BRB No. 92-1077

ANNIE D. HAWTHORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
	)	DECISION and ORDER
Respondent	)	on RECONSIDERATION

Appeal of the Decision and Order and the Decision on Motion for Reconsideration of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol A. 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), has filed a timely motion for reconsideration of the Board's decision in this case, *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. We hereby grant the Director's motion for reconsideration.

Claimant, a welder, injured her left knee in 1986 and her left ankle in 1988 while working

for employer. She filed a claim for each injury, and employer controverted both claims. In its notice of controversion for the 1988 ankle injury, employer asserted its entitlement to Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation. While the claims were pending before the administrative law judge, employer first asserted its entitlement to Section 8(f) relief with regard to continuing benefits for the 1986 knee injury. *See Hawthorne*, 28 BRBS at 75. The administrative law judge determined that employer failed to file a timely application for Section 8(f) relief, noted that the district director invoked the Section 8(f)(3), 33 U.S.C. §908(f)(3) (1988), absolute defense, and denied employer's request. *Id.* at 76.

Employer appealed the administrative law judge's decision, challenging his denial of Section 8(f) relief.[1] On appeal, the Board held that, as the administrative law judge awarded permanent disability benefits for only the knee injury, employer is not eligible for Section 8(f) relief with regard to benefits for the ankle injury, and it considered the issue moot. *Hawthorne*, 28 BRBS at 82-83. With regard to the knee injury, the Board determined that the administrative law judge erroneously relied on the district director's denial of relief for the ankle injury in denying relief for the knee injury. Specifically, the Board held:

> Although . . . employer did not raise the applicability of Section 8(f) to the 1986 claim while the case was before the district director in violation of 20 C.F.R. §702.321(a), the Director did not raise the absolute defense with regard to the November 4, 1986 knee injury claim. As the Director cannot raise the applicability of Section 8(f)(3) for the first time on appeal, we reverse the administrative law judge's determination that employer's entitlement to Section 8(f) relief is precluded by application of Section 8(f)(3) and remand for the administrative law judge to consider the merits of employer's Section 8(f) request.

Hawthorne, 28 BRBS at 83.

The Director challenges this holding, arguing that it deprives her of the opportunity to assert the affirmative defense pursuant to Section 8(f)(3) where employer failed to file a timely application for Section 8(f) relief. Employer responds that the Director's rights are preserved by virtue of the Board's remand order in that she now has notice that Section 8(f) has been raised and the opportunity to contest the applicability of Section 8(f) on the merits with regard to the 1986 injury. Employer also states that it could not have anticipated the applicability of Section 8(f) with regard to the 1986 injury because claimant had not reached maximum medical improvement while the case was before

[1]Employer also challenged the administrative law judge's findings that claimant is permanently totally disabled as a result of her left knee injury, that claimant is entitled to permanent total disability benefits based on an average weekly wage of $568.27, and that employer is liable for a Section 14(e), 33 U.S.C. §914(e), penalty. The Board vacated the administrative law judge's findings regarding the availability of suitable alternate employment and the average weekly wage applicable for claimant's knee injury, and it affirmed his conclusion that employer is liable for a Section 14(e) penalty. *Hawthorne*, 28 BRBS at 78, 80-81.

the district director.

Section 8(f)(3) provides that a request for Section 8(f) relief, including the grounds therefor, "shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner." Failure to do so is "an absolute defense to the special fund's liability . . . unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order." 33 U.S.C. §908(f)(3) (1988). Section 702.321(b)(3) of the regulations, 20 C.F.R. §702.321(b)(3), provides that the defense is an affirmative one which must be raised and pleaded by the Director. *See Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992); *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

In this case, the administrative law judge found that he was precluded from addressing employer's Section 8(f) request with regard to both injuries because employer failed to file a timely application for relief. On appeal, the Board reversed this finding and remanded the case for further consideration of the merits of employer's Section 8(f) petition on the claim for the knee injury. The Director interprets the Board's holding as preventing her from raising the absolute defense when the case is remanded to the administrative law judge. Because it was not the Board's intent to deprive the Director of the ability to defend the Special Fund against employer's application for relief from continuing liability for benefits, we shall clarify the holding. As the Director did not participate in the proceedings before the administrative law judge, she was not informed of employer's request for Section 8(f) relief until the administrative law judge issued his decision. Such a request for Section 8(f) relief, made without the Director's knowledge, cannot be used to circumvent the Director's defense against the request. Inasmuch as the Board cannot address the absolute defense for the first time on appeal and because the Director was not given the opportunity to raise the defense before the administrative law judge, we modify the Board's remand order to permit her to raise it before the administrative law judge on remand. *See generally Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155 (CRT) (1st Cir. 1988); 20 C.F.R. §702.336. Consequently, on remand, in order to ascertain whether employer is entitled to Section 8(f)f relief, the administrative law judge should consider the applicability of Section 8(f)(3), if raised by the Director, as well as the merits of employer's Section 8(f) request. *See Cajun Tubing Testors v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT) (5th Cir. 1992), *aff'g* 24 BRBS 248 (1991); *Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991), *aff'g Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991); *Brazeau v. Tacoma Boatbuilding Co.*, 24 BRBS 128 (1990).

Accordingly, the motion for reconsideration and the relief requested are granted, and the Board's decision in this case is modified consistent with this opinion. 20 C.F.R. §802.409. In all other respects, the Board's decision is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
JAMES F. BROWN
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge