

BRB No. 07-0618A

S.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEW YORK CONTAINER TERMINAL	)	
	)	DATE ISSUED: 12/31/2007
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LTD	)	
	)	
Employer/Carrier-	)	
Petitioners	)	ORDER

Employer appeals the Decision and Order Upon Employer's Request for Modification (2006-LHC-00023) of Administrative Law Judge Robert D. Kaplan 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). Claimant has filed a motion to dismiss employer's appeal.

In 2004, claimant was awarded ongoing temporary total disability benefits commencing December 9, 2002, for a work-related back injury and resulting psychological injury. Employer's appeal of this award was dismissed due to employer's failure to file a Petition for Review and brief, but the administrative law judge's fee award was affirmed. [*S.B.*] v. *Howland Hook Container Terminals, Inc.*, BRB No. 05-0313 (Nov. 30, 2005).<sup>1</sup>

Employer subsequently filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that claimant had recovered from her injury and could return to her usual work. The administrative law judge granted employer's motion, finding that as of September 2, 2005, when she reached maximum medical improvement, claimant no longer had any physical or psychological condition that prevented her from

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<sup>1</sup> The administrative law judge changed the caption in the present case to reflect employer's name change to New York Container Terminal.

returning to her usual work. The administrative law judge therefore terminated claimant's temporary total disability benefits. The administrative law judge found that employer remains liable for medical treatment and physical therapy. The administrative law judge found that Section 8(f), 33 U.S.C. §908(f), is not applicable in this case, as claimant was not awarded any permanent disability benefits.

Both claimant and employer appealed this decision. By Order dated August 27, 2007, the Board ordered employer to show cause why its appeal should not be dismissed for failure to file a Petition for Review and brief. Employer responded on September 11, 2007, that it appeared claimant would be withdrawing her appeal and that, if so, employer also would withdraw its appeal. In the interim, claimant had filed a motion to withdraw her appeal, which the Board granted by Order dated September 24, 2007. [*S.B.*] v. *New York Container Terminal*, BRB No. 07-0618 (Sept. 24, 2007). Nevertheless, employer filed, on September 20, 2007, its Petition for Review and brief which the Board accepted in the September 24 Order. In its appeal, employer contends that if claimant obtains permanent disability benefits by virtue of her appeal, the case should be remanded to the administrative law judge for consideration of its claim for Section 8(f) relief.

We reject claimant's motion to dismiss employer's appeal on the ground that employer did not timely respond to the show cause order of August 27, 2007. Employer's response on September 11 was timely. Moreover, the Board exercised its discretion in subsequently accepting employer's Petition for Review and brief. 20 C.F.R. §802.211(d).

We grant claimant's motion to dismiss on the alternative ground that the issue raised by employer is not properly before the Board at this time. As claimant withdrew her appeal and as there has been no award of permanent disability benefits, any discussion of employer's entitlement to Section 8(f) relief is moot. 33 U.S.C. §908(f)(1); *see, e.g., Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989); *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985); *Nathenas v. Shrimpboat, Inc.*, 13 BRBS 34 (1980).

Accordingly, employer's appeal is dismissed.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge