

JOSEPH BEACH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: <u>May 16, 2014</u>
CERES MARINE TERMINALS, INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order of Modification of T. A. Magyar, District Director, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw L.L.P.), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order of Modification (OWCP No. 5-130664) of District Director T. A. Magyar 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). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986).

On September 17, 2012, based on the parties' stipulations, Administrative Law Judge Bergstrom issued a Decision and Order of Compensation on Stipulations. He found that claimant injured his back on January 27, 2010, while working for employer, and he awarded claimant temporary total disability benefits from April 4 through October 6, 2012, and ongoing temporary partial disability compensation benefits from October 7, 2012 pursuant to the parties' stipulations. 33 U.S.C. §908(b), (e), (h). Subsequently, employer filed a claim for Section 8(f) relief, 33 U.S.C. §908(f), but the district director denied the request as premature because there was no evidence of claimant's condition being permanent.

On February 12, 2013, the parties entered into stipulations to modify the administrative law judge's order. They stipulated that: claimant's condition had reached maximum medical improvement on June 21, 2012; that claimant retains a residual earning capacity of \$400 per week; and that claimant is entitled to ongoing permanent partial disability benefits at a compensation rate of \$475.26 per week from June 21, 2012. 33 U.S.C. §908(c)(21), (h). Also on February 12, 2013, employer filed another application for Section 8(f) relief, submitting the signed stipulations to the Office of Workers' Compensation Programs (OWCP) in support thereof.

The district director declined to accept the stipulations as they related to the Section 8(f) application.¹ She stated there was no evidence supporting claimant's residual wage-earning capacity or a date of permanency of June 21, 2012, as Dr. Clifford first placed claimant at maximum medical improvement on March 22, 2012; therefore, the district director proposed March 22, 2012, as the date claimant's condition reached permanency. On April 2, 2013, employer responded to the district director, agreeing with the suggested date of permanency and submitting labor market survey evidence of claimant's residual wage-earning capacity. On May 16, 2013, the Director, Office of Workers' Compensation Programs (the Director), on behalf of the Special Fund, replied that the August 17, 2012, labor market survey demonstrated the first availability of suitable alternate employment and claimant's residual wage earning capacity; therefore, he averred that claimant is entitled to permanent total disability benefits from March 22 through August 17, 2012, and to permanent partial disability benefits commencing August 18, 2012, and continuing. The Director further advised that he agreed that claimant's permanent total disability benefits are payable at the compensation rate of \$741.93, that claimant's permanent partial disability compensation rate is \$475.26 based on his loss of wage-earning capacity of \$712.89, and that Section 8(f) relief would be granted upon the parties' agreeing to have the prior compensation order modified based on the terms stated in the Director's May 16, 2013 filing. 33 U.S.C. §922; Cl. Br. Ex. 10.

¹ Stipulations of the private parties that affect the applicability of Section 8(f) are not binding on the Special Fund absent agreement of the Director. *Misho v. Dillingham Marine & Mfg.*, 17 BRBS 188 (1985).

In view of the Director's response, employer informed claimant's counsel that the "Special Fund demanded we the (sic) change the date for going from total disability to partial disability from June 21, 2012, to August 18, 2012. This gets [claimant] an additional \$2,171.46. [Employer] is willing to make the additional payment." Cl. Br. Ex. 11. In June 2013, the parties signed the new stipulations, reflecting March 22, 2012 as the date of permanency, and August 18, 2012 as the date partial disability commenced based on a \$400 residual wage-earning capacity. Emp. Br. Ex. A. The parties submitted these stipulations to the district director, and she accordingly modified the administrative law judge's September 2012 Order;² she ordered employer to pay compensation for permanent total disability from March 22 to August 17, 2012, at the rate of \$741.93 per week, and for permanent partial disability from August 18, 2012, to March 19, 2014, at \$475.23 per week. As of March 20, 2014, the Special Fund would commence paying claimant's permanent partial disability compensation pursuant to Section 8(f).

Claimant appeals the district director's compensation order. Claimant contends the Order of Modification should be vacated because he did not agree to the change from total disability to partial disability as of August 17, 2012, and because employer did not sufficiently establish the availability of suitable alternate employment as of August 2012. Employer responds, urging affirmance. Claimant filed a reply brief.

As a general rule, stipulations are binding upon those who enter into them. *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Stipulations are offered in lieu of evidence and therefore may be relied on to establish an element of the claim. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). However, stipulations are not binding if they evince an incorrect application of law. *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

In this case, the record reflects that claimant and his attorney signed stipulations, dated June 5, 2013. Among the stipulations are:

2. The parties agree as of August 18, 2012 and continuing, the Claimant has a residual earning capacity of \$400.00 a week, based on his ability to perform sedentary work even while wearing sandals. The Claimant agrees and represents that he can perform such work and agrees and represents that such jobs are available to him paying \$400.00 a week, and remains available to him.

² See *Roulst v. Marco Constr. Co.*, 15 BRBS 443 (1983); 20 C.F.R. §702.315(a).

4. The parties agree as of August 18, 2012 and continuing, the Claimant shall be entitled to permanent partial disability benefits of \$475.26 a week.

Emp. Br. Ex. A. The parties submitted these stipulations to the district director in support of their motion for modification of the administrative law judge's award. *Id.* Claimant is bound by these stipulations unless they reflect an incorrect application of law. *Puccetti*, 24 BRBS 25.

We reject claimant's assertion that the stipulation that claimant is partially disabled is not binding because employer's labor market survey is deficient. The existence of suitable alternate employment and the degree of claimant's loss of wage-earning capacity are facts to which the parties stipulated. *See Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). Whether employer's evidence would be sufficient to establish suitable alternate employment if the claim were adjudicated is not relevant to the district director's acceptance of the stipulation as between the private parties. *Vander Linden v. Hodges*, 193 F.3d 268, 279-280 (4th Cir. 1999).³ Moreover, the stipulation does not involve an incorrect application of law. *See, e.g., Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010) (stipulations that violate Sections 6 and 15 of the Act are not binding); *Puccetti*, 24 BRBS 25 (same). Thus, claimant is bound by the stipulation that he is partially disabled.⁴ *Simonds*, 27 BRBS 120.

³ In *Vander Linden*, the Fourth Circuit stated,

a stipulation, by definition, constitutes “[a]n express waiver made . . . preparatory to trial by the party or his attorney conceding for the purposes of trial the truth of some alleged fact . . . *the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it . . .* It is, in truth, a substitute for evidence, in that it does away with the need for evidence.” 9 Wigmore, Evidence § 2588, at 821 (Chadburn 1981) (emphasis added). *See* 2 McCormack on Evidence § 254 (West 1992) (stipulations “have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact”).

Vander Linden, 193 F.3d at 279-280.

⁴ Orders based on the parties' stipulations are subject to modification under Section 22 of the Act if there is a mistake in a determination of fact, such as one established by a stipulation, or a change in the claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

Moreover, claimant's contentions about the alleged deficiencies in the labor market survey are without merit. It is well established that, in attempting to establish the availability of suitable alternate employment, an employer need not act as an employment agency for the claimant, place the claimant in a specific job, establish that the claimant was offered a specific job, or contact employers to ascertain if they would hire an employee like the claimant. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (1984). The duties and physical requirements of the jobs may be ascertained with reference to standard occupational descriptions. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Contrary to claimant's contention, employer's labor market survey identifies the names of the prospective employers and the cities and towns in which the businesses are located. *See* Cl. Br. Ex. 9. Claimant's ability to apply for the specific jobs identified has no bearing on whether employer satisfied its burden of establishing suitable alternate employment or whether claimant established a diligent search.⁵

⁵ A claimant can refute employer's showing of suitable alternate employment by establishing he diligently sought work without success. A claimant "is not required to show that he tried to get the identical jobs the employer showed were available." Rather, the claimant must establish only that he was reasonably diligent in seeking employment of the type his employer showed to be suitable and available. *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 8(CRT) (2^d Cir. 1991).

Accordingly, the district director's Order of Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge