BRB No. 92-2643

MICHAEL SESTICH	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
LONG BEACH CONTAINER TERMINAL	)	DATE ISSUED:
	)	
and	)	
	)	
CIGNA MUTUAL INSURANCE ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Jack Williams, Glendale, California, for employer/carrier.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol 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, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (91-LHC-2641) of Administrative Law Judge Samuel J. Smith granting relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), 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).

The private parties stipulated that claimant sustained a work-related injury to his back on December 30, 1988. However, the parties contested the issues of the nature and extent of claimant's disability. After the hearing was underway, employer agreed to pay claimant permanent partial disability compensation for the period from April 1, 1991 and continuing, and $7,500 in settlement of his entitlement to future medical benefits. The only issue remaining was employer's entitlement to relief from continuing compensation liability pursuant to Section 8(f).

The administrative law judge found that employer established that claimant's asthma and knee condition were pre-existing disabilities under Section 8(f), that these conditions were manifest to employer, and that they materially and substantially contributed to his permanent partial disability. Thus, the administrative law judge granted Section 8(f) relief based on these conditions. The administrative law judge also concluded that the evidence does not establish that claimant's prior back injuries were permanent partial disabilities.

On appeal, the Director contends that the administrative law judge erred in admitting evidence into the record without serving it on her or affording her notice of new issues. The Director contends she thus was deprived of the opportunity to raise the Section 8(f)(3), 33 U.S.C. §908(f)(3), bar with respect to pre-existing conditions which were not raised before the district director. Employer responds, urging affirmance of the administrative law judge's decision, alleging it was harmless error that the Director did not receive Dr. London's post-hearing report.

Section 8(f)(3) provides that an employer's request for Section 8(f) relief which is filed after September 28, 1984, such as the one in the instant case, 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). The 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 be an absolute defense to the liability of the Special Fund. 20 C.F.R. §702.321(b)(3). The regulation also states that the Section 8(f)(3) bar is an affirmative defense which must be raised and pleaded by the Director. *See generally Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990).

In the present case, employer submitted an application for Section 8(f) relief before the district director alleging that claimant suffered from a pre-existing back condition and asthma. This application was denied by the district director, inasmuch as the evidence submitted with the application failed to establish a permanent disability or to show that any permanent disability was manifest to employer. In addition, the district director denied the Section 8(f) application because

there were no medical reports submitted that addressed the contribution element pursuant to 20 C.F.R. §702.321(a)(1)(iv). *See* Decision and Order at 4-5.

The Director did not attend the hearing before the administrative law judge, but did submit a brief stating she opposed a grant of Section 8(f) relief for the reasons given by the district director. It is not disputed that employer did not serve on the Director the post-hearing evidence admitted into the record by the administrative law judge, which included a report by Dr. London dated July 28, 1992, that addressed the contribution of claimant's knee condition and asthma to his overall permanent partial disability.

In his decision, the administrative law judge considered testimony given by Dr. London at the hearing regarding the effect of claimant's pre-existing knee condition and asthma on his current permanent partial disability. This testimony was memorialized by Dr. London in a post-hearing report dated July 28, 1992. The administrative law judge concluded that in light of claimant's medical records and Dr. London's credible, competent, and uncontradicted testimony, claimant's permanent partial disability is materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of his pre-existing knee and asthmatic conditions.

The Director contends on appeal that the administrative law judge erred in relying on the report admitted after the hearing, inasmuch as counsel for the Director was not afforded notice of the new evidence. The Director requests that the case be remanded to the administrative law judge and that the Director be served a copy of all the exhibits submitted by employer, as well as a transcript of the original hearing proceedings. At that time, the Director requests the opportunity to rebut any evidence or cross-examine any witnesses relied on by employer, and to raise the Section 8(f)(3) affirmative defense if necessary.

The regulation at 20 C.F.R. §702.336(b) provides that parties must be notified of and given the opportunity to present argument and evidence on a new issue which arises during the course of a hearing. Where such notice is not provided, and a decision and order issues, the decision must be vacated and the case remanded. *See generally Scott v. S.E.L. Maduro, Inc.*, 22 BRBS 259 (1989); *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988). In the present case, the Director did not have service of the hearing transcript or the post-hearing evidence submitted by employer, Employer's Exhibits 1-19, including the report by Dr. London relied on by the administrative law judge.[1] Thus, the Director did not have proper notice that employer had

[1]The only evidence served on the Director post-hearing was the reports submitted to the district director in support of the Section 8(f) application. It appears from the record that this included the report of Dr. London dated March 6, 1989, which notes claimant's knee surgeries in his past medical history, but does not address claimant's asthmatic condition. Emp. Exs. 2, 19. In addition, the Section 8(f) application included a report from Dr. London dated April 9, 1991, which does not provide an opinion regarding the contribution of any of claimant's previous injuries or conditions to his present disability. Emp. Ex. 19. We note that the Director was served with Employer's Exhibits

requested Section 8(f) relief based on claimant's knee condition as an alleged pre-existing permanent partial disability, and did not have the opportunity to raise the Section 8(f)(3) affirmative defense with respect to this condition.

Inasmuch as the Director did not have notice of the new issue that arose during the course of the hearing, we vacate the administrative law judge's grant of Section 8(f) relief based on claimant's pre-existing knee condition and remand the case to the administrative law judge to consider the issue further. *Coats*, 21 BRBS at 81. On remand, the administrative law judge must allow the Director to raise the applicability of the Section 8(f)(3) bar, and the opportunity challenge the award of Section 8(f) on the merits. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994).

The administrative law judge also found that employer established entitlement to Section 8(f) relief based on claimant's pre-existing asthma. This issue was properly raised by the Section 8(f) application presented to the district director, but was not documented by the supporting physician's reports at that time. The administrative law judge relied upon the hearing testimony of Dr. London and the medical records that were submitted by employer after the hearing, Emp. Exs. 1-19, to find that employer established that the asthma met the required elements of Section 8(f) relief.

While the Board has held that the Director has standing to appeal a grant of Section 8(f) relief regardless of her participation below, *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984), the Board also has held that the Director may not raise new issues requiring additional fact-finding. *Outland v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 552 (1981). In the present case, the Director had the opportunity to participate at the hearing and chose not to do so, although she knew employer was raising asthma as a pre-existing permanent partial disability. Therefore, we reject the Director's request on remand to cross-examine the witnesses relied upon by employer at the hearing to establish Section 8(f) relief based on claimant's pre-existing asthma. However, as the Director was not served with the post-hearing evidence admitted by the administrative law judge on this issue, or given an opportunity to rebut this evidence, on remand the Director must be given the opportunity to submit rebuttal evidence on the issue of whether claimant's asthma meets the required elements for relief under Section 8(f).

In addition, if on remand the administrative law judge finds that the Section 8(f)(3) bar is raised with respect to claimant's knee condition, the administrative law judge must consider whether claimant's asthma alone meets the required elements for Section 8(f) relief. *Dillingham Corp. v. Massey*, 505 F.2d 1126 (9th Cir. 1974); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

Accordingly, the Decision and Order of the administrative law judge granting employer relief from continuing compensation liability pursuant to Section 8(f) is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

1-51 prior to the hearing, but that these were withdrawn from the record midway through the hearing, and therefore cannot be reviewed to determine whether they may have adequately given the Director notice of the new issue.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge