BRB No. 99-1129

RAYMOND LORENZO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
METRO MACHINE CORPORATION	)	DATE ISSUED: 7/27/2000
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Order on Reconsideration (98-LHC-0427) of Administrative Law Judge Fletcher E. Campbell, Jr., 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related back injury on December 11, 1989. Following two back operations, he returned to work for employer in a light duty capacity, first in the safety department, and then as a gate guard in the security department. Claimant was laid off from his light duty job in March 1997 for economic reasons. He was recalled by employer in December 1997. In the interval, claimant worked for two other companies, earning less than he did with employer.

The sole issue before the administrative law judge was whether claimant was entitled to benefits during the period of his economic layoff; the administrative law judge found that claimant

was so entitled. *See* *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). The parties agreed to the amounts of temporary total and temporary partial disability benefits claimant would receive if the administrative law judge awarded benefits.[1] The administrative law judge, however, found that after April 7, 1997, claimant is entitled to permanent disability benefits based on the parties' stipulation that claimant has permanent work restrictions, and on Dr. Byrd's report assigning these restrictions on April 7, 1997. Decision and Order at 3 n.2, 8; CX 1.

Employer filed a motion for reconsideration, contending, *inter alia*, that the administrative law judge erred in awarding permanent disability benefits as claimant had not made a claim for such. The administrative law judge denied employer's motion, stating that the issue was raised by virtue of the parties' stipulation concerning claimant's permanent work restrictions, and that therefore he was not required to give the parties notice that he was raising a new issue pursuant to 20 C.F.R §702.336(b). He found no prejudice to employer, stating there was no significant difference in the burdens of proof between claims for permanent and temporary disability. Finally, the administrative law judge rejected employer's assertion that its right to seek relief pursuant to Section 8(f) was impaired, as Section 8(f) could not be implicated in the this case, as the award was for fewer than 104 weeks. Order on Reconsideration at 3-5.

On appeal, employer challenges the administrative law judge's award of permanent disability benefits. Claimant responds, urging affirmance.

[1]The parties agreed that claimant would receive temporary total disability benefits from March 23 to August 17, 1997, from September 17 to October 7, 1997, and from October 15 to October 26, 1997. They agreed claimant would receive temporary partial disability benefits from August 18 to September 16, 1997, from October 8 to October 15, 1997, and from October 27 to December 14, 1997. JX 1.

We vacate the administrative law judge's award of permanent disability benefits, as the administrative law judge was not free to modify the parties' stipulation that, if entitlement was established, claimant was to receive temporary total and partial disability benefits.[2] The administrative law judge's options with regard to a stipulation are either to accept it as offered, or to reject it with notice to the parties that it will not be accepted so that the parties have the opportunity to offer evidence in support of their positions on the issue. *See, e.g., Dodd v. Newport New Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). If, as in the instant case, the administrative law judge found certain stipulations to be inconsistent, *see* Order on Reconsideration at 2 n.1, he was obliged to inform the parties that the stipulations would not be accepted as offered. As employer contends, by virtue of the administrative law judge's action, it was deprived of the opportunity to introduce evidence bearing on the issue of when claimant's condition became permanent.[3] The administrative law judge correctly noted that when a claimant claims entitlement to temporary total and permanent partial disability benefits, the administrative law judge nonetheless may award benefits for permanent total disability. *See Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321

[2]We note that the parties' pre-hearing statements do imply a claim for permanent disability benefits, but the parties obviously refined their positions by the time of the hearing.

[3]This issue would potentially be relevant if claimant was found to be entitled to benefits in the future, such that employer's liability for permanent disability benefits exceeds 104 weeks, *see* 33 U.S.C. §908(f), and also can affect the applicability of Section 10(f) of the Act, 33 U.S.C. §910(f). In reality, however, employer's ability to litigate Section 8(f) in the future was not endangered by the administrative law judge's action in this case. Employer filed an application for Section 8(f) relief while the claim was before the district director, *see* 33 U.S.C. §908(f)(3). Even if claimant had made a claim for permanent disability benefits, the administrative law judge would not have been required to address employer's entitlement to Section 8(f) relief, as the award was for fewer than 104 weeks.

(1983). The rationale for the foregoing principle is that all possible combinations of benefits are raised in a claim for temporary total and permanent partial disability, and the parties can fully litigate the nature and extent of the claimant's disability. In *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993), the Board held that the administrative law judge had not erred in allowing the claimant to claim for permanent total disability benefits at the hearing when only temporary total disability benefits had previously been claimed. In that case, however, it appears the parties were not seeking to litigate the nature of claimant's disability, but only the extent, which is not dependent on whether claimant's condition is temporary or permanent.

In contrast, in this case, employer alleged, in its motion for reconsideration, prejudice from the modification of the parties' stipulation that claimant is entitled to temporary disability benefits. The administrative law judge rejected this argument on the basis that there is no significant distinction between the burden of proof on claims for temporary and permanent disability. However, upon the administrative law judge's constructive rejection of the stipulation, the parties were not given the opportunity to submit evidence to meet the burden of proof or to litigate the issue of when claimant's condition became permanent. Merely because Dr. Byrd imposed permanent restrictions in April 1997 would not preclude a finding, based on a record fully developed on this issue, that claimant's condition became permanent at some other time. *See generally* *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Thus, we hold that the administrative law judge erred in modifying the parties' stipulation without giving them notice that he would do so. We vacate the award of permanent disability benefits, and remand the case for further action. On remand, the administrative law judge may accept the parties' stipulation and enter an award consistent therewith. Alternatively, he may inform them that the stipulation will not be accepted, and give them the opportunity to present evidence and argument on this issue consistent with the regulation at 20 C.F.R. §702.336(b).[4] *See generally Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

[4]Section 702.336(b) states:

At any time prior to the filing of the compensation order in the case, the administrative law judge may in his discretion, upon the application of a party or upon his own motion, give notice that he will consider any new issue. The parties shall be given not less than 10 days' notice of the hearing on such new issue. The parties may stipulate that the issue may be heard at an earlier time and shall proceed to a hearing on the new issue in the same manner as on an issue initially considered.

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration are vacated insofar as they award claimant permanent disability benefits, and the case is remanded for further action consistent with this decision. In all other respects, the decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge