

BRB No. 00-1008

DAVID C. AUFANG)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TACOMA BOATBUILDING COMPANY)	DATE ISSUED: <u>July 9, 2001</u>
)	
and)	
)	
PACIFIC MARINE INSURANCE)	
COMPANY)	
)	
and)	
)	
LIBERTY NORTHWEST INSURANCE)	
COMPANY)	
)	
Employer/Carriers-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order After Remand of Edward C. Burch,
Administrative Law Judge, United States Department of Labor.

James R. Walsh, Lynwood, Washington, for claimant.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order After Remand (89-LHC-1218,1219) of
Administrative Law Judge Edward C. Burch 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1969); 33 U.S.C. §921(b)(3).

This case is before the Board for the fourth time. Claimant, a welder-fitter, sustained a work-related back injury in 1982. He settled his claim for compensation for this injury pursuant to an approved Section 8(i), 33 U.S.C. §908(i), settlement. In 1983, claimant returned to modified duty work for employer. Claimant sustained additional injuries to his back while performing modified work in incidents occurring in January 1984, and on January 21, 1985, and May 15, 1985. In July 1985, claimant was terminated as part of a general reduction-in-force. Upon recalling its employees in November 1985, employer advised claimant that modified work was no longer available for him and thus claimant did not return to work at that time. Claimant returned to work for employer on July 1, 1986. On July 7, 1986, while carrying a flat bar on his shoulder, claimant experienced sharp back pain. Claimant has not returned to work since that day. Pacific Marine Insurance Company (Pacific Marine) was employer's insurance company from the date of claimant's initial 1982 back injury until February 28, 1986.¹ Thereafter, Liberty Northwest Insurance Company (Liberty Northwest) assumed insurance coverage for employer.

Claimant filed a claim for benefits under the Act, contending that he was permanently totally disabled as a result of his July 1986 injury, while Liberty Northwest was on the risk. Claimant additionally raised claims for the injuries occurring in 1984 and 1985, while Pacific Marine was on the risk. In his Decision and Order, Administrative Law Judge James J. Butler denied the claim on the ground that claimant did not sustain a work-related injury in July 1986; Judge Butler declined to address the previous incidents. On claimant's appeal, the Board vacated the denial of benefits and remanded the case for consideration of the issue of whether claimant sustained a work-related aggravation of his pre-existing back condition in July 1986. *Aufang v. Tacoma Boatbuilding Co.*, BRB No. 90-1776 (Jan. 26, 1994)(unpub.).

On remand, Administrative Law Judge Edward C. Burch (the administrative law judge) determined that claimant suffered a work-related injury on July 7, 1986,

²Both Tacoma Boatbuilding Company and Pacific Marine Insurance Company are now defunct.

but that claimant is not permanently and totally disabled as a result of that injury. Accordingly, claimant's claim for permanent total disability benefits was denied, but claimant was awarded temporary total disability benefits for the period between July 8, 1986 and July 16, 1986.

Claimant appealed and Liberty Northwest cross-appealed this decision. Claimant did not file a Petition for Review and brief in support of his appeal, but filed a motion to remand the case to the administrative law judge for adjudication of his claim for disability compensation arising out of the work incidents which he alleged occurred prior to 1986. Claimant stated that although he had argued before the administrative law judge that the July 7, 1986, incident rendered him permanently totally disabled, he had alternatively and consistently argued that he was permanently totally disabled as a result of a 1985 injury while in employer's employ. In reply to Liberty Northwest's response to the motion to remand, claimant stated he "respectfully advise[s] that Liberty Northwest should be dismissed in this matter on appeal and on Claimant's Motion for Remand. Liberty Northwest correctly points out that the claimant does not dispute Judge Burch's findings insofar as the claimant and Liberty Northwest are concerned."

By Order dated November 19, 1996, the Board granted claimant's motion to remand this case to the administrative law judge for consideration of his claim for compensation arising out of injuries occurring prior to July 1986. The Board dismissed claimant's appeal with prejudice based on his representation that he did not wish to challenge the administrative law judge's findings with regard to any disability for which Liberty Northwest could be liable. Subsequently, the Board decided Liberty Northwest's cross-appeal on the merits, and affirmed the administrative law judge's award of temporary total disability benefits for the period between July 8, 1986 and July 16, 1986. *Aufang v. Tacoma Boatbuilding Co.*, BRB No. 96-696A (Feb. 26, 1997)(unpub.).

On remand, the administrative law judge denied the claim for disability arising out of the alleged incidents occurring prior to 1986, stating that no claim for such incidents was before him as they were considered and denied by Judge Butler in the initial proceedings. Claimant appealed, contending he is permanently and totally disabled as a result of the 1984 and 1985 injuries.² The Board vacated the denial of

²Liberty Northwest responded that claimant's appeal did not involve its period of coverage of employer. The administrative law judge found that Liberty Northwest had no responsibility in this matter and, accordingly, dismissed Liberty Northwest with prejudice. The Board stated that the dismissal of Liberty Northwest was consistent with its previous determination that Liberty Northwest's liability was finally established, due to claimant's decision, in effect, to abandon any further claim against Liberty Northwest. The Board

benefits, and remanded the case to the administrative law judge for further findings. *Aufang v. Tacoma Boatbuilding Co.*, BRB No. 98-1401 (July 22, 1999) (unpub.).

On remand, the administrative law judge awarded claimant temporary total disability benefits from January 22 to January 27, 1985, and from November 13, 1985 to June 30, 1986. Claimant appeals the decision, contending he is permanently totally disabled as a result of his injury of July 7, 1986. Claimant notes that his treating physician, Dr. Reese, states that the injury of July 7, 1986, permanently worsened and aggravated his condition and resulted in his total disability. No response briefs have been filed.

We reject claimant's contention. Claimant previously appealed the administrative law judge's finding that he is not permanently totally disabled as a result of the July 7, 1986, injury. Rather than proceed with this appeal, however, claimant elected to seek benefits for injuries occurring prior to July 7, 1986. Claimant specifically stated that he was forgoing any further claim against Liberty Northwest for the injury of July 7, 1986. As a result, the Board dismissed, with prejudice, claimant's appeal of the finding that he is not permanently totally disabled as a result of the July 7, 1986, injury, and subsequently, Liberty Northwest was dismissed as a party to these proceedings. *See* Board Order dated Nov. 19, 1996, and n. 2, *supra*. Claimant cannot now attempt to resurrect his claim for permanent total disability for the July 7, 1986 injury. Inasmuch as claimant does not contest any of the findings in the administrative law judge's Decision and Order After Remand, this decision is affirmed.

accordingly granted Liberty Northwest's motion to be dismissed as a party to the action. *Aufang v. Tacoma Boatbuilding Co.*, BRB No. 98-1401 (July 22, 1999) (unpub.), slip op. at 5 n.6.

Accordingly, the administrative law judge's Decision and Order After Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge