



BRB No. 14-0446

DAVID H. FLYNN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA STAR STEVEDORE COMPANY	)	DATE ISSUED: <u>Sept. 21, 2015</u>
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order of Remand of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Marcin M. Grabowski (Bauer Moynihan & Johnson LLP), Seattle, Washington, for employer/carrier.

Before: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order of Remand (2014-LHC-01368, 2014-LHC-01369) of Administrative Law Judge Steven B. Berlin 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 administrative law judge's discretionary determinations will be upheld unless the challenging party establishes that they are arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See generally National Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9<sup>th</sup> Cir. 1979); *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995).

This appeal involves consolidated claims for benefits under the Act arising from two work-related injuries: (1) a right knee injury on June 19, 2012 (right knee claim), and (2) an injury to claimant's left shoulder, arm and neck on March 19, 2013 (left shoulder claim). The right knee claim was never controverted by employer, and employer voluntarily paid disability and medical benefits for the knee injury. *See* EXs 1, 2, 10.<sup>1</sup> Employer filed a notice of controversion regarding the left shoulder claim on December 9, 2013. *Id.* An informal conference before an Office of Workers' Compensation Programs (OWCP) claims examiner was held on February 12, 2014, during which both claimant and employer requested that the other party provide documentation necessary to calculate the appropriate average weekly wage for each of the injuries. *See* EX 3. By letter dated February 20, 2014, employer rescinded its controversion of the left shoulder claim, and reinstated disability and medical benefits for that injury. *See* EX 1. On February 25, 2014, claimant requested referral of the claims to the Office of Administrative Law Judges (OALJ) for a formal hearing, and the district director forwarded the claims. *See* EX 4.

In an order issued on March 19, 2014, the administrative law judge ordered claimant to show cause within 21 days why the right knee and left shoulder claims should not be remanded to the district director on the ground that there was nothing in dispute for adjudication by the administrative law judge.<sup>2</sup> *See* EX 6. Claimant did not file a timely response to the order to show cause,<sup>3</sup> and, in an Order of Remand issued on April 16, 2014, the administrative law judge concluded that there were no issues for adjudication in either of the claims and he therefore remanded the claims to the district director. *See* EX 7. On May 21, 2014, claimant requested that the district director refer the right knee and left shoulder claims back to the OALJ. *See* EX 8. On the same date, claimant wrote to the administrative law judge, requesting that he accept the referral of

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<sup>1</sup> Citations to all exhibits refer to attachments to Respondents' Brief in Opposition to Petitioner's Petition for Review.

<sup>2</sup> The administrative law judge's March 19, 2014 order also denied claimant's request that the right knee and left shoulder claims be consolidated for hearing with another claim filed by claimant for hearing loss. *See* EX 6; *see also* EXs 2, 5.

<sup>3</sup> By letter dated April 2, 2014, claimant sent employer various records related to his self-employment income as a commercial fisherman from 2009 through 2012, and requested that employer pay the back compensation due on his right knee and left shoulder claims once the correct average weekly wage was calculated. *See* EX 13.

the two claims.<sup>4</sup> *See* EX 9. On May 29, 2014, the case was again forwarded to the OALJ. The administrative law judge conducted a telephonic conference on July 30, 2014, during which the issue of claimant's average weekly wage for each of the claims was addressed. *See* August 27, 2014 Order of Remand at 2-3. Pursuant to the administrative law judge's order, on August 8, 2014, employer provided a proposed average weekly wage calculation for claimant's right knee claim, based on the earnings and expense data previously furnished by claimant. *See id.* at 3. Employer stated, however, that it needed documentation of claimant's 2012 business expenses in order to calculate claimant's average weekly wage for the left shoulder injury. *See id.* Claimant had not supplied employer with the requested documentation as of the date of the previously-scheduled resumption of the telephonic conference on August 22, 2014. *Id.*

In an Order of Remand issued on August 27, 2014, the administrative law judge remanded the case to the district director, noting that the district director had not had the opportunity to consider any dispute regarding claimant's average weekly wage. The administrative law judge found that once claimant provides employer with his business expense records for 2012, that evidence is likely to resolve the case without the need for a formal hearing; thus, consistent with the regulation at 20 C.F.R. §702.336(a), the administrative law judge remanded the case to the district director. Claimant appeals the administrative law judge's Order of Remand, contending that the case should not have been remanded to the district director. Employer responds, urging affirmance of the administrative law judge's Order of Remand.

