

BRB Nos. 04-0226
and 04-0226A

WILLIAM FERRO)	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
HOLT CARGO SYSTEMS)	
)	
and)	
)	
NATIONAL UNION FIRE INSURANCE)	DATE ISSUED: <u>May 28, 2004</u>
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	
Cross-Respondent)	ORDER

The Director, Office of Workers' Compensation Programs (the Director) appeals the Decision and Order Awarding Special Fund Relief (2000-LHC-2838) of Administrative Law Judge Ralph A. Romano 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). Employer appeals the interlocutory Order of Remand of Administrative Law Judge Ainsworth Brown. The Director has filed a motion to summarily vacate the administrative law judge's "consent order" dated September 11, 2003, and the Decision and Order awarding Section 8(f) relief to employer. Employer responds that the Director's motion should be denied.¹ Employer has filed a motion to

¹ We accept employer's response to the Director's motion, which was accompanied by a motion to accept it out of time. 20 C.F.R. §§802.217(e), 802.219(e).

dismiss the Director's appeal. The Director responds, contending that employer's motion is without basis.

We deny employer's motion to dismiss the Director's appeal. By Order dated January 23, 2004, the Board directed the Director to file his Petition for Review and brief within 10 days of his receipt of the Order, or to show cause why his appeal should not be dismissed for failure to file a Petition for Review and brief. On February 9, 2004, the Director filed his motion to vacate and remand, which, if granted, will dispose of the appeal. In the event the Board denies the motion, the Director seeks 20 days from the Board's ruling in which to file his brief on the merits. The Director's February 9, 2004, motion is a timely filed response to the Board's January 23, 2004, Order to show cause, 20 C.F.R. §802.221, and the Director need not file his Petition for Review and brief until the Board acts on his pending motion.

In his motion to vacate and remand, the Director contends that there is no valid compensation order awarding benefits to claimant underlying the award of Section 8(f) relief. To briefly recapitulate the facts, following a formal hearing Administrative Law Judge Brown remanded the case to the district director so that claimant could undergo both a psychiatric and a psychological examination. Employer appealed the administrative law judge's order of remand, and the Board dismissed the appeal as interlocutory. *Ferro v. Holt Cargo Systems*, BRB No. 02-0116 (Jan. 22, 2002) (order). After the examinations were performed, the case was assigned to Administrative Law Judge Romano (the administrative law judge), and a second hearing was held in April 2003. Before the administrative law judge issued his decision, claimant's counsel drew up a "Consent Order Awarding Benefits," in which employer agreed to pay claimant temporary total disability benefits from September 26, 1996 until February 22, 2000, and permanent total disability benefits continuing from February 23, 2000. Employer's attorney signed the document signifying his consent to the entry of this award. The administrative law judge issued the "Consent Order Awarding Benefits" on September 11, 2003, and his office served a copy of the order on all parties, including the district director, on September 12, 2003. Subsequently, the administrative law judge issued a Decision and Order awarding employer relief from continuing compensation liability pursuant to Section 8(f).

The Director avers that the district director was never requested to file and serve the consent order as required by 20 C.F.R. §702.349. The Director therefore contends that there is no effective compensation order awarding claimant permanent disability benefits underlying the award of Section 8(f) relief. The Director also states that the consent order is invalid because it is based neither on stipulations of the parties nor on findings of fact and conclusions of law of the administrative law judge. The Director contends that as he did not agree to the consent order, the administrative law judge was required to make findings on the elements of claimant's entitlement to benefits prior to addressing the applicability of Section 8(f).

We agree with the Director that the administrative law judge's decision awarding Section 8(f) relief must be vacated because the consent order awarding claimant permanent disability benefits is not an "effective" compensation order and therefore cannot support an award of Section 8(f) relief. *See generally Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). In order to be "effective," a compensation order awarding or denying benefits must be "filed in the office of the [district director], and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each." 33 U.S.C. §§919(e), 921(a); 20 C.F.R. §§702.349, 702.350; *see generally Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989). Although claimant's counsel requested that the administrative law judge forward the consent order to the district director so it could be filed and served, there is no evidence that this occurred. Moreover, the administrative law judge did not incorporate the consent order into the "order" portion of his decision and order awarding Section 8(f) relief. For this reason, we must vacate the Decision and Order Awarding Special Fund Relief and remand the case to the administrative law judge.

However, we reject the Director's contention that the form of the consent order renders it invalid. It is clear that the private parties entered into an agreement concerning claimant's entitlement to benefits, and the Director's attempt to characterize the consent order otherwise is merely form over substance. Moreover, on the facts of this case, we hold that the Director has waived his right to object to the parties' agreement that claimant is permanently totally disabled. The parties' agreement was served on the Director's counsel. Counsel then filed a brief with the administrative law judge in which she observed that "Recently, Claimant and Employer resolved the issue of permanent total disability and a Consent Order Awarding Benefits was entered on September 11, 2003. The only issue remaining to be decided is the issue of §8(f) relief for the Employer." Dir.'s Post-hearing Br. at 4. The Director opposed employer's entitlement to Section 8(f) relief on several grounds, none of which challenged the underlying award of permanent total disability benefits, and the Director did not contend he was being improperly bound to the parties' stipulations. *See, e.g., Byrd v. Alabama Dry Dock & Shipbuilding Co.*, 27 BRBS 253 (1993). The Director therefore cannot now contend that he is not bound by the underlying award. *See Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998).

On remand, the administrative law judge may forward to the district director the parties' Consent Order with the request that it be filed and served in accordance with procedures prescribed in the Act and its regulations, or he may incorporate the parties' agreement into his Decision and Order awarding Section 8(f) relief which also must be filed and served by the district director. If any party remains aggrieved by the administrative law judge's findings regarding the applicability of Section 8(f) after the issuance of a properly filed decision, that party may file an appeal with Board. 33 U.S.C. §921; 20 C.F.R. §§702.350, 802.205.

Accordingly, employer's motion to dismiss the Director's appeal is denied. The Director's motion to vacate the Decision and Order Awarding Special Fund Relief is granted. The case is remanded to the administrative law judge for action consistent with this decision. Employer's cross-appeal of Judge Brown's interlocutory order is dismissed; employer may file a new appeal after a properly filed final compensation order is issued. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge