BRB No. 01-0247

LAWRENCE E. DENNIS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICES,	)	DATE ISSUED: Nov. 7, 2001
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES, INCORPORATED	)	
	)	
Self-Insured Employer/Administrator-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Order Denying the District Director's Motion to Disallow Section 8(f) Relief Based on the "Absolute Defense" of Section 8(f)(3) of the Act and the Decision and Order Granting Section 8(f) Relief to the Employer and Denying the Director's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

James M. Mesnard (Seyfarth Shaw), Washington, D.C., for self-insured employer/administrator.

Kristin Dadey (Harold M. Radzely, Acting 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Denying the District Director's Motion to Disallow Section 8(f) Relief Based on the "Absolute Defense" of Section 8(f)(3) of the Act, and the Decision and Order Granting Section 8(f) Relief to the Employer and Denying the Director's Motion for Reconsideration (99-LHC-2097) 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his back on April 6, 1995, during the course of his employment as a mechanic. Employer voluntarily initiated compensation payments for temporary total disability. 33 U.S.C. § 908(b). On August 10, 1995, claimant underwent surgery to remove loose screws that had previously been inserted at L5 and S1. On April 17, 1999, employer terminated claimant's compensation for temporary total disability and commenced paying compensation for permanent partial disability, 33 U.S.C. § 908(c)(21). On April 19, 1999, claimant's counsel requested an informal conference before the district director to address the reinstatement of temporary total disability compensation. The informal conference scheduled for May 19, 1999, was canceled because the parties agreed that discussion at the district director level would be futile. Accordingly, on June 8, 1999, the claim was referred to the Office of Administrative Law Judges (OALJ) for a hearing. At no time while the back injury claim was before the district director did employer request relief under Section 8(f) of the Act, 33 U.S.C. §908(f). On October 6, 1999, employer filed an LS-18 pre-hearing statement in which it first raised the applicability of Section 8(f). On February 22, 2000, the Director filed a motion to dismiss, raising the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3), and contending that employer knew of the permanency of claimant's back condition before the case was transferred to the OALJ and failed to timely submit an application for Section 8(f) relief. At the formal hearing, claimant and employer stipulated that beginning on April 17, 1999, and continuing, claimant is capable of working four hours a day and earning $97.63 per week, and that he is entitled to compensation for permanent partial disability based on a weekly loss of wage-earning capacity of $376.89. The sole issue before the administrative law judge was employer's request for Section 8(f) relief.

In his July 14, 2000, Order denying the absolute defense of Section 8(f)(3), the administrative law judge found that whereas employer indicated that claimant's back condition reached permanency by commencing compensation payments for permanent partial disability in April 1999, claimant's May 1999 pre-hearing statement requested compensation for temporary total disability. The administrative law judge found that permanency, therefore, was "not clearly" at issue before the case was transferred to the OALJ, and that, as a result, Section 8(f)(3) does not bar employer's request for Section 8(f) relief. Order at 5. The administrative law judge granted the parties 30 days to submit additional exhibits and for the Director to review the merits of employer's Section 8(f) application. The Director filed a motion for reconsideration, in which he conceded that employer's application satisfies the criteria for Section 8(f) relief; however, the Director maintained that Section 8(f)(3) nonetheless bars an award of such relief. In his October 12, 2000, decision granting employer Section 8(f) relief, the administrative law judge summarily denied the Director's motion for reconsideration.

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. Employer responds, urging affirmance.

Section 8(f)(3) 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 that the Special Fund's liability would be at issue while the case was pending before the district director.[1] 33 U.S.C. §908(f)(3). The regulation implementing this provision, 20 C.F.R. §702.321, provides that an employer seeking relief under Section 8(f) must request the relief and file a fully documented application with the district director prior

[1]Section 8(f)(3) of the Act states:

> 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 (sic), shall be presented to the [district director] prior to the consideration of the claim by the [district director]. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, 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).

to referral of the claim for adjudication. If claimant's condition has not reached maximum medical improvement and no claim for permanency has been raised by the date of referral to 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 Fund. This defense is an affirmative defense which must be raised and pleaded by the Director. 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).

In this case, the Director timely raised the defense before the administrative law judge, and it is undisputed that employer did not file a Section 8(f) application with the district director. We agree with the Director that the administrative law judge's finding that the absolute bar does not apply in this case cannot be affirmed, as his rationale is not supported by the evidence and is not consistent with the regulation. The administrative law judge reasoned that permanency was not at issue prior to the transfer of the claim to the OALJ because claimant's LS-18 pre-hearing statement, filed on May 19, 1999, while the claim was pending before the district director, requested compensation for temporary total disability. The Director correctly argues that Section 702.321(b)(1) does not require that claimant raise a claim for permanent disability benefits to trigger employer's obligation to timely request Section8(f) relief. Rather, a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known or is an issue in the case. 20 C.F.R. §702.321(b)(1); *see also* *Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109(CRT) (5th Cir. 1992). Precisely on point here, the regulation states that an example of when employer must request Section 8(f) relief, "could be when benefits are first paid for permanent disability." 20 C.F.R. §702.321(b)(1). Employer began paying benefits in April 1999, while the case was pending before the district director. Accordingly, to avoid the absolute bar of Section 8(f)(3), employer was obligated to request Section 8(f) relief at that time. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 1245 n.1, 31 BRBS 215, 219 n.1(CRT) (4th Cir. 1998); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 268, 31 BRBS 119, 128(CRT) (4th Cir. 1997); *see also Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). Moreover, prior to the case's transfer to the OALJ, employer possessed medical evidence that claimant's back injury resulted in permanent impairment, as evidenced by the October 27, 1998, report of claimant's treating physician to employer's claims administrator stating that claimant's back condition had reached maximum medical improvement and delineating specific permanent work restrictions. EX 15, 22 at 38-40; *see Firth v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 75 (1999); *Rice v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 102 (1998). Employer thus had ample reason to know permanency was at issue in the case, and it has not demonstrated that it could not have reasonably anticipated the liability of the Special Fund while the case was

before the district director.[2] *See Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283, *modifying in pert. part on recon.* 32 BRBS 118 (1998). We therefore reverse the administrative law judge's finding that the Section 8(f)(3) bar is not applicable in this case, and we hold that employer was required to request Section 8(f) relief prior to the transfer of the case to the OALJ. As employer did not do so, the administrative law judge's award of Section 8(f) relief must be reversed.

Accordingly, the administrative law judge's Order Denying the District Director's Motion to Disallow Section 8(f) Relief Based on the "Absolute Defense" of Section 8(f)(3) of the Act, and the Decision and Order Granting Section 8(f) Relief to the Employer and Denying the Director's Motion for Reconsideration granting employer relief from continuing compensation liability pursuant to Section 8(f) of the Act are reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]We note that in its response brief employer makes no argument that it could not have reasonably anticipated the liability of the Special Fund while the claim was pending before the district director.