's head and psychological injuries.

The Director filed a motion for reconsideration of the administrative law judge's acceptance of stipulations which, he contended, are contrary to Section 22 of the Act, 33 U.S.C §922. In his July 12, 2013 Order Denying Director's Motion for Reconsideration, the administrative law judge stated he was inclined to agree with the Director's position, but, in order to facilitate a direct appeal to the Board without delay, he denied the Director's motion for reconsideration.[2]

On appeal, the Director contends the administrative law judge erred in: 1) not issuing a compensation order; 2) accepting stipulations that allow employer to terminate or reduce compensation without seeking modification and securing entry of a new compensation order; and 3) adopting the parties' stipulation that the onset of claimant's disability is March 29, 2012. Claimant and employer respond, urging affirmance of the administrative law judge's acceptance of their stipulations.[3] The Director filed a reply brief in support of his position.

We agree with the Director that, upon accepting the parties' stipulations, the administrative law judge was obligated to issue an "order" awarding compensation to

[2] The administrative law judge stated that, otherwise, the parties would not be able to challenge the rejection of their stipulations until he had issued a decision on the merits after an evidentiary hearing.

[3] Additionally, the Board has received a Petition to Intervene from an attorney representing two claimants who entered into stipulations that were rejected by an administrative law judge pending disposition of this appeal. *See* 20 C.F.R. §802.214. We deny the motion to intervene. 20 C.F.R. §802.219.

claimant.[4] In *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011), the Board recently addressed a case with facts similar to those here. The parties stipulated that the claimant was temporarily totally disabled; the only issue for adjudication was average weekly wage. The administrative law judge determined the claimant's average weekly wage, but he also accepted the employer's contention that its payment of temporary total disability compensation and medical benefits was "voluntary." Thus, he vacated his prior award of ongoing disability compensation. On appeal, the Board stated:

> Section 19(c) provides that an administrative law judge "shall" by "order" "make an award" or "reject the claim." 33 U.S.C. §919(c); *see also* 33 U.S.C. §919(e). The implementing regulation, Section 702.348, provides that: "the administrative law judge shall have prepared a final decision and order, in the form of a compensation order, with respect to the claim, making an award to the claimant or rejecting the claim. The compensation order shall contain appropriate findings of fact and conclusions of law with respect thereto, and shall be concluded with one or more paragraphs containing the order of the administrative law judge…." 20 C.F.R. §702.348. Pursuant to Section 19(c) and Section 702.348, the Board has noted that the administrative law judge's compensation order must include an "order" directing the payment of benefits. *Aitmbarek* [*v. L-3 Communications*, 44 BRBS 115 (2010)] at 120 n.8; *see also Hoodye v. Empire/United Stevedores*, 23 BRBS 341, 344 (1990). In *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005), the Board similarly held that any agreements between the parties must be embodied in a formal

[4] The posture of the parties at the time the administrative law judge issued his Interim Order is unclear. If employer had "rescinded" or withdrawn its controversion of the claim, and the parties were in agreement as to the disposition of the claim, the case should have been remanded to the district director. Section 702.351 of the regulations states:

> Whenever a party withdraws his controversion of the issues set for a formal hearing, the administrative law judge shall halt the proceedings upon receipt from said party of a signed statement to that effect and forthwith notify the district director who shall then proceed to dispose of the case as provided for in § 702.315.

20 C.F.R. §702.351. *See generally Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47 (2004); 20 C.F.R. §702.315 (district director can issue a compensation order upon agreement of the parties).

> order issued by the district director or an administrative law judge. *Davis*, 39 BRBS at 6.

*Luttrell*, 45 BRBS at 34. The Board held that as the parties had stipulated that claimant remained temporarily totally disabled as of the date of the hearing, the administrative law judge had the duty under Section 19(c) to make an award to claimant of continuing temporary total disability compensation. *Id*.

In this case, the administrative law judge's Order incorporated and "accepted" the parties' stipulations without providing for an "award" of benefits. The Order merely states: "[T]he Stipulations are approved and incorporated herein by reference." Order at 1-2. Section 19(c) and its implementing regulation, Section 702.348, explicitly provide that an administrative law judge's order must include an award or denial of benefits. *Luttrell*, 45 BRBS at 34; *see also Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010); *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005). Accordingly, the administrative law judge's Order is not in accordance with law as it does not conclude with an order entering an award of benefits. *See generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

Moreover, we agree with the Director that the parties' stipulations numbered 4 and 6 are contrary to law.[5] As a general rule, stipulations are binding upon those who enter into them. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). However, stipulations are not binding if they evince an incorrect application of law. *Aitmbarek*, 44 BRBS at 117-119; *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). The Director specifically objects to stipulations 4 and 6, which provide:

> 4. The Employer/Carrier agrees to pay temporary total disability benefits from March 29, 2012 and continuing until the Claimant is placed at maximum medical improvement or returns to work. The Employer/Carrier is entitled to a credit for any previously paid benefits.
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> 6. The parties agree that the Employer/Carrier shall be able to reduce or terminate the Claimant's compensation benefits based upon a Labor Market

[5] In his Order Denying Director's Motion for Reconsideration, the administrative law judge stated he was "inclined to the Director's view" that the stipulations are invalid. Order at 3.

> Survey or full duty medical release without a Section 22 modification; however, the Claimant has the right to contest the validity of the Labor Market Survey and the basis for reduction in compensation benefits without the need for an Informal Conference and/or recommendations from the OWCP.

Stipulations of the Parties at 2. The Director argues that these stipulations are not in accordance with law as they purport to allow employer to terminate or reduce compensation without first seeking modification under Section 22 and securing entry of a new compensation order.

Section 22 of the Act provides the sole means by which a compensation award can be modified, decreased, or terminated upon a change in condition or a mistake in a determination of fact. *See Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968). In this case, stipulations 4 and 6 attempt to avoid Section 22 by permitting to employer to unilaterally decrease or terminate claimant's compensation upon changes in condition. These stipulations improperly give employer the authority to determine those changes in condition which warrant a reduction or termination in benefits.[6] Rather, such authority is given by Section 22 of the Act only to an administrative law judge in contested cases.[7] *See generally Island Operating Co. v. Director, OWCP*, 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013); *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986); *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986); *see* 33 U.S.C. §919(d). The Director also correctly notes that as the stipulations are currently written, claimant would be unable to enforce the "award" while he "contested the validity" of employer's action in reducing its payments as no sum certain would be due.[8] *See* 33 U.S.C. §§914(f),

[6] The stipulations reference the following "changes in condition" that will permit employer to change its payments: claimant's reaching maximum medical improvement; claimant's return to work; the production of a labor market survey; or claimant's full medical release to return to work.

[7] If the parties are in agreement as to the way in which an award should be modified, they can apply to the district director for such an order. 20 C.F.R. §702.315; *Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986).

[8] If employer unilaterally terminates or decreases compensation due under an award without pursuing Section 22 modification, it takes the risk that it will be liable for a Section 14(f) assessment in addition to past due benefits. *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Richardson v. General Dynamics Corp*., 19 BRBS 48 (1986).

918(a), 921(d); *see generally Severin v. Exxon Corp.*, 910 F.2d 286, 24 BRBS 21(CRT) (5th Cir. 1990). Accordingly, stipulations 4 and 6 are invalid because they are contrary to law. As a consequence, we must vacate the administrative law judge's Order accepting all the parties' stipulations and vacating his Interim Order. Thus, the administrative law judge's Interim Order is reinstated. The case is remanded to the administrative law judge to address the parties' joint motion for reconsideration of the Interim Order or to take other action consistent with law.[9] *See generally Jukic v. American Stevedoring, Inc.*, 39 BRBS 95 (2005).

[9] The Director contends that the administrative law judge also erred in accepting the parties' stipulation that claimant's benefits are to commence as of March 29, 2012, because the stipulation does not account for the time between the filing of the claim on November 2, 2011 and March 28, 2012, a period during which claimant did not work. This contention is without merit, as the stipulation is not contrary to law. Stipulations of fact are offered in lieu of evidence. *Schlemmer v. Provident Life & Acc. Ins. Co.*, 349 F.2d 682 (9th Cir. 1965); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). A stipulation is "[a]n express waiver . . . conceding for the purposes of trial the truth of some alleged fact . . . so that the one party need offer no evidence to prove it and the other is not allowed to disprove it . . . ." *Vander Linden v. Hodges*, 193 F.3d 268, 279-280 (4th Cir. 1999) (internal citations omitted). The administrative law judge's Interim Order directed that payment of claimant's benefits commence as of March 29, 2012. The Interim Order is subject to Section 22 modification.

Accordingly, the administrative law judge's Order Vacating Interim Compensation Order [and] Approving Stipulations and his Order Denying Director's Motion for Reconsideration are vacated. The Interim Compensation Order is reinstated. The case is remanded for further proceedings in accordance with this decision.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge