BRB No. 91-1728

BILLY RAY HAMLET	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
EDWARD'S TRUCKING COMPANY	)	
	)	
and	)	
	)	DATE ISSUED:_____
ROYAL 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 of Samuel B. Groner, Administrative Law Judge, United States Department of Labor.

James F. Bromley (Bromley, Greene & Walsh), Washington, D.C., for employer/carrier.

LuAnn Kressley (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Employer's Motion for Modification (90-DCW-27) of Administrative Law Judge Samuel B. Groner 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.*, (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his right foot on September 24, 1980 during the course of his employment with employer. Subsequently, due to complications from diabetes, claimant's right leg was amputated below the knee.[1] Employer paid claimant temporary total disability benefits since September 25, 1980, and the parties agreed that on September 10, 1981, claimant's condition reached maximum medical improvement. Based on the stipulated agreement, on March 24, 1983 the district director[2] issued a compensation order entitling claimant to permanent total disability benefits from September 10, 1981 and continuing.

On October 27, 1989, employer filed a request for modification of the award pursuant to Section 22, of the Act, 33 U.S.C. §922, seeking Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation. In the alternative, employer sought such relief as an initial adjudication. Employer based its request on claimant's pre-existing diabetes. The district director sought the Director's opinion on employer's entitlement to Section 8(f) relief, and the Director opposed the request, contesting the timeliness of the application and employer's substantive eligibility. *See* letter to the Director dated December 21, 1989 and letter to the claims examiner dated January 10, 1990. On January 30, 1990, the district director denied employer Section 8(f) relief, apparently as untimely. Decision and Order at 2. Employer then requested a hearing before the Office of Administrative Law Judges.

Although the Director was not present at the hearing, the administrative law judge considered the issues before him to be the same as those before the district director. *See* letter dated September 27, 1990; Decision and Order at 1-2. The administrative law judge acknowledged that the 1984 amendments to the Act are inapplicable in D.C. workers' compensation cases.[3] *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). He found that the law requiring an employer to seek Section 8(f) relief at the first hearing in which claimant's permanent disability was at issue is not dispositive as there had been no such hearing in this case. Additionally, he determined that as employer alleged entitlement to Section 8(f) relief in its notices of controversion,[4] and as employer has continued to pay claimant

[1]Due to the same complications, following a later non-work-related accident, claimant's left leg was amputated below the knee. Tr. at 18-19.

[2]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

[3]After the enactment of the 1984 Amendments to the Act, an employer seeking relief under Section 8(f) must present its request "and a statement of the grounds therefore. . . to the deputy commissioner prior to the consideration of the claim by the deputy commissioner." 33 U.S.C. §908(f)(3) (1988). No such time limit was in effect previously. 33 U.S.C. §908(f) (1982).

[4]On employer's notices of controversion dated April 17, 1981 and March 30, 1982, it noted the applicability of Section 8(f) as one of its reasons for controverting the claim. Petition for Modif. Exs. A, B.

compensation, Section 22 is an available tool. Therefore, he concluded that employer's claim for Section 8(f) relief is not barred. Decision and Order at 3. Substantively, the administrative law judge concluded employer is entitled to relief from continuing liability for compensation. Decision and Order at 4. Arguing only the issue of timeliness, the Director appeals the decision. Employer responds, urging affirmance.

The Director contends the October 27, 1989 petition for Section 8(f) relief was untimely. He argues that employer, at the latest, should have applied for relief in March 1983 when the parties agreed to the permanency of claimant's disability and presented their stipulations to the district director. In response, employer asserts its notices of controversion to support its argument that the issue was timely raised and not abandoned. Further, employer argues that its failure to address the Section 8(f) issue before the district director was deliberate, as the parties had agreed employer would seek Section 8(f) relief in a Section 22 request for modification after the approval of the stipulations regarding disability. *See* letters dated September 24, 1982, January 27, 1983 and March 7, 1983.

A request for Section 8(f) relief must be raised 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. *Verderane v. Jacksonville Shipyards, Inc.*, 729 F.2d 726, 17 BRBS 154 (CRT) (11th Cir. 1985); *American Bridge Div., U.S. Steel Corp. v. Director, OWCP*, 679 F.2d 81, 83, 14 BRBS 923, 925 (5th Cir. 1982), *aff'g Carroll v. American Bridge Div., U.S. Steel Corp.*, 13 BRBS 759 (1981); *Avallone v. Todd Shipyards Corp.*, 13 BRBS 348 (1981), *review denied*, 672 F.2d 901 (2d Cir. 1981); *Wilson v. Old Dominion Stevedoring Corp.*, 10 BRBS 943 (1979); *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979). Once a compensation order becomes final, the only method to reopen the claim is to petition for modification pursuant to Section 22 of the Act, and the party seeking a modification must establish that there has been a change in claimant's condition or a mistake in a determination of fact. *See Director, OWCP v. Edward Minte Co., Inc.*, 803 F.2d 731, 735, 19 BRBS 27, 31 (CRT) (D.C. Cir. 1986), *aff'g Dixon v. Edward Minte Co., Inc.*, 16 BRBS 315 (1984); 33 U.S.C. §922; 20 C.F.R. §702.350. A claim for Section 8(f) relief may be raised for the first time through a petition for Section 22 modification if employer shows that there are special circumstances which warrant such action. *Edward Minte Co.*, 803 F.2d at 731, 19 BRBS at 27 (CRT). However, parties are not permitted to invoke Section 22 to correct errors or misjudgments of counsel, nor may they use Section 22 to circumvent the rule that Section 8(f) relief is waived if not properly raised at the first possible opportunity. *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 26, 14 BRBS 636, 640 (1st Cir. 1982), *aff'g Woodberry v. General Dynamics Corp.*, 14 BRBS 431 (1981); *Dykes v. Jacksonville Shipyards, Inc.*, 13 BRBS 75, 76 (1981).

In this case, the district director did not hold a hearing on disability before she approved the parties' stipulations; therefore, employer claims the modification hearing before the administrative law judge was the first wherein the permanency of claimant's disability was at issue. Tr. at 37. Employer also contends that the mistake of fact necessary for modification occurred when the district director failed to discuss employer's request for Section 8(f) relief in her compensation order.

Tr. at 37; Emp. Brief at 30. Employer's contentions create precisely a situation previously disapproved of by the United States Court of Appeals for the D.C. Circuit. In *Edward Minte Co.*, the court held that employer properly raised Section 8(f) in response to claimant's petition for modification based on a change in claimant's condition from a permanent partial disability to a permanent total disability. In approving such action, the court noted that this was not a situation where the employer was invoking Section 22 as an "afterthought to justify a belated request for Section 8(f) relief," or the mistake alleged was the district director's failure to raise Section 8(f) in the initial decision. *Edward Minte Co.*, 803 F.2d at 735, 19 BRBS at 32 (CRT). This "mistake" is precisely that alleged by employer in the present case. Moreover, the only issues before the administrative law judge pertained to Section 8(f), as the nature and extent of claimant's disability had been established as permanent and total in 1983.[5] Further, at the time of the proceedings before the district director, the permanent nature of claimant's condition was known and employer was aware of facts which would have enabled it to file a claim for Section 8(f) relief.

The purpose of requiring an employer to apply for Section 8(f) relief in the first proceedings wherein the permanency of claimant's disability is at issue is to facilitate the policy of finality in litigation and to avoid the bifurcation of issues. *See generally American Bridge*, 679 F.2d at 83, 14 BRBS at 925; *Egger*, 9 BRBS at 897.[6] The fact that the issue of the permanency of claimant's disability was settled at the district director level without a hearing does not support employer's contention that the hearing before the administrative law judge was the first opportunity it had to litigate the permanency of claimant's disability. The proceedings before the district director resulted in the final resolution of the claim for permanent total disability benefits. *Avallone*, 13 BRBS at 350. Additionally, employer has not established that there are special circumstances sufficient to justify reopening the claim pursuant to Section 22 despite employer's failure to raise the issue of Section 8(f) relief at the time claimant was awarded permanent total disability. *Edward Minte Co.*, 803 F.2d

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[5]Stipulation number 5 states, *inter alia*, that:

> It is agreed that the claimant has been permanently and totally disabled within the meaning of the Act since September 10, 1981, because of his inability to return to his former employment, age, education and physical limitations.

Stip. at 1.

[6]In *Egger*, the Board specifically mandated:

> It is our opinion 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 <u>hereafter</u> the issue must be raised and litigated at the first hearing of the case.

Egger, 9 BRBS at 899 (emphasis added). As *Egger* was decided in 1979, employer was aware of it in 1983 and cannot prevail on the basis that the bifurcation of issues was the "accepted practice" at the time the parties filed their stipulations.

at 735, 19 BRBS at 32 (CRT). Because the applicability of Section 8(f) was a viable issue in 1983, and because employer deliberately violated the policy against the bifurcation of issues, *see Egger* 9 BRBS at 899, we reverse the administrative law judge's findings and hold that employer is not entitled to Section 8(f) relief as its application for relief is untimely. *See Verderane*, 729 F.2d at 775, 17 BRBS at 154 (CRT); *American Bridge*, 679 F.2d at 81, 14 BRBS at 923.

Accordingly, the administrative law judge's Decision and Order on Employer's Motion for Modification is reversed.

SO ORDERED.

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BETTY J. STAGE, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge