BRB No. 99-0894

CONNIE M. DUNCAN KNIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Interim Order of Compensation Based on Stipulations and the Supplemental Decision and Order - Awarding Attorney Fees and Granting Section 8(f) Relief of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Rafal, Swartz, Taliaferro & Gilbert, P.C.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason), Newport News, Virginia, for self-insured employer.

Andrew D. Auerbach (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Interim Order of Compensation Based on Stipulations and the Supplemental Decision and Order - Awarding Attorney Fees and Granting Section 8(f) Relief (98-LHC-364, 365) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 administrative law judge's findings of fact and conclusions of law if they 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 sustained two injuries during the course of her employment. She injured her back on January 11, 1989, and both upper extremities on March 3, 1994. Claimant and employer entered into stipulations concerning the benefits employer paid to claimant and the benefits to which claimant is entitled as a result of these injuries. The parties also stipulated that "Employer is entitled to a credit for all payments made to the Employee." The administrative law judge accepted the parties' stipulations and entered an Interim Order of Compensation wherein he held employer liable for past-due benefits of $126,173.66 less employer's credit of $102,669.58, and for permanent partial disability benefits of $230.23 per week from June 15, 1998, and continuing. 33 U.S.C. §908(c)(21).

Claimant's appeal of the Interim Order was dismissed by the Board as interlocutory. BRB No. 98-1577. The administrative law judge subsequently issued a second decision, awarding employer Section 8(f) relief for continuing benefits due as a result of claimant's 1994 injury, 33 U.S.C. §908(f), and awarding claimant's counsel an attorney's fee. Claimant then perfected her appeal of the administrative law judge's Interim Order. BRB No. 99-0894.

On appeal, claimant contends the administrative law judge erred in awarding employer certain credits for voluntary payments of compensation against benefits due her per the parties' stipulations. Employer responds, urging affirmance of the administrative law judge's Interim Order. The Director, Office of Workers' Compensation Programs (the Director), also responds, contending that the administrative law judge's interpretation of the parties' stipulations is erroneous. The Director contends that correction of this interpretation will "solve" the problem of the awarded credits. He further agrees with claimant that the administrative law judge erred in awarding employer a credit for benefits paid for the second injury against compensation due for the first injury. Claimant's subsequently filed reply brief conforms to the Director's primary contention that the administrative law judge erred in interpreting the parties' stipulations.

We decline to address the Director's contentions regarding the administrative law

judge's allegedly erroneous interpretation of the parties' stipulations regarding the 1994 injuries to claimant's arms. As an initial matter, we note that issues raised in a response brief that challenge the findings of the administrative law judge will be addressed only if they provide an alternate means of affirming the ultimate decision. A party seeking to alter the administrative law judge's decision must file an appeal or a cross-appeal. *See Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 283 (1998), *vacating in pert. part on recon.* 32 BRBS 118 (1998); *see generally Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1994). Acceptance of the Director's position on the interpretation of the stipulations regarding the 1994 injuries would result in an alteration of the credits awarded by the administrative law judge, and thus does not provide an alternate basis for affirming the administrative law judge's decision. Moreover, the parties' stipulations as to the benefits claimant was paid and those she is entitled to receive were accepted by the administrative law judge as submitted.[1] The Director's attempt to "clarify" the parties' stipulations by recharacterizing the periods during which claimant is entitled to a specific type of benefits frustrates the purpose of stipulations, which is to obviate the need for evidence proving the alleged fact and to prevent another party from attempting to disprove it. *See Vander Linden v. Hodges*, 193 F.3d 268, 280 (4th Cir. 1999), *quoting* 9 Wigmore, Evidence §2588 at 281. That claimant subsequently "adopted" this position in her reply brief does not establish that the issue is properly raised. *See* 20 C.F.R. §§802.212, 802.213. The issue raised in claimant's Petition for Review and brief is that the administrative law judge's offset provisions are in error because she is entitled to concurrent awards. *See infra*. Claimant's belated attempt to re-interpret the stipulations to which she agreed, therefore, is disingenuous.

We next address the contention of claimant and the Director that the administrative law judge erred in awarding employer a credit for benefits due for the 1989 injury against benefits paid for the 1994 injury. As a result of her 1989 back injury, the parties agreed that claimant is entitled to permanent partial disability benefits of $230.23 per week pursuant to Section 8(c)(21) from March 4, 1996, and continuing. The parties also stipulated that employer paid claimant temporary partial disability benefits from July 7, 1997 to January 4, 1998, at the rate of $267.16 per week for the March 3, 1994 injuries. The parties did not stipulate that claimant was entitled to these temporary partial disability benefits paid, and the administrative law judge allowed employer an offset for those benefits against its liability for the permanent partial disability benefits due for the 1989 injury, despite the fact that the

[1]As the parties stipulated only that employer is entitled to a credit for compensation paid, the administrative law judge was permitted to discern the various credits to which employer is entitled.

benefits were for two separate injuries. We agree with claimant and the Director that the administrative law judge erred in awarding employer this credit, although we do so on grounds other than those alleged.

Initially, we reject the contention of claimant and the Director that the credit was erroneously awarded because claimant is entitled to concurrent awards for the two injuries. Although a claimant who sustains two injuries is entitled to compensation for both injuries, *see generally I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 151(CRT) (4th Cir. 1999); *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994), the parties herein did not stipulate that claimant was entitled to the temporary partial disability benefits for the 1994 injury, but only that employer paid claimant these benefits. With regard to entitlement, they stipulated that claimant is entitled to permanent partial disability benefits under the schedule for this injury which compensates claimant for the period during which employer paid claimant temporary partial disability benefits. *See* discussion, *infra*. Thus, the principle of concurrent awards cannot prevent application of the credit at issue, on the facts presented in this case.

Nonetheless, we hold that such a credit is precluded by Section 14(j) of the Act, 33 U.S.C. §914(j). Section 14(j) states: "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j). The Board has held that an employer is not entitled to reduce its liability for compensation due for a subsequent work-related injury by crediting an overpayment of compensation made for a prior, unrelated work injury. *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993). In this case, employer is seeking the converse: a credit for compensation paid for a later injury against compensation due as a result of an earlier, unrelated injury. The rationale of *Vinson*, however, is equally applicable, as the Board held that the plain language of Section 14 of the Act as a whole references a single compensable injury:

> Specifically, Section 14(b) states that the first installment of compensation shall become due on the fourteenth day after the employer has knowledge of "the injury or death." 33 U.S.C. §914(b). Similarly, Section 14(d) provides that an employer's controversion of a claim is due on or before the fourteenth day after it has knowledge of "the alleged injury or death." 33 U.S.C. §914(d). Lastly, pursuant to Section 14(g), an employer's notice of final payment of compensation shall state "the date of the injury or death." 33 U.S.C. §914(g).

Vinson, 27 BRBS at 223.[2] Thus, employer is entitled to an offset only for advance payments

of compensation against later compensation due for a single injury. Inasmuch as claimant in the instant case sustained two unrelated injuries, employer is not entitled to a credit for the temporary partial disability benefits paid for the 1994 injuries against its continuing liability for benefits for the 1989 injury. We, therefore, reverse the administrative law judge's award of this credit to employer. Claimant is entitled to full payment of the award under Section 8(c)(21) for her 1989 injury commencing March 4, 1996.

Claimant next contends that the administrative law judge erred in awarding employer a credit for its payments of temporary total disability benefits for the 1994 injuries against its liability for permanent partial disability benefits under the schedule for the same injuries. Claimant contends she is entitled to these benefits concurrently, citing *Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984), and *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956). We reject claimant's contention, and affirm the award of this credit. In addition, we hold that the credit for the temporary partial disability benefits paid, which we held above could not be applied to the benefits due for the 1989 injury, is properly taken against the scheduled permanent partial disability award for the 1994 injuries.

