BRB No. 98-1467

PERCY PETRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CNG PRODUCING COMPANY	)	DATE ISSUED: Aug. 11, 1999
	)	
and	)	
	)	
CIGNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Karl W. Bengtson (Shelton and Legendre), Lafayette, Louisiana, for claimant.

Craig W. Marks (Briney & Foret), Lafayette, Louisiana, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-LHC-212) of Administrative Law Judge Clement J. Kennington 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*., as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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).

Claimant was injured on November 13, 1989, while working as a pumper on a fixed platform, after a wrench struck him above his left knee. As a result of this accident, claimant sustained a quadriceps tendon rupture, which was repaired by Dr. Drez, an orthopedic surgeon. The parties stipulated that prior to the accident claimant had back problems. ALJ X-1, Stip. 13-17. According to Dr. Gunderson, claimant's abnormal gait resulting from the current leg injury aggravated a preexisting degenerative back condition. Employer voluntarily paid claimant compensation for various periods.

At the hearing, claimant and employer submitted 28 stipulations, agreeing that claimant was entitled to a scheduled award for 57.6 weeks due to his leg impairment, commencing on August 1, 1990. They also agreed that employer paid claimant compensation for 108 weeks after this date, when he reached maximum medical improvement with respect to his leg. Although Section 8(f) was at issue, the Director was not represented by counsel at the hearing.[1]

[1]The parties had previously submitted an application for approval of a settlement

under Section 8(i). In the application, the parties agreed to settle the claim for $32,000 in a lump sum, in addition to compensation benefits previously paid. As a condition of settlement, the parties agreed that claimant reserved rights to claim future benefits from the Special Fund. Pursuant to that condition, they requested that the issue of Section 8(f) entitlement be decided. On December 16, 1997, the administrative law judge issued a Decision and Order approving the settlement, without addressing the Section 8(f) issue. On December 30, 1997, the administrative law judge issued an order modifying the settlement and remanding the issue of Section 8(f) relief to the district director. The district director refused to consider the Section 8(f) issue because it had not been resolved by the administrative law judge. Subsequently, on January 6, 1998, the administrative law judge revoked the approval of the settlement and set the case for a hearing. A hearing was held on March 13, 1998.

In his July 1998 decision, the administrative law judge found employer entitled to Section 8(f) relief. Employer filed a timely appeal, but also requested remand, stating that the parties had reached a settlement in the case. The Board then remanded the case to the district director for further action. The district director denied approval of the settlement under Section 8(i). Ex. 6. By Order dated December 17, 1998, the Board reinstated employer's appeal.

In his Decision and Order, the administrative law judge initially declared that he found it proper to address all issues presented by the record evidence notwithstanding the parties' understanding of those issues. Decision and Order at 4 n.3. The administrative law judge found that claimant's leg impairment was causally related to his accident and that the resulting altered gait was the cause of his present back condition; thus, claimant's back condition also was work-related. He concluded, however, that claimant is limited to only one award under Section 8(c)(21), 33 U. S. C. §908(c)(21), for a loss of wage-earning capacity and that he is precluded from receiving compensation separately for his scheduled leg injury. Accordingly, he found employer liable for temporary total disability compensation from November 14, 1989 to August 24, 1992, the stipulated maximum medical improvement date for claimant's back condition, permanent total disability from August 25, 1992, to October 10, 1993, the date on which he found employer established suitable alternate employment, and permanent partial disability from October 11, 1993 to August 23, 1994. Having found that employer established the requisite elements, he granted employer Section 8(f) relief from continuing compensation liability beginning August 24, 1994.

On appeal, employer asserts that the administrative law judge erred in failing to accept the parties' stipulations regarding the amount of compensation to which claimant is entitled; alternatively, it argues that the administrative law judge's findings are not supported by substantial evidence. Claimant responds, agreeing with employer that he is not entitled to any further compensation.

Employer contends that the administrative law judge erred in failing to inform the parties that their stipulations would not be accepted. We agree. Employer and claimant were led to believe that the only issue the administrative law judge was going to address was employer's entitlement to Section 8(f) relief.[2] Tr. at 29-32. In a footnote, citing 29 C.F.R. §18.57(b), the administrative law judge stated that he found it

[2]Employer continuously refers to the *employee's* obtaining relief from the Special Fund. Section 8(f) relief, however, operates to relieve employer of its liability, and claimant has no stake in this issue, as he has no interest in the source of his compensation. *Coats v. Newport News Shipbuilding & Dry Dock Co.,* 21 BRBS 77 (1988); *Dove v. Southwest Marine of San Francisco*, 18 BRBS 139 (1986).

proper to address all issues presented by the record evidence notwithstanding the parties' understanding of those issues. Decision and Order at 4 n.3. He consequently awarded claimant benefits for different periods from those to which the parties stipulated, resulting in additional compensation liability for employer.

The Board has consistently held that an administrative law judge may not reject stipulations without giving the parties prior notice that the stipulations will not be accepted and an opportunity to present evidence in support of their positions. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock Co.*, 17 BRBS 225, 228 (1985); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984). In cases where Section 8(f) is at issue, the Board has further held that stipulations which impact on the liability of the Special Fund are not binding on the Fund absent the agreement of the Director. *Beltran*, 17 BRBS at 226-227; *Brady v. J. Young & Co.*, 17 BRBS 46 (1985). In such cases, the administrative law judge must resolve issues affecting the Fund's liability consistent with the evidence after giving claimant and employer notice and the opportunity to prepare for litigation.[3] In this case, therefore, while the administrative law judge could properly refuse to accept the stipulations, he erred in failing to give the parties notice he would do so.

[3]Although the parties may submit stipulations with the evidence in a case involving Section 8(f), we note that where claimant and employer enter into a settlement agreement under Section 8(i) of the Act, 33 U.S.C. §908(i), without the agreement of the Director, employer is thereafter barred from seeking Section 8(f) relief. 33 U.S.C. §908(i)(4). *See Strike v. S. J. Groves & Sons*, 31 BRBS 183 (1997), *aff'd mem. sub nom. S. J. Groves & Sons v. Director, OWCP*, 166 F.3d 1206 (3d Cir. 1998)(table).

Under the facts presented, the administrative law judge's findings regarding the nature and extent of claimant's disability must be vacated and the case remanded for the parties to have the opportunity to present additional evidence on these issues, which the administrative law judge must reconsider. The administrative law judge found that employer established suitable alternate employment on October 10, 1993, based on Ms. Favaloro's report, and ordered employer to pay claimant permanent total disability from the date of maximum medical improvement to this date and permanent partial disability under Section 8(c)(21) for 45.1 weeks thereafter, for a total of 104 weeks. Employer, however, argues that it established suitable alternate employment between 1990 and 1992, but did not submit any evidence supporting an earlier date, because it did not think the issue would be litigated.[4] Employer maintains that it submitted Ms. Favaloro's vocational report to establish the permanent partial disability rate to be paid to claimant, rather than to establish the date of suitable alternate employment. Claimant agrees that employer provided evidence of suitable alternate employment earlier than the date found by the administrative law judge. Inasmuch as the parties agree that employer established suitable alternate employment prior to October 10, 1993, the date found by the administrative law judge based on Ms. Favaloro's report, we hold that the administrative law judge erred by not providing the parties with notice prior to issuance of his decision that he would consider this issue. We therefore vacate the administrative law judge's determination that employer established suitable alternate employment as of October 10, 1993, and we remand the case for the administrative law judge to allow the parties the opportunity to present additional evidence in support of their positions regarding this issue. *See Dodd*, 22 BRBS at 250; *Erikson v. Crowley Maritime Corp.*, 14 BRBS 218 (1981).

Employer also argues that the administrative law judge erred in finding claimant temporarily totally disabled until August 24, 1992, as the parties stipulated that claimant achieved maximum medical improvement on August 1, 1990. The parties stipulated that claimant reached maximum medical improvement with respect to his leg condition on August 1, 1990, and his back on August 24, 1992. ALJX-1, Stip. 10, 20, 22. We agree that the administrative law judge erred in his analysis regarding the compensation due for claimant's knee and back conditions. Relying on *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988), he reasoned that because claimant's back impairment was a natural consequence of claimant's scheduled leg injury, claimant was entitled only to one award for a loss of wage-earning capacity under Section 8(c)(21) of Act, and not to a separate scheduled award for the leg. As claimant did not reach maximum medical improvement for the back condition until August 24, 1992, the administrative law judge concluded that claimant's condition became permanent on that date.

[4]The parties do not dispute that claimant cannot return to his usual employment.

That portion of *Frye* on which the administrative law judge relied was overruled in *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). In *Bass*, the Board held that where harm to a body part not covered under the schedule results from the natural progression of an injury to a scheduled member, claimant may receive a separate award under Section 8(c)(21) for the consequential injury, in addition to an award under the schedule for the initial injury. If two injuries are then being compensated separately, any loss of wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award. Accordingly, the administrative law judge should reconsider his awards consistent with *Bass. See also I.T.O. Corp. of Baltimore v. Green,* F.3d , 1999 WL 528157, No. 98-1972 (4th Cir. July 23, 1999).

Employer further asserts that, as it obtained Section 8(f) relief, its liability is limited to 104 weeks from the date of permanency for claimant's leg, August 1, 1990, rather than the August 24, 1992, date of permanency for the back used by the administrative law judge. The parties stipulated that employer paid compensation for 57.6 weeks for a 20 percent impairment of the leg under the schedule from August 1, 1990, until September 8, 1991. Employer continued to pay at this rate until the stipulated date of maximum medical improvement for the back, August 24, 1992, at which time it had paid compensation for 108 weeks. We cannot accept the assertion that employer's period of liability for purposes of Section 8(f) necessarily commenced in August 1990. The administrative law judge's award of Section 8(f) relief was based on evidence that claimant had a manifest back condition pre-existing his current injury which combined with that injury to result in his ultimate disability. The administrative law judge's decision does not reference evidence that the prior back condition worsened claimant's scheduled knee impairment, but rather that it combined with claimant's current back condition to worsen the disability due to his back. Thus, it appears that Section 8(f) award applies to limit employer's liability for claimant's back condition, not for the knee condition, and that the administrative law judge thus correctly held employer liable for 104 weeks after August 24, 1992. In addition, even if employer could obtain credit toward its 104 weeks of liability for the 57.6 weeks prior to this date, which it characterizes as scheduled permanent partial disability, it is not clear that the remaining benefits paid prior to permanency of the back condition were for permanent disability. On remand, the parties may submit additional evidence for the administrative law judge's consideration on this issue.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded for further proceeding consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge