BRB No. 03-0512

ROBERT McCABE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS	)	DATE ISSUED:April 22, 2004
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Granting Special Fund Relief of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

John E. Kawcynski (Field Womack & Kawcynski, LLC), South Amboy, New Jersey, for self-insured employer.

Silvia J. Dominguez (Howard Radzely, Solicitor of Labor; Donald S. Shire, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Special Fund Relief (02-LHC-01269) 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his right leg and back during the course of his employment as a checker for employer on September 30, 1996. Claimant returned to light duty work for employer in July 1997. At claimant's request, he began performing his usual work three days a week commencing in September 1997. Claimant experienced a recurrence of back pain in December 1997 during the course of his employment for employer. He stopped working on December 28, 1997. The medical evidence establishes that, prior to his September 1996 work injury, claimant had spondylolisthesis and degenerative disc disease. In April 2001, employer submitted an application for Section 8(f) relief to the district director, 33 U.S.C. §908(f), alleging entitlement to such relief on the basis that claimant's pre-existing spondylolisthesis combined with the September 1996 work injury to increase the extent of claimant's permanent partial back impairment. The district director denied employer's request on the grounds that claimant's pre-existing back condition was not manifest to employer before the September 1996 injury.

At the hearing on November 6, 2002, claimant and employer agreed to claimant's entitlement to past and continuing compensation for his work-related back condition. The administrative law judge issued a consent order on November 18, 2002, reflecting this agreement, in which he awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from October 1, 1996, to July 7, 1997, and from December 29, 1997, to November 6, 2002, based on an average weekly wage of $882.72, for temporary partial disability, 33 U.S.C. §908(e), of $202.08 per week from July 8 to December 28, 1997, and for continuing permanent partial disability, 33 U.S.C. §908(c)(21), of $500 per week.

The sole remaining issue before the administrative law judge was employer's entitlement to Section 8(f) relief. In his decision, the administrative law judge initially concluded that employer failed to establish that claimant had a manifest back condition prior to the September 30, 1996, work injury.[1] In its post-hearing brief, employer raised

[1] Employer has not appealed this finding.

for the first time a new theory for Section 8(f) entitlement. The administrative law judge addressed employer's contention that, pursuant to *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002), claimant's recurrence of back pain prior to his having to stop working in December 1997 constitutes a second injury, and that employer is therefore entitled to Section 8(f) relief on the basis that the September 1996 work injury was a manifest pre-existing permanent partial disability. The administrative law judge credited the testimony of Dr. Lefkoe and claimant's return to his usual duties before the recurrence of back pain in December 1997, to find that the exacerbation of claimant's back condition that month is an "injury" under the Act. *See* 33 U.S.C. §902(2). The administrative law judge found no authority prohibiting employer from asserting that a subsequent work injury establishes its entitlement to Section 8(f) relief, rather than the injury initially claimed. The administrative law judge further found that claimant's back condition following the 1996 injury constituted a manifest, permanent disability that contributed to claimant's current permanent partial disability. The administrative law judge therefore granted employer Section 8(f) relief.

On appeal, the Director argues that the Board should reverse the administrative law judge's grant of Section 8(f) relief because the December 1997 injury was not the subject of a claim or the basis for the compensation payments to which the parties agreed claimant is entitled. The Director further contends that Section 8(f)(3) bars employer's claim for Section 8(f) relief based on a second work injury in December 1997 because employer did not raise this theory in its application to the district director. Alternatively, the Director contends that the Board should vacate the granting of Section 8(f) relief and remand the case because the administrative law judge failed to provide the Director with notice that he would address employer's new theory for Section 8(f) relief and afford the Director an opportunity to respond. Employer responds that the Board should not reverse the administrative law judge's granting of Section 8(f) relief; however, employer agrees with the Director's contention that the case must be remanded for the Director to have an opportunity to respond to employer's new theory of entitlement based on a December 1997 work injury.

Section 8(f) of the Act shifts the liability to pay compensation for permanent partial disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, if employer establishes: (1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that the current disability is not due solely to the second injury but is materially and substantially greater than that which would result from the second injury alone. *See Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997); *see also Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS

55(CRT) (3d Cir. 2000); *Director, OWCP v. Sun Ship, Inc. [Ehrentraut]*, 150 F.3d 288, 32 BRBS 132(CRT) (3d Cir. 1998).

We agree with the Director's contention that the administrative law judge's granting of Section 8(f) relief must be vacated and the case remanded to afford the Director an opportunity to respond to employer's assertion that claimant sustained a second injury in December 1997 which establishes employer's entitlement to Section 8(f) relief. In this regard, Section 702.336(a) of the regulations, 20 C.F.R. §702.336(a), allows the administrative law judge to expand the hearing to include new issues that arise during the course of the hearing. Section 702.336(b), 20 C.F.R. §702.336(b), permits the administrative law judge to consider "[a]t any time prior to the filing of the compensation order in the case," any new issue upon the application of a party, but requires that he give the parties "not less than 10 days' notice of the hearing on such new issue." In this case, the issue of employer's entitlement to Section 8(f) relief based on a second work injury in December 1997 was not raised by employer before the district director or at the hearing before the administrative law judge, but was first raised by employer in its post-hearing brief. The Director filed a brief addressing employer's entitlement to Section 8(f) relief based on the September 1996 work injury on February 18, 2003, and employer filed its brief on February 19, 2003. Inasmuch as the employer raised its new theory of entitlement subsequent to the hearing, the Director was entitled to reasonable notice and an opportunity to submit evidence on this issue. *See, e.g., Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988); *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000). We therefore remand the case for the administrative law judge to afford the Director an opportunity to submit argument and evidence and respond regarding employer's assertion that a second injury in December 1997 provides a basis for Section 8(f) relief. *Id.*

On remand, the administrative law judge must address the Director's contention that Section 8(f) relief may not be granted for a second injury that was not the basis for the award of permanent disability benefits.[2] In this regard, the Director states that the evidence is uncontradicted that all compensation payments by employer were for the loss of wage-earning capacity due to the September 1996 work injury. Employer filed an LS-208 Notice of Final Payment or Suspension of Compensation Payments, wherein employer represented that its compensation payments, including temporary total disability from July 1997 to May 2000, are related to the September 1996 work injury. JX 7. Moreover, pursuant to the agreement between claimant and employer, claimant's compensation award for permanent partial disability is based on his average weekly wage

[2] Section 8(f)(1) provides that employer must make compensation payments for 104 weeks for the work injury that has resulted in permanent disability.

on the date of the September 30, 1996, work injury, and loss of wage-earning capacity thereafter. *See* Decision and Order at 2.

The Director also asserts that *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT), does not provide authority for granting employer Section 8(f) relief in this case. In *Delaware River Stevedores*, the United States Court of Appeals for the Third Circuit, in whose jurisdiction this case arises, affirmed the Board's reversal of a responsible employer determination. The case addressed a subsequent period of temporary total disability after claimant returned to work for a second employer. The court affirmed the Board's application of well-established case law that where claimant's work causes a prior condition to become symptomatic, even if no permanent harm results, he has sustained an injury within the meaning of the Act, and the employer at the time of the exacerbation is responsible for any resulting period of temporary disability. *Delaware River Stevedores*, 279 F.3d at 241, 35 BRBS at 160(CRT). We agree with the Director that *Delaware River Stevedores* is inapplicable to this case. Initially, the case addresses the issue of the allocation of liability as between two employers, and Section 8(f) is not at issue. Moreover, the case does not address under what circumstances employer can raise the occurrence of a second injury in order to obtain Section 8(f) relief.[3] Finally, the mere fact that claimant arguably sustained an injury within the meaning of the Act in December 1997 is not determinative of the issue because the "second injury" must result in additional permanent disability before employer can be entitled to Section 8(f) relief. 33 U.S.C. §908(f)(1); *see* n.2, *supra*. *See generally Gupton v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 94 (1999).

The administrative law judge also must address the Director's contention that employer's claim for Section 8(f) relief is barred pursuant to Section 8(f)(3), 33 U.S.C. §908(f)(3).[4] Section 8(f)(3) requires that the employer present a request for Section 8(f) relief to the district director prior to his consideration of the claim; failure to do so bars

[3] We reject the Director's contention that the December 1997 injury must be the subject of a claim filed by claimant in order to be raised. For example, in an appropriate case, an employer against whom a claim was filed may attempt to shift compensation liability to a subsequent employer by raising the issue of the occurrence of a subsequent work injury. Under such circumstances, the second employer would not be precluded from seeking Section 8(f) relief based solely on the fact that the claimant did not file a claim against the second employer.

[4] The Director timely raised the absolute defense of Section 8(f)(3) on appeal because the administrative law judge addressed employer's alternate theory of entitlement to Section 8(f) relief without first providing notice to the Director. *See generally Abbey v. Navy Exchange*, 30 BRBS 139 (1996).

the payment of benefits by the Special Fund unless the employer could not have reasonably anticipated the liability of the Special Fund before the claim was transferred to the Office of Administrative Law Judges (OALJ).[5] The regulation implementing this provision, 20 C.F.R. '702.321(b)(3), provides that an application need not be filed with the district director where claimant's condition has not reached maximum medical improvement and no claim for permanent benefits is raised by the date of referral. *See Brazeau v. Tacoma Boatbuilding Co.*, 24 BRBS 128 (1990). Otherwise, it is employer=s burden to establish that it could not have reasonably anticipated the liability of the Special Fund while the case was before the district director. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283, *modifying in pert. part on recon.*, 32 BRBS 118 (1998). Where employer raises a new theory for its entitlement to Section 8(f) relief after the case is before an administrative law judge, the administrative law judge must determine whether employer could have reasonably anticipated the Special Fund's liability on this basis. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Dillard]*, 230 F.3d 126, 34 BRBS 100(CRT) (4th Cir. 2000); *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998). Accordingly, the administrative law judge should address this issue in light of the contentions of the parties on remand.

[5] Section 8(f)(3) of the Act 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 [district director] prior to the consideration of the claim by the [district director]. 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.

33 U.S.C. '908(f)(3).

Accordingly, the administrative law judge's Decision and Order Granting Special Fund Relief is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge