

JAMES M. JOHNS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ALABAMA DRY DOCK &)	DATE ISSUED:
SHIPBUILDING 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 Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Walter R. Meigo, Mobile, Alabama, for the self-insured employer.

Michael S. Hertzig (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (89-LHC-3249) of Administrative Law Judge Quentin P. McColgin 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

must affirm the findings of fact and conclusions of law of the administrative law judge if they 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, a retired ship repairer who worked for employer from 1942 until 1985, sought benefits under the Act for a work-related binaural hearing impairment. The assistant district director¹ approved employer's petition for Section 8(f), 33 U.S.C. §908(f), relief based on a March 29, 1982 audiogram which revealed a pre-existing 16.6 percent binaural impairment. She therefore indicated that Section 8(f) would not be an issue in her letter referring the case to the Office of Administrative Law Judges for a formal hearing. After referral of the case, but prior to the hearing, the parties submitted a joint stipulation of suggested findings of fact and conclusions of law in which employer and claimant agreed that claimant was entitled to disability compensation for a 28.44 percent binaural impairment. In accordance with the Section 8(f) approval, the stipulation provided that the Special Fund was liable for 16.6 percent of the impairment, or 33.2 weeks of compensation, and that employer was liable for the remaining amount. The parties also stipulated that claimant's average weekly wage based on his last fifty-two weeks of employment was \$365.69, yielding a compensation rate of \$243.79, that claimant's right to future medical expenses was not foreclosed, and that claimant was entitled to an attorney's fee of \$2,045 for services rendered at the district director and administrative law judge levels. Finally, the parties agreed that claimant's entitlement to interest and penalties shall be waived.

In a Decision and Order dated June 27, 1990, the administrative law judge entered an award of benefits based upon the agreement and stipulations of the parties and the district director's prior approval of employer's Section 8(f) claim, incorporating the parties' agreement by reference into his decision. Accordingly, the administrative law judge ordered employer to pay claimant \$5,772.95 for 23.68 weeks of disability compensation at \$243.79 per week and ordered the Special Fund to pay \$8,093.83, for 33.2 weeks, both without interest. The administrative law judge also ordered employer to pay claimant \$2,045 in attorney's fees and expenses, and continued medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, the Director contends that the administrative law judge's Decision and Order should be reversed and the case remanded because the decision as it currently stands is unreviewable, and it does not comport with the Act or the Administrative Procedure Act, 5 U.S.C. §554 *et seq.* (APA). In particular, the Director argues that although the administrative law judge indicated that he was awarding compensation based on the parties' joint stipulation, the adequacy of the decision cannot be assessed because the joint stipulation is not appended to the decision. Moreover, the Director asserts that because the parties' stipulations are not included in the Decision and Order, there is no basis for determining how claimant's average weekly wage was determined, or whether claimant was awarded compensation pursuant to Section 8(c)(13) or (c)(23) of the Act, 33 U.S.C. §908(c)(13), (23). Finally, the Director contends that the administrative law judge's order fails to provide for interest on the accrued compensation owed in contravention of the settled law,

¹Pursuant to 20 C.F.R. §702.105, the term "district director" as been substituted for the term "deputy commissioner" used in the statute.

and that it is unclear from the decision whether claimant is entitled to the penalties provided under Section 14(e) and (f) of the Act, 33 U.S.C. §914(e), (f).²

We reject the Director's argument that the administrative law judge's award based on claimant and employer's joint stipulations must be reversed based on his failure to append or reproduce the parties' joint stipulations in his Decision and Order. The stipulations were clearly a part of the record before the administrative law judge, and the fact that he chose to incorporate the agreement by reference, rather than reproducing it or attaching it to the Decision and Order, is not determinative. The agreement states that claimant's hearing impairment was 28.44 percent at the time of his retirement, that the Special Fund is liable for 16.6 percent of this loss, and that any loss in excess of 28.44 percent was attributable to causes subsequent and unrelated to claimant's employment with employer. Inasmuch as the administrative law judge's Decision and Order provides that claimant is to receive compensation for a finite number of weeks based on his binaural hearing impairment rather than a continuing award based on the impairment of his body as a whole, we reject the Director's assertion that there is no basis for ascertaining whether the compensation was awarded under Section 8(c)(13) or Section 8(c)(23) of the Act. The Director's assertion that there is no basis for determining how claimant's average weekly wage was determined similarly must fail; the stipulation specifically states that claimant's average weekly wage of \$365.69 was based on his earnings in the 52 weeks prior to his retirement. Moreover, although the administrative law judge failed to explicitly address employer's liability for a Section 14(e) assessment in his Decision and Order, no assessment is owed inasmuch as the parties' agreement incorporated therein indicates that employer timely controverted the claim.

²By way of response, employer filed a Motion for Leave to Amend Decision of Administrative Law Judge in the Benefits Review Board or in the Alternative for Remand. Employer argues that the error which the Director attributes to the administrative law judge in not appending the parties' stipulation can be cured under Rule 60(a) of the Federal Rules of Civil Procedure, which provides for correction of clerical mistakes. In view of our disposition of the case, we need not address employer's argument.

We agree with the Director, however, that the administrative law judge's failure to provide for interest on the accrued compensation owed to claimant is not in accordance with law. As interest is mandatory, it cannot be waived based on a stipulation in a case where the administrative law judge issues a Decision and Order on the merits.³ See 33 U.S.C. §915(b); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982). See generally *Quave v. Progress Marine*, 912 F.2d 798, n.2, 24 BRBS 55, 56 n.2 (CRT) (5th Cir. 1990); *Jones v. U.S. Steel Corp.*, 25 BRBS 355, 359 (1992); *Vanover v. Foundation Constructors*, 22 BRBS 453 (1989), *aff'd sub nom. Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991). Moreover, a stipulation cannot be accepted where it evinces an incorrect application of the law. *McDevitt v. George Hyman Construction Co.*, 14 BRBS 677 (1982). Accordingly, we modify the administrative law judge's Decision and Order to reflect that claimant is entitled to interest on the accrued compensation owed at the rate specified in 28 U.S.C. §1961. See *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989).⁴

³Interest, however, may be waived by the parties as an item of compromise in a settlement agreement under Section 8(i), 33 U.S.C. §908(i)(1988). The administrative law judge's Decision and Order Awarding Benefits in this case, however, does not constitute the approval of a Section 8(i) settlement because it fails to provide for the complete discharge of employer's liability and does not contain any findings regarding whether the compensation awarded was in claimant's best interest. See *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988); see generally *Lucas v. Louisiana Insurance Guaranty Association*, BRBS , BRB NO. 93-985 (February 24, 1994).

⁴Although the Director also alleges that the administrative law judge's Decision and Order does not comply with Sections 702.242 and 702.243 of the regulations, 20 C.F.R. §§702.242, 702.243, governing Section 8(i) settlements and that the administrative law judge's decision is deficient because it does not allow for a determination of whether the Special Fund's liability was compromised, we decline to address these arguments which have not been adequately briefed. See *West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125, 127 n.3 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is modified to provide interest on the accrued compensation owed, but is in all other respects affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge