

HOWARD SINGER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
KINDER MORGAN, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE	)	DATE ISSUED: <u>JUN 3, 2004</u>
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 Approving Joint Stipulations and Awarding Section 8(f) Relief of Donald B. Jarvis, Administrative Law Judge, United States Department of Labor.

James P. Aleccia and Michael T. DeMicco (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

Barry H. Joyner (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Approving Joint Stipulations and Awarding Section 8(f) Relief

(2002-LHC-0964; 2002-LHC-1260) of Administrative Law Judge Donald B. Jarvis 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a roustabout and petroleum tank gauger, suffered cumulative trauma injuries to his right wrist prior to and on March 7, 2001, and to his right knee and right wrist prior to and on August 20, 2001.<sup>1</sup> The parties stipulated that claimant suffers a 64.5 percent impairment to his right lower extremity and a 21 percent impairment to his right upper extremity.<sup>2</sup>

In his Decision and Order, the administrative law judge accepted the private parties' stipulations regarding the nature and extent of claimant's disabilities and his resulting compensation under the schedule. After determining that employer had satisfied all three elements necessary for relief under Section 8(f), 33 U.S.C. §908(f), the administrative law judge granted employer's application for relief. Relevant to this appeal, the administrative law judge accepted the private parties' stipulation that employer is liable for only one period of 104 weeks of permanent disability compensation.<sup>3</sup>

The Director appeals, conceding that employer is entitled to relief under Section 8(f), but arguing that the administrative law judge erred in accepting the stipulation as to

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<sup>1</sup> Claimant suffered an aggravation to the carpal instability of his right wrist as well as an aggravation of pre-existing osteoarthritis of his right knee.

<sup>2</sup> Claimant has undergone surgeries for carpal tunnel release on March 8 and September 6, 2001, as well as a total right knee arthroplasty on September 6, 2001. Stips. at 1(c).

<sup>3</sup> In his Decision and Order, the administrative law judge awarded claimant compensation for 185.76 weeks for his right lower extremity, *see* 33 U.S.C. §908(c)(2), and 65.52 weeks of compensation for impairment to his right upper extremity, *see* 33 U.S.C. §908(c)(1), based upon the parties' stipulations. Further, the administrative law judge ordered employer to pay permanent partial disability benefits for one period of 104 weeks with the Special Fund assuming liability for the remaining 147.28 weeks of compensation.

the extent of the respective liabilities of employer and the Special Fund. The Director contends that the administrative law judge erred in holding employer liable for only one period of 104 weeks since there were two separate scheduled awards involved arising from two separate injuries, creating two separate liabilities with Section 8(f) applicable to each. The Director contends that use of applicable law renders employer liable for 156.96 weeks of compensation for claimant's leg injury, with the Special Fund liable for the remaining 28.8 weeks of compensation, and that employer is fully liable for the 65.52 weeks of compensation due for claimant's arm injury. Employer responds that the Director cannot raise this issue for the first time on appeal, and urges affirmance of the administrative law judge's Decision and Order.

We initially address employer's arguments that the Director should be precluded at this juncture from raising the issue of the allocation of liability pursuant to Section 8(f) as he neither appeared at the hearing nor objected to the parties' stipulations. Contrary to employer's contentions, the Director may raise new issues on appeal if the liability of the Special Fund is at issue and the Director's contentions allege erroneous legal determinations. *See, e.g., Stewart v. Bath Iron Work Corp.*, 25 BRBS 151 (1991). The Director's non-participation before the administrative law judge does not preclude his raising on appeal issues concerning Section 8(f). *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9<sup>th</sup> Cir. 1993).

Moreover, employer's reliance upon *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9<sup>th</sup> Cir. 1998), is misplaced. In that case, the Ninth Circuit held that substantial evidence supported the administrative law judge's granting of Section 8(f) relief and that the administrative law judge had not relied on the parties' stipulations to award Section 8(f) relief. In this case, the administrative law judge made findings of fact regarding the three elements necessary for Section 8(f) relief, but, contrary to employer's contention, relied solely on the parties' stipulations to allocate liability between employer and the Special Fund. This is evidenced by the lack of any discussion of this issue in the decision. It is well established, as the Director contends, that the Special Fund cannot be bound by stipulations to which the Director has not agreed. *E.P. Paup*, 999 F.2d at 1352, 27 BRBS at 53(CRT); *Brady v. J. Young & Co.*, 17 BRBS 46, *aff'd on recon.*, 18 BRBS 167 (1985). In addition, stipulations are not binding when they evince an incorrect application of law.<sup>4</sup> *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). For the reasons that follow, we agree with the Director that the parties'

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<sup>4</sup> Thus, employer's argument that it would not have entered into the stipulations if the extent of its liability to claimant and the limitation of its relief under Section 8(f) were different is without merit.

stipulation concerning the allocation of liability between employer and the Special Fund is contrary to law.

Section 8(f) shifts the liability to pay compensation for permanent disability from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest, preexisting permanent partial disability and that his current permanent partial disability is not due solely to the subsequent work injury but is “materially and substantially greater than that which would have resulted from the subsequent work injury alone.” 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep’t of Labor*, 203 F.3d 664, 33 BRBS 204(CRT) (9<sup>th</sup> Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). In the case of scheduled disability, employer is liable for compensation for the number of weeks of benefits due pursuant to the schedule for the subsequent injury, or 104 weeks, whichever is greater. 33 U.S.C. §908(f)(1); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

In this case, the administrative law judge properly analyzed whether employer established entitlement to Section 8(f) relief on each claim. *See id.* The Board and the Ninth Circuit have held, however, that when a claimant sustains injuries to discrete body parts resulting in scheduled disability to each, employer is liable pursuant to Section 8(f) for a period of benefits for each disability; its liability is not limited to one period of 104 weeks. *Berg v. Matson Terminals, Inc.*, 34 BRBS 140 (2000), *aff’d*, 279 F.3d 694, 35 BRBS 152(CRT) (9<sup>th</sup> Cir. 2002) (case involved injuries to both knees sustained in the same accident).<sup>5</sup> In this case, it is clear that claimant sustained separately compensable scheduled disabilities to his right arm and his right leg. Thus, for the reasons stated in *Berg*, we cannot affirm the administrative law judge’s acceptance of the parties’ stipulation imposing on employer liability for only a single period of 104 weeks, as it is contrary to law. *Id.*

As the Director suggests, the award of Section 8(f) relief may be modified to accord with law. Section 8(f) limits employer’s liability for scheduled injuries to the “applicable period of weeks [provided under the schedule] for the subsequent injury, or for one hundred and four weeks, whichever is greater.” 33 U.S.C. §908(f)(1). Applying this law to the facts of this case, claimant is entitled to 185.76 weeks of compensation for his 64.5 percent impairment of his right leg, 33 U.S.C. §908(c)(2), (19). The

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<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. In *Berg*, 279 F.3d 694, 35 BRBS 152(CRT), the court deferred to the Director’s construction of Section 8(f).

administrative law judge found, and the Director does not dispute, that claimant had a pre-existing 10 percent impairment of his right leg. As the disability attributable to the subsequent injury, a 54.5 percent impairment, results in benefits payable for 156.96 weeks, employer is liable for this compensation as it exceeds 104 weeks. 33 U.S.C. §908(f)(1). The Special Fund is liable for the compensation due for the remaining 28.8 weeks. *Berg*, 34 BRBS at 144. Additionally, claimant is entitled to 65.52 weeks of compensation for the 21 percent impairment of his right arm, 33 U.S.C. §908(c)(1), (19), 16 percentage points of which is due to the pre-existing arm impairment. As claimant's award of benefits is for fewer than 104 weeks, employer is fully liable for all compensation due for this injury. *Strachan Shipping Co. v. Nash*, 751 F.2d 1460, 17 BRBS 29(CRT) (5<sup>th</sup> Cir. 1985), *modified on other grounds on reh'g en banc*, 782 F.2d 513, 18 BRBS 45(CRT) (1986). The administrative law judge's award is modified to reflect the proper allocation of liability for these scheduled disability benefits.

Accordingly, the administrative law judge's Decision and Order Approving Joint Stipulations and Awarding Section 8(f) Relief is modified as stated herein to reflect the proper allocation of compensation payments between employer and the Special Fund. In all other respects, the administrative law judge's Decision and Order is affirmed.

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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BETTY JEAN HALL  
Administrative Appeals Judge