

RHETA DEMARTINO)	
(Widow of LOUIS J. DEMARTINO))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: <u>Oct. 30, 2003</u>
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order B Awarding Benefits and the Decision on Motion for Reconsideration of David Di Nardi, Administrative Law Judge, United States Department of Labor.

Mark W. Oberlatz (Murphy and Beane), New London, Connecticut, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order B Awarding Benefits and the Decision on Motion for Reconsideration (02-LHC-319, 02-LHC-320) of Administrative Law Judge David Di Nardi 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

Decedent was exposed to asbestos during his employment with employer. He left

employer=s shipyard in 1990, worked elsewhere for employer, and thereafter stopped working on January 24, 1994. Decedent died on February 3, 1996, and the cause of his death was listed as bilateral pneumonia due to or as a consequence of Aend stage asbestosis.@ CX 1. The parties agreed that employer was liable for permanent total disability compensation from the decedent=s last day of work through the date of his death, and death benefits to claimant thereafter. The parties disputed, however, the rate of death benefits to be paid to claimant. EX 6. Additionally, employer=s entitlement to relief pursuant to Section 8(f), 33 U.S.C. '908(f), was at issue.

In his Decision and Order B Awarding Benefits, the administrative law judge awarded decedent the benefits to which the parties had agreed. Citing to the parties= joint statement of stipulations, which did not address employer=s request for Section 8(f) relief, the administrative law judge determined that that issue had been withdrawn by employer and, therefore, he did not consider it. Employer filed a timely Motion for Reconsideration, requesting that the administrative law judge reconsider his finding that employer withdrew its claim for Section 8(f) relief. In a Decision on Motion for Reconsideration, the administrative law judge denied employer=s motion, stating that there was no valid basis for modification of his previous Decision and Order. Specifically, the administrative law judge found that employer raised the issue of Section 8(f) relief at the district director level, and again at the formal hearing, but that the only evidence filed by employer after April 17, 2002, was the report of Dr. Godar and the deposition testimony of Dr. Gerardi. Moreover, the administrative law judge found that, although he directed employer to file a brief on this issue, no brief was received. The administrative law judge stated that he Awaited@ until September 25, 2002, to issue his decision, and that as no brief was filed relating to the Section 8(f) issue, he interpreted the parties= stipulations, filed on August 30, 2002, as evidencing a withdrawal of the employer=s Section 8(f) petition.

On appeal, employer challenges the administrative law judge=s finding that it withdrew its claim for Section 8(f) relief.

We agree with employer that the administrative law judge erred in determining that employer had withdrawn its request for Section 8(f) relief. Initially, it is undisputed that employer did not formally request that its petition for Section 8(f) relief be withdrawn. Rather, in response to the administrative law judge=s inquiry at the formal hearing as to whether the parties could stipulate to any of the unresolved issues, employer=s counsel stated: AThe B if there is an unresolved issue today I think it=s the Employer=s claim for Section 8(f) relief, and I do think there may be some questions we need to straighten out relative to what the rate would be for [claimant] but not that there=s an issue there. I think there=s a question for the Court.@ See Tr. at 7. The parties then discussed the possibility of resolving the issues regarding the amount of the widow=s benefits, but employer never indicated that it intended to withdraw the Section 8(f) issue from consideration by the

administrative law judge. *See generally Ridley v. Surface Technologies Corp.*, 32 BRBS 211 (1998).

The administrative law judge, however, determined that the Section 8(f) issue had been withdrawn, initially based on the fact that there is no reference to the issue in the parties' post-hearing stipulations. *See* JX-1. Claimant, however, has no interest in the Section 8(f) issue. Stipulations between employer and claimant impacting on the liability of the Special Fund are not binding on the Fund absent participation of the Director. *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999); *Brady v. J Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.* 18 BRBS 167 (1985). Therefore, even if there were a reference in the stipulations to the Section 8(f) issue, it would have no legal significance. In any event, the mere failure to reference the contested Section 8(f) issue in the parties' stipulations cannot support a finding that employer wished to withdraw that issue from consideration by the administrative law judge.

The administrative law judge also relied on the fact that no brief addressing this issue was filed by employer. At the conclusion of the formal hearing on April 17, 2002, the administrative law judge stated: A I still would ask counsel to get together and attempt to resolve that issue and arrive at a stipulation as to the amount of the weekly benefits to be paid to [claimant] effective . . . the day after the date of death. *If the parties are unable to agree on that weekly benefit . . . then the parties may submit a brief on that issue . . .* Employer's brief shall deal with the possible applicability of Section 8(f). . . . [I]t is apparent that Section 8(f) would be applicable in the proceeding if the evidence supports [employer's counsel's] opening statement.¹ *See* Tr. at 29-30 (emphasis added). The parties entered into the stipulations regarding the amount of weekly benefits to be paid to claimant, JX 1, and employer did not file a post-hearing brief. The absence of a post-hearing brief does not equate to a withdrawal of the Section 8(f) issue. *See* 20 C.F.R. ' ' 702.338, 702.343, 702.351. Employer informed the administrative law judge that it was seeking relief pursuant to Section 8(f), it argued the issue at the formal hearing, Tr. at 21-24, it submitted evidence in support of its assertions, and it forwarded its exhibits to the Director, Office of Workers' Compensation Programs, pursuant to the administrative law judge's instructions. The record does not contain any evidence that employer sought to withdraw the Section 8(f) issue from consideration. For these reasons, we vacate the administrative law judge's dismissal of employer's Section 8(f) claim. The case is remanded for the administrative law judge to

¹ The administrative law judge also directed employer to forward its exhibits to the Director, Office of Workers' Compensation Programs, and employer did so post-hearing.

consider employer=s claim for Section 8(f) relief on the merits.² *See generally French v. California Stevedore & Ballast*, 27 BRBS 1 (1993).

Accordingly, the administrative law judge's Decision and Order B Awarding Benefits and the Decision on Motion for Reconsideration are vacated insofar as they dismiss employer=s claim for Section 8(f) relief, and the case is remanded for consideration of the merits of employer=s claim in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

² Employer alleges that the administrative law judge erred in ruling on its Motion for Reconsideration before 10 days had elapsed. In view of our disposition of this case, we do not need to address this issue.

