U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 23-0164

PETER F. STEGEMANN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEGEMANN MARINE, INCORPORATED, d/b/a COASTAL MARINE SERVICES	)	DATE ISSUED: 01/29/2025
	)	
and	)	
	)	
STATE INSURANCE FUND-NEW YORK	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Reconsideration Denying Modification of Noran J. Camp, Administrative Law Judge, United States Department of Labor.

Jacob Shisha (Tabak, Mellusi & Shisha LLP), New York, New York, for Claimant.

John E. Kawczynski (Field & Kawczynski, LLC), Jamesburg, New Jersey, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer and its Carrier appeal Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order on Reconsideration Denying Modification (2019-LHC-00417) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act).[1] We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, an employee and co-owner of Stegemann Marine, Inc., d/b/a Coastal Marine Services ("Stegemann Marine" or "Employer"),[2] sustained a work-related right hip injury on June 20, 2012. ALJXs 1-2, 4-5; EX 1 at 2; CX A at 2. He continued working for and operating Stegemann Marine until he dissolved the business in 2017.[3] TR at 51, 63, 77-78. He underwent hip replacement surgery on June 6, 2018, and became temporarily totally disabled due to his work injury. *Id.* at 63, 77-78; ALJXs 1-2, 4-5; CX A at 2.

Request for Modification of Order Approving Stipulation Agreement

On September 10, 2018, the parties stipulated that Claimant sustained a work-related injury under the Act, and Employer would pay temporary total disability benefits at the 2018 maximum compensation rate of $1,471.78 beginning June 6, 2018. EX 9. Additionally, the parties stipulated there was no agreement regarding Claimant's average weekly wage. *Id.* On September 18, 2018, ALJ Lystra A. Harris issued an order approving the parties' stipulation agreement (2018 order). EX 1; CX A. On October 10, 2018, Employer filed a request for modification of the order with the district director under Section 22 of the Act, 33 U.S.C. §922, based on a mistake of fact regarding Claimant's average weekly wage and compensation rate. EX 10. After the district director referred

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because Claimant sustained his injury in New York. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002); 20 C.F.R. §702.201(a).

[2] Stegemann Marine was a marine construction business organized as an S-corporation. TR at 18, 69; EX 2 at 1. Claimant and his wife, Elizabeth Casey, each owned a 50% share in the business. TR at 68.

[3] Claimant testified he stopped working and dissolved his business in 2017 because of his 2012 work injury. TR at 63, 77-78.

the case to the Office of Administrative Law Judges, it was assigned to ALJ Camp (the ALJ) who held a formal hearing on February 11, 2020.

In a December 27, 2021 decision, the ALJ initially denied Employer's request for modification, finding the original order that ALJ Harris issued approving the stipulation agreement was an order approving a settlement agreement under Section 8(i) of the Act, 33 U.S.C. §908(i), and therefore, not subject to modification under Section 22, 33 U.S.C. §922. D&O Denying Modification at 7-8. However, neither party had submitted the actual stipulation agreement into the record at that time. Following issuance of the ALJ's decision, Employer moved for reconsideration of the decision and requested the record be reopened, which the ALJ granted. Decision and Order on Reconsideration Denying Modification (D&O) at 4. Employer then submitted the actual stipulation agreement into the record. EX 9. Based on the stipulation agreement underlying the 2018 order, EX 9, the ALJ determined the stipulation agreement "bears no indicia of a proposed settlement under Section 8(i), as it does not contain the information required for a Section 8(i) settlement." D&O at 5. Consequently, he found the 2018 order was a "Compensation Order," and therefore is subject to modification under Section 22. D&O at 5-6.

ALJ Harris's Order approving the stipulation agreement does not make any reference to Section 8(i) of the Act, but she did indicate she determined the stipulation agreement was adequate pursuant to the criteria set forth at 20 C.F.R. §702.243(f), implementing Section 8(i), and not procured by duress. EX 1 at 2. Nevertheless, for an agreement between the parties to constitute a settlement pursuant to Section 8(i), it must completely discharge the employer's liability. *See* 33 U.S.C. §908(i); *Bass v. Broadway Maint.*, 28 BRBS 11, 18 n.4 (1994); *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79, 84 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196, 200 (1989); *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282, 284 (1988). "While Section 22 modification is unavailable to alter settlements approved pursuant to Section 8(i), 33 U.S.C. § 908(i), … an award based upon the agreements and stipulations of the parties is subject to Section 22 modification." *Lucas v. La. Ins. Guar. Ass'n*, 28 BRBS 1, 6 (1994); *see Finch*, 22 BRBS at 200.

Unlike a Section 8(i) settlement, the stipulation agreement and ALJ Harris's Order in this case do not provide for the complete discharge of Employer's liability for payment of compensation; this stipulation merely provides: "Employer/Carrier shall commence the payment of temporary total compensation to Claimant at the maximum rate of $1,471.78 as of June 6, 2018 to the present and continuing." CX A at 2; EX 9 at 2; *see Lawrence*, 21 BRBS at 284 ("Unlike a settlement, the Compensation Order … does not provide for the complete discharge of employer's liability for payment of compensation."). Thus, contrary to our dissenting colleague's assertion, ALJ Harris's Order does not effectuate the approval of a Section 8(i) settlement but must be considered an award of benefits based on the

stipulation agreement of the parties, *see* 20 C.F.R. §§702.351, 702.315, which is subject to modification pursuant to Section 22 of the Act. 33 U.S.C. §922; *Lucas*, 28 BRBS at 6. Indeed, the parties agreed the stipulation agreement was subject to modification. Pre-Hearing Conference Call Transcript at 5-6; *see also* D&O Denying Modification at 6-7. Consequently, the ALJ properly found that ALJ Harris's Order was subject to modification because it did not constitute the approval of a Section 8(i) settlement. D&O at 5-6; *see Bass*, 28 BRBS at 18 n.4; *Norton*, 25 BRBS at 84; *Finch*, 22 BRBS at 200; *Lawrence*, 21 BRBS at 284.

Average Weekly Wage Determination

In his decision on reconsideration, the ALJ determined Claimant was "a hybrid between owner and employee" and "functionally self-employed," but his total income – which included wages he paid himself as an employee (W-2) and annual profit distributions he received from Stegemann Marines's net profits (K-1) – did not represent the fair market value of his labor. D&O at 8-9. Instead, the ALJ found Claimant's average weekly wage is between $4,000 and $4,500 per week, based solely on Claimant's hearing testimony that if he were to seek employment as a foreman with another dock building company, he would expect to work between 40 and 45 hours per week and be paid at least $100 per hour, which he stated was the industry standard for someone with his skill level.[4] Because this salary range yields a compensation rate greater than the maximum compensation rate in 2018, which Employer was already paying, the ALJ denied Employer's request to modify the 2018 order. *Id.* at 10-11.

On appeal, Employer contends the ALJ's average weekly wage calculation is not supported by substantial evidence or in accordance with law. Claimant responds, urging affirmance.

Disability compensation for a traumatic work injury is based on the claimant's average weekly wage at the time of the injury. 33 U.S.C. §910; *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 68 (2d Cir. 1985); *see also LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160-162 (5th Cir. 1997); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172-173, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Section 10 of the Act provides three different methods for calculating a claimant's average annual earnings, 33 U.S.C. §910(a)-(c), from which the average weekly wage is calculated

[4] This equates to between $208,000 and $234,000 in annual earnings:

$100/hour x 40 hours = $4,000/week x 52 weeks = $208,000 per year

$100/hour x 45 hours = $4,500/week x 52 weeks = $234,000 per year

pursuant to subsection (d), 33 U.S.C. §910(d). Section 10(c) of the Act, which the ALJ found and the parties agree is applicable here, states in relevant part:

> [A]verage annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the *reasonable value of the services of the employee if engaged in self-employment,* shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c) (emphasis added); *Rountree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862, 868 n.7 (1981) (Section 10(c) applies where self-employment earnings are involved), *appeal dismissed on other grounds*, 723 F.2d 399 (5th Cir. 1984) (en banc); *see also Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405-406 (1989).[5]

The ALJ is afforded broad discretion under subsection (c) and his determination must be affirmed if it reflects a fair and reasonable approximation of the claimant's earning capacity at the time of the injury. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855, 859 (1982); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549, 566 (1981); *Anderson v. Todd Shipyards, Inc.*, 13 BRBS 593, 595 (1981); *see Joyce v. European Auto Service*, 226 A.D.2d 952, 953 (N.Y. App.

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[5] *Seidel* involved a question of how to calculate the post-injury wage-earning capacity of an injured employee who returned to alternate work at a comic bookstore and eventually became part owner of another of the company's stores. As an employee, he was entitled to a wage, and as an owner, he was entitled to 50% of the profits. *Seidel*, 22 BRBS at 404. Based on the definition of "wages" in Section 2(13) of the Act, 33 U.S.C. §902(13), the Board stated that when a claimant "performs such *extensive services* for the business that the income represents salary rather than profits, the income should be considered in determining wage-earning capacity." *Id.* at 405-406 (emphasis in original). In *Seidel*, the claimant did not have profits from investment, and the store was "a small operation" generally needing only the claimant's or one other employee's services, so the store's profits depended on the claimant's services. However, because no profit distributions had been made, the Board held the ALJ erred in including the claimant's 50% of the profits in his wage-earning capacity calculation. *Id.* at 406; *see also Licor v. WMATA*, 879 F.2d 901, 904 (D.C. Cir. 1989) (ALJ correctly excluded income from truck ownership and differentiated it from income earned as a truck driver in assessing the claimant's post-injury wage-earning capacity).

Div. 1996) (whether income the claimant received from his business constitutes profits rather than earnings included in his average weekly wage is a question of fact);[6] *Hines v. Divers World Enterprises, Inc.*, 158 A.D.2d 831 (N.Y. App. Div. 1990) (average weekly wage for owner who performed valuable services for diving company reasonably based on other divers' daily wages).

Employer challenges the ALJ's average weekly wage determination on several grounds. It first contends the ALJ ignored relevant financial evidence in the record, including Claimant's W-2 earnings statements, K-1 profit income distribution forms,[7] and wage evidence of similar workers, which could constitute "wages" under Section 2(13), 33 U.S.C. §902(13).[8] Emp. Br. at 7-11. Second, it asserts Claimant's testimony regarding the

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[6] The court explained: "[w]hile income has been found to be profits from investment where a self-employer claimant performs primarily a supervisory function . . . the issue of whether income is profits rather than earnings is essentially one of fact for the [New York State Workers' Compensation Board], and a finding that income is salary for services performed is likewise within the board's fact-finding power." *Joyce*, 226 A.D.2d at 952-953 (internal citation omitted). In *Joyce*, the court held it was reasonable for the state board, in determining the employee's average weekly wage, to find that the money the employee withdrew each week from the company represented his earnings for his non-supervisory work because the evidence established his profit-sharing distribution as an owner was separate from that weekly withdrawal. *Id.*

[7] Employer argues Claimant's K-1 forms showing profit income distributions should not be included because it is not readily apparent which portion of Claimant's K-1 income is "directly traceable to Claimant's personal management and endeavor" in Stegemann Marine. Emp. Br. at 7-11. However, if any part of the profits is to be included, Employer asserts the profits must first be decreased by 50% to account for Claimant's wife's portion of the profits. *Id.* at 10. Additionally, unlike the claimant in *Seidel*, Employer argues Claimant here invested in his company, and company income or profits could be generated from other sources not related to just his labors, such as his employees' efforts, the use of the company's equipment, etc.

[8] The Act defines wages as:

> *the money rate at which the service rendered by an employee is compensated* by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or

amount he would be willing to accept to work for someone other than himself does not qualify as "substantial evidence" supporting the ALJ's finding that Claimant's average weekly wage is $4,000 to $4,500 per week. *Id.* at 12. Finally, it asserts the ALJ's average weekly wage calculation covering a wage range is inappropriate. *Id.* We agree with Employer's contentions.

We address Employer's first two contentions together. Earnings from self-employment may form the basis of an average weekly wage determination if they "reasonably represent" the value of the work performed. *Rountree*, 13 BRBS at 869 ("The phrase 'reasonable value of the services of the employee' indicates that [the] claimant's average weekly wage should reflect the value of the work he performed." (internal citations omitted)). The reasonable value of a claimant's work may be determined by the cost of hiring another worker of "equivalent skill and experience" or by any other rational manner. *Id.* at 870; *Hines*, 158 A.D.2d at 831. In the instant case, the manner in which the ALJ determined the value of Claimant's work is neither rational nor supported by substantial evidence.

The record contains evidence relevant to calculating Claimant's average weekly wage. It contains statements reporting his Social Security Administration (SSA) Earnings from 2012 through 2017 which show he paid himself between $24,800 and $41,600 per year in W-2 wages.[9] EX 4; *see also* EXs 5-6. There are also forms reporting Claimant's K-1 profit distributions for the years 2015 through 2017. CXs B, C, D; EX 4. In addition, there is evidence of co-workers' wages, *infra* note 14, and Claimant testified at the February 11, 2020 hearing that he would not work for someone else as a foreman for less than $100 per hour, he would expect to work approximately 45 hours per week, and he considered that wage rate to be standard in the industry.[10] TR at 78-79.

> contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. §902(13) (emphasis added).

[9] In 2012, Claimant was paid $31,200 in total wages. He was paid $40,400 in 2013, and $41,600 per year from 2014 through 2016. EX 6 at 3. He testified he earned considerably less in 2017, $24,800, than in previous years because he could no longer work due to his work injury, TR at 77.

[10] Claimant specifically testified:

The ALJ appears to have briefly considered this evidence – at least long enough to have found Claimant has a "hybrid" employment status, so his "average weekly wage cannot be determined solely by the wage he paid himself during the year, nor simply by including all the K-1 distributions he paid himself at the end of the year."[11] D&O at 9. As the ALJ recognized not all self-employment earnings equate to a wage-earning capacity, he stated he must determine what amount Claimant "could earn from his own labor." *Id.* However, he concluded the parties did not give him sufficient information for Claimant's 2012 earnings, *id.* at n.23, abandoned considering that evidence, and, instead, purportedly looked to what a similarly skilled person would earn. He decided the only evidence in that regard was from Claimant himself, who testified he would not work for someone else for less than $100 per hour. *Id.* at 9; *but see infra* note 14.[12] Based solely on Claimant's testimony at the 2020 hearing, and ignoring the remaining relevant evidence, the ALJ found the value of Claimant's labor was $100 per hour, resulting in an average weekly wage of $4,000 to $4,500 based on a likely 40 to 45-hour work week. D&O at 9-10.

Q: Are there other dock-building companies that have multiple crews out, multiple boats with foremen?

A: Yes.

Q: How much would you make as a foreman doing that?

A: I wouldn't work for less than a $100 an hour and I am worth every nickel.

Q: Is that standard in the industry for someone of your skill and ability?

A: With my skill level, yes, I would say that and more.

TR at 78. He added he would expect to work "maybe a 45-hour week," *id.* at 79, and "would probably make more" than he did while working independently for Stegemann Marine. *Id.* at 56.

[11] When addressing Claimant's 2012 W-2 wages, the ALJ determined they were not sufficient for calculating average weekly wage because there was no evidence showing the K-1 profit distributions Claimant received in 2012. D&O at 9 n.23, 10 n.28.

[12] While the ALJ then looked at the W-2 wages and K-1 profit distributions evidence, he decided it did not represent the market value of Claimant's services because it was far lower than what Claimant testified was the value of his labor. *Id.* at 9-10.

Given the extent of Claimant's services for his company, the ALJ permissibly found Claimant's average weekly wage could not be calculated based *solely* on his W-2 wages or based on his W-2 wages *plus all* the K-1 profit distributions because of his status as both an employee and co-owner of Stegemann Marine. *Licor*, 879 F.2d at 904; *Seidel*, 22 BRBS at 405-406; *Rountree*, 13 BRBS at 869-870; *Joyce*, 226 A.D.2d at 952-953; *Hines*, 158 A.D.2d at 831. However, the ALJ erred in relying only on Claimant's 2020 hearing testimony to establish a range of the value of his labor without adequately considering evidence indicating the amount of his earnings at the time of his 2012 injury. Indeed, "[i]t will be an exceedingly rare case where the claimant's earnings at the time of the injury are wholly disregarded as irrelevant, unhelpful, or unreliable." *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). This is not such a case, particularly where evidence relevant to Claimant's earnings at the time of his injury is inconsistent with the ALJ's ultimate findings regarding the value of Claimant's labor and determination of his average weekly wage.[13]

[13] Without considering the effects of inflation since 2012 and Claimant's respective share of ownership in Stegemann Marine, the sums of Claimant's 2015 through 2017 W-2 wages and total K-1 profit distributions are predominantly *less* than annual earnings the ALJ calculated based solely on Claimant's testimony:

W-2 wages and K-1 income distributions:

2015: $41,600 (W-2) + $91,049 (K-1) = $132,649/year ÷ 52 weeks = $2,550.94/week.

2016: $41,600 (W-2) + $182,388 (K-1) = $223,988/year ÷ 52 weeks = $4,307.46/week.

2017: $24,800 (W-2) + $94,662 (K-1) = $119,462/year ÷ 52 weeks = $2,297.35/week.

TR at 19, 21-22, 68; CXs B-E; EX 2 at 4 (Joseph Matheson report: shareholder's gross income from subchapter S-Corporations determined by shareholder's pro rata share). EXs 4, 5, 6.

The ALJ can permissibly approximate Claimant's average weekly wage based on the "reasonable value" of the work he performed, but if Claimant's actual earnings (W-2 wages) in 2012 do not "reasonably represent" the market value of his labor, *Rountree*, 13 BRBS at 870; D&O at 9-10, and portions of Claimant's K-1 profit distributions do not

The ALJ did not adequately consider Claimant's actual wages in 2012, or other relevant evidence that could be used to calculate or approximate the reasonable value of Claimant's work as a marine construction foreman in 2012.[14] 33 U.S.C. §910(c); *Rountree*, 22 BRBS at 869-870. For this reason, and because the manner in which he calculated Claimant's average weekly wage is neither reasonable nor rational in light of the relevant financial documentation in the record, we vacate the ALJ's average weekly wage determination and remand the case for additional factual findings and conclusions of law based on a consideration of all the evidence relevant to the value of Claimant's labor and services at the time of his 2012 work injury.[15] 33 U.S.C. §910; *see also Seidel*, 22 BRBS at 405-406; *Joyce*, 226 A.D.2d at 953. On remand, the ALJ has great leeway to arrive at a reasonably representative 2012 average weekly wage under Section 10(c); however, he must consider all relevant evidence and fully explain his decision. He may reopen the record to admit additional evidence if he deems it necessary. *Rountree*, 22 BRBS at 870.

Finally, with respect to its remaining argument, Employer is correct in asserting the ALJ's determination of an average weekly wage range is not proper. Emp. Br. at 12. Under the Act, there can be only one average weekly wage upon which payments of compensation

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represent salary to him for his personal services, D&O at 9, then Claimant's average weekly wage cannot rationally exceed the sum of both sources of his income.

[14] For example, insurance payroll audit reports showed Claimant and some of his employees shared the same occupational code (6005) and description of duties (marine construction). EX 5 at 1-3, 7-9, 13-14, 19-20, 29-30. The reports revealed that from October 2011 through September 2012, Stegemann Marine had seven other marine construction employees on its payroll and indicated the respective wages paid to each. Notably, another marine construction employee of Stegemann Marine, James Liguori, was paid similar wages and with the same frequency as Claimant from 2012 through 2017. *Id.* at 8, 14, 20, 30; *see also* TR at 65-66, 69, 75-76 (Claimant testified Mr. Liguori was his assistant on jobs and an employee of Stegemann Marine).

[15] The ALJ has not adequately explained why Claimant's 2020 testimony alone establishes his average weekly wage in 2012, despite the relevant financial documentation in the record, and it is not clear from the ALJ's decision whether he considered Claimant's testimony representative of the value of his labor at the time of his work injury in 2012 or at the time of the hearing in 2020. D&O at 9 n.23. However, we note the hourly rate Claimant stated he was willing to work for someone else in 2020 does not, on its own, constitute substantial evidence to support Claimant's average weekly wage at the time of his work injury in 2012. 33 U.S.C. §910 (average weekly wage is determined at the time of the injury); *Morales*, 769 F.2d at 68.

for a specific injury may be based, regardless of whether the disability for which compensation is payable is characterized as temporary or permanent, partial or total. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995); *Thompson v. Nw. Enviro Services, Inc.*, 26 BRBS 53, 58 (1992); *James v. Sol Salins, Inc.*, 13 BRBS 762, 765 (1981). On remand, the ALJ must arrive at a single average weekly wage.

Accordingly, we vacate the ALJ's average weekly wage calculation in his Decision and Order on Reconsideration Denying Modification, and we remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority decision. Neither the ALJ nor the Board have authority under Section 22 of the Longshore Act, 33 U.S.C. §922, to grant the relief Employer requests: modification of ALJ Lystra A. Harris's order approving the parties' 2018 settlement agreement. Therefore, the subsequent result reached by ALJ Noran J. Camp – denial of Employer's motion for modification of ALJ Harris's order – must be affirmed.

In September 2018, the parties submitted a joint "Stipulation" to ALJ Harris agreeing that Claimant suffered a disabling work injury on June 20, 2012, that required hip replacement surgery on June 6, 2018. They also agreed he is entitled to Employer-paid temporary total disability benefits at the maximum compensation rate of $1,471.78, to be paid from the date of his surgery "to the present and continuing," as well as $5,000 in an attorney's fee. EX 9; *see* 33 U.S.C. §928 (employer-paid attorney's fee available for "successful prosecution" of a claim). ALJ Harris, in turn, rationally considered the parties' stipulation to be a settlement under Section 8(i), 33 U.S.C. §908(i), and explicitly issued

an "Order Approving Settlement Agreement" in which she found the "proposed settlement is adequate and not procured by duress." EX 1; *see* 20 CFR §702.242(a) (settlements submitted to the ALJ "shall be in the form of a stipulation"). She thus "APPROVED" the settlement and stated, "this matter is hereby CLOSED." EX 1.

Under the Act, the only two avenues for overturning an approved settlement are filing a motion for reconsideration with the ALJ within ten days, 20 C.F.R. §802.206(b)(1), or an appeal to the Board within thirty days, 33 U.S.C. §921; 20 C.F.R. §§702.350, 702.393, 802.205(a). *Jeschke v. Jones Stevedoring Co.*, 36 BRBS 35, 36 (2002) (an order approving a settlement "is the equivalent of a final adjudication of the issues resolved therein, and may not be collaterally attacked by the parties in a subsequent proceeding"). Rather than pursuing either approach, Employer filed a motion for modification under Section 22 alleging that ALJ Harris's order approving the settlement was based on a mistake in fact – namely, what appears to be Employer's own mistake in agreeing to a maximum compensation rate when some evidence suggests he might be entitled to a lesser amount.[16] EX 10. However, the statute is clear: Section 22 "does not authorize the modification of settlements." 33 U.S.C. §922.

Given that the sole appeal filed with the Board in this matter is of ALJ Camp's denial of Employer's motion for modification under Section 22, and neither the ALJ nor the Board has authority to grant Employer's motion for purposes of modifying an approved settlement agreement, the Board must dismiss this appeal. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112, 113-114 (1997).

In *Porter*, a case with similar facts, the claimant filed a motion with the ALJ to rescind a settlement agreement the ALJ had approved three weeks earlier. The Board held the ALJ properly denied the motion to rescind the settlement agreement "since no timely motion for reconsideration [of the order approving the settlement] was filed, and since settlements approved pursuant to Section 8(i) of the Act are not subject to modification under Section 22." *Porter*, 31 BRBS at 113-114. The Board further held that a party "cannot unilaterally rescind the settlement as the settlement is binding . . . and not subject to rescission after it was approved by the administrative law judge." *Id*. at 113. Finally,

[16] Employer's argument hinges largely on its belief that Claimant's average weekly wage, a data point that factors into compensation rate, is less than what Employer initially believed at the time it agreed to pay benefits at the maximum compensation rate. EX 10. While Employer later discovered what it believes to be a discrepancy in Claimant's tax returns and payroll information that warrants a lesser average weekly wage and thus lesser compensation rate, it does not allege that it lacked the necessary information to discover this alleged discrepancy prior to entering into its settlement with Claimant.

the Board determined that it, too, must dismiss the appeal because the claimant's challenge to the ALJ's denial of his motion to rescind the settlement did not constitute a timely appeal of the underlying order approving the settlement. *Id*. The same is true here.

Claimant and Employer entered into a settlement under which Employer agreed that Claimant is entitled to ongoing temporary total disability benefits at the maximum compensation rate. EX 9. ALJ Harris approved the settlement agreement and found it was adequate and not procured by duress.[17] EX 1. Because Employer did not file a timely motion for reconsideration with the ALJ or an appeal to the Board, ALJ Harris's "Order Approving Settlement Agreement" became final thirty days after it was filed in the office of the district director.[18] 33 U.S.C. §921(a); 20 C.F.R. §702.350. As Employer's motion

[17] The majority concludes that ALJ Harris's "Order Approving Settlement Agreement" is not actually an approval of a settlement because the parties' agreement does not "completely discharge" Employer's liability. To the contrary, the parties agreed Claimant suffered a disabling work injury and is entitled to a specific sum of weekly compensation, paid by Employer, "to the present and continuing," as well as an attorney's fee. EX 9. Neither party suggests that the agreement for Employer to pay, and Claimant to accept, maximum temporary total disability benefits on a continuing basis is void as a matter of law. Rather, Employer conceded before ALJ Camp that temporary total disability compensation payments can last indefinitely. *See* Employer's Motion for Reconsideration at 9 (arguing there is "no cap" on the "duration of temporary total compensation payments").

On the merits, Claimant has argued that modification will allow him to seek a higher compensation rate in the future for permanent disability benefits, while Employer has argued that modification is necessary to reduce Claimant's temporary total disability compensation rate below the amount provided in the settlement. But these are simply collateral attacks on the terms of the settlement itself – ongoing payment of temporary total disability compensation at the rate of $1,471.78. DX 9; *Jeschke*, 36 BRBS at 36. The parties' additional assertion that ALJ Harris misinterpreted the intent of their settlement as a final rather than interim agreement does not make her approval of their settlement subject to modification under Section 22. The statute and case law are clear that such arguments must be made by timely motion for reconsideration to the ALJ or timely appeal to the Board, neither of which happened here. 33 U.S.C. §922; *Porter*, 31 BRBS at 113-114.

[18] Although the parties' settlement states they reached "no agreement" on Claimant's average weekly wage, that fact does not render the settlement void or somehow subject to Section 22 modification. As Employer has conceded, the lack of stipulation on average weekly wage simply means that, at the time they entered into the settlement, the parties understood Claimant's income was at least high enough to warrant the maximum

for modification under Section 22 is not a valid basis for modifying or otherwise rescinding the settlement agreement approved by ALJ Harris, 33 U.S.C. §922, there is nothing more for the Board to decide in this appeal.[19]

I therefore dissent.

GREG J. BUZZARD
Administrative Appeals Judge

compensation rate of $1,471.78. EX 10 at 1-2. But even if Section 22 were available to modify ALJ Harris's order, I question whether such relief can be granted where, as here, a litigant's request is based on *its own* factual mistake in making a stipulation rather than "a mistake in a determination of fact by [the adjudicator]" as provided in the statute. 33 U.S.C. §922; *see Mitri v. Global Linguist Solutions*, 48 BRBS 41, 43 (2014) ("stipulations are binding upon those who enter into them").

[19] ALJ Camp's error in considering the underlying merits of Employer's Section 22 motion is harmless, as he nonetheless denied the relief requested and left intact the settlement agreement approved by ALJ Harris.