

BRB No. 04-0639

RICHARD FEIDER )  
 )  
 Claimant )  
 )  
 v. )  
 )  
 POMEROY GRAIN GROWERS ) DATE ISSUED: Mar 8, 2005  
 )  
 and )  
 )  
 MAJESTIC 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 Awarding Benefits and the Amended Decision and Order Awarding Section 8(f) Relief of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Robert E. Babcock, Lake Oswego, Oregon, for employer/carrier.

Patricia M. Nece (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits and the Amended Decision and Order Awarding Section 8(f) Relief (2003-LHC-1322) of Administrative Law Judge Anne Beytin Torkington 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The facts of this case are not in dispute. Prior to April 30, 1999, claimant had a degenerative condition in his left knee resulting from a torn meniscus and chondromalacia. Claimant also had a surgically fused right ankle with severe arthritis. On April 30, 1999, claimant fell from a ladder at work and sprained his right ankle. He was treated and released, but he returned on May 4, 1999, because he had developed a staph infection. Aggressive antibiotic treatment failed, and on May 12, 1999, his right leg was amputated below his knee. On May 22, 1999, his left leg was amputated above his knee.<sup>1</sup> The only dispute before the administrative law judge was the issue of employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief.

The administrative law judge found that claimant's fused ankle and degenerative knee conditions were manifest pre-existing permanent partial disabilities. Decision and Order at 5-6. She also found that claimant's pre-existing ankle and knee conditions contributed to claimant's ultimate permanent total disability, regardless of the source of the infection.<sup>2</sup> Consequently, the administrative law judge awarded employer Section 8(f) relief. Decision and Order at 6. With regard to the amount of relief to which employer was entitled, the administrative law judge found, contrary to the Director's arguments, that, as claimant was permanently totally disabled, and his benefits were to be awarded pursuant to Section 8(a) of the Act, 33 U.S.C. §908(a), employer is to be relieved of its liability for benefits following 104 weeks of permanent disability payments. The administrative law judge found that the Director's reliance on *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 35 BRBS 152(CRT) (9<sup>th</sup> Cir. 2002), *aff'g* 34

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<sup>1</sup>Doctors believed that bacteria settled in claimant's right ankle and left knee where the irregular surfaces of the joints, due to the previous injuries, provided "nidi," or breeding grounds, for the bacteria to develop and avoid antibiotic treatment. The staph infection was eradicated by the amputations. Decision and Order at 2-4; ALJ Ex. 3.

<sup>2</sup>Doctors' opinions differed on whether the infection was present before the ankle sprain and became active or developed as a result of it. The administrative law judge found that the source of the infection did not matter, as she concluded from the doctors' opinions that the infection would have been eradicated by the antibiotic treatment had it not been for the nidi in the two previously injured joints. Decision and Order at 6.

BRBS 140 (2000), was misplaced, as *Berg* is distinguishable. Decision and Order at 7-8.

The Director moved for reconsideration of the decision, arguing that the administrative law judge erred in failing to award claimant benefits, in awarding employer Section 8(f) relief, and, alternatively, in determining how much relief to grant employer. In her Amended Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from April 30 through May 21, 1999, and on-going permanent total disability benefits thereafter. She rejected the Director's arguments that there were no manifest pre-existing permanent partial disabilities that contributed to the ultimate disability, and she rejected the Director's alternate contention that employer should be held liable for 288 weeks of permanent disability benefits, the amount to which claimant would be entitled for the loss of a leg pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). Amended Decision and Order at 2. The administrative law judge, therefore, reaffirmed her award of Section 8(f) relief to employer following its payment of permanent disability benefits for 104 weeks. *Id.*

The Director appeals the decisions, and employer responds, urging affirmance. The only issue raised is the amount of the Special Fund's liability; that is, how many weeks of permanent disability benefits must employer pay to claimant before the Special Fund becomes liable?<sup>3</sup> The Director contends employer must pay 205 weeks of benefits before the Special Fund becomes liable.<sup>4</sup> The Director argues that it is claimant's "injury" and not his "disability" that determines which part of Section 8(f)(1), 33 U.S.C. §908(f)(1), applies. Thus, he asserts that as claimant's injury, the below-the-knee amputation precipitated by the ankle sprain and the infection, falls within the schedule, the Board should modify the administrative law judge's award of Section 8(f) relief to reflect employer's liability for 205 weeks of permanent disability benefits. Employer argues that, as claimant is totally disabled, his benefits are to be paid pursuant to Section 8(a) of the Act; thus, they are not payable pursuant to the schedule, and its liability should be limited to 104 weeks. Therefore, employer urges the Board to affirm the administrative law judge's award of Section 8(f) relief following 104 weeks of permanent

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<sup>3</sup>The Director no longer challenges employer's entitlement to Section 8(f) relief.

<sup>4</sup>Although the Director argued below that employer should have to pay benefits for 288 weeks pursuant to Section 8(c)(2), he has changed his position and now argues that employer is liable for 205 weeks of benefits pursuant to Sections 8(c)(4), (15), 33 U.S.C. §908(c)(4), (15), for claimant's ankle injury resulting in the first amputation which was below the knee. Section 8(c)(4) states: "Foot lost, two hundred and five weeks. . . ." Section 8(c)(15) provides: "Amputated arm or leg: Compensation for an arm or leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot."

disability payments by employer.

Section 8(f)(1) states, in pertinent part:

If following an *injury* falling within the provisions of subsection (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater. . . .

33 U.S.C. §908(f)(1) (emphasis added). Claimant herein sustained an injury to his ankle, and that injury falls within the provisions of the schedule at subsection (c)(1)-(20), 33 U.S.C. §908(c)(1)-(20). As a result of the chain reaction following that injury, claimant is permanently and totally disabled, and that disability was not the result of the ankle injury alone. Therefore, pursuant to Section 8(f)(1), employer must pay claimant benefits for the greater of 104 weeks or the prescribed period of weeks for that scheduled injury. As Section 8(c)(4) prescribes the period of benefits due for the loss of a foot, we agree with the Director that employer must pay claimant benefits for a period of 205 weeks, which is greater than 104 weeks. 33 U.S.C. §908(f)(1). Although claimant also subsequently lost the use of his other leg, and loss of both limbs establishes a presumption that claimant is totally disabled, 33 U.S.C. §908(a), it is the location of claimant's *injury* that controls which portion of Section 8(f)(1) is applicable.<sup>5</sup>

This result is supported not only by the plain language of the Act, but also by the Board's decision in *Higgins v. Hampshire Garden Apartments*, 19 BRBS 77 (1986) (Brown, J., dissenting), *recon. en banc denied*, 19 BRBS 192 (1987). In *Higgins*, the claimant's toe became frostbitten in 1979 at work. With a history of diabetes, the claimant's toe did not heal properly, became gangrenous, and was amputated. The gangrene spread and was not eradicated until the claimant underwent an amputation of his leg below the knee. The claimant was awarded permanent total disability benefits, and the employer filed a claim for Section 8(f) relief, and the administrative law judge

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<sup>5</sup>Section 8(f)(1) also provides:

*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, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.*

33 U.S.C. §908(f)(1) (emphasis added).

granted the relief, holding the employer liable for 288 weeks of benefits pursuant to Section 8(c)(2). *Higgins*, 19 BRBS at 78. On appeal, the Board rejected the employer's argument that its liability was limited to 104 weeks because the award was payable pursuant to Section 8(a), stating that such an interpretation would render the second sentence of Section 8(f)(1) meaningless. The Board, however, modified the decision to reflect the employer's liability for 205 weeks, instead of 288, because the injury was to the toe and, under Section 8(c)(15), the amputation of a leg below the knee is equivalent to the loss of a foot; therefore, Section 8(c)(4) controlled the amount of benefits for which the employer was liable. *Higgins*, 19 BRBS at 79; *see also Davenport v. Apex Decorating Co., Inc.*, 13 BRBS 1029, 1040 (1981).

For the reasons set forth in *Higgins*, we reject employer's argument that its liability should be limited to 104 weeks, and we modify the administrative law judge's award of Section 8(f) relief to reflect employer's liability for 205 weeks of permanent disability benefits prior to the commencement of the Special Fund's liability for benefits.<sup>6</sup>

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<sup>6</sup>We agree with the administrative law judge's finding that the Director's reliance on *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 35 BRBS 152(CRT) (9<sup>th</sup> Cir. 2002), *aff'g* 34 BRBS 140 (2000), is misplaced, as *Berg* can be distinguished. In *Berg*, the claimant sustained an injury to each knee in the work accident. Claimant was found entitled to a permanent partial disability scheduled award for each leg. Therefore, the employer was held liable for two periods of 104 weeks because each injury was a discrete injury that was separately compensable. 33 U.S.C. §908(f)(1); *Berg*, 279 F.3d at 697, 35 BRBS at 153(CRT); *see Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4<sup>th</sup> Cir. 1990). To the contrary, claimant's subsequent work-related injury in this case was a single, discrete injury to his ankle, and that injury set off a chain reaction leading to claimant's permanent total disability.

Accordingly, the administrative law judge's award of Section 8(f) relief is modified to reflect employer's liability for 205 weeks of permanent disability benefits before the liability of the Special Fund commences. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge