BRB Nos. 99-920
and 99-920A

DOUGLAS LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUNNEN CRANE SERVICE, INCORPORATED	)	DATE ISSUED: June 1, 2000
	)	
	)	
Employer-Petitioner Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order on Remand and Order Concerning Motions for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

William D. Hochberg, Edmonds, Washington, for claimant.

Russell R. Williams and Anthony J. Gaspich (Gaspich & Williams PLLC), Seattle, Washington, for employer.

Kristin Dadey (Henry L. Solano, 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, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand and the Order Concerning Motions for Reconsideration (94-LHC-3070) of Administrative Law Judge Paul A. Mapes 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). 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).

This case is before the Board for the second time. To briefly recapitulate the facts, claimant worked as a crane operator and oiler for employer in a variety of locations since the early 1970's. Claimant injured his left knee and upper back on August 26, 1993, while operating a crane in the Port of Tacoma, moving heavy machinery. Claimant has not returned to work since this injury and sought permanent total disability benefits under the Act.

In her Decision and Order, Administrative Law Judge Christine McKenna denied the claim, finding that claimant was not an employee covered under Section 2(3) of the Act, 33 U.S.C. §902(3), based on the work he was performing at the time of the injury, because the unloading process had been completed by the time he started working and, thus, the goods moved by employer's crane had left the stream of maritime commerce. The administrative law judge also determined that claimant's overall work duties did not involve traditional maritime work, and that, even assuming that claimant did engage in such activities, they were at best episodic and incidental to his regular employment as a land-based crane operator.

Claimant appealed this decision. On appeal, the Board agreed with claimant that the administrative law judge's determination that claimant was not engaged in covered employment at the time of the injury could not be affirmed, as it rested on findings relevant to the discredited "point of rest" theory rejected by the United States Supreme Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), and is contrary to case precedent which recognizes that coverage under the Act extends to land-based workers who, although not actually unloading vessels, are involved in intermediate steps of moving cargo between ship and land transportation. *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34, 36-37 (1997). The Board also held that in addition to claimant's performance of maritime work at the time of injury, the administrative law judge's findings establish that claimant was subject to maritime assignments and spent "some of his time" in maritime work which was neither "discretionary" nor "extraordinary." *Id.*, 31 BRBS at 40. Thus, the Board reversed the administrative law judge's findings that claimant is not an employee covered under the Act based on the overall nature of his work duties and that

employer is not a maritime employer, and remanded the case to the administrative law judge for consideration of the remaining issues.

On remand, the case was assigned to Administrative Law Judge Paul A. Mapes (the administrative law judge) as Judge McKenna was no longer with the Department of Labor. In his decision, the administrative law judge found that claimant established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his pre-existing degenerative cervical spine and left knee conditions were aggravated by his work injury, and that rebuttal of this presumption was not established. The administrative law judge found that claimant cannot return to his former duties, but that employer's offer of a position as a yard assistant modified to accommodate claimant's restrictions establishes the availability of suitable alternate employment. Inasmuch as the administrative law judge found that claimant's cervical impairment alone would have caused his entire loss of earning capacity, the administrative law judge found that claimant is entitled to concurrent awards under Section 8(c)(2), 33 U.S.C. §908(c)(2), for his 20 percent knee impairment, and Section 8(c)(21), 33 U.S.C. §908(c)(21), for the loss in wage-earning capacity due to the cervical impairment. The administrative law judge also ordered that reimbursement for medical expenses should be made directly to the Washington Department of Labor and Industries and not indirectly through the claimant. *See Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).

In reviewing employer's application for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f) , the administrative law judge found that employer established that claimant had a pre-existing permanent partial disability, namely degenerative joint disease in both his left knee and cervical spine, and that this condition was manifest to employer. The administrative law judge also found that the degenerative condition made claimant's disability materially and substantially worse than the disability resulting from the work injury. Thus, Section 8(f) relief was granted on the Section 8(c)(21) award after 104 weeks from March 29, 1995.

The Director filed a motion for reconsideration with the administrative law judge requesting the adjustment of claimant's compensation rate from $738.30 to the maximum allowable rate at the time of the injury, $721.14; this motion was joined by employer. The Director also filed a second motion for reconsideration, asserting that employer was not in compliance with the requirements of Section 32(a) of the Act, 33 U.S.C. §932(a), requiring insurance coverage at the time of claimant's injury, and, thus, pursuant to Section 8(f)(2)(A), 33 U.S.C. §908(f)(2)(A), it is not entitled to Section 8(f) relief.[1]

[1]The administrative law judge noted that the Director's second motion for reconsideration was not filed within ten days of the filing of the Decision and Order, but found that since it was filed while the first reconsideration was pending, thus suspending the

In his decision on reconsideration, the administrative law judge adjusted the compensation rate in accordance with the Director's motion. However, the administrative law judge rejected the Director's request to find employer's application for Section 8(f) relief barred by Section 8(f)(2)(A). The administrative law judge found that the Director did not raise this issue in a timely manner, as the Director was aware since at least 1995 that Section 8(f) was at issue, and as the Director did not offer any explanation for his delay other than that it was an "oversight."

On appeal, employer contends that the Board erred in reversing Judge McKenna's finding that claimant is not a covered employee. Claimant responds, urging affirmance of this issue as it was previously resolved and thus is the law of the case. The Director also appeals, contending that the administrative law judge erred in rejecting his motion for reconsideration as employer was not prejudiced by the late submission of his argument concerning Section 8(f)(2)(A). The Director contends that to permit employer the benefit of Section 8(f) relief in this case is to contravene the plain language of the statute. Employer responds, urging affirmance of the administrative law judge's denial of the Director's motion, and asserting that since it was insured by the time the Special Fund assumed liability for claimant's benefits, Section 8(f)(2)(A) is not applicable. The Director replies to this contention, maintaining that the insurance status of employer at the time of the claimant's injury dictates the applicability of Section 8(f)(2)(A).

Employer urges the Board to reinstate Judge McKenna's finding that claimant was not a covered employee pursuant to Section 2(3), and thus is not entitled to benefits under the Act. The Board thoroughly considered and addressed employer's contentions in this regard in its previous decision, and employer has raised no basis for the Board's departing from the law of the case doctrine. Employer's contention therefore is rejected. *Ricks v. Temporary Employment Services*, 33 BRBS 81 (1999); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

In his appeal, the Director contends that the administrative law judge erred in failing to find employer's application for Section 8(f) relief barred due to its non-compliance with Section 32(a) of the Act. *See* 33 U.S.C. §908(f)(2)(A). Section 32(a) provides that every employer shall secure the payment of compensation under the Act with a company authorized to insure workmen's compensation. Alternatively, an employer may be

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time for appeal to the Board under 20 C.F.R. §802.206(a), no purpose was served by finding the motion untimely.

designated a self-insured employer by the Secretary. *See* 33 U.S.C. §932(a). In this case, it is undisputed that employer was not insured for claims under the Act at the time of claimant's injury in August 1993, but obtained such insurance in February 1995. *See* Tr. at 135-146. Section 8(f)(2)(A) provides that if employer establishes the requirements of Section 8(f), after the period of 104 weeks, claimant's benefits will be paid by the Special Fund, "except that the special fund *shall not* assume responsibility with respect to such benefits (and such payments shall not be subject to cessation) in the case of any employer who fails to comply with section 932(a) of this title." 33 U.S.C. §908(f)(2)(A) (emphasis added). The implementing regulation states that relief under Section 8(f) is not available to an employer who fails to comply with Section 32(a). 20 C.F.R. §702.321(b)(3).

In denying the Director's motion to address Section 8(f)(2)(A) for the first time on reconsideration, the administrative law judge noted that the Board has repeatedly held that when a petitioning party fails to exercise due diligence, an administrative law judge has the discretion to deny the party's request to receive new evidence or consider new issues. The administrative law judge also stated that the only explanation given by the Director for his failure to raise this issue at an earlier time was the assertion that there was an "oversight," which he interpreted as representing a lack of diligence on the Director's part. The administrative law judge considered the fact that refusal to address this issue would mean that the employer would be granted a benefit to which it would otherwise not be entitled. However, the administrative law judge found that this consideration was outweighed by the need for serious consequences to result from a party's failure to exercise due diligence in complying with procedural requirements. Thus, the administrative law judge declined to find employer's entitlement to Section 8(f) relief barred by Section 8(f)(2)(A).[2]

[2]The administrative law judge also considered the Director's request in terms of Section 22, 33 U.S.C. §922, and concluded that it would be improper to invoke Section 22 for the purpose of allowing the Director to submit evidence and arguments that should have been offered at an earlier stage in the proceeding. In addition, the administrative law judge summarily rejected employer's response that it is entitled to Section 8(f) relief because it became insured in 1995. The administrative law judge found the date of injury controlling on this issue. *See* discussion, *infra*.

We reverse the administrative law judge's finding that the Director was precluded from raising the applicability of Section 8(f)(2)(A) by way of a motion for reconsideration in this case. Section 8(f)(2)(A) states that the Special Fund *shall not* be responsible for benefits pursuant to Section 8(f) if the employer fails to comply with Section 32(a). This language is not discretionary, but is mandatory. In another section of the Act with similar mandatory language, Section 14(e), 33 U.S.C. §914(e),[3] the Board held the issue of this section's applicability may be raised at any time, even on appeal in the first instance, as the assessment of additional compensation under Section 14(e) is mandatory when the facts so warrant. *See Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981); *see also Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981); *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *aff'd in pert. part sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979).

In addressing another case in which an issue was not raised in a timely manner, *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds* *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999), the Board had previously vacated an administrative law judge's findings regarding situs and the timeliness of the claim and remanded the case for further consideration. On remand, the administrative law judge also addressed for the first time the issue of responsible carrier. When challenged on appeal, the Board held that the administrative law judge properly addressed the responsible carrier issue although first raised on remand, as it is an issue which is fundamental to the administration of justice. *Blanding*, 32 BRBS at 177. Similarly, in *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), the Board rejected the claimant's contention that the post-hearing submission of the Director's affirmative defense that claimant failed to cooperate with the Office of Workers' Compensation Programs' vocational rehabilitation efforts denied him due process as the failure to cooperate with the Department of Labor is *per se* raised as an issue whenever termination of a vocational rehabilitation plan is contested by an employee.

[3]Section 14(e) provides that "[i]f any installment of compensation payable without an award is not paid within fourteen days after it becomes due . . . there *shall* be added to such unpaid installment an amount equal to 10 per centum thereof . . . ." 33 U.S.C. §914(e)(emphasis added).

Section 8(f)(2)(A) and its implementing regulation, Section 702.321(b)(3), state the prohibition against relief under Section 8(f) if employer fails to comply with Section 32(a) as a requirement for relief rather than as an affirmative defense to be raised by the Fund, as is the absolute defense of Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3).[4] While Section 8(f)(3) also contains mandatory language in stating that a request for Section 8(f) relief "shall" be presented to the district director in the first instance, that section goes on to state that the failure to do so is an "absolute defense" to liability unless other requirements are met, and its implementing regulation clarifies that the bar imposed therein is an affirmative defense. 20 C.F.R. §702.321(b)(3). Section 702.321(b)(3) states "[t]his defense [failure to file an application with the district director] is an affirmative defense which must be raised and pleaded by the Director." By contrast, Section 8(f)(2)(A) states simply that the Fund "shall not" assume responsibility for benefits due from an employer who has not complied with Section 32(a), and the regulation is equally clear, stating that "[r]elief under Section 8(f) *is not* available to an employer who fails to comply with section 32(a) of the Act . . . ." 20

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[4]Section 8(f)(3) 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 deputy commissioner prior to the consideration of the claim by the deputy commissioner. 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.

C.F.R. §702.321(b)(3)(emphasis added). Given the mandatory nature of Section 8(f)(2)(A), the difference in the regulatory language implementing Sections 8(f)(2)(A) and 8(f)(3),[5] and the case law discussing when the issue of a Section 14(e) assessment can be raised, we hold that the applicability of Section 8(f)(2)(A) is an issue which may be raised at any time. Thus, the Director was permitted to raise it for the first time in a motion for reconsideration before the administrative law judge, even if his doing so was the result of a lack of diligence in presenting his case. This holding is bolstered by the limited legislative history of Section 8(f)(2), which states only that an employer is "precluded from realizing a benefit by avoiding the insurability requirements of the Act." H.R. Conf. Rep. 98-1027 (Sept. 14, 1984), *reprinted in* 1984 U.S.C.C.A.N. 2781. The administrative law judge's finding to the contrary therefore is reversed.

[5]Both the provision of Section 8(f)(2)(A) at issue here and Section 8(f)(3) were added to the Act by the 1984 Amendments.

We further hold that as it is uncontested that employer was not insured as required by Section 32(a) of the Act at the time of claimant's injury, Section 8(f)(2)(A) bars its entitlement to Section 8(f) relief. In so holding, we reject employer's contention in response that Section 8(f)(2)(A) is not applicable because it was insured by February 1995, prior to the time the Special Fund assumed liability, and we agree with the Director that the insurance coverage at the time of the injury controls this issue. The Director contends that, pursuant to the plain language of Section 44(c)(2) of the Act, 33 U.S.C. §944(c)(2),[6] only disability payments made by an insured employer are taken into account in the assessment formula of

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[6]This section states:

(c) Payments into such fund shall be made as follows:

* * *

(2) At the beginning of each calendar year the Secretary shall estimate the probable expenses of the fund during that calendar year and the amount of payments required (and the schedule therefor) to maintain adequate reserves in the fund. Each *carrier and self-insurer* shall make payments into the fund on a prorated assessment by the Secretary determined by--

(A) computing the ratio (expressed as a percent) of (i) the *carrier's or self-insured's* workers' compensation payments under this chapter during the preceding calendar year, to (ii) the total of such payments by all carriers and self-insureds under this chapter during such year;

(B) computing the ratio (expressed as a percent) of (i) the payments under section 908(f) of this title during the preceding calendar year *which are attributable to the carrier or self-insured*, to (ii) the total of such payments during such year attributable to all carriers and self-insureds;

(C) dividing the sum of the percentages computed under subparagraphs (A) and (B) for the carrier or self-insured by two; and

(D) multiplying the percent computed under subparagraph (C) by such probable expenses of the fund (as determined under the first sentence of this paragraph).

33 U.S.C. §944(c)(2) (emphasis added).

Section 44. Thus, the Director asserts that as employer was not insured for the benefits it owed to claimant, these payments were not included in employer's assessment pursuant to Section 44. The Director contends that permitting an award of Section 8(f) relief merely because employer obtained insurance prior to the time the Special Fund was to assume liability allows employer to doubly benefit by its uninsured status, first by not having its

disability payments accounted for in the Section 44 assessment formula, and second, by being relieved of liability for further payments to claimant.[7]

As the Director's interpretation of Section 44 is supported by the plain language of the Act, and as the Director is the administrator of the Special Fund, we defer to his interpretation of Section 44 as taking into account only the payments made by an insured employer.[8] *See Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993). Thus, in order to avoid employer's benefitting from its uninsured status, which would be contrary to the intent of Congress, the insured status of the employer must be determined with reference to the time of the claimant's injury. As it is uncontested that employer was not insured at the time of claimant's injury, Section 8(f)(2)(A) bars employer's entitlement to Section 8(f) relief as a matter of law. The administrative law judge's grant of Section 8(f) relief to employer therefore is vacated.

Accordingly, the administrative law judge's Order Concerning Motions for Reconsideration rejecting the Director's motion to strike the grant of Section 8(f) relief is reversed, and the award of Section 8(f) relief is vacated. Employer is liable for all benefits due claimant. The administrative law judge's Decision and Order on Remand and Order Concerning Motions for Reconsideration are affirmed in all other respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

[7]It is not stated in the record whether the insurance coverage employer did obtain in 1995 covers claimant's disability, which commenced at the time of injury in August 1993.

[8]The Director also notes that failure to properly insure compensation payments is a federal crime under Section 38 of the Act, 33 U.S.C. §938, indicating the seriousness with which Congress perceived the need to secure payment of compensation. The Director contends that to allow employer to enjoy the benefit of Section 8(f) relief without compliance with Section 32(a) frustrates the legislative intent of the section.

Administrative Appeals Judge