



BRB Nos. 17-0256
and 17-0256A

JAMES SCOTTY BOUDREAUX)	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
OWENSBY & KRITIKOS,)	DATE ISSUED: <u>July 6, 2017</u>
INCORPORATED)	
)	
and)	
)	
LOUISIANA WORKERS')	
COMPENSATION CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	
Cross-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	
Cross-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Clement J. Kennington,
Administrative Law Judge, United States Department of Labor.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana,
for employer/carrier.

Matthew W. Boyle (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, BOGGS and ROLFE,
Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the Decision and Order on Remand (2014-LHC-00489) of Administrative Law Judge Clement J. Kennington 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), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the OCSLA). 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. In its first decision, the Board affirmed the administrative law judge's conclusion that claimant's claim falls under the coverage of the OCSLA pursuant to *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 45 BRBS 87(CRT) (2012). The Board remanded the case for the administrative law judge to address any remaining issues. *Boudreaux v. Owensby & Kritikos, Inc.*, 49 BRBS 83 (2015).¹

On September 16, 2016, employer's counsel informed the administrative law judge that the parties agreed to stipulate to claimant's average weekly wage, the amount of past due benefits owed claimant, the amount due claimant with regard to his disfigurement claim, and that no other issues related to compensation or medical benefits were presently in dispute. In his Decision and Order on Remand issued January 11, 2017, the administrative law judge adopted the parties' stipulations into his "Findings of Fact." In his "Order," the administrative law judge ordered employer to carry out "authorizations and actions" in accordance with the stipulations.

Employer appeals the Decision and Order on Remand, and has filed a motion for summary affirmance, stating that it seeks a final order so that it may appeal the Board's first decision to the United States Court of Appeals for the Fifth Circuit. BRB No. 17-0256. The Director cross-appeals the Decision and Order on Remand and has filed a Motion to Dismiss employer's appeal, contending that the administrative law judge's

¹ The Board stated that employer's appeal was of an interlocutory order, in that the administrative law judge neither awarded nor denied benefits to claimant. Nonetheless, the Board accepted the appeal in view of the significance of the issue raised. *Boudreaux*, 49 BRBS at 84 n.2.

Decision and Order on Remand fails to address the ongoing rights of the parties and does not contain a formal award of compensation pursuant to Section 19(c) of the Act, 33 U.S.C. §919(c). Thus, the Director contends the case should be remanded for the administrative law judge to address employer's liability for ongoing compensation and to enter an award of compensation. BRB No. 17-0256A.

We agree with the Director that the administrative law judge's Decision and Order on Remand is not a final compensation order because it does not contain an order "making an award" in accordance with Section 19(c) and 20 C.F.R. §702.348. Section 19(c) of the Act provides that an administrative law judge "shall" by "order" "make an award" or "reject the claim." 33 U.S.C. §919(c); *see also* 33 U.S.C. §919(e). The implementing regulation, Section 702.348, provides that:

the administrative law judge shall have prepared a final decision and order, in the form of a compensation order, with respect to the claim, making an award to the claimant or rejecting the claim. The compensation order shall contain appropriate findings of fact and conclusions of law with respect thereto, and shall be concluded with one or more paragraphs containing the order of the administrative law judge

20 C.F.R. §702.348; *see Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011); *Davis v. Delaware River Solutions*, 39 BRBS 5 (2005); *see also Kreschollek v. Southern Stevedoring Co.*, 223 F.3d 202, 34 BRBS 48(CRT) (3d Cir. 2000) ("After conducting a hearing, the ALJ makes findings of fact and conclusions of law and issues an enforceable compensation order, which is filed with the district director. 33 U.S.C. § 919(c); 20 C.F.R. §§ 702.348-349.").

In *Luttrell*, 45 BRBS 31, and *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014), the Board addressed cases wherein the administrative law judges issued decisions analogous to that in this case. In *Luttrell*, the parties stipulated that the claimant had been temporarily totally disabled since June 30, 2008 and remained so; the only issue for adjudication was the claimant's average weekly wage. The administrative law judge determined the claimant's average weekly wage and entered an award of disability benefits. On reconsideration, the administrative law judge accepted the employer's contention that its payment of temporary total disability compensation and medical benefits was "voluntary." Thus, the administrative law judge vacated his award of ongoing disability compensation. Citing Section 19(c) of the Act and 20 C.F.R. §702.348, the Board held that the parties' stipulation concerning claimant's disability status and the administrative law judge's calculation of claimant's average weekly wage provided the basis for an ongoing award of continuing temporary total disability benefits, as the administrative law judge had originally entered. The Board thus reinstated that award. *Luttrell*, 45 BRBS at 34.

In *Mitri*, the parties stipulated, inter alia, that the employer would pay the claimant ongoing temporary total disability benefits. The administrative law judge's order stated only that: "[T]he Stipulations are approved and incorporated herein by reference." *Mitri*, 48 BRBS at 43. The Board held that the order was not in accordance with Section 19(c) and Section 702.348 because the administrative law judge did not enter an award of benefits in accordance with the stipulations. *Id.*

In this case, the administrative law judge accepted the parties' stipulations as set forth in employer's September 16, 2016 letter. See Decision and Order on Remand at 2. The administrative law judge's Order then states that: "**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Employer/Carrier shall forthwith carry out authorizations and actions in accordance with the provisions of the agreed stipulations." *Id.* at 3 (emphasis in original). As this Order does not set forth a specific award of benefits to claimant, it is not in accordance with law. *Mitri*, 48 BRBS 41; *Luttrell*, 45 BRBS 31.

We also agree with the Director that the administrative law judge's decision is deficient in that it fails "to address the ongoing rights of the parties." Dir. Mot. to Dismiss at 2. Letters in the administrative file suggest that claimant remains disabled. Employer's January 26, 2016 letter to the administrative law judge states that employer paid temporary total disability benefits to claimant from August 3, 2012 to August 13, 2013, and temporary partial disability benefits to claimant from August 14, 2013 "through and including the present." On February 4, 2016, claimant's counsel responded by letter to the administrative law judge that the parties had agreed to the period of temporary total disability as stated above and to "TPD from August 14, 2013, through the present." Following a August 30, 2016 conference call with the administrative law judge, employer wrote to the administrative law judge that the parties agreed that the past due benefits owed totaled \$27,313.36, that claimant would receive \$5,000 for a disfigurement award, and that the "parties further stipulated that at present there are no other issues related to medical expenses or indemnity benefits, however the parties will reserve any and all claims and defenses with respect to any issues which may arise in the future."

The parties' apparent agreement that there are no disputed issues regarding claimant's compensation entitlement does not absolve the administrative law judge from the statutory requirement that he award or deny benefits. *Mitri*, 48 BRBS 41; *Luttrell*, 45 BRBS 31; *Davis* 39 BRBS 5; *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). While the parties apparently agreed to employer's liability for a lump sum of past-due benefits, it is incumbent upon the administrative law judge to award claimant specific type(s) of benefits at specific compensation rate(s), to include an award

of ongoing benefits if claimant is so entitled.² 33 U.S.C. §919(c); *Luttrell*, 45 BRBS 31; *see Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *see also* 33 U.S.C. §908(e) (temporary partial award runs for a maximum of five years). The entry of such an award is a prerequisite for a “final” compensation order.³ *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). Consequently, in accordance with this decision, we remand the case to the administrative law judge for any necessary proceedings and for the entry of a specific award of benefits. Thus, as the administrative law judge’s Decision and Order on Remand is not “final,” employer’s motion for summary decision thereof is denied and employer’s appeal is dismissed.

Accordingly, employer’s appeal of the administrative law judge’s Decision and Order on Remand is dismissed. The case is remanded for further proceedings in accordance with this decision. The Director’s Motion to Suspend Briefing Until Ruling on Motion to Dismiss is moot.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

² Employer is entitled to a credit pursuant to Section 3(e), 33 U.S.C. §903(e), for its payments to claimant under the state compensation act.

³ Only “final” compensation orders are enforceable. *See* 33 U.S.C. §§918(a), 921(d); *Brown v. Avondale Industries, Inc.*, 46 BRBS 1 (2012). Moreover, specific awards facilitate modification proceedings. 33 U.S.C. §922.