

**Compensation Orders in Litigated LHWCA Claims:
What the ALJs and the Parties Should Know**

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The Longshore Act provides for administration of claims and informal dispute resolution by the District Directors within the Office of Workers' Compensation Programs ("OWCP"), as well as formal adjudication of claims before the Office of Administrative Law Judges ("OALJ"). *See* 33 U.S.C.S. §§ 901, 919. In a recent decision, the Supreme Court described as follows the dispute resolution process under the LHWCA:

Consistent with the central bargain of workers' compensation regimes—limited liability for employers; certain, prompt recovery for employees—the LHWCA requires that employers pay benefits voluntarily, without formal administrative proceedings. . . . In the mine run of cases, therefore, no compensation orders issue.

If an employer controverts, or if an employee contests his employer's actions with respect to his benefits, the dispute advances to the Department of Labor's Office of Workers' Compensation Programs (OWCP). *See* 20 CFR §§ 702.251-702.262 (2011). The OWCP district directors 'are empowered to amicably and promptly resolve such problems by informal procedures.' § 702.301. A district director's informal disposition may result in a compensation order. § 702.315(a). In practice, however, 'many pending claims are amicably settled through voluntary payments without the necessity of a formal order.' *Intercountry Constr. Corp. v. Walter*, 422 U. S. 1, 4, n. 4, 95 S. Ct. 2016, 44 L. Ed. 2d 643 [2 BRBS 3] (1975). If informal resolution fails, the district director refers the dispute to an administrative law judge (ALJ). *See* 20 CFR §§ 702.316 , 702.331-702.351. An ALJ's decision after a hearing culminates in the entry of a compensation order. 33 U.S.C. § 919(c)-(e).

Roberts v. Sea-Land Services, Inc., 182 L. Ed. 2d 341, 353, 132 S. Ct. 1350, 1354-1355, 46 BRBS 15(CRT) (2012) (footnote omitted).¹ This commentary will address various substantive and procedural issues surrounding the ALJs' authority to issue compensation orders.

The Benefits Review Board has consistently interpreted Section 19(c) of the LHWCA and its implementing regulation, 20 C.F.R. § 702.348, as imposing upon ALJs a duty to issue a compensation order awarding or denying benefits. Section 19(c) provides that an ALJ "shall" by "order" "make an award" or "reject the claim." 33 U.S.C.S. § 919(c); *see also* 33 U.S.C.S. § 919(e). Section 702.348 provides in relevant part that: "the [ALJ] 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 [ALJ]...." The Board has held that these provisions "mandate that an [ALJ] set forth findings of fact and conclusions of law in his compensation order, and that the order either make an award to the claimant or reject the claim." *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).²

In light of this interpretation, the Board has deemed deficient ALJ orders which resolved a particular issue raised by the parties (*e.g.*, average weekly wage ["AWW"], coverage, or employer's entitlement to § 8(f) relief, 33 U.S.C.S. § 908(f)), but stopped short of awarding or denying benefits under the Act. In a recent decision in *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011), the Board highlighted this reading of the statute and summarized the relevant precedent. In that case, the ALJ initially issued a decision awarding claimant ongoing compensation for temporary total disability ("TTD") and medical benefits. Employer sought reconsideration on the ground that its payment of benefits was "voluntary" and that the issue of claimant's entitlement to benefits under the Act was not among the issues at the hearing, which was limited to resolving the contested issue of AWW. Therefore, employer argued that the ALJ's order that it pay TTD compensation and provide medical benefits was beyond the scope of the disputed issues raised at the hearing. The ALJ granted reconsideration and modified his decision accordingly. Agreeing with the Director, OWCP, the Board held that the ALJ erred in finding on reconsideration that he did not have the authority to award TTD benefits and medical

1 The Court observed that "[u]nder settled LHWCA practice, orders are rare," and that the Act embodies "the congressionally preferred system of voluntary compensation and informal dispute resolution." *Id.* at 357. The Court noted that, in fiscal year 1971, only 209 cases out of the 17,784 in which compensation was paid resulted in orders (*citing* Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 757-758 (1972)). *Id.* at 353 n.3.

2 In *Hoodye*, during the hearing, employer withdrew its controversion as to a past period of temporary total disability ("TTD") compensation. The ALJ then determined that he could not address the issue of continuing award of TTD compensation, apparently since employer was making voluntary payments, and that a remand to the District Director was appropriate. Agreeing with the Director, OWCP, the BRB held that because the issues of nature and extent of claimant's disability were properly before the ALJ, the ALJ erred by failing to make a determination regarding claimant's right to an award of ongoing TTD benefits. The ALJ erred as he failed to make necessary findings or to formally rule on any potential stipulations on this issue.

benefits in this case as only claimant's AWW was at issue at the hearing. In reinstating the ALJ's award of ongoing TTD compensation, the Board observed that, pursuant to Section 19(c) and Section 702.348, the ALJ's compensation order must include an "order" directing the payment of benefits. *Luttrell*, 45 BRBS at 31 (citing *Aitmbarek v. L-3 Communications*, 44 BRBS 115, 120 n.8 (2010));³ *Hoodye*, 23 BRBS at 344). Given the parties' stipulation that claimant remained TTD as of the date of the hearing, once ALJ determined the appropriate compensation rate, he had the duty under Section 19(c) and Section 702.348, to make an award to claimant of continuing TTD compensation. *Id.* (citing *Aitmbarek*, 44 BRBS 115; *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005);⁴ *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002)⁵). The Board rejected employer's assertion that, under 29 C.F.R. § 18.43, the ALJ may only decide issues that are raised by the parties (in that case AWW), stating that "[a]ssuming, *arguendo*, that this regulation should be interpreted as advocated by employer, it is superseded by the program-specific provisions in Section 19 and Section 702.348. *See* 29 C.F.R. § 18.1(a)." *Luttrell*, 45 BRBS at 31 n.6.

Relatedly, where ALJs have remanded cases to the District Director without first resolving disputed issues pertaining to claimants' entitlement, the Board has held that the ALJs thereby abdicated their responsibility under Section 19(d) of the Act; the ALJ may not delegate his fact-finding duty to the District Director.⁶ Thus, in *Gupton*, the Board held that the ALJ erred in addressing employer's entitlement to § 8(f) relief without entering an award of benefits

3 In *Aitmbarek*, the Director contended that the ALJ erred in refusing to establish a schedule for the payment of concurrent awards based on the parties' agreement that claimant was paid in full. The BRB agreed and held that the ALJ's order must include an "order" directing employer and the Special Fund to pay benefits to claimant for specific time periods, as issuing an order is a duty of the ALJ. Even though the parties stipulated that the employer had paid in full, the ALJ should have set forth the types of benefits due claimant for each time period. This would have ensured claimant's receipt of the full amount of compensation, as well as employer's payment of benefits for all temporary disability and 104 weeks of permanent disability before the Special Fund assumed liability under § 8(f).

4 In *Davis*, the BRB remanded the case to the ALJ as he did not enter an award of benefits prior to addressing employer's entitlement to § 8(f) relief. The BRB stated that the parties' stipulations concerning claimant's entitlement to benefits must be embodied in a compensation order.

5 In *Seguro*, the parties initially stipulated that claimant was totally disabled. However, the first ALJ did not issue an order based on these stipulations and, instead, issued an order addressing "the only disputed issue" of employer's entitlement to § 8(f) relief (which was denied). Employer subsequently filed a motion for § 22 modification, along with a motion for partial summary decision, seeking a ruling that there was no final compensation award contained in the initial ALJ order. A second ALJ granted employer's motion for partial summary decision, and employer promptly stopped paying compensation. On appeal, the BRB agreed that no final compensation order had been issued in this case by the first ALJ, and thus consideration of the claim by the second ALJ constituted initial adjudication, not subject to § 22.

6 *Cf. Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd in part*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219, 129 L. Ed. 2d 833, 114 S. Ct. 2705 (1994) (ALJ properly remanded the case for calculation of the amount of § 33(f) credit and entry of an award, as the ALJ made the necessary findings of facts and conclusions of law, leaving only ministerial calculations to be performed by the deputy commissioner).

based on the parties' stipulations and/or findings of fact following a hearing. *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94, 96 (1999). Although the parties allegedly entered into stipulations resolving their dispute regarding claimant's entitlement to benefits, the ALJ neither received the alleged stipulations nor took evidence on the substantive issues. The Board concluded that, in remanding the case, the ALJ abdicated his responsibility under § 19(d).⁷ *Gupton*, 33 BRBS at 96 (citing *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998) (ALJ erred in remanding the case to the District Director with instructions that claimant provide evidence of post-injury earnings; obtaining evidence and calculating the award was the role of the ALJ); *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986) (ALJ abdicated his responsibility under § 19(d) by failing to resolve the responsible employer issue, instead remanding the case to the District Director for findings of fact)). In this regard, the Board in *Gupton* quoted the Fifth Circuit's instruction that "[t]o constitute a 'final decision and order' of the ALJ, the order 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 which are potentially subject to genuine dispute between the parties." *Gupton*, 33 BRBS at 95, quoting *Ledet*, 163 F.3d at 905, 32 BRBS at 215(CRT).⁸ At the same time, as discussed below, if there is no agreement between the parties, the District Director is not authorized to issue a compensation order.

In cases arising under the LHWCA, it is not uncommon for parties to reach an agreement on all previously disputed issues after the case had been referred to the OALJ.⁹ Interpreting Section 19(c) and Sections 702.315 and 702.348 of the regulations, the Board has held that "any agreements between the parties must be embodied in a formal order issued by the [D]istrict [D]irector or an [ALJ]." *Luttrell*, 45 BRBS at 31 (citing *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5, 6 (2005)); see also *Seguro*, 36 BRBS 28; *Gupton*, 33 BRBS at 96; *Jackson v.*

7 Moreover, the BRB held that the ALJ was procedurally prevented from addressing the § 8(f) issue because it was unknown whether the award was for permanent benefits of more than 104 weeks or the Director agreed to the alleged stipulations.

8 Other decisions applied this standard in determining whether an ALJ order is final and enforceable under § 14(f). See *Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008) (the original ALJ award was not final and enforceable under § 14(f) because it did not specify a compensation rate, only that compensation was to be based on wages of a "comparable employee;" yet, a dispute remained regarding whether payments made to the comparable employee should have been included in the benefits calculation); *Severin v. Exxon Corp.*, 910 F.2d 286, 289-290, 24 BRBS 21(CRT) (5th Cir. 1990) (as the ALJ order did not meet this standard, the court held that the District Court properly declined to enforce a default order issued pursuant to § 18(a) requiring employer to pay a § 14(f) assessment); see also *Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994); *Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

9 An award based on the stipulations of the parties or approved by order of the District Director based on the parties' agreement, see 20 C.F.R. § 702.315, is not a Section 8(i) settlement and, as such, is subject to modification (33 U.S.C.S. § 908(i)). See, e.g., *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (2000); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988); *Stock v. Management Support Assoc.*, 18 BRBS 50 (1986). Section 8(i) settlements are outside the purview of this article.

Straus Systems, Inc., 21 BRBS 266 (1988)).¹⁰ The regulations at 20 C.F.R. § 702.351 address a situation where a party withdraws controversion of the issues set for a formal hearing. This provision states that

“[w]hen a party withdraws his controversion of the issues set for a formal hearing, the [ALJ] shall halt the proceedings upon receipt from said party of a signed statement to that effect and forthwith notify the district director who shall then proceed to dispose of the case as provided for in § 702.315.”

20 C.F.R. § 702.351. Section 702.315, in turn, provides that a District Director may issue a compensation order at the request of “either party,” but only when the parties agree on all issues. 20 C.F.R. § 702.315;¹¹ see *Roulst v. Marco Constr. Co.*, 15 BRBS 443 (1983); 20 C.F.R. § 702.316; see also *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007) (District Director not authorized to issue a compensation order where dispute on the merits remained); *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988) (same); *Edwards v. Willamette W. Corp.*, 13 BRBS 800 (1981) (same). In practice, however, where parties reach an agreement while a case is pending before the OALJ, the ALJs routinely proceed to issue compensation

10 In *Jackson*, the BRB reviewed an ALJ’s decision which found coverage but did not include a compensation order since the parties stated that, once the coverage issue was resolved, all issues necessary to an award could be resolved by agreement. The BRB instructed, however, that in the future, in order to avoid piecemeal review, the ALJ should obtain the facts necessary to resolve all issues prior to deciding the coverage issue so that a single compensation order may issue.

11 Section 702.315 states in relevant part:

“§ 702.315 Conclusion of conference; agreement on all matters with respect to the claim.
(a) Following an informal conference at which agreement is reached on all issues, the district director shall . . . embody the agreement in a memorandum or within 30 days issue a formal compensation order If 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. . . . [W]hen the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action shall be commenced immediately upon becoming aware of the agreement, and without awaiting receipt of the memorandum or the formal compensation order.”

With respect to the district directors’ authority to issue compensation orders, the DLHWC Longshore Procedure Manual, Chapter 4-400 – Authority of the District Director (“DD”) provides:

“Agreement of the Parties: Absent an agreement by the parties in interest or a request for an order under 20 C.F.R. section 702.315, the DD is not empowered to issue a compensation order. However, the DD may issue an order without agreement in those areas reserved for the discretion of the DD such as change of physicians, attorney’s fees etc. Also if there is no factual dispute, and the issue is strictly legal, a compensation order may be issued. (See LHWCA Circular No. 87-1, November 14, 1986).”

Available at: www.dol.gov/owcp/dlhwc/lspm/lspm4-400.htm

orders based on stipulations executed by the parties. *See generally Aitmbarek*, 44 BRBS 115. This practice is consistent with recent Board decisions that stress an adjudicator's role in ensuring that stipulations executed by private parties accord with the law, and hold that the parties cannot merely "agree" via stipulation that claimant has been fully compensated. *Aitmbarek*, 44 BRBS 115;¹² *see also Bomback v. Marine Terminals Corp.*, 44 BRBS 95 (2010).¹³

Board precedent makes it clear that application of Section 702.351 is only appropriate when doing so would not infringe on the ALJs' authority to resolve disputes and issue compensation orders awarding or denying benefits. The Board has held that this regulation assumes that the parties have decided to voluntarily dispose of the claim in a manner consistent with informal proceedings, thus obviating the need for a formal hearing on any issues.¹⁴ *Irby*, 41 BRBS 21; *Lundy*, 9 BRBS 391;¹⁵ *see also Edwards*, 13 BRBS 800.¹⁶ Thus, in *Irby*, the Board concluded that "[c]ase precedent supports the Director's position that reliance on [§ 702.351] is inappropriate when the parties are not in agreement concerning the issuance of a compensation order." *Irby*, 41 BRBS at 23-24 (*citing Falcone*, 21 BRBS 145;¹⁷ *Edwards*, 13 BRBS 800-803).

12 In *Aitmbarek*, the BRB vacated the ALJ's order based on stipulations which evinced an incorrect application of law regarding: the proper maximum rate, an improper waiver of claimant's entitlement to interest, the failure to account for benefits for all injuries and time periods of disability, and the failure to properly consider the law for concurrent awards. The BRB remanded the case for the ALJ to make findings of fact or accept proper stipulations and issue an award.

13 In *Bomback*, the BRB vacated the ALJ's summary approval of the parties' stipulation that claimant has a seven percent permanent leg impairment since there was neither substantial evidence nor a legal foundation for such a stipulation. Specifically, as the ALJ did not address the parties' stipulation regarding the extent of claimant's impairment in terms of the aggravation rule, the credit doctrine, or whether suitable alternate employment was established, the stipulations evinced an incorrect application of the law. Parties cannot "compromise" via stipulation the degree of permanent impairment. The BRB further vacated the ALJ's finding, based on the parties' stipulation, as to the date the Special Fund shall assume liability for claimant's permanent partial disability benefits relating to his cervical injury because the ALJ's decision lacked specific findings or stipulations regarding the dates claimant reached maximum medical improvement and as to claimant's post-injury wage-earning capacity.

14 For a case distinguishing a withdrawal of controversion from a settlement agreement under § 8(i) of the Act, *see Clefstad v. Perini North River Assoc.*, 9 BRBS 217 (1978).

15 In *Lundy*, the ALJ denied the claim based on claimant's statement that his position could not be substantiated by evidence at the time of hearing. The Director appealed, arguing that the ALJ should have remanded the matter to the District Director as claimant withdrew his controversion of the issues within the meaning of § 702.351. The BRB found that § 702.351 was inapplicable because "[h]ere, the claimant simply decided not to pursue his claim, obviating the need for both formal and informal proceedings." *Id.* at 393. Rather, the claimant's statement had to be treated as a request for withdrawal of claim, and thus the ALJ erred in denying the claim.

16 In *Edwards*, the BRB concluded that the attempted withdrawal of controversion by one of two employers was invalid because the issue of liability remained pending before the ALJ.

17 In *Falcone*, employer attempted to withdraw its controversion at the hearing (on a § 7 claim for home health care services) and argued that the ALJ was obligated to halt the proceedings and remand the case pursuant to § 702.351. Claimant objected to employer's withdrawal of controversion at such a late date and urged the ALJ to hear

In *Irby*, employer withdrew its controversion of claims for death benefits and sought remand to the District Director for the entry of a compensation order pursuant to § 702.351.¹⁸ Claimants, however, objected to the issuance of a compensation order. The ALJ denied employer's request for remand and instead instructed employer to file a motion for summary decision. Claimants then filed motions for withdrawal of claims (in order to pursue state law claims), which the ALJ denied. On appeal, employer asserted that the use of the mandatory term "shall" in § 702.351 required the ALJ to remand the case to the District Director and the issuance of compensation order. The Board concluded that, on the facts of that case, the ALJ properly retained authority over the cases, as claimants' objection to the issuance of a compensation order was sufficient to preclude application of § 702.351. The BRB noted that claimants' failure to raise issues requiring adjudication would be properly addressed in disposing of employer's motion for summary decision.

A recent ALJ decision in *Knoshnaw v. Global Linguist Solutions, LLC*, 2012-LDA-00089 (Oct. 3, 2012), 46 BRBS 839(ALJ), *recon. denied*, (Nov. 1, 2012), 46 BRBS 845(ALJ), illustrates a scenario where a claimant seeks the issuance of a compensation order, while employer invokes § 702.351 in an attempt to prevent this outcome. In that case, employer agreed to voluntarily reinstate TTD benefit payments and provide medical benefits several weeks before the scheduled hearing date. Employer then requested a remand to the District Director under § 702.351, asserting that there was no issue for determination at the hearing.¹⁹ Employer, however, made it known that, upon remand, it would oppose the issuance of a compensation order by the District Director under § 702.315, or alternatively, would only agree to a TTD award for a period of six months. Claimant, in turn, asserted entitlement to an award by the ALJ of ongoing TTD benefits. He argued that § 702.315 requires the District Director to issue a compensation order if requested by either party upon remand from the ALJ, following withdrawal of controversion. Accordingly, claimant contended that employer, by failing to agree to the issuance of a formal order by the District Director upon remand, had not fully withdrawn the controversion. The ALJ denied employer's request for remand based on his finding that, contrary to employer's contention, a disputed issue remained as reflected in employer's refusal to agree to the issuance by the District Director of a compensation order for ongoing TTD benefits upon remand. Unconvinced by employer's attempt to split hairs as to its purported withdrawal of controversion, the ALJ proceeded to resolve the dispute and issue a compensation order awarding ongoing TTD benefits. The ALJ's reasoning is instructive:

and decide the case. The BRB reasoned that § 702.351 assumes that the parties have decided to voluntarily dispose of the claim in a manner consistent with informal proceedings, thus rendering a formal hearing unnecessary. As the parties were not in agreement, the ALJ therefore properly retained jurisdiction and made findings on the disputed issues.

18 The BRB noted that employer sought compensation orders so that it could obtain reimbursement pursuant to the War Hazards Compensation Act, 42 U.S.C.S. § 1701 *et seq.*, for benefits paid.

19 Employer analogized this scenario to *Palma v. Pacord*, BRB No. 11-0200 (Oct. 24, 2011), discussed below.

At first blush, the issues in this matter would appear to be, in the words of the Bard, 'Much Ado About Nothing.' However, nothing could be further from the truth. Rather, the issue in controversy involves whether Respondents will retain the right to terminate or reduce benefits to Claimant in the future and thereby reinstitute its controversion based on their own evaluation of the claim or whether Respondents will have to follow the procedures for modification of an award under Section 22 of the Act. Respondents argue that a remand without a compensation order furthers the purposes of the Act in that it would encourage payment of compensation without the need to resort to formal ... adversary proceedings. *RPTB* at 10, citing *Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3rd Cir. 1978). Claimant argues that Respondents should not be entitled to simply reinstate their payment of compensation without an award given their controversion of the claim for over a full year while it 'investigated.' Thus, Claimant urges that Respondents have had their chance to pay voluntarily but failed to do so for over a year and should not be entitled to this informality under the Act now. The undersigned agrees with Claimant. . . .

I find that Claimant is entitled to an order awarding [TTD] benefits and medical treatment under section 7 of the Act. I believe that this result is consistent with both the *Hoodye* and *Palma* decisions as well as the clear intent of 20 C.F.R. §§ 702.351 and 702.315. As in *Hoodye*, the undersigned actually conducted a hearing in this matter and thus should issue a compensation order. Although Respondents argue that the undersigned should have granted their earlier Motion for Remand and thus should not have conducted the hearing, I find that the hearing was required due to Respondents' refusal to agree to the entry of a formal compensation order either by the undersigned or by the District Director upon an agreed remand. I find it clear that Respondents agreed only to a remand without a formal compensation order, or alternatively, to an order granting temporary total benefits only for six months in the future. In the opinion of the undersigned, such a demand by Respondents was contrary to the regulations as well as the spirit and purpose of the Act to afford injured workers' compensation to which they are entitled as quickly as is reasonably possible. The regulations at 20 C.F.R. §§ 702.351 and 702.315 clearly indicate that when an Employer/Carrier controverts a claim forcing Claimant to seek a hearing before OALJ, then Claimant is entitled to a formal compensation order from either the [ALJ] or the District Director if the Claimant so requests. In this case, the Claimant requested agreement by Respondents to issuance of such a formal compensation order by the District Director which Respondents refused. Based on that refusal, the undersigned finds that there was an issue regarding Claimant's entitlement to such an order. Further, the undersigned finds no basis in law or in fact for the limitation of an ongoing [TTD] order in this case.

Slip op. at 4-5.

The facts in *Irby* and *Knoshnaw* may be contrasted with those in *Palma v. Pacord*, BRB No. 11-0200 (Oct. 24, 2011) (unpub.). In *Palma*, the Board rejected claimant's assertion that he was entitled to a compensation order by the ALJ, despite employer's willingness to have an order issued by the District Director on remand pursuant to §§ 702.351 and 702.315. In this unpublished decision, the Board concluded that, where claimant and employer had reached an agreement on all issues after the case had been referred to the OALJ and employer withdrew its controversion of the case, the ALJ properly remanded the case to the District Director pursuant to § 702.351. Although employer initially controverted the claim, after its investigation, and after the claim had been referred to the OALJ, employer began paying claimant TTD benefits, as well as additional compensation under § 14(e) (33 U.S.C.S. § 914(e)). As no dispute on the merits remained, employer withdrew its controversion of the claim and requested the case be remanded to the District Director for disposal of the case.²⁰ Claimant objected to employer's request and moved for a summary decision on the merits from the ALJ, arguing that the ALJ must issue a compensation order setting forth claimant's entitlement to benefits based on the lack of any dispute. The ALJ denied claimant's motion, finding that the moving papers were inadequate to make any factual findings. The ALJ distinguished the case law cited by claimant (e.g., *Hoodye, supra*) in support of his motion for summary decision on the ground that those cases had proceeded to formal hearing before the parties agreed to resolve their cases. Pursuant to § 702.351, the ALJ found that remand to the District Director was appropriate. The Board upheld the ALJ's order of remand and, consequently, affirmed the denial of claimant's motion for summary decision. The Board reiterated that § 702.351 presupposes the agreement of the parties as to the merits, and concluded that:

[c]laimant and employer agreed there were no factual disputes between them and that employer withdrew its controversion of the case. Thus, there are no factual or legal disputes between the parties that would prevent the district director from issuing a compensation order contemplated by Sections 702.315 and 702.351. Therefore, we affirm the [ALJ's] application of Section 702.351 and his order remanding the case to the district director. *See generally Lundy* [, *supra*].

Palma, slip op. at 4.

As the foregoing discussion demonstrates, parties who request a referral to the OALJ, and thereby enter the realm of formal administrative adjudication, should generally expect that the process will ultimately result in the issuance of a formal compensation order. This conclusion is

20 The BRB noted that, "contrary to employer's argument, the [ALJ] may issue a compensation order without holding a formal oral hearing. *See, e.g., Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010) (stipulations); *Tisdale v. American Logistics Services*, 44 BRBS 29 (2010) (motion for summary decision); *J.H. [Hodge] v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008) (settlement); 20 C.F.R. § 702.346 (waiver of hearing)." Slip op. at 2-3, n.2.

supported by the case law and borne out by practical considerations. Yet, at times, one or both parties to a litigated claim may seek to avoid the issuance of a compensation order. Employers' potential motivation for pursuing this strategy was aptly summarized in *Knoshnaw, supra*. Also, where claimant's disability is temporary in nature, an employer may take the position (unsupported by law) that a compensation order is "premature." See generally *Knoshnaw, supra*. At the same time, a claimant may find that his or her willingness to forego a compensation order incentivizes employer not to fight entitlement. However, in cases where disagreements persist (or simmer below the surface), the absence of an enforceable compensation order carries a risk for all involved. Thus, it may give rise to piecemeal litigation, with resulting waste of judicial resources. See generally *Jackson, 21 BRBS 266* (in order to avoid piecemeal review, the ALJ should obtain the facts necessary to resolve all issues prior to deciding the coverage issue, so that a single compensation order may issue); *Ledet, 163 F.3d 901, 32 BRBS 212 (CRT)*. Further, as the ALJ cautioned in *Knoshnaw*, in the absence of a compensation order, claimant is exposed to employer's unilateral termination or reduction of benefits.²¹ See, e.g., *Seguro, 36 BRBS 28*.²² Employers also face a risk where, for whatever reason, an agreement reached by the parties in a litigated case is not embodied in a compensation order. In particular, in view of the Supreme Court's holding in *Intercounty, supra*, that a timely claim which is not closed by an order awarding or denying the claim remains open and pending until it is resolved, employer does not get the benefit of the § 22 statute of limitations for filing a request for modification if the claim was never closed by a compensation order (33 U.S.C.S. § 922). See, e.g., *Petit v. Electric Boat Corp., 41 BRBS 7 (2007)*.

Given this state of the law, in preparation for a formal hearing, the parties should clearly identify any disputed issue(s) and submit stipulations detailing agreed facts necessary for an ALJ to issue a compensation order. Where the parties fail to do so, the ALJs should not hesitate to request such information from the parties. If the parties reach an agreement on some or all of the disputed issues while the case is pending before the OALJ, the ALJs and the parties should be mindful of the implications under the applicable law and regulations discussed above. Further, ALJ orders based in whole or in part on the parties' stipulations should set forth the elements required for an enforceable compensation order.

21 See also *Foster v. Davison Sand & Gravel Co., 31 BRBS 191 (1997)* (voluntary payment of benefits by employer is not a stipulation to compensability, and employer does not waive its right to contest a claim by making these payments).

22 The facts in *Seguro, 36 BRBS 28*, illustrate the risk to claimant.