The contentions raised by claimant on appeal do not demonstrate an abuse of discretion by the administrative law judge in his determination to remand these claims to the district director. As recognized by the administrative law judge, Section 702.336(a) provides, in pertinent part, as follows:

If the new issue arises from evidence that has not been considered by the district director, and such evidence is likely to resolve the case without the need for a formal hearing, the administrative law judge may remand the case to the district director for his or her evaluation and recommendation pursuant to §702.316.

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<sup>4</sup> Claimant erroneously stated that notices of controversion had been filed, and had not been withdrawn, in the claims. Claimant additionally stated that average weekly wage was in dispute, and that delays with respect to medical benefits made it imperative that claimant obtain a compensation order covering the claim. *See* EX 9. In a response dated June 2, 2014, employer clarified that the right knee claim had never been controverted and that the controversion of the left shoulder claim had previously been withdrawn. *See* 20 C.F.R. §702.351. Employer further stated that any issue regarding the appropriate average weekly wage should be addressed in the first instance at the district director level. *See* EX 10.

20 C.F.R. §702.336(a). *See* August 27, 2014 Order of Remand at 4. The administrative law judge correctly observed that remand to the district director in such a case effectuates the regulatory scheme which is premised on the informal resolution of disagreements prior to resort to formal hearing proceedings. *Id.*; *see* 20 C.F.R. §702.301. While Section 702.336 permits the administrative law judge to expand the hearing to consider issues not previously considered, the regulation does not require him to do so. In an effort to resolve the average weekly wage issue while the case was before him, the administrative law judge afforded the parties the opportunity to develop the evidence on the issue. *See* August 27, 2014 Order of Remand at 3. Claimant’s counsel, however, had not procured the necessary documentation regarding claimant’s 2012 business expenses as of the date of the second teleconference convened by the administrative law judge. *See id.* Under these circumstances, the administrative law judge acted within his discretion in remanding the case to the district director to allow the parties to develop the evidence and to allow the district director to consider, in the first instance, any dispute between the parties regarding the applicable average weekly wage. *See* 20 C.F.R. §§702.301-302, 702.336(a). We therefore affirm the administrative law judge's determination to remand the case to the district director.<sup>5</sup>

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<sup>5</sup> Claimant’s counsel has requested that the Board consider statements contained in the administrative law judge's Order of Remand concerning sanctions that might be imposed in the event that claimant or his counsel seeks referral of these claims to the OALJ without a reasonable, good faith belief that there is a justiciable dispute for adjudication. *See* August 27, 2014 Order on Remand at 5. As the administrative law judge did not sanction claimant or his counsel, we decline to address his contention that the administrative law judge exceeded his authority in “threatening” counsel with sanctions. *Andrews v. Petroleum Helicopters*, 15 BRBS 160 (1982). This issue is raised by claimant in connection with his desire for the issuance of a formal compensation order which, according to claimant, has been resisted by employer. We note in this regard that Section 702.315(a) of the regulations provides that in a case before the district director in which agreement is reached on all issues, “[i]f either party requests that a formal compensation order be issued the district director *shall*, within 30 days of such request, prepare, file, and serve such order in accordance with §702.349.” 20 C.F.R. §702.315(a)(emphasis added). Thus, where it is undisputed that the parties have reached agreement on all issues and where a formal compensation order has been requested, Section 702.315 requires the district director to issue such an order. On the other hand, where the parties do not agree on all issues, the district director is without authority to issue a compensation order, and the parties may request a formal hearing. *See* 20 C.F.R. §§702.316, 702.217; *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21, 24 (2007); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47, 49 (2004); *see generally Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 956 (2000).

Accordingly, the administrative law judge's Order of Remand is affirmed.

SO ORDERED.

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge