BRB No. 99-0134

EFRAIM RAMOS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL & CONTAINER SERVICES, INCORPORATED	)	DATE ISSUED: 10/7/99
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification (97-LHC-2202) of Administrative Law Judge Ralph A. Romano 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*. (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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was injured on January 28, 1987, when a container weighing over 1,000 pounds fell on his left hand. He was taken to a hospital where he was admitted for a period of two weeks, undergoing a partial amputation of the left ring finger. Following his discharge he continued under the care of Dr. Rayo, who performed additional surgeries, including a skin graft, the last of which occurred in 1988. Claimant sought permanent total disability benefits under the Act. After entering into stipulations, the parties agreed to a compensation order issued by the district director awarding permanent total disability benefits, and relief from continuing compensation liability under Section 8(f), 33 U.S.C. §908(f), was awarded to employer. *See* 20 C.F.R. §702.315.

In 1998, employer sought modification of the compensation order. Employer submitted two physicians' reports stating that claimant is no longer prevented from returning to his former longshore work. In addition, employer submitted a labor market survey identifying four positions as suitable alternate employment.

In his decision, the administrative law judge found that employer established that claimant's medical condition has changed, pursuant to Section 22 of the Act, 33 U.S.C. §922. The administrative law judge found that claimant had recovered from the work-related injury to his left hand, and that he is capable of performing the jobs identified in the labor market survey. Thus, the administrative law judge found that claimant is now limited to recovering permanent partial disability benefits under the schedule at Section 8(c)(10), 33 U.S.C. §908(c)(10), for a 50 percent impairment to the finger.

Claimant contends on appeal that the administrative law judge erred in modifying the stipulations employer had agreed to in 1990, and in finding that employer has standing to pursue modification when benefits are being paid by the Special Fund. In addition, claimant contends that there is no proof of a change in condition, because there is no evidence of what claimant's condition was at the time of the 1990 compensation order. Moreover, claimant contends that employer could have identified alternate employment at the time of the 1990 compensation order and should not be allowed to introduce a labor market survey for the first time on modification.

Initially, we reject claimant's contention that employer does not have standing to petition for modification as benefits are being paid by the Special Fund pursuant to Section 8(f). Section 22 states that any party-in-interest, including an employer granted relief under Section 8(f), may apply for modification. 33 U.S.C. §922. Furthermore, Section 8(f)(2)(B) of the Act, 33 U.S.C. §908(f)(2)(B), states that after employer has paid benefits for the

requisite number of weeks, it retains all the rights it had under the Act prior to the Special Fund's assuming liability. In addition, an award based on the parties' stipulations is subject to modification if the requirements of Section 22 are met, contrary to claimant's contention. *See generally Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994).

Claimant also contends that the administrative law judge erred in finding that there has been a change in his condition as there was no evidence regarding claimant's condition at the time of the compensation order in 1990. As a general rule, stipulations made by parties are binding upon those who made them. *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985). Stipulations are offered in lieu of evidence and thus may be relied upon to establish an element of the claim. *See generally Williams Electronics, Inc. v. Arctic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982). In the present case, as the parties stipulated that claimant was permanently totally disabled at the time of the compensation order, we hold that this stipulation establishes claimant's condition in 1990. Consequently, as the record establishes that claimant was totally disabled at the time of the 1990 compensation order, and thus was not able to return to his former longshore work, we also reject claimant's contention that the new medical evidence submitted by employer with its petition for modification is insufficient to establish that claimant's condition has changed. Therefore, we affirm the administrative law judge's consideration of the claim pursuant to Section 22. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

Once employer shows a change in condition, the standard for determining disability is the same in a Section 22 modification proceeding as it is in an initial proceeding under the Act. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Dr. Olson, a neurologist, stated in 1996 and 1997 that claimant has completely recovered from his injury from a neurologic standpoint, and that his subjective complaints are not corroborated by objective findings. EX A. In a 1998 report and deposition, Dr. Nehmer, an orthopedist, opined that claimant is not precluded from performing his former longshore duties as a result of his hand injury. EX B, E. The administrative law judge rationally credited this evidence over claimant's subjective complaints. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Inasmuch as this evidence supports the administrative law judge's finding that claimant is limited to an award under the schedule, we affirm the administrative law judge's grant of modification and denial of continuing permanent total disability benefits.[1] *See generally Morin v. Bath Iron*

[1]Thus, we need not address claimant's contentions regarding the propriety of employer's submission of a labor market survey for the first time in a modification proceeding.

Works Corp., 28 BRBS 205 (1994).

Accordingly, the administrative law judge's Decision and Order on Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge