BRB Nos. 91-1351
and 91-1351A

CHARLES H. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARBORSIDE REFRIGERATED, INCORPORATED	)	
	)	
and	)	
	)	
FLORIDA INSURANCE GUARANTY ASSOCIATION	)	
	)	DATE ISSUED:_____
Employer/Carrier-Respondents Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Cross-Petitioner	)	on RECONSIDERATION

Appeal of the Decision and Order of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (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: DOLDER, Acting Chief Administrative Appeals Judge, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), has filed a timely motion for reconsideration of the Board's decision in this case, *Moore v. Harborside Refrigerated, Inc.*, BRB Nos. 91-1351/A (May 27, 1993) (unpublished), wherein the Board reversed the administrative law judge's denial of benefits and his order instructing claimant to reimburse employer. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Neither claimant nor employer has responded. We hereby grant the Director's motion for reconsideration and the relief requested in part.

In this case, the parties stipulated that on June 15, 1983, claimant slipped and fell while off-loading a crate of shrimp from a ship, injuring his lower back.[1] Decision and Order at 4; Tr. at 74. Employer paid claimant temporary total disability benefits from June 25, 1983 through January 6, 1988 at a rate of $304.02 per week and permanent partial disability benefits from January 7, 1988 through April 13, 1988 at a rate of $117.39 per week. Decision and Order at 3. Upon the termination of his benefits, claimant filed a claim for reinstatement of compensation.

The administrative law judge found that claimant is entitled to temporary total disability benefits from June 15, 1983 through February 27, 1986 and to permanent partial disability benefits for a 20 percent impairment of the whole person from the date of maximum medical improvement and continuing. Decision and Order at 15-16; *see also* 33 U.S.C. §908(b), (c)(21) (1988). Although he determined claimant is entitled to disability compensation, the administrative law judge concluded that because claimant "deliberately withheld his [post-injury] employment information from the Employer/Carrier in an effort to prolong his temporary total disability payments[,]" claimant "has committed fraud against the Employer/Carrier and will be responsible for remuneration . . . for any and all temporary total disability payments received after June 19, 1983, the date he returned to work at Del Monte as a longshoreman." Decision and Order at 18. In light of his conclusion that claimant committed fraud, the administrative law judge referred the case to the United States Attorney, pursuant to Section 31(a), 33 U.S.C. §931(a) (1988), and he determined that claimant is not entitled to continuing permanent partial disability benefits. He also denied counsel an attorney's fee. Decision and Order at 19. Claimant and the Director appealed the decision to the Board.

The Board reversed the administrative law judge's denial of benefits and order for remuneration because the Act does not provide for reimbursement of payments, and it remanded the case for the administrative law judge to determine the periods during which claimant is entitled to temporary total and temporary partial disability compensation and whether he is entitled to permanent partial disability benefits in accordance with Sections 8(c)(21) and 8(h), 33 U.S.C. §908(c)(21), (h).[2] *Moore*, slip op. at 5. Further, the Board stated that once the administrative law

[1]Doctors diagnosed lumbar strain/sprain with a mild disc bulge. Cl. Exs. 1, 3; Decision and Order at 4-11.

[2]There is a discrepancy in the administrative law judge's decision. Although he accepted the

judge makes these determinations, he may suspend payments under Section 8(j), 33 U.S.C. §908(j) (1988), for specific periods if he finds that claimant misrepresented his earnings, and that employer is entitled to a credit for any overpayment pursuant to Section 14(j), 33 U.S.C. §914(j). *Moore*, slip op. at 5. Additionally, the Board affirmed the administrative law judge's findings regarding claimant's post-injury employment, and it reversed the administrative law judge's denial of an attorney's fee. *Id.* at 7.

In her Motion for Reconsideration, the Director requests clarification of that portion of the Board's decision pertaining to Section 8(j). Specifically, the Director contends that Section 8(j) was not in effect during part of the period of claimant's alleged misrepresentation, that the reporting requirements of that section are not mandatory, and that the administrative law judge is not authorized to determine the schedule of suspended payments. Neither claimant nor employer has responded to the Director's motion.

Initially, the Director contends that, as Section 8(j) was enacted on September 28, 1984 and became effective 90 days later, there can be no forfeiture of benefits prior to the effective date. We agree. Section 8(h) of the 1984 Amendments to the Act added Section 8(j) to the Act, and Section 28(e)(2) of the Amendments specifically states that amendments made by section 8(h) "shall be effective 90 days after the date of enactment[.]" Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, §§8(h), 28(e)(2), 98 Stat. 1639, 1646-1647, 1655 (1984). Therefore, Section 8(j) of the Act became effective on December 27, 1984.

As the Supreme Court of the United States has stated on many occasions, there is a judicial presumption that legislation is not to be applied retroactively unless there is a clear statement in the statute to the contrary. Thus, the judicial preference is for prospective, as opposed to retroactive, application. *See Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S.Ct. 1510 (1994); *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S.Ct. 1483 (1994);[3] *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141 (1944). In *Landgraf*, Justice Stevens, writing for the majority, noted that this principle is "older than our Republic" and, in fact, originated in English common law. *See Landgraf*, ___ U.S. at ___, 114 S.Ct. at 1497 n.17. In his concurring opinion, Justice Scalia referred to it as a judicial presumption "of great antiquity[.]" *See Landgraf*, ___ U.S. at ___, 114 S.Ct. at 1522; *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.) (applying the rule against retroactivity in interpreting the 1972 Amendments to the Act), *cert. denied*, 429 U.S. 820 (1976). Neither Section 8(j) of the Act nor Section 8(h) of the 1984 Amendments contains language which clearly mandates retroactive application of Section 8(j). Therefore, we hold that the

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parties' stipulation that claimant's condition reached maximum medical improvement on July 12, 1984, he determined that claimant is entitled to temporary total disability benefits until February 27, 1986. The Board instructed him to resolve this discrepancy on remand. *Moore*, slip op. at 5 n.6.

[3]*Rivers* and *Landgraf* were companion cases. In a separate opinion, Justice Scalia, joined by Justices Kennedy and Thomas, concurred in the judgments therein. *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S.Ct. 1522 (1994).

provisions of Section 8(j) of the Act are to be applied prospectively from the effective date of the amendment. In this case, claimant began receiving temporary total disability benefits on June 25, 1983. Because Section 8(j) became effective on December 27, 1984 and there can be no forfeiture of benefits prior to that date, we hold, as a matter of law, that all benefits claimant received prior to December 27, 1984 are not subject to forfeiture.[4]

Next, the Director contends that the Section 8(j) duty to report earnings is not mandatory. Specifically, she argues that claimant need not have reported his post-injury income unless employer solicited the information. In its previous decision, the Board noted that there is no basis in the Act for allowing an employer to be reimbursed for benefits mistakenly paid and that the administrative law judge failed to properly apply the statutory provisions to this case. *Moore*, slip op. at 3; *see also Cooper v. Ceres Gulf*, 24 BRBS 33 (1990). The Board then discussed the provisions in the Act which enable an employer to recoup its money by credit rather than by reimbursement. *Moore*, slip op. at 3-4; *see also* 33 U.S.C. §§908(j), 914(j). In discussing Section 8(j), the Board stated:

> Section 8(j) of the Act provides that *a claimant must report earnings* from employment or self-employment. If the claimant fails to report the earnings or knowingly understates them, he "forfeits his right to compensation with respect to any period" during which he was required to file such a report. 33 U.S.C. §908(j)(1), (2) (1988). Further, employer can recover such compensation "by a deduction from the compensation payable" in the future. 33 U.S.C. §908(j)(3) (1988).

Moore, slip op. at 4 (footnote omitted) (emphasis added).

[4]Although we conclude that Section 8(j) cannot be applied retroactively, our conclusion does not affect claimant's potential liability for misrepresentation, as it is a crime to use false or misleading statements to obtain benefits under the Act, punishable by fine, imprisonment, or both. 33 U.S.C. §§931 (1982), 931(a) (1988). Prior to the 1984 Amendments, such misrepresentation constituted a misdemeanor; as of September 28, 1984, it constituted a felony. *See id.*; Pub. L. 98-426, §§19, 28(e)(1), 98 Stat. at 1650, 1655. Thus, our opinion herein does not affect the administrative law judge's decision to refer the case to the United States Attorney's office for investigation pursuant to Section 31.

Section 8(j)(1), (2) of the Act provides:

(1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who--

(A) fails to report the employee's earnings under paragraph (1) *when requested*, or

(B) knowingly and willfully omits or understates any part of such earnings,

and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

33 U.S.C. §908(j)(1), (2) (1988) (emphasis added). When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989); *see also Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 183 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. December 9, 1993). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A review of Section 8(j) and its implementing regulations, 20 C.F.R. §§702.285-702.286, supports the Director's assertion that a claimant's duty to report his post-injury earnings is not mandatory unless the information is first requested by his employer or the Director. Section 702.285(a) of the regulations states in pertinent part:

(a) An employer, carrier or the Director . . . *may require an employee* to whom it is paying compensation to submit a report on earnings from employment or self-employment.

20 C.F.R. §702.285(a) (emphasis added). Further, Section 702.286(b) provides:

> (b) Any employer or carrier who believes that a violation . . . of this section has occurred may file a charge with the district director.[5] The allegation shall be accompanied by evidence which includes a copy of the report, *with proof of service requesting the information* from the employee and clearly stating the dates for which the employee was required to report income.

20 C.F.R. §702.286(b) (emphasis added). Although the Board and the courts have not addressed previously whether Section 8(j) automatically obliges a claimant to report his post-injury income,[6] we agree with the Director's position that the information must first be requested before a claimant has a duty to report his earnings. Therefore, we amend that portion of the Board's decision which indicates that Section 8(j) imposes a mandatory duty on claimants to report their post-injury earnings, and we hold that benefits cannot be forfeited under Section 8(j) unless the party seeking forfeiture establishes that it requested information concerning a claimant's post-injury income and that the claimant either failed to respond or responded falsely to the request. On remand in this case, if the administrative law judge determines that employer made the requisite requests and claimant failed to report or falsely reported his income, then benefits claimant received after December 27, 1984 may be subject to forfeiture.[7] *See* 20 C.F.R. §702.286(a).

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[5]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute. The term "district director" will be used in this decision except when the statute is quoted.

[6]*See Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992); *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, 112 S.Ct. 3056 (1992) (The United States Courts of Appeals for the Fifth and Ninth Circuits discussed Section 8(j) as it relates to an employer's inability to recoup mistakenly paid benefits from a claimant); *Zepeda v. National Steel & Shipbuilding Co.*, 24 BRBS 163 (1991) (The Board held that an administrative law judge did not abuse his discretion by determining whether a claimant forfeited benefits due to his violation of the provisions of Section 8(j)); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988) (The Board held that Section 8(j) applies only to disabled employees and not to claimants in death benefits cases).

[7]As the parties did not address this issue at the hearing, the administrative law judge must re-open the record for the submission of evidence relevant to the Section 8(j) issue. 33 U.S.C. §908(j) (1988); 20 C.F.R. §§702.285-702.286.

Finally, the Director contends the Board erred in permitting the administrative law judge to suspend payments of compensation and credit employer for payments made during claimant's alleged periods of misrepresentation.[8] The Director argues that the Act authorizes the district director, and not the administrative law judge, to take such action. Although the district director has the authority to determine the schedule of suspended payments, we disagree with the Director's contention that the Board erroneously granted that authority to the administrative law judge.

Section 8(j)(3) specifically provides:

> (3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

33 U.S.C. §908(j)(3) (1988). Additionally, Section 702.286(b) of the regulations states that an employer who is suspicious of a violation of the reporting requirements "may file a charge with the district director[,]" and:

> Where the district director finds the evidence sufficient to support the charge he or she shall convene an informal conference as described in [the general adjudication procedures] and shall issue a compensation order affirming or denying the charge and setting forth the amount of compensation for the specified period.

20 C.F.R. §702.286(b). The regulation further indicates that an employer can recover the forfeited compensation by deducting from compensation payable "on such schedule as determined by the district director." 20 C.F.R. §702.286(c).

Contrary to the Director's argument, however, the Board did not err in permitting the administrative law judge to suspend payments of compensation if he deems such action necessary in this case, as the district director does not have the authority to adjudicate the question of whether benefits should be suspended. Section 702.286(b) of the regulations specifically grants that duty to the administrative law judge in the event there is a disagreement after an informal conference:

> If there is a conflict over any issue related to this matter any party may request a formal hearing before an Administrative Law Judge. . . .

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[8]In its decision, the Board stated:

> Once the administrative law judge makes the relevant findings in determining claimant's entitlement to benefits, he may suspend payments for specific periods based on claimant's misrepresentation of his earnings and award employer a credit for its continuing compensation liability against any overpayment of temporary total disability benefits.

Moore, slip op. at 5.

20 C.F.R. §702.286(b). Further, Section 702.286(c) limits the scope of the district director's authority; therefore, his discretion extends only "to rescheduling repayment by crediting future compensation and not to whether and in what amounts compensation is forfeited." 20 C.F.R. §702.286(c).

In this case, the Board stated that the administrative law judge may suspend payments and award employer a credit if he determined that claimant violated the conditions of Section 8(j). In order to clarify the Board's decision, we hold that if, on remand, the administrative law judge determines that claimant is entitled to benefits after December 27, 1984, but that those benefits should be suspended because of claimant's misrepresentation of earnings, then the administrative law judge must remand the case for the district director to consider claimant's financial situation and to establish the forfeiture schedule.[9] 33 U.S.C. §908(j)(3) (1988); 20 C.F.R. §702.286(c).

Accordingly, the Director's motion for reconsideration is granted, and the relief requested is granted in part. Consequently, that portion of the Board's previous decision which pertains to Section 8(j) is modified, and the case is remanded for further consideration in accordance with this decision. In all other respects, the Board's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[9]To establish the schedule, the district director must "consider the employee's essential expenses for living [and] income from whatever source. . . ." 20 C.F.R. §702.286(c).