BRB No. 91-1299

EDWARD PARKER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
OLD DOMINION STEVEDORING	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Daniel R. Lahne (Knight, Dudley, Dezern & Clarke), Norfolk, Virginia, for self-insured employer.

Janet R. Dunlop, Counsel for Longshore (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Order Granting Motion for Reconsideration (88-LHC-163) of Administrative Law Judge Richard K. Malamphy 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 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, on April 10, 1984, sustained injuries to his hip, ribs, back and legs while in the course of his employment with employer. Thereafter, claimant filed a claim for permanent total

disability benefits under the Act. Employer controverted the claim, and an informal conference was held before the district director[1] on August 29, 1984, at which time the only issue discussed was that of claimant's disability. On November 7, 1984, the case was referred to the Office of Administrative Law Judges, before which both parties submitted pre-hearing statements.

On July 5, 1985, employer amended its pre-hearing statement to include its entitlement to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), as an issue. Thereafter, on September 5, 1985, the administrative law judge remanded the case to the district director. A second informal conference was held on April 29, 1987, at which time the issues of claimant's disability and employer's entitlement to Section 8(f) relief were discussed; the district director granted employer's request for an extension of time, until July 7, 1987, in which to file a completed application for Section 8(f) relief pursuant to Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3)(1988), and Section 702.321, 20 C.F.R. §702.321, of the implementing regulations. As no application was received by the district director's office by August 6, 1987, the district director forwarded a letter to employer's counsel requesting the status of its application for Section 8(f) relief and granting a further extension of time in which to file such an application. On August 11, 1987, employer's counsel sent a letter to the district director stating, in pertinent part: "I wish to advise that I am unable to submit an application for Section 8(f) relief and, accordingly, we will await your recommendation based upon the evidence presently in your file." Dir. Ex. 5.

On September 24, 1987, the district director recommended that employer pay claimant permanent total disability compensation, and the case was again referred to the Office of Administrative Law Judges. Subsequently, employer's carrier became insolvent; on February 15, 1988, employer's present counsel filed a motion to remand the case to the district director so it could submit an application for Section 8(f) relief. Employer's motion was granted by the administrative law judge; the district director, however, after noting that employer had previously waived the issue of Section 8(f) relief, refused to schedule a third informal conference and referred the case to the Office of Administrative Law Judges. On September 26, 1990, employer filed its pre-hearing statement with the administrative law judge, listing Section 8(f) relief as an issue to be adjudicated.

A formal hearing before the administrative law judge was held on January 18, 1991, at which time the Director, Office of Workers' Compensation Programs (the Director), did not appear. The administrative law judge accepted the parties' stipulation that claimant was entitled to permanent total disability benefits under the Act. 33 U.S.C. §908(a). Thus, the sole issue to be resolved by the administrative law judge was that of Section 8(f) relief. In his Decision and Order dated March 1, 1991, the administrative law judge considered employer's request for Section 8(f) relief on its merits, and found that employer was entitled to such relief. Subsequent to the issuance of the administrative law judge's Decision and Order, the Director filed a motion for reconsideration, asserting the absolute defense under Section 8(f)(3) of the Act and Section 702.321(b)(3), 20 C.F.R. §702.321(b)(3), of the regulations. In his Order Granting Motion for Reconsideration dated April

[1] Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

19, 1991, the administrative law judge, after specifically noting that both employer and the Director acknowledge that employer did not file the requisite application requesting Section 8(f) relief, granted the Director's motion and denied employer Section 8(f) relief.

On appeal, employer contends that, since its request for Section 8(f) relief had already been granted, the administrative law judge erred in subsequently applying the absolute bar to its request for Section 8(f) relief. Employer asserts that it was wrongfully denied the opportunity to file its application for Section 8(f) relief after the case was remanded to the district director in February 1988, and that the regulations at 20 C.F.R. §702.321, which implement Section 8(f)(3) of the Act, are invalid as they exceed the statutory authority granted by Congress. The Director responds, urging affirmance of the denial of Section 8(f) relief; specifically, the Director asserts, *inter alia*, that the scope of the regulations implementing Section 8(f) is irrelevant in the instant case, since employer failed to comply with the specific requirement of Section 8(f)(3) that a request for Section 8(f) relief be submitted to the district director.

Section 8(f)(3) of the Act provides that an employer's request for Section 8(f) relief, and a statement of the grounds for such relief, which is filed after September 28, 1984, must be presented to the district director prior to consideration of the claim by the district director and that failure to do so will bar the payment of benefits by the Special Fund unless the employer could not have reasonably anticipated that Special Fund liability would be at issue. 33 U.S.C. §908(f)(3)(1988). Following the addition of this provision in 1984, the Secretary adopted regulations implementing its requirements. Those implementing regulations provide that the employer must file a fully documented application in support of its request for Section 8(f) relief. Such an application shall contain a specific description of the pre-existing condition "relied upon as constituting an existing permanent partial disability, ..." 20 C.F.R. §702.321(a). The failure to submit a fully documented application by the date established by the district director shall by an absolute defense to the liability of the Special Fund. 20 C.F.R. §702.321(b)(3). Such a failure is excused only where the employer could not have reasonably anticipated the liability of the Special Fund prior to the issuance of a compensation order. *Id*. The regulation also states that the Section 8(f)(3) bar is an affirmative defense which must be raised and pleaded by the Director.

Employer first argues that the administrative law judge erred in applying the absolute bar to its request for Section 8(f) relief, since the actions of the Department of Labor prevented it from filing a Section 8(f) application. Specifically, employer asserts that after the administrative law judge granted its motion to remand the case in February 1988 for the district director to consider its request for Section 8(f) relief, employer was wrongfully prevented from filing its application by the district director. Therefore, employer argues, the Director should have been estopped from asserting the absolute defense since its own agency prevented employer from complying with the statutory and regulatory requirements of filing a Section 8(f) request. On the facts of this case, we disagree.

In the instant case, a second informal conference was held in April 1987; during this conference, employer's request for Section 8(f) relief was discussed. Employer requested, and was granted by the district director, an extension of time in which to file a Section 8(f) application until

July 7, 1987. By August 6, 1987, employer had not complied with the district director's deadline. In response to a status letter from the district director, employer's counsel stated that employer declined to submit a Section 8(f) application. *See* Dir. Ex. 5. Thus, employer had ample opportunity to either file its application for Section 8(f) relief, or request a further extension of time in which to file the application, pursuant to Section 702.321(b)(2), 20 C.F.R. §702.321(b)(2), of the regulations prior to the second remand of this case in 1988. *See Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT)(5th Cir. 1992), *aff'g* 24 BRBS 248 (1991). We therefore reject employer's argument and hold that the district director committed no reversible error in concluding that employer had waived the issue of Section 8(f) relief and subsequently refusing to schedule a third informal conference after the case was remanded to him a second time in 1988.

Moreover, we need not address employer's alternative argument that the regulations implementing Section 8(f)(3) of the Act exceed the authority granted by Congress to the Secretary of Labor, inasmuch as the record in the instant case clearly demonstrates and the administrative law judge properly found that employer failed to comply with the requirements of Section 8(f)(3) itself. Section 8(f)(3) of the Act states in pertinent part that:

Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the district director prior to the consideration of the claim by the deputy commissioner.

33 U.S.C. §908(f)(3)(1988). In the instant case, it is uncontroverted that employer not only failed to file an application for Section 8(f) relief with the district director pursuant to Section 702.321 of the regulations, but also failed to file *any* statement with the district director setting forth the basis for its Section 8(f) request, as specifically required by Section 8(f)(3). *See generally Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992); *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992). The legislative history of Section 8(f)(3) indicates that the purpose of that section is to encourage employers to raise the issue of Section 8(f) relief early in the claims adjudication process to afford the Office of Workers' Compensation Programs the opportunity to examine the validity of the employer's basis for requesting such relief. *See* House Conf. Rep. No. 1027, 98th Cong., 2d Sess. 21, *reprinted in* 1984 U.S. CODE CONG. & ADMN. NEWS 2771, 2781. Thus where, as here, an employer makes a Section 8(f) request, but fails to file a statement of the grounds therefor, the purpose of allowing the district director the opportunity to examine the validity of the Section 8(f) request is frustrated. *See Hargrave, supra*. Therefore, inasmuch as employer failed to file a statement of the grounds for its Section 8(f) relief request, as required by Section 8(f)(3) of the Act, we affirm the administrative law judge's application of the absolute defense, and his consequent denial of Section 8(f) relief.

Lastly, employer contends that it was unable to file an application for Section 8(f) relief until October 1990, when it received the medical report of claimant's treating physician.[2] Specifically,

[2] Claimant suffered a previous injury to his back while working for employer in 1979. In his October 11, 1990 report, Dr. Weitzman stated that claimant is restricted from prolonged sitting as a

employer asserts that any application for Section 8(f) relief made prior to its receipt of claimant's treating physician's report would have been rejected by the Director. It is uncontroverted, however, that in 1987 employer discussed the applicability of Section 8(f) at an informal conference and requested an extension of time in which to file the statutorily required application for Section 8(f) relief. Thereafter, the district director extended the time for filing such an application; employer, however, specifically declined to file such an application. Even if, as employer contends, it did not have sufficient evidence in 1987 to establish all of the elements necessary for entitlement to Section 8(f) relief, employer was not precluded at that time from filing a request for Section 8(f) relief, within the time frames set by the district director, and then immediately acting to obtain the evidence necessary to sustain its request. We therefore reject employer's contention.

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result of both his 1979 and 1984 injuries, and that the 1979 injury left claimant with a permanently weakened neck and back, which was more susceptible to future injury. *See* Cl. Ex. 6C.

Accordingly, the Order Granting Motion for Reconsideration of the administrative law judge is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge