



BRB No. 17-0314

ANTHONY GRABERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BESCO TUBULAR	)	DATE ISSUED: <u>July 25, 2017</u>
	)	
and	)	
	)	
AMERICAN INTERSTATE INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Henry H. LeBas and F. Douglas Ortego (LeBas Law Offices), Lafayette, 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 the Decision and Order Awarding Benefits (2015-LHC-00925) of Administrative Law Judge Larry W. Price 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 Longshore 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'Keefe 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 reversed the administrative law judge's conclusion that claimant's claim did not fall under the coverage of the Longshore Act, as extended by the OCSLA, pursuant to *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 45 BRBS 87(CRT) (2012). The Board remanded the case to the administrative law judge for an entry of an award of benefits, as the parties apparently agreed that claimant has been totally disabled since the work accident. *Grabert v. Besco Tubular*, BRB No. 16-0140 (Sept. 16, 2016) (unpub.).

In his Decision and Order Awarding Benefits on remand, the administrative law judge set forth the prior procedural history of claimant's claim and, in his "Order," ordered employer to "pay compensation and medical benefits as provided by the Act."

Employer appeals the Decision and Order Awarding Benefits, seeking a final order so that it may appeal the Board's first decision to the United States Court of Appeals for the Fifth Circuit. The Director, Office of Workers' Compensation Programs, has filed a Motion to Dismiss employer's appeal, contending that the administrative law judge's Decision and Order Awarding Benefits lacks the necessary components of a "compensation order" 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 enter a proper compensation order. Employer opposes the Director's motion to dismiss, contending that the parties have no contested issues between them and wish the appeal on the coverage issue to go forward. Claimant has not responded to these pleadings.

We agree with the Director that the administrative law judge's Decision and Order Awarding Benefits 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’s original Decision and Order Denying Benefits contained stipulations between the parties which were accepted by the administrative law judge. However, four of these stipulations concern the circumstances of claimant’s employment at the time of the accident. Another stipulation states that the compensability of claimant’s injury is not in dispute and that employer is paying claimant compensation under the Louisiana workers’ compensation statute and providing medical care. The parties agreed that the only issue for adjudication concerns OCSLA jurisdiction. These stipulations do not address the nature and extent of claimant’s work-

related disability, the period of that disability, claimant's average weekly wage at the time of his injury, or the compensation rate due claimant under the Act. Moreover, the administrative law judge's decision on remand contains neither "Findings of Fact" nor any additional stipulations entered into by the parties. *See* Decision and Order Awarding Benefits at 1. Rather, administrative law judge's Order summarily states that:

[e]mployer shall pay compensation and medical benefits as provided by the Act. The Parties have not indicated any issues related to compensation or medical benefits.

*Id.* at 2. 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.

The parties cannot circumvent Section 19(c)'s requirement merely by agreeing that the compensation to which claimant is entitled is not in dispute, *Luttrell*, 45 BRBS 31, nor is the administrative law judge absolved from the 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 may be satisfied with the present arrangement, 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.<sup>1</sup> 33 U.S.C. §919(c); *Aitmbarek v. L-3 Communications*, 44 BRBS 115, 120 n.8 (2010) (the consent of the parties is not a prerequisite to the issuance of an "order" awarding benefits); *Luttrell*, 45 BRBS 31; *see also Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). The entry of such an award is required for a "final" compensation order.<sup>2</sup> *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998) (the administrative law judge must, at a minimum, specify the amount of compensation due or provide a means of calculating the correct amount without resort to "extra-record facts"). Thus, as the administrative law judge's Decision and Order Awarding Benefits is not "final," it cannot be affirmed.<sup>3</sup> *See generally Arjona v. Interport Maint.*, 24 BRBS

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> We reject employer's assertion that the decision in *Maher Terminals, Inc. v. Director, OWCP*, 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir.), *cert. denied*, 540 U.S. 1088 (2003), supports its contention that further proceedings are not required. In its decision in *Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001), the Board reversed the

222 (1991). Consequently, we dismiss employer’s appeal and remand the case to the administrative law judge for any necessary proceedings and for the entry of a specific award or denial of benefits. *Id.*; see also *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002) (award must be based on evidence admitted into the record); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999) (award may be based on stipulations).

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administrative law judge’s finding that the Act’s status requirement was not met. The Board remanded the case for consideration of any remaining issues. Nonetheless, the employer appealed the Board’s decision to the United States Court of Appeals for the Third Circuit, and the Director moved to dismiss the appeal on the ground that the Board’s decision was not a “final order.” The court denied the motion to dismiss, stating that there was nothing more for the administrative law judge to decide in light of the parties’ stipulation resolving all issues except for the legal questions of coverage. “Because the Board’s order was ‘for all purposes final by the time this court was called upon to consider the petition,’ we have jurisdiction under the Act.” *Maier Terminals*, 330 F.3d at 166 n.3, 37 BRBS at 44 n.3 (quoting *Sea-Land Serv., Inc. v. Director, OWCP*, 540 F.2d 629, 631 n.1 (3d Cir. 1976)).

The Board cannot determine if and when a circuit court of appeals will accept an appeal under the circumstances presented in this case. The Board is empowered only to determine if the administrative law judge’s decision is supported by substantial evidence and in accordance with law. Having concluded it is not in accordance with law, we cannot affirm it and must remand for further action. See generally *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). We note, moreover, that in the present case, employer appealed the Board’s first decision to the Fifth Circuit. The Director moved to dismiss the appeal on the ground that the Board’s decision was not final. See 33 U.S.C. §921(c). Employer opposed the motion to dismiss on grounds similar to those it espouses to the Board: that the parties had not requested the administrative law judge to adjudicate additional issues; there is no dispute as to the extent of the claimant’s disability; and employer is paying disability and medical benefits to claimant. The Fifth Circuit dismissed employer’s appeal for lack of jurisdiction. *Besco Tubular v. Director, OWCP*, No. 16-60729 (Dec. 2, 2016).

Accordingly, employer's appeal of the administrative law judge's Decision and Order Awarding Benefits 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.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge