



BRB No. 16-0681

JARED B. VAN BOENING)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BLACKWATER SECURITY)	
CONSULTING, LLC)	
)	
and)	
)	
CONTINENTAL INSURANCE COMPANY)	DATE ISSUED: <u>Aug. 8, 2017</u>
c/o CNA INTERNATIONAL)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order Award of Compensation, the Errata Correcting Compensation Order Approval of Stipulations, and the Errata Correcting Compensation Order of David Widener, District Director, United States Department of Labor.

Sarah Bahlert Stewart and Lisa G. Wilson (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

Kathleen H. Kim (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Compensation, the Errata Correcting Compensation Order Approval of Stipulations, and the Errata Correcting Compensation Order (OWCP No. 02-213999) of District Director David Widener 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the district director's award unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant worked for employer as a personal security specialist in Iraq. On December 22, 2007, claimant injured his neck and suffered a concussion while traveling in an armored vehicle when the hatch of the turret came loose, hitting his head and cracking his ballistic helmet. Employer accepted the claim for orthopedic injuries and began paying medical and disability benefits. This case was assigned OWCP No. 02-172135.

Claimant later alleged he sustained psychiatric injuries as a result of repetitive exposure to traumatic events during his employment. Employer accepted the claim for psychiatric injuries and paid medical and disability benefits. This case was assigned OWCP No. 02-21399.

On July 20, 2015, the parties agreed to resolve both claims and submitted to the district director for approval: 1) a Section 8(i), 33 U.S.C. §908(i), agreement to settle the orthopedic claim for a lump sum of \$222,159.20; and 2) a pleading entitled "Joint Stipulations and Request for Order" regarding the psychiatric claim.¹ The stipulations relevant to claimant's psychiatric claim and this appeal are summarized as follows:²

1. On September 22, 2009, claimant was diagnosed with post-traumatic stress disorder and depressive disorder not-otherwise specified, and he began

¹ On July 25, 2015, the district director issued a compensation order approving the Section 8(i) settlement agreement for claimant's orthopedic claim, OWCP No. 02-172135. This claim is not before the Board on appeal.

² After employer filed its appeal with the Board, the parties submitted additional stipulations to the district director, dated September 28, 2016. These stipulations were not considered by the district director and will not be considered by the Board.

treating with a psychiatrist for medication management on October 1, 2009. JXs 7, 8.

2. On February 4, 2010, claimant underwent a psychiatric Independent Medical Evaluation conducted by Dr. Wisner, who opined that claimant's psychiatric condition was related in part to his employment with employer. JX 9.
3. On May 13, 2011, Dr. Wisner determined that claimant was psychiatrically stable. Dr. Wisner implemented restrictions that limited claimant's ability to work. Dr. Wisner recommended ongoing psychotherapy and medication monitoring. JX 10. Claimant's injuries reached maximum medical improvement on May 13, 2011.
4. Claimant's average weekly wage on the date of injury was \$3,014.66, which entitles him to the maximum disability compensation rate, \$1,160.36. JX 11.
5. As a result of his injuries, claimant is unable to return to his usual work.
6. Claimant is entitled to temporary total disability benefits from December 29, 2007,³ through May 12, 2011.
7. Claimant is entitled to ongoing permanent partial disability benefits from the date of maximum medical improvement, May 13, 2011, to the present and continuing. From May 13, 2011 through June 1, 2015, claimant's compensation rate for permanent partial disability is \$1,160.36. From June 2, 2015, claimant's permanent partial disability compensation rate is \$1,060.36 per week, which takes into account claimant's agreed-upon residual wage-earning capacity of \$1,424.12.
8. Claimant is entitled to reasonable and necessary medical care for his industrial psychiatric injuries under Section 7, 33 U.S.C. §907.

On February 12, 2016, the district director issued a compensation order wherein he stated that employer paid compensation on the orthopedic claim from December 29, 2007, through July 8, 2011, and from March 6 through May 19, 2014; that employer

³ The original stipulations misstated the onset date for compensation as July 9, 2011. By letter dated February 12, 2016, employer sought to correct this typographical error, stating that the parties intended it to be December 29, 2007.

established the availability of suitable alternate employment on February 27, 2012; and that the parties stipulated to a post-injury wage-earning capacity of \$1,424.12 and weekly wage loss of \$1,509.54. The district director awarded claimant: 1) permanent total disability benefits from July 9 to September 30, 2011, at a rate of \$1,160.36; 2) permanent total disability benefits from October 1, 2011 to February 12, 2012 at a rate of \$1,196; 3) permanent partial disability benefits from February 27, 2011 to March 5, 2014, at a weekly rate of \$1,060.36; 3) permanent partial disability benefits from May 20, 2014, and continuing at a weekly rate of \$1,060.36; and 4) reasonable and necessary medical benefits pursuant to Section 7. The district director also stated that “Carrier is allowed credit for any compensation previously paid.” Compensation Order at 2.

Because the Compensation Order did not correspond to the parties’ stipulations, employer moved for reconsideration. Pursuant to employer’s request, the district director issued an Errata Order on February 19, 2016. Therein, the district director “corrected” the award to reflect that employer paid compensation for claimant’s orthopedic injuries through July 8, 2011; claimant is due permanent partial disability benefits from the date of maximum medical improvement, May 13, 2011; claimant was paid at the applicable maximum weekly compensation rate, \$1,160.36, through June 2, 2015; and claimant has a residual wage-earning capacity of \$1,424.12 as of June 2, 2015, which entitles him to a permanent partial disability award of \$1,060.36 as of that date. Errata Order at 1. The district director modified the award to reflect claimant’s entitlement to permanent partial disability benefits for his psychiatric injuries from July 9, 2011 to June 1, 2015, at the maximum weekly rate of \$1,160.36, and continuing permanent partial disability benefits from June 2, 2015, at the agreed rate of \$1,060.36 per week. In all other respects, the original order remained unchanged. *Id.* at 2.

Because this Errata Order also did not reflect the parties’ agreement, employer filed a motion for reconsideration.⁴ The district director issued a second Errata Order on September 1, 2016. In this order, the district director “corrected” his award to reflect that the parties stipulated to a permanent partial disability rate of \$1,060.36 per week

⁴ In support, employer submitted revised LS-208 Notice of Final Payment forms for both claimant’s orthopedic and psychological injuries. Employer explained that the parties became aware of claimant’s psychiatric condition as of December 17, 2009, at which point temporary total disability benefits encompassed both the orthopedic and psychiatric claims. The revised LS-208 for claimant’s orthopedic claim, OWCP No. 02-172135, indicated that temporary total disability benefits were paid December 29, 2007 through December 16, 2008. The revised LS-208 for claimant’s psychiatric claim, OWCP No. 02-21399, indicated that claimant was paid temporary total disability benefits from December 17, 2008 through May 12, 2011, and permanent partial disability benefits at the stipulated rates as of May 13, 2011.

continuing from the date of maximum medical improvement, May 13, 2011. Nevertheless, the district director modified the award to reflect claimant's entitlement to permanent partial disability benefits from July 9, 2011, and continuing at the agreed rate of \$1,060.36 per week. In all other respects, the award was unchanged. Second Errata at 1-2.

Employer appeals, contending the district director exceeded his authority by failing to issue a compensation order reflective of the parties' stipulations. Specifically, as the parties stipulated to temporary total disability benefits from December 29, 2007 to May 12, 2011 at the maximum weekly compensation rate of \$1,160.36, permanent partial disability benefits from May 13, 2011 to June 1, 2015 at a weekly compensation rate of \$1,160.36, and permanent partial disability benefits from June 2, 2015 and continuing at a weekly compensation rate of \$1,060.36, the district director erred in awarding permanent partial disability benefits continuing from July 9, 2011, at the weekly rate of \$1,060.36. Employer asks the Board to remand the case to the district director with instructions to issue an order based on the parties' stipulations filed on July 20, 2015.⁵ Employer also asks that the district director's order include a correct accounting of benefits paid between the two claims as set forth in the updated LS-208 forms filed in February 2016. Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds, conceding the district director erred. However, the Director asserts that the substance of the district director's orders indicates there is disagreement regarding whether some of the stipulations are supported by the evidence. Given this disagreement between the district director and the private parties, the Director asserts the district director was not authorized to issue any binding compensation orders and should have referred the dispute to the Office of Administrative Law Judges (OALJ). Accordingly, the Director urges the Board to vacate the district director's orders and to remand the case either directly to the OALJ for a hearing, or to remand the case to the district director with instructions to forward it to the OALJ. Employer replies, reiterating that the parties are in agreement as to all issues and stating that remand to the OALJ will result in judicial inefficiency.

The district director's role under the Act is that of a claims administrator who functions both to process claims and to facilitate their informal resolution "amicably and promptly." 20 C.F.R. §702.301; *see Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986); 20 C.F.R. §§702.301 – 702.321. The district director is not empowered to adjudicate disputed claims, and absent an agreement by the parties and a request for a compensation order under Section 702.315, 20 C.F.R. §702.315, the district director is not empowered to issue a compensation order on factual issues. *Roulst v. Marco Constr.*

⁵ Employer's brief makes no reference to the joint stipulations filed on September 28, 2016.

Co., 15 BRBS 443 (1983); *see generally Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000). Section 702.315(a) of the regulations provides that in a case before the district director in which agreement is reached on all issues, “[i]f either party requests that a formal compensation order be issued, the district director shall, within 30 days of such request, prepare, file, and serve such order in accordance with §702.349.” 20 C.F.R. §702.315(a). Thus, where the parties agree on all issues and request a formal compensation order, Section 702.315(a) requires the district director to issue an order embodying the parties’ agreement. On the other hand, where the parties do not agree on all issues, the district director is without authority to issue a compensation order, and the parties may request a formal hearing before an administrative law judge. 20 C.F.R. §§702.316, 702.317; *see Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21, 24 (2007); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47, 49 (2004).

In this case, the parties reached an agreement and submitted a document to the district director on July 20, 2015, titled “Joint Stipulations and Request for Order.” The document contained 21 stipulations in which the parties expressed agreement as to the compensability of claimant’s psychiatric claim, the nature and extent of disability for all relevant dates, compensation rates to which claimant is entitled for all relevant periods of disability, and claimant’s entitlement to medical benefits. The district director’s compensation order and two errata orders do not embody the parties’ stipulations. *See Grimes v. Exxon Co., USA*, 14 BRBS 573 (1981). The district director’s orders are, therefore, unlawful and must be set aside. 20 C.F.R. §702.315(a).

The parties stipulated to: the nature and extent of disability; claimant’s entitlement to benefits; the amount of benefits due; and whether the prior disability payments were made for the orthopedic injuries or the psychological injuries. The stipulations do not appear to be contrary to law, as claimant has not waived his entitlement to any benefits and the stipulated maximum compensation rate is correct. *See, e.g., Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010) (stipulations that are contrary to the Act are not binding); *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990) (same); *McDevitt v. George Hyman Constr. Co.*, 14 BRBS 677 (1982) (a stipulation cannot be accepted where it evinces an incorrect application of the law). Although the Director states that the district director’s apparent “dispute” with some of the stipulations warrants referral to the OALJ for a hearing, it is a dispute between the *parties* that triggers the need for a hearing. *Hitt*, 38 BRBS 47; *Roulst*, 15 BRBS 443; 20 C.F.R. §702.316. Whether the evidence could support the fact of the stipulation if the claim were adjudicated is not relevant to the district director’s acceptance of the stipulation. *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014) (stipulations of fact are offered in lieu of evidence, and the fact need not be established by record evidence); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999) (stipulations are offered in lieu of evidence and may be relied upon to establish an element of the claim); *Brown v.*

Maryland Shipbuilding & Drydock Co., 18 BRBS 104, 107-108 (1986); *see also Vander Linden v. Hodges*, 193 F.3d 268, 279-280 (4th Cir. 1999).⁶ Thus, as the parties agreed and stipulated to resolve all issues with respect to claimant’s psychiatric claim, and as the stipulations are not contrary to law, the district director was required to issue a compensation order embodying the parties’ agreement pursuant to Section 702.315(a). In light of the foregoing, we vacate the district director’s Compensation Order, Errata Order, and second Errata Order, and we remand the case to the district director to issue a compensation order that comports with the parties’ stipulations. 20 C.F.R. §702.315(a). In so doing, the district director may consider the July 2015 stipulations and the September 2016 stipulations, and the parties may clarify their intentions as needed. If a dispute arises between the parties, the case must be referred to the OALJ for a formal hearing. 20 C.F.R. §702.316.

⁶ In *Vander Linden*, the United States Court of Appeals for the Fourth Circuit stated,

a stipulation, by definition, constitutes “[a]n express waiver made . . . preparatory to trial by the party or his attorney conceding for the purposes of trial the truth of some alleged fact . . . *the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it* It is, in truth, a substitute for evidence, in that it does away with the need for evidence.”⁹ Wigmore, Evidence § 2588, at 821 (Chadburn 1981) (emphasis added). *See* 2 McCormack on Evidence § 254 (West 1992) (stipulations “have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact”).

Vander Linden, 193 F.3d at 279-280.

Accordingly the district director's Compensation Order Award of Compensation, Errata Correcting Compensation Order Approval of Stipulations, and Errata Correcting Compensation Order are vacated, and the case is remanded to the district director for further consideration as set forth herein.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge