BRB No. 98-0181

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<tr><td>GIOVANNI CUCCI

Claimant-Petitioner

v.

GLOBAL TERMINAL AND CONTAINER SERVICES, INCORPORATED

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION

Employer/Carrier-Respondents</td><td>)
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DECISION and ORDER</td></tr>
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Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-0226) of Administrative Law Judge Robert D. Kaplan 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'Keeffee v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a hustler driver, sustained injuries to his back and coccyx when, on

May 17, 1995, he slipped and fell from the steps of a hilo machine during the course of his employment with employer. Employer voluntarily paid claimant temporary total disability compensation from May 18 1995 to June 7, 1995, and from July 19, 1996 to September 16, 1996. 33 U.S.C. §908(b). Claimant, who has not been employed since the date of this incident, thereafter sought permanent total disability compensation under the Act.

In his Decision and Order, the administrative law judge concluded that claimant was temporarily totally disabled from May 18, 1995, to September 25, 1995, and that claimant suffered no work-related disability thereafter. Accordingly, the administrative law judge awarded claimant temporary total disability compensation for that period of time, and further determined that employer was entitled to a credit for all compensation paid to claimant.

On appeal, claimant contends that the administrative law judge erred in his interpretation and weighing of the evidence and in denying him compensation after September 25, 1995. Employer responds, urging affirmance of the administrative law judge's decision.

Initially, claimant contends that the administrative law judge erred by allowing employer to credit monies paid to him by employer from July 19, 1996, through September 16, 1996, against the temporary total disability compensation to which claimant was found to be entitled to during the period May 18, 1995 to September 25, 1995. Specifically, claimant avers that, based on the stipulation of the parties at the formal hearing, claimant was totally disabled during the former period of time and, thus, employer should not be allowed to a credit for the benefits paid to claimant during that period. Employer, in responding to claimant's allegation of error, asserts that it did not stipulate that claimant was totally disabled from July 19, 1996 through September 16, 1996, but, rather, only that it paid claimant total disability compensation during that period of time.

Section 19(d), 33 U.S.C. §919(d), of the Act requires that hearings conducted by an administrative law judge comply with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §554. Pursuant to the APA, every adjudicatory decision must be accompanied by a statement of

> findings and conclusions and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record.

5 U.S.C. §557(c)(3)(A). Failure to do so will violate the APA's requirement for a

reasoned analysis. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In this regard, while an administrative law judge is not obligated to accept any or all stipulations entered into by the parties and such stipulations are not binding until received into evidence, *see Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149 (1988), where an administrative law judge rejects or modifies a stipulation, such rejection or modification must be adequately stated. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Grimes v. Exxon Co., U.S.A.,* 14 BRBS 573 (1981).

In the instant case, the parties did not reduce their stipulations to writing. Rather, the hearing transcript reflects that claimant's counsel, in addressing the issue of the parties' stipulations, made the following statement:

> With your permission, Judge, I would read the relevant stipulations into the record. The parties are in agreement that.... [t]he employer initially paid benefits for a temporary total disability from May the 18 of 1995, to June the 7th of 1995 .... Thereafter, after filing of a form LS-18, there was a deposition of the Claimant at which time, there was an agreement made between myself and carrier's Counsel that the Claimant would undergo a work hardening program. And the Claimant underwent that program and the employer paid an additional period of temporary total disability from 7/10/96 to 7/23/96. *** The issue presented before your Honor is disability between June the 7th of 1995 and 7/10 of '96 and subsequent to 9/16 of '96....

Hearing Transcript at 6-8. With the exception of correcting one date stated by claimant's counsel, employer's counsel made no comment regarding counsel's statement of the alleged stipulations.

Our review of the record reveals that employer paid claimant compensation for two periods of temporary total disability, specifically from May 18, 1995 to June 7, 1995, and from July 19, 1996 to September 16, 1996; during the latter period, claimant underwent the work-hardening program which the above statement indicates employer approved. Other than the statement made by claimant's counsel at the hearing, however, there is no documentation regarding employer's approval of the work-hardening program during the period of July 19, 1996, to September 16, 1996, or of employer's agreeing to pay claimant additional temporary total disability benefits during that period of time. The administrative law judge found that claimant's disability ceased in 1995, and he did not address employer's liability for benefits during the period of time that claimant was undergoing the work-hardening program. To determine whether employer and claimant entered into an agreement

at the hearing to withhold from the administrative law judge's consideration the issue of liability for benefits paid during the work-hardening program requires fact-finding. Thus, we hold that the instant case must be remanded so that the administrative law judge may address this issue, including interpreting the aforementioned stipulation. Thus, we vacate the administrative law judge's finding that employer is entitled to a credit for the payments of compensation it made to claimant during the period of July 19, 1996, through September 16, 1996, and we remand the case for the administrative law judge to address claimant contention that he disabled during the period of his work-hardening program.

Claimant also challenges the administrative law judge's finding that he suffered no continuing work-related disability after September 25, 1995. Specifically, claimant contends that the administrative law judge erred in rejecting the testimony of Dr. Stein, his treating physician, which, claimant avers, is sufficient to establish that he remains totally disabled as a result of his work-related injury.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). In addressing the issue of the extent of claimant's disability, the administrative law judge, citing the superior credentials and more exacting examinations of claimant by Drs. Genova and Koval, credited those two physicians in determining that claimant suffered no work-related disability after September 25, 1995. In rendering this determination, the administrative law judge discounted the opinion of Dr. Stein, claimant's treating physician, that claimant remained totally disabled because he found Dr. Stein to be less credentialed and his opinion based on a less thorough examination of claimant.

It is well established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1983). In the instant case, however, the administrative law judge failed to explain why he considered Dr. Genova, who is Board-certified in general surgery, CX 4, and Dr. Koval, who is Board-certified in orthopedic surgery, EX 23, to have superior credentials when compared to Dr. Stein, claimant's treating physician, who is Board-certified in physical medicine and rehabilitation. CX 9. Moreover, as claimant's treating physician, Dr. Stein testified that, although he was unable to have claimant lie down on the examining table, he performed a series of thorough examinations of claimant and that his opinion regarding claimant's disability was based in part on his

reliance on his review of claimant's x-rays and MRIs.[1] CX 9. Thus, the administrative law judge's decision to give this opinion less weight based in part on a less thorough examination of claimant by Dr. Stein is not supported by the record, particularly in light of the fact that Dr. Koval, upon whom the administrative law judge primarily relied, examined claimant on only one occasion. CX 7. Moreover, although Dr. Genova opined as early as July 19, 1995, that there was no evidence of any permanent disability and that claimant could be working, EX 5, Dr. Koval opined that as of his examination of August 28, 1995, claimant was totally disabled, adding the if claimant suffered a fractured coccyx, it would fully resolve within the ensuing four weeks, CX 7, *i.e.,* by September 25, 1995. Subsequently, however, Dr. Koval testified that he did not conduct an examination other than the one in which he found claimant to be totally disabled and that he could only comment on claimant's condition as of the date of his examination. EX 23 at 21. The administrative law judge did not address this testimony. Thus, as the administrative law judge failed to fully consider the relevant medical opinions and provide a rational explanation for his conclusions in weighing this evidence, we vacate the administrative law judge's finding that claimant suffered no disability after September 25, 1995. The case is remanded to the administrative law judge for reconsideration regarding the issue of the extent of claimant's disability.

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

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[1]The record reflects that Dr. Stein treated claimant on numerous occasions between May 22, 1995, and the date of his deposition, December 1, 1996.

REGINA C. McGRANERY
Administrative Appeals Judge