

EDWARD DIFIDELTO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DELAWARE RIVER STEVEDORES	)	DATE ISSUED: <u>Oct. 8, 2004</u>
	)	
and	)	
	)	
LIBERTY MUTUAL	)	
INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	ORDER on MOTION for RECONSIDERATION

The Director, Office of Workers' Compensation Programs (the Director) has filed a timely motion for reconsideration of the Board's decision in this case, *DiFidelto v. Delaware River Stevedores*, BRB No. 03-705 (July 19, 2004) (McGranery, J., concurring and dissenting), requesting that the Board vacate its order of remand and reverse the administrative law judge's forfeiture order in accordance with the Board's decision in *Briskie v. Weeks Marine, Inc.*, \_\_ BRBS \_\_, BRB No. 03-796 (August 25, 2004).<sup>1</sup> 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant and employer respond in agreement with the Director. We grant the Director's motion for reconsideration. 20 C.F.R. §801.301(c).

To recapitulate, claimant was injured in January 2000. Employer voluntarily paid benefits from January 8, 2000, through November 19, 2001. In January, February, and April 2002, when employer was not paying claimant compensation, employer sent

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<sup>1</sup>As the Board has issued its decision in *Briskie*, the Director's request to hold this case in abeyance pending the resolution of *Briskie* is now moot.

claimant LS-200 forms, requesting post-injury wage information pursuant to Section 8(j) of the Act, 33 U.S.C. §908(j). Claimant did not respond to any of the requests. Ultimately, claimant was awarded temporary total disability benefits from January 8, 2000, through July 2001, and temporary partial disability benefits thereafter. However, because claimant failed to complete and return the LS-200 forms, the administrative law judge determined that claimant forfeited his entitlement to disability benefits. The Board affirmed claimant's entitlement to benefits, but a majority of the panel vacated the forfeiture order, holding that the administrative law judge erred in his application of the Board's decision in *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997). The Board remanded the case for further consideration of the specific language of the implementing regulation, 20 C.F.R. §702.285(a), which provides that employer may request an earnings report "from an employee to whom it is paying compensation."<sup>2</sup> The Board remanded the case for the administrative law judge to determine whether Section 8(j) applies to bar claimant from his entitlement to benefits, in light of the fact that employer was not paying any benefits when it sent the forms to claimant. *DiFidelto*, slip op. at 5, 9-10. In dissent, Judge McGranery stated that, based on these facts and the plain language of Section 702.285(a), Section 8(j) does not apply in this case. Accordingly, she stated she would reverse the administrative law judge's forfeiture order and permit claimant to receive the benefits to which he was entitled. *DiFidelto*, slip op. at 10-12.

The Director argues that the issue in the case at bar, whether employer was entitled to request an earnings report from claimant at a time when it was not paying him compensation, is directly on point with the issue involved in *Briskie*. In *Briskie*, the claimant also did not respond to his employer's wage information request, which was made at a time when the employer was not paying benefits to the claimant. The administrative law judge found that the Section 8(j) forfeiture provision applied to bar the claimant's receipt of benefits. Adopting the rational interpretation of the statute and implementing regulation offered by the Director, the Board reversed the forfeiture order. Specifically, the Board held that Section 702.285(a) defines the term "disabled employee" in Section 8(j) and thus, pursuant to the plain language of Section 702.285(a), an employer or the Special Fund must be "paying compensation," to the claimant, either voluntarily or by virtue of an award, in order for the claimant to be considered "disabled" under Section 8(j) and for him to be required to submit an earnings report pursuant to that section. If the employer or the Special Fund is not paying compensation, the forfeiture provision cannot be applied to a claimant who fails to respond timely or accurately to the wage information request. *Briskie*, slip op. at 9.

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<sup>2</sup>Section 702.285(a) states in pertinent part:

An employer, carrier or the Director . . . may require an employee to whom it is paying compensation to submit a report on earnings from employment or self-employment.

We agree with the Director that pursuant to *Briskie* and the regulation at Section 702.285(a), Section 8(j) forfeiture does not apply in this case, as employer was not paying claimant compensation at the time that it sought completion of the earnings reports. As the requests were not made during a period when claimant was required to file the report, 33 U.S.C. §908(j)(2), his failure to respond to employer's requests does not affect his entitlement to temporary total and temporary partial disability benefits. Consequently, we hold that claimant is entitled to the benefits awarded.

For the reasons set forth in *Briskie*, we vacate the Board's initial decision in the instant case with regard to the Section 8(j) issue only, and we reverse the administrative law judge's order of forfeiture. In all other respects, the Board's initial decision in this case is affirmed.

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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REGINA C. McGRANERY  
Administrative Appeals Judge