BRB No. 92-1167

PATRICK VISCONTE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARCO SHIPYARDS	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Stipulation and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol 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, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Stipulation and Order (91-LHC-867) of Administrative Law Judge Vivian Schreter-Murray awarding benefits 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 suffered a work-related lumbosacral strain on May 12, 1989. Employer paid temporary total disability benefits from May 15, 1989, to October 8, 1989. Claimant continued to seek permanent partial disability benefits and medical treatment. After the case was transferred to the Office of Administrative Law Judges, the parties entered into stipulations resolving the claim. Employer agreed to pay an additional period of temporary total disability benefits from June 7, 1990, through January 15, 1991, permanent partial disability benefits from June 1, 1991, and continuing, and to pay for reasonable, necessary and related medical expenses. The administrative law judge accepted the stipulations and entered an order based on these stipulations.

In the Stipulation and Order, the parties stipulated that claimant suffers a seven percent permanent impairment of the whole man. In addition, the parties stipulated that claimant suffers a loss in wage-earning capacity based on the salary claimant earns at his present position as a bus driver, adjusted annually to reflect a one dollar per hour raise until January 16, 1996. Thus, employer agreed to continue paying permanent partial disability benefits, based on the stipulated loss in wage-earning capacity. The parties also agreed that they would be restricted from seeking modification of the agreement until January 16, 1996, but that the agreement could be modified after that time as appropriate. Claimant also waived entitlement to interest and to penalties under Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, the Director contends that the agreement is inadequate to represent a settlement agreement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), inasmuch as the stipulations do not entirely discharge employer's obligations under the Act. The Director therefore contends that the stipulations not to seek modification or interest limit claimant's potential rights to additional compensation in violation of Section 15(b) of the Act, 33 U.S.C. §915(b). Moreover, the Director contends that Section 14(e) penalties cannot be waived. Finally, the Director contends that the stipulation regarding claimant's future loss in wage-earning capacity is too speculative and is not supported by the evidence in the record. Neither claimant nor employer has responded to this appeal.

In order for an agreement between the parties to constitute a settlement pursuant to Section 8(i), it must completely discharge the liability of the employer. *See* 33 U.S.C. §908(i)(1988); *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79, 84 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting). In the present case, unlike a Section 8(i) settlement, the Stipulation and Order does not provide for the complete discharge of employer's liability for payment of compensation; rather, it provides a schedule of benefits through January 16, 1996. Therefore, as the Director contends, the order must be considered an award based upon the agreements and stipulations of the parties and is thus subject to modification under 33 U.S.C. §922. *See Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988).

The Director contends that the administrative law judge erred in approving the Stipulation and Order as the agreement not to seek modification, interest, or penalties limits claimant's potential rights to additional compensation in violation of Section 15(b) of the Act. 33 U.S.C. §915(b). Section 15(b) provides that any agreement by an employee to waive his right to compensation under the Act is invalid. *See Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd in pert. part on recon.*, 22 BRBS 430 (1989). A

settlement approved pursuant to Section 8(i) is an exception to Section 15(b). *Gutierrez v. Metropolitan Stevedore Co.*, 18 BRBS 62 (1986). Although a stipulation between the parties is generally binding, it is not binding if it evinces an incorrect application of law. *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990); *McDevitt v. George Hyman Construction Co.*, 14 BRBS 677 (1982). Under Section 22 of the Act, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection a claim, may request modification because of a mistake in fact or a change in physical or economic condition. *See generally Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144 (1995). In the instant case, we agree with the Director that the stipulation that the parties will not seek modification of the order until January 16, 1996, must be vacated as it is contrary to the statute.

Moreover, as the Director asserts, a claimant may not waive his right to a penalty under Section 14(e), as imposition of this penalty is mandatory, when appropriate. *McNeil v. Prolerized New England Co.*, 11 BRBS 576, 578 (1979), *aff'd sub nom. Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 809 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *see also Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); 33 U.S.C. §914(b), (d), (e). Similarly, an award of interest is mandatory on accrued unpaid benefits, *see Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); thus a claimant may not waive his right to interest to which he may be entitled. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982). Therefore, as the stipulations waiving the right to seek modification, interest and penalties are inconsistent with law, we vacate the administrative law judge's acceptance of these stipulations and remand the case for amendment of the agreement in accordance with the applicable law. *See generally Puccetti*, 24 BRBS at 29.

The Director also contends that the administrative law judge erred in approving the stipulation regarding claimant's projected wage-earning capacity prior to January 16, 1996. The Director maintains that there is no support for the parties' agreement that claimant's wages would rise each year by one dollar per hour. The post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). The party that contends that the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See Burch v. Superior Oil Co.*, 15 BRBS 423 (1983). In the present case, the parties stipulated that claimant's wages of $5.75 per hour for 35 hours per week at his current position as a bus driver accurately and fairly represent his post-injury wage-earning capacity. *See* Stipulation and Order at 2. In addition, the parties agreed that on each anniversary of claimant's hiring, claimant will receive a wage increase of one dollar per hour. Thus, claimant will have the following projected post-injury wage-earning capacities:

Eff. 1/16/92	$ 6.75 per hour
Eff. 1/16/93	$ 7.75 per hour
Eff. 1/16/94	$ 8.75 per hour
Eff. 1/16/95	$ 9.75 per hour

Eff. 1/16/96 $10.75 per hour

See Stipulation and Order at 3.

A stipulation of fact is generally binding upon the parties to it. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994); *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). Section 725.461(a) of the regulations, 20 C.F.R. §725.461(a), allows the administrative law judge to admit any documents and stipulations into evidence when the parties have waived their right to appear and present evidence. These documents and stipulations shall be considered the evidence of record in the case and the decision shall be based upon them. 20 C.F.R. §725.461(b). As the parties in the instant case stipulated to the issue of fact that claimant would receive a raise in the amount of one dollar per hour for each year prior to and including January 1996, they were not required to also support the stipulation with an evidentiary foundation. We thus affirm the administrative law judge's acceptance of the parties' stipulation of claimant's post-injury wage-earning capacity. *See generally Fox v. Melville Shoe Corp., Inc.*, 17 BRBS 71 (1985).

Accordingly, the Stipulation and Order of the administrative law judge awarding benefits, but waiving claimant's entitlement to seek modification and receive interest or penalties is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's acceptance of the parties' stipulation of claimant's post-injury wage-earning capacity is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge