BRB No. 06-0101

HERSEY F. SEARS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 08/30/2006
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Order of Remand of Larry Price, Administrative Law Judge, United States Department of Labor.

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

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order of Remand (2005-LHC-2304) of Administrative Law Judge Larry 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 Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained an injury while working for employer and eventually returned to work for employer in a light-duty capacity. Claimant filed a claim seeking temporary partial disability benefits and employer responded, by correspondence dated April 11, 2005, that it would pay temporary partial disability benefits from March 14, 2005, through April 10, 2005. Additionally, employer stated that "temporary partial benefits

from April 11, 2005, will be reviewed on an as requested basis." Employer Letter Dated April 11, 2005. Claimant thereafter requested an informal conference before the district director on the issue of his entitlement to temporary partial disability benefits. On July 18, 2005, the district director determined that "there is no recommendation to make as the employer is voluntarily making payments." District Director's Letter dated July 18, 2005. The district director thus informed claimant that "if you must have an award, please sent [*sic*] me your LS-18 forms so that you may make that request to the OALJ [Office of Administrative Law Judges]." *Id.*

The case was then forwarded to the Office of Administrative Law Judges and a formal hearing was scheduled for December 14, 2005. However, based on the pleadings filed by the parties, the administrative law judge found that employer is voluntarily paying compensation and providing medical benefits. He therefore concluded that there are no issues ripe for adjudication, and thus cancelled the formal hearing and remanded the case to the district director "for appropriate action."

On appeal, claimant requests that the Board vacate the administrative law judge's Order of Remand and remand the case to the administrative law judge for a formal hearing and adjudication of the merits. Employer responds, urging affirmance of the administrative law judge's Order of Remand. Additionally, claimant's counsel has filed an attorney's fee petition for work performed before the Board in this appeal.

Claimant initially asserts that the administrative law judge's one paragraph Order of Remand fails to address his contention that employer's payment of benefits "at their whim" does not comply with the requirements of Sections 14(a) and (b) of the Act, 33 U.S.C. §§914(a), (b). In particular, claimant asserts that Sections 14(a) and (b) require that employer pay benefits periodically and promptly in the form of regular installments. Claimant further argues that the administrative law judge's finding that his claim is not ripe for adjudication is incorrect.

Ripeness for review turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration," *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967), with the central concern being whether the case involves uncertain or contingent future events that may not occur as anticipated, or at all, *see Texas v. United States*, 523 U.S. 296, 298 (1998), since "[c]ourts should decide only existing, substantial controversies, not hypothetical questions or possibilities...." *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989); *see also Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). The United States Court of Appeals for the Ninth Circuit has concluded that the doctrine of ripeness has a justifiable place in administrative cases, although to a lesser degree than in judicial cases, and it has discussed the "traditional ripeness analysis." *Chavez v. Director, OWCP*, 961 F.2d 1409, 1414, 25 BRBS 134, 141(CRT). The court explained that the

first prong of the test, the fitness of issues, is determined by whether the issues are "purely legal" and "sufficiently developed factually,"[1] and the second prong, the hardship on the parties, is determined by whether there is a "direct and immediate hardship [which] would entail more than possible financial loss." *Id.*, 961 F.2d at 1414-1415, 25 BRBS at 141-142(CRT).

The scant administrative file before the Board, consisting of the parties' communications between themselves, to the district director and to the administrative law judge, establishes that the parties openly dispute claimant's entitlement to temporary partial disabling benefits. While employer appears to be voluntarily paying claimant temporary partial disability benefits on an "as requested" basis, it has explicitly rejected claimant's request for an ongoing award of temporary partial disability benefits based on a loss in overtime. In this regard, claimant has asserted that he has a loss in wage-earning capacity based on a loss of overtime earnings, and that absent a formal award of benefits, he may be left to employer's "whim" in receiving temporary partial disability benefits. Claimant alleges that despite employer's statement, on April 11, 2005, that claimant would be compensated for the period between March 14, 2005, through April 10, 2005, and that benefits thereafter would be reviewed on an as requested basis, employer had not, as of May 27, 2005, paid any benefits for loss of overtime since February 7, 2005, thus prompting claimant to seek adjudication of his claim. Moreover, claimant seeks to formally resolve the issue of his entitlement to temporary partial disability benefits rather than have to repeatedly request payment from employer. Claimant thus seeks a compensation order awarding temporary partial disability benefits.

In his Order of Remand, the administrative law judge observed that "it appears that employer is voluntarily paying compensation." He thus concluded that "there are no issues ripe for adjudication," and consequently cancelled the hearing scheduled for December 14, 2005, and remanded the case to the district director "for appropriate action." Absent, however, from the administrative law judge's order are any findings of fact in support of his conclusion, 5 U.S.C. §557(c)(3)(A); *see generally McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988), let alone any specific findings relevant to the pertinent issue in this case, *i.e.*, claimant's entitlement to an award of temporary partial disability benefits, *see Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).[2]

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[1] Consideration of the underlying factors of the first prong is primarily an appellate concern.

[2] In *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000), the court discussed the fact that Section 8(e) permits temporary partial disability awards to continue for up to five years. The court also injected the caveat that "[a]

Additionally, we hold that the administrative law judge's finding that claimant's claim is not ripe cannot be affirmed. First, the administrative law judge's order lacks any particular foundation for finding that the claim is not "ripe" as he did not specifically address the two-prong test enunciated in *Chavez*, 961 F.2d at 1414-1415, 25 BRBS at 141-142(CRT). Additionally, the administrative law judge's statement that "there are no issues ripe for adjudication," is, as evidenced above, incorrect as there is sufficient information in the file to establish that the parties have not explicitly agreed on claimant's continued entitlement to benefits in this case. In this regard, the uncertainty of claimant's continued entitlement to temporary partial disability benefits creates a practical hardship for both parties. *Chavez*, 961 F.2d at 1414, 25 BRBS at 141(CRT). As the parties have not agreed on claimant's entitlement, a hearing is necessary to receive evidence and the administrative law judge must adjudicate the issue of claimant's entitlement to a continued award of temporary partial disability benefits for lost overtime. *See Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in pert. part*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001). *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Grimes v. Exxon Co.*, 14 BRBS 573 (1981). Consequently, we vacate the administrative law judge's Order of Remand and remand the case to the administrative law judge to conduct a formal hearing on the merits of claimant's claim.[3]

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temporary award may terminate sooner than five years upon a showing that the condition giving rise to the disability has reached its 'maximum medical improvement;' at that point, if the 'improvement' is less than full recovery, the claimant may receive a permanent disability award." *Id.* 228 F.3d at 516, 34 BRBS at 93(CRT).

[3] Because the Act requires a showing of success on the merits before any attorney's fee becomes appropriate, claimant, who has successfully established his right to a hearing on the merits in this case, has nevertheless not yet established entitlement to benefits so as to entitle counsel to an award of attorney's fees. *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997)(Order). Therefore, we deny, at this time, counsel's petition for an attorney's fee for work performed before the Board.

Accordingly, the administrative law judge's Order of Remand is vacated, and the case is remanded for the administrative law judge to hold a hearing on claimant's claim.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge