

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 23-0115

STUART ZION)

Claimant)

v.)

AMERICAN SEAFOODS COMPANY,)
LLC/KLOOSTERBOER DUTCH HARBOR,)
LLC)

and)

SIGNAL MUTUAL INDEMNITY)
ASSOCIATION, LIMITED)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED: 04/12/2024

DECISION and ORDER

Appeal of the Order Denying Claim for Section 8(f) Relief of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Marcin M. Grabowski (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

Eirik Cheverud (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor;

Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Christopher Larsen's Order Denying Claim for Section 8(f) Relief (2021-LHC-00434) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The Benefits Review Board must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law.¹ 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

On December 3, 2016, Claimant sustained severe contact burns to his left arm and hand, corneal damage, vocal cord damage, and inhalation damage to his lungs as a result of freezer coils exploding and exposing him to ammonia. Employer's Post-Hearing Brief at 4-5. Claimant's coworkers found him unconscious and took him to the hospital, where he required lung suctioning, corneal transplants, skin grafts, and speech and physical therapy. *Id.* He has not returned to work since the injury. *Id.* at 2.

On November 17, 2017, Dr. Lawrence Klock, a pulmonologist, diagnosed Claimant with moderate chronic obstructive pulmonary disease caused by ammonia exposure and opined he is at maximum medical improvement. Employer's Exhibit (EX) 5 at 12, 14. From December 4, 2016, to November 17, 2017, Employer voluntarily paid Claimant temporary total disability (TTD) benefits. EX 1 at 2-3. On November 18, 2017, Employer began voluntarily paying permanent partial disability (PPD) compensation and medical benefits based on Dr. Klock's medical report. *Id.* at 3. The only unresolved issue before

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the injury occurred in Dutch Harbor, Alaska. 33 U.S.C. §921(c); 20 C.F.R. §702.201(a); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); Employer's Exhibit (EX) 1.

the ALJ was Employer’s request for Section 8(f) relief.² 33 U.S.C. §908(f); *see* Employer’s Pre-Hearing Statement (Aug. 1, 2022); Employer’s Post-Hearing Brief; Director’s Post-Hearing Brief.

In his decision, the ALJ found Employer established Claimant had a pre-existing orthopedic permanent partial disability and this pre-existing disability was manifest to Employer. Order Denying Claim for Section 8(f) Relief (Order) at 7, 10. The ALJ further found Employer established the December 2016 workplace accident was not the sole cause of Claimant’s ultimate disability, which was due to a combination of the work accident and his pre-existing orthopedic conditions. *Id.* at 12. However, the ALJ determined Employer did not show Claimant’s pre-existing orthopedic disability resulted in a materially and substantially greater degree of disability than he would have suffered as a result of the work-related pulmonary injury alone. *See Marine Power & Equip. v. Dep’t of Labor [Quan]*, 203 F.3d 664, 668 (9th Cir. 2000); Order at 13-14. Consequently, he denied Employer’s request for Section 8(f) relief. Order at 14.

On appeal, Employer challenges the ALJ’s denial of Section 8(f) relief. Employer’s Brief at 11-16. The Director, Office of Workers’ Compensation Programs (the Director), argues the Board is precluded from addressing Employer’s appeal at this juncture because the ALJ did not issue a final decision or order either awarding or denying Claimant’s claim for benefits. Director’s Brief at 1-2. We agree with the Director’s argument.

The ALJ cannot address a claim for Section 8(f) relief if there is no award in excess of 104 weeks of benefits for permanent disability or death.³ *See* 33 U.S.C. § 908(f)(1);

² Employer and the Director, Office of Workers’ Compensation Programs (the Director), waived a formal hearing and sought a decision on the written record. Order for Decision on the Written Record (Aug. 26, 2022).

³ Section 19(c) of the Act provides that an ALJ “shall” by “order” “make an award” or “reject the claim.” 33 U.S.C. §919(c); *see also* 33 U.S.C. §919(e). The implementing regulation provides:

the administrative law judge shall have prepared a final decision and order, in the form of a compensation order, with respect to the claim, making an award to the claimant or rejecting the claim. The compensation order shall contain appropriate findings of fact and conclusions of law with respect thereto, and shall be concluded with one or more paragraphs containing the order of the administrative law judge....

20 C.F.R. §702.348; *see Luttrell v. Alutiiq Glob. Sols.*, 45 BRBS 31, 34 (2011); *Davis v. Delaware River Sols.*, 39 BRBS 5, 6-7 (2005); *see also Kreschollek v. S. Stevedoring Co.*,

Gupton v. Newport News Shipbuilding & Dry Dock Co., 33 BRBS 94, 95-96 (1999); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155, 160 (1997). It is necessary for the ALJ to determine Claimant's entitlement to an award of permanent disability benefits in excess of 104 weeks and to formally enter such an award before addressing Employer's request for Section 8(f) relief. *See* 20 C.F.R. §702.348.

Consequently, for the reasons set forth in *Gupton*, 33 BRBS at 95-96, we vacate the ALJ's denial of Section 8(f) relief and remand the case to the ALJ for any necessary proceedings and for the entry of a specific order regarding Claimant's entitlement to benefits. 33 U.S.C. §919(d); 20 C.F.R. §§702.331-702.351; *see also McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136, 138 (2002) (award must be based on evidence admitted into the record); *Ramos v. Glob. Terminal & Container Servs., Inc.*, 34 BRBS 83, 84 (1999) (award may be based on parties' stipulations). Then, the ALJ may address Employer's request for Section 8(f) relief. If any party is aggrieved by the ALJ's decision, the party may file an appeal within 30 days of the date the ALJ's final compensation order awarding or denying benefits is filed in the district director's office. 33 U.S.C. §§919(c), 921(a).

Accordingly, we vacate the ALJ's Order Denying Claim for Section 8(f) Relief and remand the case for further proceedings consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

223 F.3d 202, 207 (3d Cir. 2000) ("After conducting a hearing, the ALJ makes findings of fact and conclusions of law and issues an enforceable compensation order, which is filed with the district director.").