

QUENTIN H. TAHARA)
)
 Claimant-Petitioner)

v.)

MATSON TERMINALS,)
 INCORPORATED)

DATE ISSUED: April 10, 2002

and)

JOHN MULLEN AND COMPANY,)
 INCORPORATED)

Employer/Carrier-)
 Respondents)

McCABE, HAMILTON AND RENNY,)
 COMPANY)

and)

EAGLE PACIFIC INSURANCE,)
 COMPANY)

Employer/Carrier-)
 Respondents)

DECISION and ORDER

Appeal of the Order of Remand and the Order-Denying Motion for Reconsideration of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, and Mark McDougal, Portland Oregon, for claimant.

Scott G. Leong and Normand R. Lezy (Leong, Kunihiro & Leong), Honolulu, Hawaii, for Matson Terminals, Incorporated and John Mullen and Company, Incorporated.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order of Remand and the Order-Denying Motion for Reconsideration (97-LHC-0232) of Administrative Law Judge John C. Holmes 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. To recapitulate, claimant worked for ten years as a longshoreman, winch operator and substitute crane operator for McCabe, Hamilton & Renny Company (McCabe), whose business involves providing labor loans to shipping companies in and around Honolulu, Hawaii, pursuant to labor loan agreements. Claimant was on a labor loan from McCabe to Matson Terminals (Matson), on March 30, 1994, when he was attacked and severely beaten by a co-worker, Bruce Perry. As a result of that incident, claimant sustained four broken ribs and a crushed skull which permanently severed his optic nerve causing blindness in his left eye.

Claimant filed a claim under the Act against both Matson and McCabe. Matson paid claimant temporary total disability benefits from March 30, 1994 through June 5, 1994, and scheduled permanent partial disability benefits for a 100 percent loss of one eye. On August 24, 1995, the district director issued an "Order Memo" recognizing Matson as claimant's statutory employer and releasing McCabe from any responsibility under the Act. In May 1995 claimant was placed in protective police custody and shortly thereafter moved to the mainland as part of the witness protection program, pending the trial of his assailant.

Following its payment of benefits to claimant in June 1999, Matson submitted a motion for summary decision to the Office of Administrative Law Judges, wherein it sought to conclusively resolve the responsible employer issue. In response, claimant filed his own motion for summary decision seeking to have McCabe named as the responsible employer. In his initial decision, the administrative law judge bifurcated the case at the parties' urging, proceeding only on the responsible employer issue. On that issue, the administrative law judge determined that Matson was claimant's borrowing employer at the time of the accident, and therefore liable for benefits under the Act. Accordingly, he granted Matson's motion for summary decision, and denied claimant's motion for summary decision.

On claimant's appeal, the Board affirmed the administrative law judge's finding that

Matson was claimant's borrowing employer, and thus liable for claimant's benefits as the responsible employer. *Tahara v. Matson Terminals, Inc.*, BRB No. 00-0383 (Oct. 13, 2000). The Board remanded the case to the administrative law judge "for further proceedings necessary to a final decision on claimant's claim in this case," *id.* at 7, having previously noted that the parties raised as an issue for resolution claimant's entitlement to temporary total disability benefits while he was in the witness protection program, commencing in September 1995.¹ *Id.* at 3.

In his Order of Remand, the administrative law judge stated that the Board's opinion delineated no unresolved issues, that he had gone to great lengths at the initial hearing to get the parties to agree that the only issue before him was the responsible employer issue, and that the parties agreed that "this matter would be concluded based on final determination on this one issue." Order of Remand at 1. Thus, he stated there is no issue before him on remand, and he remanded the case to the district director "in the unlikely instance that one or the other party despite protestations to the contrary wishes to raise additional issues." *Id.*

Claimant moved for reconsideration, stating that the issue of his entitlement to temporary total disability benefits while he was in the witness protection program was unresolved. He requested that the administrative law judge set the issue for a hearing as soon as possible, as he wishes to appeal the responsible employer issue to the court of appeals. The administrative law judge summarily denied claimant's motion for reconsideration.

Claimant appeals, contending the administrative law judge erred in failing to follow the Board's instruction that he address the remaining issue in this case and enter a final award or denial of benefits. Matson responds, stating it takes no position with regard to claimant's appeal.

We agree with claimant that the administrative law judge erred in not addressing the issue of claimant's entitlement to disability benefits, and instead remanding this case to the district director. The parties agreed at the 1999 hearing to go forward only on the issue of the responsible employer. Tr. at 7-8. In his initial decision, the administrative law judge noted that the parties disagreed over claimant's entitlement to temporary total disability

¹Claimant appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit. Matson's motion to dismiss the appeal was granted on February 16, 2001. *Tahara v. Matson Terminals, Inc.*, No. 00-71372 (9th Cir. Feb. 16, 2001).

benefits while he was in the witness protection program, but that they strongly urged him to bifurcate the issues and to proceed only on the responsible employer issue. *See* Decision and Order-Granting Summary Judgment at 2. The mere fact that the administrative law judge admitted to “bifurcating” the case indicates that some issues were not decided in the initial decision. Indeed, the administrative law judge’s initial decision neither awarded nor denied compensation, but resolved only the responsible employer issue.

Moreover, the Board’s decision noted the unresolved issue of claimant’s entitlement to disability benefits, *see Tahara*, slip op. at 3, and directed the administrative law judge to undertake further proceedings “necessary to a final decision on claimant’s claim in this case.” *Id.*, slip op. at 7; *see* 20 C.F.R. §802.405(a)(“Where a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board.”). The Act requires that an administrative law judge “reject the claim” or “make an award.” 33 U.S.C. §919(c); *see generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999); *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986). As the administrative law judge has resolved only the responsible employer issue, and has neither rejected the claim nor awarded benefits, we must vacate his Order of Remand to the district director. We remand this case to the administrative law judge for resolution of the issue of claimant’s entitlement to disability benefits while in the witness protection program.² The administrative law judge may require the parties to set forth their positions in briefs with

²We deny claimant’s request that we remand this case to a different administrative law judge due to the administrative law judge’s alleged “expressed dissatisfaction” with claimant’s attorney in this and other cases. Cl. Brief at 7. Claimant has not preserved for the record sufficient evidence of bias by the administrative law judge such that remand to another administrative law judge is warranted. *See generally Orange v. Island Creek Coal Co.*, 786 F.2d 724 (6th Cir. 1986); *Marcus v. Director, OWCP*, 548 F.2d 1044, 5 BRBS 307 (D.C. Cir. 1976).

regard to this issue, and to stipulate to any issues on which there is agreement. If there are no remaining issues, the administrative law judge can enter an award of benefits based on the stipulations. If there are remaining issues between the parties, he is obligated to resolve them consistent with the Act and regulations. *See* 20 C.F.R. §§702.331-348.

Accordingly, the administrative law judge's Order of Remand and the Order-Denying Motion for Reconsideration are vacated. The case is remanded to the administrative law judge for resolution of claimant's claim for disability benefits while in the witness protection program.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge