

BRB No. 00-0977

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|------------------------------|---|--------------|
| RUDOLPH WILLIAMS             | ) |              |
|                              | ) |              |
| Claimant                     | ) |              |
|                              | ) |              |
| V.                           | ) |              |
|                              | ) |              |
| METRO MACHINE CORPORATION    | ) |              |
|                              | ) | DATE ISSUED: |
| Self-Insured                 | ) |              |
| Employer-Petitioner          | ) |              |
|                              | ) |              |
| DIRECTOR, OFFICE OF WORKERS' | ) |              |
| COMPENSATION PROGRAMS,       | ) |              |
| UNITED STATES DEPARTMENT OF  | ) |              |
| LABOR                        | ) |              |
|                              | ) |              |
| Respondent                   | ) | ORDER        |

Employer appeals the administrative law judge's denial of relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The Director has filed a Motion to Dismiss employer's appeal as interlocutory, and to remand the case to the administrative law judge to determine the compensability of the underlying claim for benefits. Employer responds, urging rejection of the Director's motion. Claimant has not responded to this motion. We grant the Director's motion, and we remand this case to the administrative law judge for further proceedings consistent with this opinion.

Only counsel for employer appeared at the formal hearing before the administrative law judge. Counsel stated that employer did not contest the compensability of claimant's claim for a 1991 work injury, and employer seemingly has been paying claimant permanent total disability benefits. Tr. at 4. It was unclear to the administrative law judge whether claimant had ever filed a claim for this injury, but it was clear that no compensation order had ever been issued regarding the injury. Nevertheless, employer sought relief from continuing compensation liability pursuant to Section 8(f), which the Director opposed.

The administrative law judge initially addressed the justiciability of the claim for Section 8(f) relief. He noted that he had requested that employer's counsel submit a draft compensation order to him regarding the underlying claim, but that counsel had not done so.

The administrative law judge found that:

The purposes of the act would be furthered by a rule that would allow me to issue an order granting relief pursuant to section 8(f) where there is no claim or compensation order in place. This is because public policy does or at least should encourage voluntary payment of compensation. To deny section 8(f) relief to an employer which is voluntarily paying compensation simply because there is no claim would defeat this purpose and serve no other legislative purpose.

Decision and Order at 4. Upon considering Section 8(f) on the merits, the administrative law judge found that claimant had a pre-existing permanent partial disability, but that the manifest requirement was not satisfied. He therefore did not address the contribution element. Section 8(f) relief was denied, and employer appeals this denial.

In his motion to dismiss, the Director contends the appeal is of an interlocutory order, and therefore should be dismissed. The Director contends that until there is a finding regarding the compensability of the underlying claim, there can be no determination regarding the applicability of Section 8(f) relief. The Director states that review of the administrative law judge's findings pursuant to Section 8(f) can be obtained following the completion of all proceedings necessary to resolve the underlying claim.

In response to the Director's motion, employer contends that the Director should have filed a cross-appeal of the administrative law judge's finding that he has the authority to determine an employer's entitlement to Section 8(f) relief in the absence of a formal claim. Employer thus contends that the Board should decline to address the Director's contention as it was not properly raised. While the Director certainly could have filed a cross-appeal of the administrative law judge's decision, the regulations do not limit what type of issues may be raised in a motion to the Board. *See* 20 C.F.R. §802.219. As the Director has raised a proper basis for his motion to dismiss, namely the interlocutory nature of the administrative law judge's decision, we reject employer's contention.

The Board generally does not accept interlocutory appeals so as to avoid piecemeal review. *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987); *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985); *Holmes & Narver, Inc. v. Christian*, 1 BRBS 85 (1974). The Board will undertake interlocutory review nonetheless if the appeal meets all the criteria of the collateral order doctrine, *see Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Butler*, 28 BRBS at 117-118, or if, in its discretion, it is necessary to properly direct the course of the adjudicatory process, *see Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1988); *Murphy v. Honeywell, Inc.*, 8 BRBS 178 (1978); *Holmes & Narver*, 1 BRBS at 87.

Employer's appeal is clearly not of a final order, as the administrative law judge's decision neither awards nor denies benefits to claimant, and there is no underlying district director order based on stipulations of the parties. *See* 20 C.F.R. §§702.315, 702.348. Moreover, there are no extenuating circumstances necessitating that the Board review employer's appeal at this time. *See, e.g., Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989); *Niazy*, 19 BRBS 266. Employer may appeal the denial of Section 8(f) relief should the administrative law judge or district director enter a compensation order granting benefits to the claimant. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994) (interlocutory orders appealable upon the issuance of final compensation order).

Contrary to the administrative law judge's statement that this is a case of first impression, the Board addressed the issue presented herein in *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). In *Gupton*, as in this case, only employer's counsel appeared at the hearing on the employer's request for Section 8(f) relief. He stated that all issues between claimant and employer were resolved, but that the parties' stipulations had not been approved by a reviewing official, and he did not have a copy to present to the administrative law judge. After addressing employer's claim for Section 8(f) relief, and finding that employer failed to satisfy both the pre-existing permanent partial disability and contribution elements, the administrative law judge remanded the case for the district director to issue a compensation order on the underlying claim. Employer appealed the administrative law judge's denial of Section 8(f) relief, and the Director filed a motion to dismiss, which the Board granted.

In *Gupton*, the Board stated, "It was incumbent upon the administrative law judge to inquire fully into the underlying compensation claim prior to addressing employer's entitlement to Section 8(f) relief." *Gupton*, 33 BRBS at 95-96, citing *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5<sup>th</sup> Cir. 1998).<sup>1</sup> The fact that in

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<sup>1</sup>In *Ledet*, the Fifth Circuit stated that:

[t]o constitute a 'final decision and order' of the ALJ, the order must at a minimum specify the amount of compensation due or provide a means of calculating the correct amount without resort to extra-record facts which are potentially subject to genuine dispute between the parties.

*Ledet*, 163 F.3d at 905, 32 BRBS at 215(CRT), quoting *Severin v. Exxon Corp.*, 910 F.2d 286, 289, 24 BRBS 21, 23(CRT) (5<sup>th</sup> Cir. 1990). The court stated that matters such as obtaining evidence of claimant's post-injury earnings and calculating the award was properly the role of the administrative law judge. *Id.*

this case the administrative law judge did not remand the case to the district director is of no significance in view of the absence of an underlying compensation award. Moreover, in *Gupton*, 33 BRBS at 96, the Board stated that the administrative law judge was procedurally prevented from addressing Section 8(f) without an underlying award, as Section 8(f) relief cannot be awarded if there is no award for permanent disability or death in excess of 104 weeks. See 33 U.S.C. §908(f)(1); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

Employer contends that *Gupton* incorrectly states that an award of benefits is necessary before entitlement to Section 8(f) relief can be adjudicated. Employer states that the language of Section 8(f) itself does not refer to an award for permanent total or permanent partial disability benefits, and that, moreover, the holding in *Gupton* is inconsistent with the Board's decision in *Langley v. Keller's Peoria Harbor Fleeting*, 27 BRBS 140 (1993). Employer is correct in stating that the language of Section 8(f) does not refer to an award of permanent total or permanent partial disability benefits.<sup>2</sup> If, however, as here, the Director is not willing to grant

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<sup>2</sup>Section 8(f)(1) states, in relevant part:

If . . . the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury . . . In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability . . . If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone .

Section 8(f) relief absent an adjudication of the claim, the practical implication of a request for Section 8(f) relief requires an award of benefits. See generally *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993); *Byrd v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 253 (1993).

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. . In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone . . .

*Langley* also does not support employer's position. In *Langley*, the Board first affirmed the administrative law judge's decision to grant the claimant's request to withdraw his claim for compensation under the Act, pursuant to 20 C.F.R. §702.225. Nevertheless, a majority of the panel agreed with the employer, and, significantly, the Director, that the employer was still entitled to have its claim for Section 8(f) relief adjudicated. It was the Director's position that a finding of Section 8(f) entitlement would aid the employer as to its assessment under Section 44 of the Act, 33 U.S.C. §944, based on its payments to claimant under the state act. The majority opinion deferred to the Director's concession that employer was entitled to a hearing on the Section 8(f) issue.<sup>3</sup> 27 BRBS at 144-145.

The holding in *Langley* does not stand for the proposition that an employer may be entitled to Section 8(f) relief without a determination of the claim on the merits by an administrative law judge. In a footnote, the Board stated that the administrative law judge had not made a determination as to whether claimant was in fact entitled to benefits under the Act despite the withdrawal of the case, and noted that employer had controverted the issues of causation and the nature and extent of claimant's disability. 27 BRBS at 145 n. 6. *Gupton* and *Langley* therefore stand for the proposition that the underlying claim must be adjudicated before an employer's entitlement to Section 8(f) relief may be adjudicated, unless the Director otherwise agrees that an award of Section 8(f) is appropriate. See generally *Dickinson*, 28 BRBS 84.

Employer also avers that in *Gupton*, the employer attempted to establish its entitlement to Section 8(f) relief by way of stipulations, whereas, in this case, employer submitted evidence in support of its case for Section 8(f) relief. This distinction is not readily apparent from the face of the *Gupton* decision, but is, in any event, irrelevant, as it is the lack of an underlying order that is significant, not the manner in which employer attempted to prove 8(f) entitlement.

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<sup>3</sup>Judge Brown dissented, stating that after the claim for compensation was properly withdrawn, the administrative law judge had no authority to proceed with a hearing on the Section 8(f) claim. He disagreed with the Director's interpretation of the Section 44 assessment issue. 27 BRBS at 146-147.

Finally, we note that, in *Gupton*, the administrative law judge found that the employer had not satisfied the contribution element for Section 8(f) relief, whereas in the instant case, the administrative law judge found that employer did not satisfy the manifest element, a finding which arguably can be reviewed without an underlying award of benefits. Nonetheless, were the Board to hold that the administrative law judge erred in this regard,<sup>4</sup> the case would have to be remanded for consideration of the contribution element. Satisfaction of the contribution element is heavily dependent on whether the ultimate award is for permanent partial disability or permanent total disability, see generally *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4<sup>th</sup> Cir. 1998), and thus, resolution of the underlying claim is required.

According, the Director's motion to dismiss employer's appeal is granted. The case is remanded to the administrative law judge for a decision of the merits of claimant's claim following a hearing, or for the issuance of an order based on the parties' stipulations. See 33 U.S.C. §919(d); 20 C.F.R. §§702.331-702.351. Employer may file a new appeal seeking review of the administrative law judge's findings regarding Section 8(f) once the administrative law judge issues a final order.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge

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<sup>4</sup>We do not intend by this statement to express an opinion on the merits of employer's appeal.