The parties stipulated that claimant was paid temporary total disability benefits for the March 1994 injuries for the period between March 15, 1996 and July 6, 1997, and temporary partial disability benefits between July 7, 1997 and January 4, 1998. In addition, they stipulated that on September 19, 1996, claimant became entitled to consecutive awards for a 10 percent impairment to each arm;[3] these awards were to run for a total of 62.4 weeks from September 19, 1996. *See* 33 U.S.C. §908(c)(1). The administrative law judge awarded employer a credit for the temporary total disability benefits paid during the period from September 19, 1996 through July 6, 1997.

We hold that this credit was properly awarded pursuant to Section 14(j) of the Act. *See Nichols v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 710 (1978). The payments were for the same injury, *cf. Vinson, supra*, and employer's advance payment of temporary total disability benefits is to be credited against the permanent partial disability benefits due for the same period. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). Contrary to claimant's contention, the decisions in *Rupert* and *Henry* do not establish her entitlement to temporary total disability benefits concurrently with permanent partial disability benefits for the same injury. The most significant obstacle to claimant's receipt of these benefits concurrently is that the parties did not stipulate that claimant was entitled to the temporary total disability benefits at issue, but only that employer paid her temporary total disability during this period.

Moreover, claimant cannot receive concurrent total and partial disability benefits for

the same injury, although it would be the partial award, rather than the total award that would not be payable. In *Rupert*, 239 F.2d at 273, the United States Court of Appeals for the Ninth Circuit held that a claimant who is permanently totally disabled cannot receive a concurrent award under the schedule for disfigurement, as an award for permanent total disability presupposes a permanent loss of all wage-earning capacity. *See also Korineck v. General Dynamics Corp.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987). In addition, the Board has held that a schedule award cannot be paid concurrently with temporary total disability benefits for the same injury. *James v. Bethlehem Steel Corp.*, 5 BRBS 707 (1977). In *Henry,* 749 F.2d at 65, 17 BRBS at 39(CRT), the United States Court of Appeals for the District of Columbia Circuit allowed an overlapping scheduled award and award of temporary total disability benefits arising out of the same work accident to a deceased claimant. The court stated that the Board's holding in *James* was arguably incorrect, but the court also noted that *James* involved a living claimant who could receive his scheduled award once the temporary total disability lapsed. Although the claimant in *Henry* was temporarily totally disabled at the time of his death, his right leg had been amputated below the knee as a result of the work injury; it was uncontested before the court that this amputation signified a permanent partial disability underlying the temporary total disability, pursuant to Section 8(c)(4) of the Act, 33 U.S.C. §908(c)(4). The court held that because claimant was deceased, disallowance of the award for the partial disability underlying the temporary total disability would result in the schedule award's never being paid. *See also Turney v. Bethlehem Steel Corp.,* 17 BRBS 232 (1985) (schedule award will lapse during periods of temporary total disability for the same injury, and then resume); 33 U.S.C. §908(d). The instant case is distinguishable, first because the parties did not stipulate that claimant's permanent partial disability lapsed into temporary total disability, and moreover, had this occurred, the partial award could have been paid upon the termination of temporary total disability. Therefore, there are no circumstances which would permit receipt of concurrent permanent partial disability and temporary total disability benefits for the 1994 injuries. The credit awarded therefore is affirmed.

Similarly, claimant is not entitled to concurrent permanent partial and temporary partial disability benefits for the same injury. Inasmuch as the parties stipulated that claimant's condition was rated on September 19, 1996, as a ten percent impairment to each arm, any partial disability benefits payable thereafter must be permanent disability benefits under the schedule. *See generally Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Although employer is not entitled to credit the temporary partial payments for the 1994 injuries against permanent partial disability due for the unrelated 1989 injury, these payments are properly credited against employer's liability for the schedule award for the 1994 injuries, pursuant to Section 14(j). *See generally Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998).

In sum, we reverse the credit awarded for temporary partial disability paid for

the 1994 injuries against employer's liability for permanent partial disability benefits for the 1989 injury. We modify the administrative law judge's decision to allow employer a credit for these benefits against its liability for the scheduled awards for the 1994 injuries. We affirm the awarded credit for the temporary total disability benefits paid against the liability for the permanent partial disability award for the 1994 injuries.

Accordingly, the administrative law judge's Interim Order is modified as stated herein, and is otherwise affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge