

PHILLIP HAYES )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 NEWPORT NEWS SHIPBUILDING AND )  
 DRY DOCK COMPANY )  
 ) DATE ISSUED: JUN 21, 2004  
 Self-Insured )  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) ORDER

Employer appeals the Decision and Order (2000-LHC-2937) of Administrative Law Judge Daniel A. Sarno, 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). Employer contends the administrative law judge erred in denying it Section 8(f) relief, 33 U.S.C. §908(f). The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to vacate the administrative law judge's decision and to remand the case for the entry of an order awarding compensation benefits to claimant. Employer responds that it has no objection to the Director's motion.

Claimant sustained a neck injury in the course of his employment with employer. At some point prior to the scheduled formal hearing, employer and claimant advised the administrative law judge that they had reached an agreement as to claimant's entitlement to compensation and that they were preparing stipulations for approval. Employer requested that its claim for Section 8(f) relief be adjudicated on the documentary evidence and the pleadings. The Director opposed employer's entitlement to Section 8(f) relief.

In his decision, the administrative law judge referenced the parties' apparent agreement as to claimant's entitlement to benefits, but did not incorporate the parties'

stipulations or otherwise award claimant any compensation.<sup>1</sup> The administrative law judge proceeded to address employer's Section 8(f) claim. He found that employer established that claimant had a manifest, pre-existing permanent partial disability, but that employer did not establish the contribution element.<sup>2</sup> Thus, he denied employer's claim for Section 8(f) relief. Employer appeals this denial, as well as the administrative law judge's denial of its motion to supplement the record based on more recent case law.<sup>3</sup>

For the reasons stated in *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999), we grant the Director's motion to vacate and remand. In *Gupton*, the Board, *inter alia*, held that without an underlying compensation order awarding 104 weeks of permanent disability and/or death benefits to claimant, the administrative law judge is precluded from addressing the applicability of Section 8(f). *See also Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). Moreover, without an indication as to the extent of claimant's partial disability, either economically or medically, the administrative law judge does not have an adequate evidentiary basis on which he can address the contribution element. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4<sup>th</sup> Cir. 1997).

---

<sup>1</sup> The administrative file before the Board does not contain any stipulations. The last correspondence addressing the stipulations states that there was a delay in reaching an agreement. *See* Letter from employer's counsel to the administrative law judge dated April 30, 2003.

<sup>2</sup> The administrative law judge stated that claimant filed a claim for permanent partial disability benefits. In addressing employer's entitlement to Section 8(f) relief, the administrative law judge found that employer did not establish that claimant's ultimate permanent partial disability is materially and substantially greater due to his pre-existing disability. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4<sup>th</sup> Cir. 1998).

<sup>3</sup> *E.g.*, *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4<sup>th</sup> Cir. 2003), and *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4<sup>th</sup> Cir. 2003).

Accordingly, the administrative law judge's Decision and Order denying employer relief pursuant to Section 8(f) is vacated, and the case is remanded to the administrative law judge for the entry of an award of benefits based on the stipulations of the parties and/or findings of fact following a hearing. *See* 33 U.S.C. §919(d); 20 C.F.R. §§702.331-702.351. Employer's appeal is dismissed; employer may file a new appeal once the administrative law judge issues a final compensation order. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge