



BRB Nos. 16-0037
and 16-0037A

CHARLES ANDERSON)	
)	
Claimant)	
)	
v.)	
)	
YUSEN TERMINALS, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: <u>July 28, 2016</u>
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	
Cross-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	
Cross-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order Regarding Employer's Petition for Relief Under 33 U.S.C. §908(f) of William J. King, Administrative Law Judge, United States Department of Labor.

James P. Aleccia and Marcy K. Mitani (Aleccia & Mitani), Long Beach, California, for employer/carrier.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.
PER CURIAM:

Employer appeals and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order Regarding Employer's Petition for Relief Under 33 U.S.C. §908(f) (2014-LHC-01549) of Administrative Law Judge William J. King 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a dockman for employer, sustained multiple injuries when he was struck by a utility truck rig on October 26, 2005. *See* EXs 1, 2.¹ Employer voluntarily paid compensation to claimant for temporary total, permanent total, and permanent partial disability for various periods. Employer filed an application for relief under Section 8(f) of the Act, 33 U.S.C. §908(f), on April 9, 2007, which was denied by the district director on April 20, 2007. Subsequently, employer filed an amended Section 8(f) application on December 9, 2009, which was denied by the district director on December 16, 2009. *See* Decision and Order at 1-2; EXs 5, 6. Employer filed several notices of controversion, *see* EX 3, and the case was referred to the Office of Administrative Law Judges (OALJ) and assigned to Administrative Law Judge Pulver in 2011.

In December 2011, claimant and employer submitted to Judge Pulver an application for approval of a Section 8(i) settlement, 33 U.S.C. §908(i), in which they agreed to settle the claim for all past disability benefits and for past and future medical benefits.² In order to preserve its claim for Section 8(f) relief, employer separately entered into stipulations with claimant regarding claimant's entitlement to permanent

¹ Exhibits referenced herein as "EX" refer to exhibits attached to employer's Pre-Hearing Statement.

² The private parties agreed that employer would pay claimant a lump sum of \$50,000 to settle his present claim for all past temporary total disability and past permanent disability benefits, as well as past and future medical benefits. *See* Dir. Consolidated Brief-Attachment B at 8-9.

partial disability benefits commencing January 1, 2012, and continuing.³ EX 25. The Director did not participate in these stipulations. Specifically, the private parties stipulated that claimant's October 26, 2005 work accident resulted in injuries to his hands, wrists, knees, right leg, and right ankle, but that the accident did not result in injuries to his head, psyche, neck, back, shoulders, ears, and internal system. *Id.* at 2. The private parties further stipulated that claimant reached maximum medical improvement on February 23, 2009, and that he has a post-injury wage-earning capacity of at least \$536.54, and they agreed that employer would pay claimant continuing permanent partial disability benefits at the rate of \$950 per week commencing January 1, 2012. *Id.* at 3. The stipulations, which reference the Section 8(f) applications previously filed by employer, request that the Section 8(f) issue be bifurcated from the proceeding regarding permanent disability. *Id.* at 4.

In an Amended Order issued on March 13, 2012, Judge Pulver approved both the parties' joint stipulations and their separate Section 8(i) settlement, and placed the matter on his June 11, 2012 calendar call to resolve the pending Section 8(f) claim;⁴ subsequently, the hearing was rescheduled for September 17, 2012. *See* EX 26; Dir. Consolidated Brief at 3. By letter dated September 14, 2012, employer advised Judge Pulver that it was withdrawing the Section 8(f) issue and requested that the case be remanded to the district director; employer provided no explanation for this withdrawal. In an Order of Remand issued on September 18, 2012, Judge Pulver found that employer had withdrawn its claim for Section 8(f) relief, and he remanded the case to the district director. *See* Dir. Consolidated Brief-Attachment E.

On June 12, 2014, employer filed a Pre-Hearing Statement, Form LS-18, with the district director seeking an order of forfeiture of compensation based on claimant's failure to complete a requested report of earnings, Form LS-200. On July 2, 2014, the district director referred the case to the OALJ, enclosing employer's pre-hearing

³ Pursuant to Section 8(i)(4) of the Act, 33 U.S.C. §908(i)(4), employer is prohibited from receiving Section 8(f) relief after a disability claim has been settled pursuant to Section 8(i). *See Bomback v. Marine Terminals Corp.*, 44 BRBS 95, 96 and n.3 (2010).

⁴ Judge Pulver's initial Order Approving Settlement issued on March 7, 2012, did not specify that the parties had submitted two separate documents: 1) Stipulations and Application for Section 8(i) Settlement; and 2) Joint Stipulations of the Parties. *See* EX 26; Dir. Consolidated Brief-Attachments A, B. Judge Pulver's amended Order specifically approved both the Section 8(i) settlement and the joint stipulations.

statement, its previously-filed Section 8(f) request, and the prior denial letters.⁵ The case was scheduled for calendar call before Administrative Law Judge Gee on May 4, 2015. Employer and the Director subsequently agreed that the Section 8(f) issue could be resolved on the record and, accordingly, the scheduled hearing was vacated and a briefing schedule was set. On May 6, 2015, the case was reassigned to Administrative Law Judge King (the administrative law judge). Subsequently, employer and the Director filed briefs regarding employer's entitlement to Section 8(f) relief.⁶

In a Decision and Order issued on September 14, 2015, the administrative law judge denied employer's request for Section 8(f) relief. Noting that the private parties resolved all issues other than the applicability of Section 8(f) by stipulation without the Director's participation, the administrative law judge stated that he was required to first make findings based on the record evidence regarding claimant's entitlement to permanent partial disability benefits in order to determine whether employer is entitled to Section 8(f) relief. Decision and Order at 2, 5. The administrative law judge determined that claimant reached maximum medical improvement on June 15, 2010, and that his October 26, 2005 work accident resulted in permanent partial disability to his right knee and right ankle, for which he was entitled to a scheduled award of 34.56 weeks of compensation. *Id.* at 3, 9-10. *See* 33 U.S.C. §908(c)(2), (19). Because Section 8(f) requires an employer to pay at least 104 weeks of compensation for a scheduled disability before liability is shifted to the Special Fund, and claimant was found entitled to scheduled benefits for fewer than 104 weeks, the administrative law judge concluded that employer is not entitled to Section 8(f) relief. Decision and Order at 3-4, 10.

On appeal, employer challenges the administrative law judge's finding that, because claimant's October 26, 2005 work accident resulted in only scheduled disability to his right knee and ankle, liability is not shifted pursuant to Section 8(f) to the Special

⁵ On August 24, 2014, claimant filed an objection to employer's request for a forfeiture order; apparently the forfeiture issue was resolved because employer's April 13, 2015 pre-trial statement indicates that the sole issue in dispute was employer's entitlement to Section 8(f) relief.

⁶ In his brief filed with the administrative law judge, the Director noted that employer withdrew its request for Section 8(f) relief on September 14, 2012, *see* Dir. Trial Brief at 7, but he did not specifically argue that employer therefore had waived its entitlement to Section 8(f) relief. Rather, the Director argued that claimant is entitled to only a scheduled permanent partial disability award of fewer than 104 weeks and, thus, Section 8(f) relief cannot be awarded; alternatively, the Director contended that the contribution requirement was not satisfied. *See id.* at 8.

Fund.⁷ In a consolidated brief, the Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief, and, in support of his cross-appeal, contends that the administrative law judge should not have considered employer's Section 8(f) request because employer waived its right to claim entitlement to such relief. In a consolidated brief, employer replies, reiterating its prior arguments, and responds to the Director's cross-appeal, urging that the Board decline to consider the Director's waiver argument or, alternatively, that the Board reject the Director's argument. The Director has filed a reply brief regarding the waiver issue.

We first address the Director's argument on cross-appeal that the administrative law judge should not have considered employer's renewed claim for Section 8(f) relief because employer's failure to litigate its Section 8(f) claim in the prior proceedings before the OALJ in 2011-2012, in which claimant was found to be permanently disabled, coupled with employer's subsequent withdrawal of its Section 8(f) claim, constitutes a waiver of the issue by employer. Initially, we reject employer's contention that the Director should not be permitted to raise this issue for the first time on appeal. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has characterized the issue of whether Section 8(f) relief may be considered as "a procedural legal matter." *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 779 F.2d 512, 513, 18 BRBS 43, 44(CRT) (9th Cir. 1985). The Board has held that the Director may present an argument raising a legal challenge to an administrative law judge's determination for the first time before the Board, especially when, as here, the liability of the Special Fund is at issue. *See Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 81 (1989); *see also Bomback v. Marine Terminals Corp.*, 44 BRBS 95, 99 n.9 (2010); *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151, 154 n.2 (1991). As the Director's argument raises a legal issue, the Director is not precluded from raising that issue for the first time on appeal.

We next address the Director's contention that employer waived its right to claim entitlement to Section 8(f) relief. A Section 8(f) claim must be "litigated" in the same proceeding wherein permanent disability is at issue, absent a showing of special

⁷ Employer also challenges the administrative law judge's finding that claimant's only pre-existing permanent partial disabilities were to his right ankle and left index finger. *See Decision and Order at 6-7.*

circumstances.⁸ See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Brady-Hamilton*, 779 F.2d 512, 18 BRBS 43(CRT); *American Bridge Div., U.S. Steel Corp. v. Director, OWCP*, 679 F.2d 81, 14 BRBS 923 (5th Cir. 1982), *aff'g Carroll v. American Bridge Div., U.S. Steel Corp.*, 13 BRBS 759 (1981); *Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998). In *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979), death benefits were awarded to the claimant following a 1975 hearing. The employer subsequently sought modification pursuant to Section 22 of the Act, 33 U.S.C. §922, in order to seek Section 8(f) relief. The administrative law judge denied modification on the ground that the employer was attempting to litigate an issue it had raised, but had withdrawn, at the initial hearing. On appeal, the Board held that, on the particular facts of the case, the interests of justice required that the case be remanded for consideration of the Section 8(f) application, because it was clear at the time of the initial 1975 hearing that both the employer and the claimant reasonably believed that bifurcation of the hearing on issues of the compensability of the claimant's claim and the claim for Section 8(f) relief was appropriate.⁹ To prevent such misunderstandings in the future, the Board explicitly stated that "it is improper to bifurcate hearings on issues that can be litigated at one hearing. In any case in which the application of Section 8(f) is an issue, we hold that hereafter the issue must be raised and litigated at the first hearing of the case." *Egger*, 9 BRBS at 899.

In *Serio*, 32 BRBS 106, the private parties stipulated before the administrative law judge that the claimant, a retiree, was entitled to permanent partial disability benefits for a 25 percent pulmonary impairment. After the formal hearing, the employer withdrew its request for Section 8(f) relief, and the administrative law judge issued a decision awarding the claimant the benefits to which the parties stipulated. Almost a year later, the employer renewed its request for Section 8(f) relief by way of a petition for Section 22 modification. The Board held that the employer's claim for Section 8(f) relief was waived by virtue of its withdrawal of the issue following the initial hearing at which the

⁸ Section 22 modification is not available to afford Section 8(f) relief where the employer waived entitlement to such relief by its failure to raise the applicability of Section 8(f) at the initial proceeding in which permanent disability was at issue. See *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155(CRT) (11th Cir. 1985); *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *M.R. [Rusich] v. Electric Boat Corp.*, 43 BRBS 35, 38 n.5 (2009). Cf. *Director, OWCP v. Edward Minte Co., Inc.*, 803 F.2d 731, 19 BRBS 27(CRT) (D.C. Cir. 1986) (Section 8(f) may be raised in Section 22 modification proceeding if the issue was not waived and grounds did not exist for its application in the prior proceeding).

⁹ The Board noted in *Egger* that the employer explicitly indicated that it did not intend to waive the Section 8(f) issue by not litigating it at the 1975 hearing and that the administrative law judge presiding at that hearing did not rule that withdrawal of the issue at that time would constitute a waiver. *Egger*, 9 BRBS at 899-900.

permanency of the claimant's condition was adjudicated.¹⁰ The Board observed that *Egger* had been the rule for 15 years at the time of the formal hearing in *Serio*, and the employer therefore could not reasonably believe it could abandon its Section 8(f) claim at the first hearing and pursue it later in separate proceedings. *Serio*, 32 BRBS at 108.

We agree with the Director that the relevant facts in *Serio* are virtually identical to those in this case, and that the Board's holding in *Serio* is therefore controlling. In both cases: 1) the private parties stipulated, in the initial proceeding before the administrative law judge, that the claimant was entitled to permanent disability benefits; 2) at that time, the private parties advised the administrative law judge that the sole remaining issue was the employer's entitlement to Section 8(f) relief, which the administrative law judge left open; 3) the employer subsequently withdrew its request for Section 8(f) relief from consideration; 4) the administrative law judge issued an order awarding the claimant permanent disability benefits based on the parties' stipulations;¹¹ and 5) the employer sought to have its request for Section 8(f) relief considered in a subsequent proceeding. Consistent with longstanding precedent established in *Serio* and *Egger*, employer was obligated to litigate its entitlement to Section 8(f) at the time the private parties stipulated that claimant was entitled to permanent disability benefits. Although employer initially raised Section 8(f) with the claim for permanent disability benefits, its withdrawal of its request for Section 8(f) relief removed the Section 8(f) issue from that proceeding. Because, by withdrawing its request for Section 8(f) relief, employer failed to litigate the Section 8(f) issue with the claim for permanent disability benefits, it waived any entitlement to that relief.

We reject employer's contention that *Serio* and *Egger* are factually distinguishable from this case and, thus, are not controlling. The distinction that employer apparently finds significant is that, in *Serio* and *Egger*, formal hearings were held regarding the permanent disability issue whereas in this case no such hearing was held. Employer contends that because there were not two hearings in this case, the policy considerations of judicial economy and avoiding multiple hearings are not implicated. Employer's argument is unavailing as it ignores the fact that although no formal hearing was held in this case, there were, in fact, two proceedings before the OALJ: 1) the private parties' submission of joint stipulations to Judge Pulver and his entry on March 13, 2012 of an amended order awarding permanent disability benefits based on those stipulations; and, 2) the Section 8(f) proceeding before the administrative law judge in 2015. In *Serio*,

¹⁰ The Board noted in *Serio* that the employer neither alleged nor demonstrated any reason for not having litigated the Section 8(f) issue at the time of the initial hearing. *Serio*, 32 BRBS at 109.

¹¹ In *Serio*, the withdrawal occurred before the entry of the award while in this case the withdrawal occurred after the award; however, employer has not shown that this difference should change the result.

although two formal hearings were held, the permanent disability issue was resolved on the basis of the private parties' stipulations, as in this case. *See Serio*, 32 BRBS at 106-107. We agree with the Director that the fact that a formal hearing on the permanent disability issue was not held in this case is not, in itself, determinative of whether employer waived entitlement to Section 8(f) relief. Notably, in *Serio*, the Board used the word "proceeding", rather than the word "hearing", stating that "[a] request for Section 8(f) relief must be raised and litigated in the same proceeding wherein permanent disability is at issue, absent a showing of special circumstances which, in the interests of justice, outweigh the need for finality in judicial proceedings." *Serio*, 32 BRBS at 107.

In this case, employer withdrew the Section 8(f) issue from consideration during the proceedings before Judge Pulver in which the private parties stipulated to claimant's permanent disability, and it has neither alleged nor demonstrated any reason for not having pursued its claim for Section 8(f) at that time.¹² *See Serio*, 32 BRBS at 109. Moreover, the record does not disclose any special circumstances that outweigh the proscription against bifurcation of issues. *See id.* at 108. We accordingly hold that employer waived any entitlement to Section 8(f) relief when it failed to litigate the issue in the initial proceeding in which claimant was found to be permanently disabled. *See Serio*, 32 BRBS 106; *see also Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Brady-Hamilton*, 779 F.2d 512, 18 BRBS 43(CRT); *American Bridge*, 679 F.2d 81, 14 BRBS 923; *Egger*, 9 BRBS 897. Therefore, we affirm the administrative law judge's denial of Section 8(f) relief, albeit for the reasons set forth herein and not for those given by the administrative law judge.¹³

Accordingly, the administrative law judge's Decision and Order Regarding Employer's Petition for Relief Under 33 U.S.C. §908(f) is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

¹² In its letter to Administrative Law Judge Pulver dated September 14, 2012, employer notes that the Section 8(f) issue was scheduled for a hearing on September 17, 2012. Employer stated it was "withdrawing the Section 8(f) issue" and requested that "this matter" be remanded to the district director. The reasons for this action were not further explained at the time, nor has employer offered any explanation on appeal.

¹³ In light of our affirmance of the administrative law judge's denial of Section 8(f) relief based on our conclusion that the Section 8(f) issue was waived by employer, we need not address employer's arguments challenging the administrative law judge's findings regarding employer's entitlement to Section 8(f) relief.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG BUZZARD
Administrative Appeals Judge