

U.S. Department of Labor

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



BRB No. 18-0468

JOSEPH DONOHUE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 02/19/2019
BATH IRON WORKS CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Motion for Reconsideration Awarding Benefits and Special Fund Relief of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Stephen Hessert (Norman, Hanson & DeTroy LLC), Portland, Maine, for self-insured employer.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Motion for Reconsideration Awarding Benefits and Special Fund Relief (2017-LHC-01639) of Administrative Law Judge Colleen A. Geraghty 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The underlying facts are not in dispute. Claimant worked for employer as an insulator and suffered an injury to his left shoulder in the course of his employment on November 16, 2011. He underwent surgery on his left shoulder on February 29, 2012. Employer paid claimant temporary total disability benefits from February 29 through April 22, 2012.

The administrative law judge found that claimant reached maximum medical improvement on August 29, 2012. Decision and Order (Jan. 17, 2018) at 3. The parties stipulated that, at the time of the hearing, claimant was unable to return to his pre-injury job due to his shoulder injury and employer did not have suitable alternate employment available at its facility. The administrative law judge awarded claimant ongoing permanent total disability benefits from August 29, 2012.

The administrative law judge found employer entitled to Section 8(f) relief, 33 U.S.C. §908(f), because claimant had pre-existing permanent partial disabilities—left shoulder osteoarthritis of the glenohumeral joint, as well as liver cirrhosis—and that his permanent total disability is not due solely to his work-related injury. She therefore found that employer's liability for permanent disability benefits was limited to the period of 104 weeks starting August 29, 2012; thereafter, the Special Fund is liable for claimant's benefits. Decision and Order (Jan. 17, 2018) at 4.

Claimant and employer filed a joint motion for reconsideration to clarify claimant's actual work history following the date of maximum medical improvement. The motion noted that employer was able to provide claimant with light-duty work for some periods following the date of maximum medical improvement. The parties stipulated that claimant worked for employer from April 23, 2012 to February 23, 2013, April 11, 2013 to February 23, 2014, and April 30 to June 22, 2014, without a loss in wage-earning capacity. Claimant and employer agreed that claimant is not entitled to disability benefits under the Act during the periods he worked after reaching maximum medical improvement (MMI) on August 29, 2012, and that the onset of the Special Fund's liability should be postponed by 23 weeks. The parties also stipulated that claimant was unable to work and received "non-

occupational accident and sickness benefits” from February 25 to April 10, 2013, February 24 to April 29, 2014, and from June 23, 2014 to November 11, 2015, when employer again started paying total disability benefits under the Act.

In response to the motion for reconsideration, the Director contended that claimant is not entitled to benefits during the additional weeks prior to November 11, 2015, when he was off work allegedly for reasons completely unrelated to the work injury. The Director asserted that these weeks also should postpone the onset of the Special Fund’s liability.

The administrative law judge agreed with employer and claimant that the 104 weeks for which employer is responsible for paying permanent disability benefits should be extended to reflect the 23 weeks during which employer was able to accommodate claimant with light-duty work and he did not sustain a loss in wage-earning capacity. She rejected the Director’s contention that the additional weeks during which he received benefits for non-occupational reasons should be excluded as well, stating that claimant is entitled to benefits under the Act for periods he is disabled by both work-related and non-work-related conditions. Decision and Order on Recon. at 7 n.16.<sup>1</sup> The administrative law judge therefore found that the Special Fund’s liability for benefits commences on February 4, 2015, reflecting the end of employer’s payment of 104 weeks of permanent disability over 127 calendar weeks. Decision and Order on Recon. at 6-7.

The administrative law judge further found, for the weeks claimant worked but earned less than his pre-injury average weekly wage, claimant’s partial loss in wage earning capacity is compensable. Decision and Order on Recon. at 8. The administrative law judge ordered, inter alia, that employer pay claimant permanent partial disability benefits for these periods at “varying” rates. *Id.* at 9.

On appeal, the Director assigns error to the administrative law judge’s finding that claimant is entitled to disability benefits under the Act for periods he was absent from work between February 2013 and November 2015 allegedly due solely to his non-work-related conditions. The Director also contends the administrative law judge erred in failing to make findings as to claimant’s post-injury wage-earning capacity for periods of partial

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<sup>1</sup> The administrative law judge found that the fact claimant “may also have been out of work for some days/weeks of this period [after he reached maximum medical improvement for his shoulder injury] for a non-work related medical condition does not mean entitlement to disability compensation benefits under the Act is terminated during the periods of sickness and disability insurance payments.” Decision and Order on Recon. at 7 n.16.

disability. Employer filed a response brief, urging affirmance of the administrative law judge's decision. The Director filed a reply brief. Claimant did not respond to this appeal.

In a case where employer is entitled to Section 8(f) relief,<sup>2</sup> employer is liable for benefits for the first 104 weeks of permanent disability. 33 U.S.C. §908(f)(1); *see generally Pacific Ship Repair & Fabrication, Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012). Thereafter, the Special Fund assumes liability for benefits. *Id.* In order to be entitled to benefits under the Act, a claimant with a non-scheduled injury must first establish that he is unable to perform his former job because of his work-related injury. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). If a claimant makes out this prima facie case, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Id.*

If a claimant's disability is solely attributable to a non-work-related condition, the disability is not compensable. *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012). A claimant who is disabled by both a work injury and a non-work-related injury, however, remains entitled to any benefits to which he would be entitled due to the work injury.<sup>3</sup> *Id.*; *see generally Mangaliman v. Lockheed Shipping Co.*, 30 BRBS 39 (1996). Claimant thus is entitled to disability benefits under the Act for any periods he sustained a partial or total loss in earning capacity due at least in part to his work-related shoulder injury. *Macklin*, 46 BRBS 31. If, however, claimant's disability was due solely to a non-work-related condition during a particular time, the disability is not compensable for that period. *Id.*

The administrative law judge rejected the Director's contention that claimant was not entitled to compensation for select periods post MMI, correctly stating that a claimant is entitled to benefits if his work-related injury caused disability for the same periods he was disabled by a non-work-related condition. *Macklin*, 46 BRBS 31. But she did not address the Director's argument that claimant was not at all disabled by the workplace injury during these periods because he was disabled solely by non-work related medical problems. Indeed, the administrative law judge did not address what, if any, evidence

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<sup>2</sup> The Director does not contest the award of Section 8(f) relief to employer.

<sup>3</sup> Under the "aggravation rule," when a work-related injury aggravates, accelerates or combines with a pre-existing condition to increase disability, employer is liable for the full extent of the resulting disability. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

supports her implicit finding that claimant's work injury disabled him for the contested periods.<sup>4</sup>

Because findings of fact are necessary on this issue, we remand the case for the administrative law judge to do so on the issue of the causes of claimant's disability for the contested periods. *See generally Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). The date on which the Special Fund's liability for benefits commences should be changed accordingly to reflect any weeks during which claimant was not entitled to benefits under the Act. *See generally Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010). Therefore, we must vacate the administrative law judge's decision and remand the case for further findings.<sup>5</sup>

The Director also contends that the administrative law judge's Decision and Order is not enforceable because the administrative law judge ordered payment of "Varying permanent partial [disability benefits]," but did not calculate the amount of compensation owed to claimant by employer and the Director. *See Decision and Order on Recon.* at 9. We agree that the administrative law judge must specify the compensation due claimant. *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014).

A compensation order is not "effective" unless it either specifies the amount of compensation due or provides a means of calculating the correct amount without resort to extra-record evidence. *See Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008); *Severin v. Exxon Corp.*, 910 F.2d 286, 24 BRBS 21(CRT) (5th Cir. 1990). On remand, the administrative law judge is directed to make findings as to

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<sup>4</sup> The record contains medical evidence regarding claimant's medical conditions during various periods. *See, e.g.*, EXs 21, 28, 33, 34. For example, claimant was out of work from February 25 to April 10, 2013 for "GI problems" and to undergo a cholecystectomy (gall bladder removal). EX 21 at 55. In addition, the parties submitted claimant's wage records. EX A to Jt. Mot. for Recon.

<sup>5</sup> Notably, the stipulations between claimant and employer to which the Director, as the representative of the Special Fund, did not agree, are not binding as to the Special Fund's liability under Section 8(f). *See, e.g., E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). The administrative law judge must evaluate the evidence to ascertain whether the stipulations are supported by the record and in accordance with law. *Bomback v. Marine Terminals Corp.*, 44 BRBS 95 (2010). Thus, the private parties' stipulation as to the weeks claimant was not disabled by his work injury does not prevent the Director from asserting that claimant was not disabled during other periods as well.

claimant's post-injury wage-earning capacity and to calculate claimant's compensation rate for his periods of permanent partial disability benefits.<sup>6</sup> 33 U.S.C. §908(c)(21), (h); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999).

Accordingly, the administrative law judge's Decision and Order on Motion for Reconsideration Awarding Benefits and Special Fund Relief is vacated in part and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

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<sup>6</sup> The parties stipulated to an average weekly wage of \$1,072.78 with a compensation rate of \$715.19, which is the amount due for total disability. *See* 33 U.S.C. §908(a); Decision and Order at 5 (Jan. 17, 2018). In addition, claimant is entitled to Section 10(f) adjustments on the permanent total disability award. 33 U.S.C. §910(f); 20 C.F.R. §702.701.