BRB No. 92-0997

JAMES SOWELL Claimant v. NORTHWEST MARINE, INCORPORATED and LEGION INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Upon Motion for Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Dennis R. VavRosky and Patric J. Doherty (VavRosky, MacColl, Olsen, Doherty & Miller, P.C.), Portland, Oregon, for employer/carrier.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Upon Motion for Reconsideration (91-LHC-1173) of Administrative Law Judge Thomas Schneider 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 findings of

fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 F.2d 359 (1965); 33 U.S.C. §921(b)(3).

Claimant developed right elbow epicondylitis while working for a previous employer as a welder. He underwent surgery in October 1989. After he was given a full release, claimant began working for employer on July 3, 1990. Claimant subsequently experienced pain in his left arm, stopped working in September 1990, and thereafter was diagnosed as having left lateral epicondylitis. Dr. Grossenbacher initially released claimant for light duty work; however, claimant was unable to obtain such work. In October, Dr. Grossenbacher stated that claimant was employable, but only through an aggressive vocational and rehabilitation program. Claimant has not worked since September 1990.

In his Decision and Order Awarding Benefits, the administrative law judge affirmed his bench decision that claimant had established causation pursuant to the Section 20(a), 33 U.S.C. §920(a), presumption. He also found that claimant had fulfilled his obligation to seek work within his capacity. After accepting the parties stipulated compensation rate of $170.54, based on claimant's average weekly wage at the time of injury of $233.77, the administrative law judge awarded claimant temporary total disability benefits commencing on September 6, 1990, and

continuing until he is released for unrestricted work or until employer shows that work within claimant's capacity is available to him.

Thereafter, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration, asserting that the administrative law judge's order awarding benefits did not take into account the changing minimum compensation rate, and that it lacked specificity with regard to the commencement date and future duration of claimant's compensation. The administrative law judge agreed with the Director's contentions and thus, in his Decision and Order Upon Motion for Reconsideration, the administrative law judge ordered employer to pay to claimant temporary total disability benefits at a rate of 50 percent of the national average weekly wage from September 6, 1990 and continuing, "subject to future order, pursuant to" Section 22 of the Act, 33 U.S.C. §922. *See* Decision and Order Upon Motion for Reconsideration at 2.

On appeal, employer argues that the administrative law judge's order on reconsideration prevents it from terminating its payment of temporary total disability benefits to claimant should either of two events occur: (1) when employer establishes suitable alternate employment, or (2) claimant returns to work. In this regard, employer insists that it should be allowed to unilaterally terminate benefits if either of these events occur without having to file a motion for modification under Section 22

of the Act. Employer also asserts that the administrative law judge's order goes beyond the issues litigated at the hearing, and challenges the Director's authority to object to an administrative law judge's decision where the Director was not a party before the administrative law judge.

The Director responds, asserting that the administrative law judge's original order was invalid, in that an award of benefits cannot delegate authority to end the payment of benefits to a physician who might release claimant for unrestricted work, or employer who might purport to establish the availability of suitable alternate employment. To do so, the Director contends, would deprive the award of continuing enforceable effect. The Director further contends that employer has no right to unilaterally terminate benefits. In a reply brief, employer reasserts the arguments contained in its petition for review. Claimant has not filed a brief in the instant matter.

Employer asserts that the administrative law judge's Decision and Order on Reconsideration should be reversed in part so that its right to terminate temporary total disability benefits compensation unilaterally is protected. We disagree. The administrative law judge's order awarding benefits does not prohibit employer from unilaterally terminating claimant's benefits. In this regard, the Board has held that while an employer may unilaterally terminate compensation, it does so at the risk of incurring liability for an additional assessment under

Section 14(f), 33 U.S.C. §914(f), of the Act if it is eventually determined that the termination was unwarranted. *See Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). Claimant's remedy in cases involving a unilateral termination of compensation is to seek a default order pursuant to Section 18(a) of the Act. *See Maria v. Del Monte/Southern Stevedore*, 22 BRBS 132 (1989)(*en banc*), *vacating on recon.* 21 BRBS 16 (1988)(McGranery, J., dissenting). Pursuant to Section 18(a) of the Act, 33 U.S.C. §918(a), where an employer fails to pay compensation due under any award of compensation, the claimant may request that the district director[1] issue a supplemental order declaring the amount due; the claimant may then seek enforcement of the district director's order in federal court. *See* Section 702.372; *see generally Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988). Thus, we hold that the administrative law judge committed no reversible error when, on reconsideration, he entered a formal award of continuing compensation to claimant "subject to future order, pursuant to [Section 22]." The administrative law judge's decision does not prohibit employer from taking the actions that it seeks; thus, employer may, at the risk of incurring additional liability, unilaterally terminate its payment of compensation benefits to claimant.[2]

[1] Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

[2] Employer's argument that the administrative law judge's order on reconsideration goes beyond the issues litigated at the hearing

Lastly, we note that subsequent to the issuance of the administrative law judge's Decision and Order Upon Motion for Reconsideration, the United States Court of Appeals for the Ninth Circuit, wherein appellate jurisdiction of this case lies, held that a party seeking to modify an award under the "change in conditions" provision of Section 22 of the Act, 33 U.S.C. §922, must prove a change in the claimant's *physical* condition. Thus, the court determined that a change in the claimant's economic condition, *i.e.*, wages, training skills, educational background, is insufficient to meet the "change in conditions" requirement under Section 22. *See Rambo v. Director, OWCP*, 28 F.3d 86, 28 BRBS 54 (CRT)(9th Cir. 1994), *petitions for reh'g denied*, September 14, 1994. Because the events under which employer maintains that it may unilaterally terminate benefits, *i.e.*, a showing of suitable alternate employment or claimant's return to work, are economic, any subsequent modification proceeding undertaken as a result of the occurrence of those events may be

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is without merit. It is undisputed that the issue of whether claimant's left elbow injury was compensable under the Act was litigated at the hearing before the administrative law judge. How the administrative law judge fashions his award of temporary total disability benefits, based on his finding of causation, is clearly not beyond the scope of the issue litigated. In addition, employer's contention that the Director had no authority to file a motion for reconsideration of the administrative law judge's initial Decision and Order is similarly without merit. Under Section 39 of the Act, 33 U.S.C. §939, the Secretary of Labor is authorized to administer the provisions of the Act. Moreover, under Section 702.333(b) of the regulations, 20 C.F.R. §702.333(b), the Director may appear and participate in any formal hearing. These arguments are therefore rejected.

impacted by *Rambo*.[3]

[3] Employer's reliance on *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, U.S. , 111 S.Ct,. 798 (1991), and *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), *vacating on recon.* BRB No. 88-1721 (January 29, 1991)(unpublished), are misplaced. In those cases, the Ninth Circuit and the Board held that an award of permanent partial disability commences on the date when the employer establishes suitable alternate employment, not on the date of maximum medical improvement.

Accordingly, the Decision and Order Upon Motion for Reconsideration is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge