BRB No. 14-0095

ARI NAVALO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COCHISE CONSULTANCY, INCORPORATED	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: Aug. 27, 2014
	)	
Employer/Carrier-Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Finding of Fact/Recommendation of R. Todd Bruininks, District Director, United States Department of Labor.

Annamarie Fortunato (Fortunato & Fortunato, PLLC), Brooklyn, New York, for claimant.

Alan G. Brackett and Robert N. Popich (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, 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, Acting Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Finding of Fact/Recommendation of District Director R. Todd Bruininks 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). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986).

Claimant worked for employer as an armed security escort in Iraq. On December 3, 2004, the convoy claimant was protecting was attacked. He suffered a gunshot or shrapnel wound which entered his back and exited through his chest, leaving him with serious injuries. Employer accepted liability for claimant's injuries but disputes later arose regarding the nature and extent of claimant's disability, including his average weekly wage, his ability to return to his usual work, his post-injury wage-earning capacity, and his entitlement to on-going compensation and medical expenses. The administrative law judge held a hearing on the matter in June 2012; she issued a Decision and Order awarding benefits in April 2013, finding that claimant's average weekly wage was $2,594.56, that he is entitled to various periods of differing types of benefits as well as to continuing permanent partial disability benefits commencing May 2012, and that he is entitled to medical benefits. For each period of disability, the administrative law judge found that claimant is entitled to two-thirds of the difference between his average weekly wage and his wage-earning capacity; she did not apply the Section 6(b)(1), 33 U.S.C. §906(b)(1), maximum compensation rate in her Order. Decision and Order at 29-32. No party appealed the administrative law judge's decision.

The administrative law judge's decision was filed in the district director's office on May 14, 2013. In serving the parties, the district director included the claims examiner's "Amended Compensation & Interest Calculation" dated May 14, 2013, in the mailings to the parties.[1] Cl. P/R at exhs. 2-3; Emp. Br. at exhs. 2-3. The claims examiner showed her calculations, and each weekly payment was calculated at two-thirds of the difference between claimant's average weekly wage and his wage-earning capacity for

[1] It is unclear why this was titled "Amended" when it was the first calculation issued. The claims examiner also inexplicably referenced an "Order granting reconsideration" dated April 26, 2013, the date of the administrative law judge's only Decision and Order.

that period without application of Section 6(b)(1). Cl. P/R at exh. 3; Emp. Br. at exh. 3. Employer initially paid benefits pursuant to the calculations, but at some point reduced benefits to reflect payments limited by the Section 6(b)(1) maximum rate. Emp. Br. at exh. 7. On August 2, 2013, claimant sent a letter to the claims examiner, referencing "several discussions" and a "letter of July 11, 2013," and he requested she amend the May 2013 calculations to reflect that employer is not entitled to a credit for benefits paid in 2004 and 2005 and that claimant, therefore, is entitled to additional benefits and interest. Claimant also stated that, pursuant to the administrative law judge's Decision and Order, he is to receive $1,409.71 per week in compensation beginning May 1, 2012,[2] but that employer is paying him at a rate of $1,047.16 per week. He concluded by "requesting a hearing to address all issues stated herein." Emp. Br. at exh. 5. On August 15, 2013, employer sent a letter to the claims examiner indicating its position in response to claimant's letter. Employer stated it is entitled to a credit for its prior payments, and it confirmed it was paying claimant at the rate of $1,047.16 per week, as that is the applicable maximum compensation rate pursuant to Section 6(b). Cl. P/R at exh. 4; Emp. Br. at exh. 4.

On August 27, 2013, the claims examiner sent the parties an "Amended Compensation & Interest Calculation." She again referred to a non-existent order on reconsideration, as well as to the July 11 and August 2 letters filed by claimant. The claims examiner adjusted some periods of disability for which benefits were due, noting that some dates had overlapped, she limited compensation payable to the applicable maximum compensation rate, and, she stated that employer is not entitled to a credit for benefits paid in 2004 and 2005. She also acknowledged that she had calculated interest at an incorrect rate, and she issued the amended calculations, indicating claimant's entitlement to a greater amount of benefits as a result of the removal of employer's credit. Cl. P/R at exh. 5; Emp. Br. at exh. 6. Employer timely made payment in accordance with the amended calculations. Emp. Br. at exh. 9.

On September 9, 2013, claimant wrote a letter to the district director and the claims examiner. He reiterated that employer is not entitled to a credit, and he asserted that he is entitled to compensation at a rate of $1,409.71 because that is what the administrative law judge awarded in her Order. He argued that employer's challenge to the compensation rate is improper because no party appealed the administrative law

[2] The administrative law judge stated that claimant accepted work "a little over a month before the June 2012 hearing" and that claimant earned $480 per month. "The difference between $2,594.56 [average weekly wage] and Claimant's current wage is $2,114.56. Employer owes Claimant two-thirds of the difference." Decision and Order at 31.

judge's Decision and Order, and, therefore this issue may not be raised.[3] Thus, claimant asserted employer should be assessed a Section 14(f), 33 U.S.C. §914(f), penalty for failing to comply with the original Decision and Order because it did not make payments in accordance with the administrative law judge's decision. Cl. P/R at exh. 6. Having heard nothing from the district director's office, claimant sent another letter, dated November 27, 2013, requesting some action on his prior letter. Cl. P/R at exh. 7.

On December 5, 2013, the district director sent claimant's counsel a letter, serving all parties. The district director first stated that, pursuant to the administrative law judge's Decision and Order, on May 14, 2013, his office calculated compensation and interest due, and then later amended the calculations. The district director found that claimant's concerns regarding employer's credit had been addressed by the claims examiner's August calculations, and that there was no compelling evidence to support further revisions. He also stated that employer was properly paying benefits at the maximum compensation rate and denied claimant's contention otherwise, and he found there was no evidence to support a finding that employer was in default, as employer fully paid claimant within 10 days of each notice of the calculations. The district director denied claimant's request for a Section 14(f) assessment, and he stated that any party who disagrees should file an LS-18 form to refer the case to the Office of Administrative Law Judges (OALJ). Cl. P/R at exh. 8; Emp. Br. at exh. 1.

Following receipt of the district director's letter, claimant filed an appeal with the Board. He contends the district director's "Decision and Order" is erroneous, as the district director declined to issue a default order despite employer's failure to abide by the administrative law judge's Decision and Order and to pay the full compensation awarded. He also asserts that the district director's action amounts to an improper "modification" of the administrative law judge's decision. Employer responds, urging the Board to dismiss claimant's appeal or, in the alternative, to affirm the district director's order. Claimant replies in opposition to the motion to dismiss, stating it was proper for him to appeal the district director's *ultra vires* action directly to the Board. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to deny employer's motion to dismiss and to affirm the district director's Order. Claimant filed a reply to the Director's brief.[4]

[3] Interestingly, claimant does not view his July and August 2013 letters as an improper "appeal" of the administrative law judge's order, despite that he challenged the administrative law judge's finding that employer is entitled to a credit.

[4] Although district directors are the designees of the Director, OWCP, for some purposes, *see*, *e.g.*, 20 C.F.R. §702.407, they are not "one and the same." Thus, the Director is not precluded from appealing an order of the district director or from filing a brief in support of the district director's action. *See*, *e.g.*, 20 C.F.R. §802.201(a).

We first address employer's motion to dismiss claimant's appeal. Employer contends that the action being appealed is a "recommendation" and not an "order" and that, when a party is aggrieved by a district director's recommendation, it should request referral of the case to the OALJ where, as in this case, it believes there are disputed facts for the administrative law judge to resolve. After an administrative law judge issues an order on the matter, employer asserts, the administrative law judge's decision is appealable to the Board. Claimant responds that the August 2013 amendments to the claims examiner's initial calculations of May 2013, which culminated in the district director's December 2013 letter, were improper, as they were not in accordance with the administrative law judge's decision, they were untimely made, and they were beyond the authority of the district director. Moreover, claimant asserts that, as the district director declined to issue a default order, the Board has jurisdiction over his appeal.[5] The Director argues that, regardless of how the district director characterized his findings, they are "in substance and practical effect" a denial of the request for a default order, such that the Board has jurisdiction to address claimant's appeal.

Employer asserts this was not an appealable order, but only a non-appealable recommendation or letter. *See Maria v. Del Monte/Southern Stevedore*, 22 BRBS 132 (1989) (recon. en banc), *vacating and dismissing* 21 BRBS 16 (1988) (McGranery, J., dissenting). Claimant asserts this letter was a denial of his request for a default order and, therefore, is appealable to the Board. Where no default order is issued, the Board has jurisdiction over an appeal regarding whether Section 14(f) is applicable. *Lynn v. Comet Constr. Co.*, 20 BRBS 72 (1986); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986). Moreover, where the district director refuses to issue a default order for purely legal reasons, or the amount due is paid and the remaining dispute is a legal one, the district director's order may be appealed directly to the Board. *See Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994); *Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981); *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting); *Jennings v. Sea-Land Service, Inc.*, 23 BRBS 12 (1989), *vacated on other grounds on recon.*, 23 BRBS 312 (1990). If a factual dispute is raised, the case must be referred to an

[5] Thus, claimant requests findings that employer's August challenge to the May calculations was an untimely appeal of the administrative law judge's Decision and Order, that the August calculations limiting the award to the maximum rate exceeded the scope of the district director's authority and were improper, that the May calculations should be reinstated, and that a default order should be entered. Claimant seems to believe that reinstatement of the May calculations would result in his receiving greater benefits; however, it also would result in employer's retaining its credit, and interest being calculated at an incorrect rate.

administrative law judge. *See Brown v. Avondale Indus., Inc.*, 46 BRBS 1 (2012); *D.G.* [*Graham*] *v. Cascade General, Inc.*, 42 BRBS 77 (2008); 20 C.F.R. §702.372(a).

In his letter dated December 5, 2013, the district director supported the claims examiner's amended calculations, and denied claimant's request for a Section 14(f) assessment, as well as claimant's assertion that he is entitled to benefits at greater than the maximum rate and his request for a default order. As the district director declined to issue a default order, we interpret the letter as an order denying default and denying a Section 14(f) assessment over which the Board has jurisdiction. *Lynn*, 20 BRBS 72; *Durham*, 19 BRBS 105; *compare with Maria*, 22 BRBS 132 (district director's letter was a notification of the suspension of benefits as claimant had not requested an order of default). Moreover, although this dispute concerns the amount of compensation due, generally a factual issue as employer stated, in this case the amount due is strictly dependent upon the applicability of the Section 6(b)(1) maximum rate, and that is a legal issue appealable directly to the Board. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 531U.S. 956 (2000). Therefore, we deny employer's motion to dismiss claimant's appeal. As the parties have filed briefs on the merits of the appeal, we shall address the issues raised.

Claimant contends employer's August letter stating that the May calculation of compensation and interest was incorrect amounted to an untimely "appeal" of the administrative law judge's April Decision and Order.[6] He also asserts that the claims examiner's August calculations regarding the applicable compensation rate effectively "modified" the administrative law judge's award. We reject these contentions.

The administrative law judge specifically noted that "Claimant agrees that the 'average weekly wage has been conclusively established at $2,594.56' *with a maximum compensation rate of $1,047.16 per week. . . .*" Decision and Order at 29 (emphasis added). Nonetheless, claimant requested a finding that his average weekly wage is $2,904. As claimant had already agreed to the amount employer asserted was correct, the administrative law judge found that the parties agreed that claimant's average weekly wage is $2,594.56. *Id.* Thereafter, the administrative law judge's Order provided:

> The Employer shall pay permanent partial disability benefits for the physical disability to the Claimant based on his alternate wage earning capacity as described above. Employer shall pay temporary partial disability benefits to the Claimant for his psychological disability not to

[6] Notably, *claimant's* July and August letters initiated the action to revisit the calculations in August 2013. *See* n.3, *supra*.

> exceed the statutory period of five years also based on the alternative wage earning capacity described above.[7]
>
> Effective May 2012, the Employer shall pay permanent partial disability benefits based on an alternate wage earning capacity of $480.00 per week.
>
> All calculations of disability payments are to be based on the Claimant's stipulated average weekly wage of $2,594.56.
>
> The District Director shall make all calculations necessary to carry out this Order.

Decision and Order at 32 (footnote added). Thus, despite addressing claimant's acknowledgement of the applicability of the maximum compensation rate in the discussion, the administrative law judge did not explicitly order the payment of any particular amount of compensation.

Rather, the administrative law judge tasked the district director with making the calculations. Decision and Order at 32. The district director may make any calculations required to effectuate a compensation order, as this task is ministerial. *See Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994); *Estate of C.H.* [*Heavin*] *v. Chevron USA, Inc.*, 43 BRBS 9 (2009); *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990). As the district director's task is ministerial, it is logical that he may make any additional calculations or revisions to ensure accuracy in effectuating an administrative law judge's compensation order or in complying with the Act, provided that resolution of disputed facts is left to the administrative law judge.[8] *Heavin*, 43 BRBS 9; *Graham*, 42 BRBS 77. As the district director was tasked with making calculations to effectuate the administrative law judge's Order, and as the August calculations, but not the May calculations, effectuated the statutory maximum rate, we reject claimant's assertion that the district director's action was *ultra vires*. *Keen*, 35 F.3d 226, 28 BRBS 110(CRT); *Heavin*, 43 BRBS 9.

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[7] The administrative law judge found that claimant was entitled to varying amounts of benefits based on differing post-injury wages earned during those periods. Decision and Order at 29-30. In each instance the administrative law judge stated that claimant is entitled to two-thirds of the difference between his average weekly wage and his post-injury wage-earning capacity. She did not mention the statutory maximum rate.

[8] *See also Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008) (an award that does not clearly establish the correct amount of compensation due cannot be enforced).

Moreover, we reject claimant's contention that employer is in default on the ground that the statutory maximum rate does not apply to awards for loss of wage-earning capacity under Section 8(c)(21), 33 U.S.C. §908(c)(21). As employer asserts, there is no legal basis to support claimant's position, and as the Director asserts, all periods of claimant's benefits are subject to the statutory maximum rate. Section 6(b)(1) provides:

> Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

33 U.S.C. §906(b)(1). Contrary to claimant's statement, there is no reason to conclude that the Section 6(b)(1) maximum does not apply to benefits awarded under Section 8(c)(21), as they are "compensation for disability." *See* 33 U.S.C. §906(b)(1); *Roberts v. Sea-Land Services, Inc.*, 566 U.S. ___, 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012); *see also Price v. Stevedoring Services of America*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. Cir. 2012); *Lake v. L-3 Communications*, 47 BRBS 45 (2013); *Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010); *J.T.* [*Tracy*] *v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 384 (2013); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). The Supreme Court specifically stated that the cap on compensation "applies, globally, to all disability claims." *Roberts*, 132 S.Ct. at 1358, 46 BRBS at 18(CRT). Thus, employer properly paid benefits at the maximum compensation rate. *Id.* The final question, therefore, is whether the claims examiner calculated, and employer paid, benefits based on the correct maximum compensation rate.

The Supreme Court held that an employee is "newly awarded compensation" within the meaning of Section 6(c), 33 U.S.C. §906(c), when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether or when a compensation order is issued. Consequently, the applicable initial maximum compensation rate is that in effect when the claimant became disabled. *Roberts*, 132 S.Ct. 1350, 46 BRBS 15(CRT); *see also Price*, 697 F.3d 820, 46 BRBS 51(CRT). Claimant here was injured in December 2004. The maximum compensation rate in effect at that time was $1,047.16.[9] Because claimant is permanently partially disabled, he is not entitled to receive annual increases in the maximum rate. 33 U.S.C. §906(b)(3), (c).[10]

[9] http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm

[10] Section 6(c) provides:

Therefore, employer has paid, and is paying, claimant at the proper maximum rate, *Roberts*, 132 S.Ct. 1350, 46 BRBS 15(CRT), and is not in default of any amounts legally due.[11] Thus, we reject claimant's request to reinstate the original calculations, and we affirm the district director's refusal to issue a default order as it is in accordance with law.

> Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Thus, in cases involving permanent total disability or death benefits where two-thirds of the claimant's average weekly wage exceeds the Section 6(b)(1) statutory maximum, the claimant is entitled to the new maximum rate calculated each fiscal year pursuant to Section 6(b)(3) until such time as two-thirds of his average weekly wage falls below 200 percent of the applicable national average weekly wage, and thereafter he is entitled to annual adjustments under Section 10(f). *Boroski v. Dyncorp Int'l*, 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012); *Lake*, 47 BRBS 45.

[11] The documents before the Board support the district director's finding that employer paid compensation within the allotted 10 days and that claimant is not entitled to a Section 14(f) assessment. 33 U.S.C. §914(f); *Lawson v. Atlantic & Gulf Stevedores*, 9 BRBS 855 (1979); Emp. Br. at exhs. 3, 7-9.

Accordingly, the district director's "Finding of Fact/Recommendation" declining to enter a default order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge