

BRB No. 07-0549

C.R.)
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 Claimant)
)
 v.)
)
 NORTHROP GRUMMAN SHIP SYSTEMS,) DATE ISSUED: 02/29/2008
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order, Order Granting Reconsideration, and Erratum of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order, Order Granting Reconsideration, and Erratum (2005-LHC-01349) of Administrative Law Judge Lee J. Romero, Jr., 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).

On May 17, 2002, claimant fell off a platform during the course of his employment for employer and injured his head, neck, hands, and bladder. Claimant filed formal claims for compensation on May 12 and November 17, 2003, averring that his injuries resulted in permanent disability. EX 9. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), until October 15, 2003, and permanent partial disability benefits for a five percent impairment of each hand, 33 U.S.C. §908(c)(3). EX 8 at 3. Employer filed seven Form LS-207, Notice of Right to Controversion, on June 17 and July 22, 2002; May 16, October 16 and November 26, 2003; and January 30 and June 29, 2004, stating that claimant's right to compensation for a left shoulder strain was controverted, *inter alia*, on the basis of its entitlement under the Act to Section 8(f) relief. 33 U.S.C. §908(f); EX 11. An informal conference was held on April 20, 2004, following claimant's exacerbating his neck condition when he unsuccessfully tried to return to work in January 2004. Claimant sought resumption of temporary total disability compensation and additional medical treatment for his neck. The Memorandum of Informal Conference does not indicate that Section 8(f) relief was discussed. EX 13. The case was forwarded by the district director to the Office of Administrative Law Judges (OALJ) on March 28, 2005. The district director noted in the referral letter that Section 8(f) had not been raised. Employer filed with the administrative law judge a documented application for Section 8(f) relief on June 22, 2005. EX 12.

In his decision, the administrative law judge noted that employer accepted as work-related claimant's neck condition and five percent permanent impairment of each hand. The administrative law judge found that claimant's bladder condition and sleep apnea also are work-related. The administrative law judge accepted the parties' stipulation that claimant's injuries reached maximum medical improvement on August 21, 2003. He found that claimant is unable to return to his usual work duties and that employer failed to establish the availability of suitable alternate employment, which entitles claimant to compensation for permanent total disability.¹ 33 U.S.C. §908(a). The

¹ The administrative law judge awarded claimant compensation for temporary total disability from May 17, 2002, to August 20, 2003, except for the period of July 8-14, 2002, and for permanent total disability from August 21, 2003. The administrative law judge also awarded claimant benefits for a five percent permanent impairment of each hand. In his Order Granting Reconsideration, the administrative law judge found that claimant is not entitled to concurrent awards for permanent total disability and permanent

administrative law judge found that employer met the prerequisites for Section 8(f) relief inasmuch as claimant had pre-existing insulin-dependent diabetes and associated diabetic maladies, these conditions were manifest to employer, and employer established that they contributed to claimant's permanent total disability based on Dr. Longnecker's opinion that claimant would be capable of light-duty work absent his pre-existing conditions.

Finally, the administrative law judge addressed the absolute defense of Section 8(f)(3) raised by the Director. 33 U.S.C. §908(f)(3). The administrative law judge found that maximum medical improvement was not at issue or addressed at the informal conference. Moreover, the administrative law judge found that employer's agreeing at the informal conference to authorize pain management treatment by Dr. Aldridge gave "rise to an assumption" that maximum medical improvement of claimant's work-related injuries other than his hands had not been reached. The administrative law judge also found that employer could not reasonably have anticipated the liability of the Special Fund based on claimant's five percent bilateral hand impairment, which pro-rates to a total of 24.4 weeks compensation, as it is far from the threshold of 104 weeks needed to transfer liability to the Special Fund. The administrative law judge found that claimant's filing claims for permanent disability and employer's raising of its entitlement to Section 8(f) on its notices of controversion filed between June 17, 2002, and November 26, 2003, and controverting "nature and extent," could have referred to the injuries to claimant's hands. Accordingly, the administrative law judge found that employer could not have reasonably foreseen the liability of the Special Fund at the time of the informal conference and he concluded that Section 8(f)(3) is inapplicable to bar employer's application for Section 8(f) relief.

On appeal, the Director contends that the administrative law judge erred in finding that the absolute defense of Section 8(f)(3) does not bar employer's claim for Section 8(f) relief. Specifically, the Director argues there is evidence the administrative law judge did not address that could establish the applicability of the absolute defense. Employer responds, urging affirmance of the administrative law judge's finding.

Section 8(f)(3) of the Act requires an employer to present a request for Section 8(f) relief to the district director prior to his consideration of the claim; failure to do so bars the payment of benefits by the Special Fund, unless the employer demonstrates it could not have reasonably anticipated the Special Fund's liability. The regulation at 20 C.F.R. §702.321(b) provides that a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known or is in dispute and that that an

partial disability, and he therefore vacated the permanent partial disability award for claimant's bilateral hand impairment.

employer seeking relief under Section 8(f) must request the relief and file a fully documented application with the district director. If claimant's condition has not reached maximum medical improvement or if no claim for permanency has been raised by the date of referral to the OALJ, an application need not be submitted. However, in all other cases failure to do so is an absolute defense to the liability of the Special Fund; failure to timely submit an application may be excused only where employer could not have reasonably anticipated the liability of the Special Fund while the case was before the district director. 20 C.F.R. §702.321(b)(3). This defense must be affirmatively raised and pleaded by the Director. *Abbey v. Navy Exchange*, 30 BRBS 139 (1996).

Initially, it is noted that employer raised the applicability of Section 8(f) in its seven notices of controversion filed with the district director. EX 11. However, employer did not file an application for Section 8(f) relief until after the claim was referred to the OALJ.² As evidence supporting his contention that permanency was at issue before the district director such that employer should have filed its application, the Director relies on the following. Claimant filed two claims for compensation stating he incurred permanent disability as a result of his work-related injuries. EX 9. Employer filed seven LS-207 Notice of Controversion forms from June 17, 2002, to June 29, 2004, all of which listed Section 8(f) as an issue and four of which listed "nature and extent" as an issue. EX 11. The notices were filed with regard to claimant's left shoulder strain and/or urinary problems. *Id.* The Director notes that employer did not raise any issues concerning claimant's hand injuries and thus contends that the administrative law judge's finding that any issues concerning permanency referenced the hand injuries is not rational.

We agree with the Director's contention that the administrative law judge's finding regarding the scope of the notices of controversion is not supported by the record. Specifically, employer's January 30, 2004, notice challenging Dr. Longnecker's restriction against driving a forklift is not consistent with the administrative law judge's

² Section 702.321(a), 20 C.F.R. §702.321(a), provides that a request for Section 8(f) relief should be accompanied by a fully documented application. Section 702.321(b), 20 C.F.R. §702.321(b), provides that in cases where an application does not accompany the request, the district director "shall, at the time of the request, fix a date for submission of the fully documented application." In this case, there is no indication in the administrative file that the district director instructed employer to submit an application upon employer's raising Section 8(f) relief in its notices of controversion. On remand, the administrative law judge may consider this omission in determining the applicability of the absolute defense. *See generally Newport News Shipbuilding & Dry Dock Co. v. Firth*, 363 F.3d 311, 38 BRBS 1(CRT) (4th Cir. 2004).

finding that employer's controversions likely were limited to claimant's hand condition. Claimant unsuccessfully attempted to return to his usual employment in January 2004 and was unable to do so due to his neck condition. Tr. at 42-44, 84-90. Dr. Longnecker examined claimant on January 26, 2004, and reiterated his opinion that claimant is unable to drive a tow motor and forklift due to his neck condition. EX 22 at 33-34. Dr. Longnecker's other medical reports refer solely to claimant's neck condition. EX 22 at 29, 35. Employer filed an LS-207 four days after the January 26, 2004, exam in which it contested claimant's ability to return to work due to his neck condition. In view of this evidence, the administrative law judge's finding that employer's raising of Section 8(f) and "nature and extent" referred only to claimant's bilateral hand injuries cannot be affirmed.

The Director also contends that the notices filed by claimant and employer in conjunction with the medical evidence establish that employer should have reasonably anticipated that the Special Fund's liability was at issue, irrespective of the fact that permanency was not discussed at the informal conference.³ The requirement that Section 8(f) be raised and pleaded before the district director is not limited to situations where permanency is at issue at the informal conference. *Container Stevedoring Co. v.*

³ The Director correctly notes that the administrative law judge's finding that employer's agreeing at the informal conference to authorize pain management treatment by Dr. Aldridge gave "rise to an assumption" that maximum medical improvement of claimant's work-related injuries other than his hands had not been reached is not consistent with the facts or law. Decision and Order at 51. The Director notes that this finding is directly contradicted by the administrative law judge's finding that claimant's work injuries reached maximum medical improvement on August 21, 2003, based, in part, on Dr. Kesler's opinion that claimant's neck reached maximum medical improvement on July 21, 2003. Decision and Order at 33-34. The record indicates that claimant asked for and Dr. Longnecker provided in January 2004 a referral to Dr. Aldridge for another cervical steroid injection after claimant aggravated his neck when he attempted to return to work. EX 22 at 33-34. It appears that employer declined to authorize this referral to Dr. Aldridge as the issue was raised for the informal conference, but employer agreed at the informal conference in May 2004 to authorize this treatment. EX 13 at 2. At the time of the conference claimant was two years post-injury. Dr. Aldridge's notes indicate that cervical steroid injections were palliative treatment rather than curative. Treatment that may temporarily improve claimant's symptoms does not preclude an earlier date of maximum medical improvement. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). Moreover, a temporary exacerbation does not preclude a finding of permanency where claimant's condition is of a lasting duration. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

Director, OWCP [Gross], 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). Section 702.321(b)(1), 20 C.F.R. §702.321(b)(1), requires an employer to file for Section 8(f) relief when it has knowledge that the claimant has a permanent disability.⁴ *Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109(CRT) (5th Cir. 1992); *Rice v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 102 (1998). While employer is not required to initiate an inquiry into the permanency of claimant's condition, *Brazeau v. Tacoma Boatbuilding Co.*, 24 BRBS 128 (1990), in this case, in addition to claimant's claim forms raising permanent disability, there is medical evidence generated while the case was before the district director indicating that claimant's neck condition was permanent.⁵ Specifically, Dr. Longnecker opined on March 11, 2003, that claimant should not return to work due to his multiple medical problems and should consider retirement. EX 22 at 19. On July 21, 2003, Dr. Longnecker noted that claimant's Functional Capacity Evaluation (FCE) indicates he can perform only light work, he cannot drive a tow motor since he is unable to turn his head from side to side, and he "question(ed)" whether claimant could return to work at all. *Id.* at 29. That same day, Dr. Kesler, who treated claimant's neck, opined that claimant's neck was at maximum medical improvement, and he agreed with the FCE restrictions. EX 25 at 25-26; *see* EX 25 at 21-23. On January 26, 2004, Dr. Longnecker noted claimant's complaint that driving a tow motor aggravated his neck condition and on March 11, 2004, Dr. Longnecker provided claimant's attorney with a letter stating that claimant's inability to drive a fork lift is a "permanent restriction." EX 22 at 35.

Given this evidence, and the fact that Section 702.321(b) requires a Section 8(f) request be made when permanency becomes known *or* is an issue in dispute, the administrative law judge's finding based on the informal conference memorandum that permanency was not at issue between the parties is not dispositive. Whether employer should have reasonably anticipated the liability of the Special Fund while the claim was before the district director and the point at which employer had knowledge of the

⁴ Section 702.321(b)(1) provides that: "A request for section 8(f) relief should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute." 20 C.F.R. § 702.321(b)(1).

⁵ Employer does not assert in response that it was unaware of this evidence while the case was before the district director.

permanency of claimant's condition are factual determinations to be addressed by the administrative law judge. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). As there is medical evidence generated while the case was before the district director that claimant sustained and claimed benefits for a permanently disabling neck injury, and the administrative law judge did not address whether employer therefore should have reasonably anticipated the liability of the Special Fund at that time, we vacate the administrative law judge's finding that the absolute defense of Section 8(f)(3) is inapplicable. On remand, the administrative law judge should fully address the relevant evidence and make findings regarding whether permanency was known to employer while the case was before the district director and whether employer reasonably could have anticipated the liability of the Special Fund. *See generally Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997). The administrative law judge may also address the effect of employer's numerous requests for Section 8(f) in its notices of controversion in considering the requirements of Section 8(f)(3) of the Act and Section 702.321(b) of the regulations.

Accordingly, the administrative law judge's finding that the absolute defense of Section 8(f)(3) does not bar employer's claim for Section 8(f) relief is vacated, and the case is remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order, Order Granting Reconsideration, and Erratum are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge