BRB No. 91-1487

CLARENCE G. KIRBY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CHAPARRAL STEVEDORING COMPANY	)	
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	DATE ISSUED:_____
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Michael D. Murphy (Fulbright & Jaworski), Houston, Texas, for employer/carrier.

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

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

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-642) of Administrative Law Judge

Kenneth A. Jennings 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his back and hips on June 3, 1986 when he fell from a crane ladder. Tr. at 24. As a result of the injury and its combination with claimant's degenerative arthritis, claimant received a total hip replacement in both hips. Doctors determined he could not return to work as a longshoreman, and employer paid temporary total disability benefits from June 4, 1986 through August 3, 1989. Emp. Exs. 7, 10, 12.

On July 14, 1989, claimant requested an informal conference with the district director[1] concerning his claim for temporary total and permanent partial disability benefits. On August 14, 1989, the district director held an informal conference at which a representative of employer or its carrier was not present. The district director subsequently recommended that claimant be awarded permanent total disability benefits. On August 15, 1989, claimant filed his pre-hearing statement, indicating the issues would be, *inter alia*, temporary total and permanent total disability.[2] Employer did not respond until one month later when it filed a representation letter with the district director and requested the filing dates of claimant's forms. On December 19, 1989, the district director referred the case to the Office of Administrative Law Judges, noting that Section 8(f), 33 U.S.C. §908(f) (1988), was not an issue. On March 16, 1990, the administrative law judge scheduled the hearing for June 26, 1990, and on April 24, 1990, employer filed its pre-hearing statement listing entitlement to Section 8(f) relief and the nature and extent of claimant's disability as issues.

A hearing was held on June 26, 1990, wherein the administrative law judge heard evidence pertaining to the nature and extent of claimant's disability and received employer's application for Section 8(f) relief from continuing liability for compensation. The Director, Office of Workers' Compensation Programs (the Director), filed a post-hearing motion to dismiss the Section 8(f) claim. The administrative law judge found that claimant is permanently totally disabled and that employer established all the necessary elements for Section 8(f) relief. Decision and Order at 5-6. However, he denied employer Section 8(f) relief because employer failed to request such relief in a timely manner pursuant to Section 8(f)(3), 33 U.S.C. §908(f)(3) (1988). He rejected employer's argument that the Director waived the Section 8(f)(3) defense. Instead, the administrative law judge found that the Director was not properly informed of the claim for Section 8(f) relief prior to the hearing, and therefore, his motion to dismiss was timely. Decision and Order at 6-7. On the merits of the

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute and shall be used in this decision except when quoting the statute.

[2]Claimant also filed a claim for permanent total disability compensation on August 15, 1989. Cl. Ex. 5.

Director's motion, the administrative law judge found that the exceptions to filing a timely request for Section 8(f) relief with the district director do not apply in this case, as employer should have known the permanency of claimant's disability was an issue when the case was before the district director. *Id.* at 7. Employer appeals the denial of Section 8(f) relief, and the Director responds, urging affirmance.

Employer first contends the Director's motion to dismiss was untimely. It also contends it was excused from filing an application for Section 8(f) relief before the district director because it did not receive notice of the informal conference and did not know permanency was an issue before him. Further, employer contends the administrative law judge erroneously placed the burden on it to raise permanency as an issue. In response, the Director argues that, as he was first aware of employer's application for Section 8(f) relief after the hearing, and as copies of documents to the regional solicitor of labor's office do not constitute adequate notice to the Director, his motion was timely. He maintains that employer did not comply with the requirements of Section 8(f)(3) or the applicable regulation, 20 C.F.R. §702.321, and that employer should have known permanency was an issue before the district director because it was raised numerous times by claimant.

Section 8(f)(3) provides that a request for Section 8(f) relief, "and a statement of the grounds therefore, 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); 20 C.F.R. §702.321(b)(3). 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; the defense cannot be raised where permanency was not at issue before the district director.

Initially, we reject employer's argument that the Director waived the Section 8(f)(3) defense by not raising it and pleading it at the hearing. In this case, employer raised the issue of Section 8(f) in its pre-hearing statement after the case was referred to the Office of Administrative Law Judges and filed its application for Section 8(f) relief with the administrative law judge at the hearing. The Director, who was not present, then raised and pleaded the defense in a post-hearing motion to dismiss and memorandum in support thereof. The administrative law judge rationally determined that the Director raised and pleaded the Section 8(f)(3) defense as soon as he was made aware of employer's application for Section 8(f) relief. Moreover, we reject employer's argument that it was prejudiced by an alleged violation of Section 18.55 of the Rules of Practice before the Office of Administrative Law Judges. 29 C.F.R. §18.55. Section 18.55 limits the time for submitting documents into the record and does not pertain to the time for filing motions. *Id.*; *see also* 29 C.F.R. §18.6(a). Consequently, this regulation cannot be used to allege that the Director's motion to dismiss was not timely. Therefore, we affirm the administrative law judge's finding concerning the timeliness of the Director's motion.[3]

[3]We decline to address employer's contention that it adequately notified the Director of its claim for Section 8(f) relief via correspondence to the Regional Solicitor's office. We note, however, that

Additionally, we reject employer's contention that the administrative law judge erred in finding that its request for Section 8(f) relief was untimely. First, we reject employer's contention that it was excused from raising Section 8(f) before the district director because it did not receive notice of the informal conference. The administrative law judge rejected this argument, noting that even if the premise were true, such an "excuse" was limited and did not explain an eight month delay in raising Section 8(f) as an issue. Decision and Order at 7. We agree with the administrative law judge. Although employer was not notified directly of the informal conference, its carrier was notified, a fact which employer does not dispute. That employer/carrier did not have legal representation during the informal proceedings of this case does not negate its knowledge of the issues therein. *See generally Duran v. Interport Maintenance Corp.*, ___ BRBS ___, BRB Nos. 89-1832, 90-926 (April 28, 1993).

In concluding that employer failed to file a timely request for Section 8(f) relief, the administrative law judge found certain medical reports and pleadings particularly persuasive. First, he cited Dr. Avery's September 16, 1986 report, wherein Dr. Avery indicated claimant had a permanent disability. Cl. Ex. 9 at 8. Further, he noted Dr. Pennington's reports dated April 21, 1989 and May 25, 1989, which indicate that Dr. Pennington released claimant from his care and claimant's condition reached maximum medical improvement. Emp. Ex. 10. The administrative law judge also relied on claimant's pleadings to establish that claimant raised permanency as an issue in this case as early as July 1989 in his request for an informal conference. Thereafter, claimant also indicated permanency as an issue in his claim for compensation and his pre-hearing statement which were submitted to the district director after the issuance of the memorandum of informal conference. The administrative law judge noted that these documents were sent to employer and that employer did not dispute such a finding. Therefore, the administrative law judge rationally found that these reports and pleadings were sufficient to place the permanency of claimant's disability in issue before the district director and to notify employer of said issue. *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); Decision and Order at 7. Consequently, the permanency of claimant's condition was at issue before the district director, and employer has not raised any persuasive reason why it could not have reasonably anticipated the liability of the Special Fund while the case was before the district director.[4] We therefore affirm the

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even if such notice was sufficient, it was untimely as it did not occur while the case was before the district director.

[4]We reject employer's analogy to *Brazeau v. Tacoma Boatbuilding Co.*, 24 BRBS 128 (1990), as the cases can be distinguished easily. In *Brazeau*, the administrative law judge concluded that permanency should have been an issue before the district director because claimant's condition reached maximum medical improvement prior to the informal conference, and employer should have raised Section 8(f) as an issue even though claimant did not raise permanency. Thus, the administrative law judge placed the burden of raising the permanency of claimant's disability as an issue on employer. *Brazeau*, 24 BRBS at 131. In the case presently before the Board, claimant clearly listed permanency as an issue before the district director and no burden to raise the issue was placed on employer by the administrative law judge.

administrative law judge's finding that Section 8(f)(3) bars employer's entitlement to relief from the Special Fund because employer's request for such relief was untimely. *See, e.g., Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT) (5th Cir. 1991), *aff'g* 24 BRBS 248 (1991); *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge