BRB No. 92-724

NOAH ALSTON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GEORGE HYMAN CONSTRUCTION COMPANY	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Second Motion for Reconsideration of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

Stewart S. Manela (Arent, Fox, Kintner, Plotkin & Kahn), Washington, D.C., for employer.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Motion for Reconsideration (86-DCW-43) of Administrative Law Judge Robert J. Feldman 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.*, (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).

This is the second time this case has been before the Board. Claimant worked as a construction laborer and foreman for employer from 1972 until November 1981. On June 27, 1981, claimant injured his low back when he tripped over a piece of scaffolding. After a recuperative absence and a period of light duty work, he returned to full duty. On November 19, 1981, claimant re-injured his back while lowering an overloaded bucket of concrete to the ground; he has not worked since. Claimant then filed a claim for permanent total disability benefits. Tr. at 30-35.

After the original hearing, wherein the nature and extent of claimant's disability and average weekly wage were at issue, the administrative law judge found that claimant is entitled to temporary total disability benefits from November 19, 1981 to June 19, 1985 and to permanent partial disability benefits thereafter, based on an average weekly wage of $480.55. Decision and Order at 6. The administrative law judge denied employer's motion for reconsideration, and both parties appealed the original decision to the Board. The Board affirmed the disability finding but vacated the average weekly wage calculation, remanding the case on that issue alone, ordering the administrative law judge to use Section 10(c), 33 U.S.C. §910(c), in his recalculation.[1] *Alston v. George Hyman Construction Co.*, BRB Nos. 88-1084/A (May 30, 1990) (unpublished).

On remand, the administrative law judge recalculated average weekly wage at $423.30 after determining that $22,011.34 reasonably represented claimant's annual earnings in 1981 at the time of the November injury. Decision and Order on Remand at 2-3. Claimant moved for reconsideration, seeking a calculation of average weekly wage based on the 12-month period prior to the November injury, and employer responded, arguing that average weekly wage should be computed from June 27, 1981, the original date of injury, and not November 19, 1981. Additionally, employer requested Section 8(f), 33 U.S.C. §908(f), relief, by way of a request for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting it did not know prior to the decision on remand of any evidence which would support a second injury finding.[2] The administrative law judge found that employer was aware of two injuries and the issue of permanent disability at the original hearing. Further, he

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[1]The administrative law judge used Section 10(a) of the Act, 33 U.S.C. §910(a), actual earnings of $22,392.71, and a five-day work week to calculate claimant's average weekly wage at $480.55. The Board noted its inability to duplicate the administrative law judge's calculations, particularly because it determined that claimant's W-2 statement showed claimant's actual 1981 earnings to be $22,011.34, and because the record does not support the administrative law judge's assumption that claimant worked five days per week. Moreover, the Board expressed agreement with employer's contention that it is problematic to try to calculate the number of days claimant worked based only upon the total weekly wage figures.

[2]According to employer, it presented evidence of average weekly wage based on an injury date of June 27, 1981; therefore, use of $22,011.34 (claimant's year-to-date earnings as of the 47th week of 1981), by the Board and the administrative law judge, as claimant's actual 1981 earnings, triggered employer's awareness of November 19, 1981 as a date of second injury and not a natural progression of claimant's June 1981 injury. *See* Emp. Ex. 29.

noted his earlier finding that claimant was not temporarily totally disabled until November 19, 1981, and that the Board relied on that finding in reaching its decision. Consequently, the administrative law judge recalculated average weekly wage, as of the year preceding November 1981, and denied employer's request for Section 8(f) relief as untimely under the provisions of Section 8(f)(3), 33 U.S.C. §908(f)(3) (1988). Decision and Order on Recon. at 2-3 (June 4, 1991).

Following the administrative law judge's decision on claimant's motion for reconsideration, employer moved for reconsideration and contended that Section 8(f)(3) does not apply in cases arising under the D.C. Act. Employer also contended that the administrative law judge erred in finding it was aware of two injuries and that there was no compelling reason for its failure to raise Section 8(f) at the original hearing. Decision and Order on Second Recon. at 1-3. The administrative law judge again concluded that employer's application for Section 8(f) relief was untimely; however, he acknowledged the inapplicability of Section 8(f)(3) to cases arising under the D.C. Act.[3] Employer appeals the administrative law judge's findings that its request for Section 8(f) relief is untimely. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

Employer contends the administrative law judge erred in concluding its application for Section 8(f) relief was untimely. Employer argues it did not apply for relief from the Special Fund earlier because it believed the date of injury was June 27, 1981, and it was not aware the November 19, 1981 incident constituted a "second injury." Further, it maintains that the administrative law judge's mistake in fact which allowed it to move for Section 8(f) relief through a Section 22 modification request was his failure to correct employer's date of injury misconception. Thus, employer contends there is a compelling reason for excusing its failure to raise Section 8(f) as an issue at the original hearing. In support of its contentions, employer cites *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984), and *Tibbetts v. Bath Iron Works Corp.*, 10 BRBS 245 (1979). The Director responds to employer's challenges, arguing that employer failed to establish a basis for Section 22 modification, and that even if employer did, its application for Section 8(f) relief was untimely as the issue was not raised at the first hearing where the permanency of claimant's disability was at issue.

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,*

[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). The 1984 amendments to the Act are inapplicable in cases arising under the D.C. Act. *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

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 means of reopening the claim is to petition for modification pursuant to Section 22 of the Act, and the party seeking modification must establish that there has been a change in the 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 the employer shows 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, 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 administrative law judge noted that Section 8(f) must be raised at the first hearing where permanency is at issue. He then relied on statements made in claimant's pre-hearing statement, claimant's deposition, claimant's post-hearing brief, the medical evidence and at the hearing to support his finding that employer knew the November 1981 incident was a second injury and not a natural progression of claimant's June 1981 injury, and he distinguished this case from the facts in *Mason*, 16 BRBS 307, and *Tibbetts*, 10 BRBS 245.[4] Based on this evidence and law, the administrative law judge concluded that employer was aware of both injuries and did not show a compelling reason for not raising Section 8(f) at the original hearing. For the reasons set forth below, we affirm the administrative law judge's finding that employer failed to timely raise Section 8(f) as an issue.

Initially, we note that claimant filed a claim for permanent total disability benefits, and both employer and claimant, in their pre-hearing statements, listed the "extent of permanent disability" as an issue for trial. Additionally, employer listed Section 8(f) as a disputed issue, but it failed to raise that issue at the hearing. Finally, the administrative law judge awarded temporary total disability

[4]The administrative law correctly determined that *Mason* and *Tibbetts* do not apply to this case. In *Mason*, the Board vacated the administrative law judge's finding that employer's application for Section 8(f) relief was late, holding that, as employer was first put on notice of a prior injury in a post-hearing deposition, its post-hearing application for Section 8(f) relief was timely. *Mason*, 16 BRBS at 309-310. In *Tibbetts*, the Board held it was erroneous for the administrative law judge to permit employer to waive a right based on a mistake of law, as employer believed Section 8(f) applied only to permanent total disability cases, and the administrative law judge failed to correct that misconception. *Tibbetts*, 10 BRBS at 252.

benefits from November 19, 1981 to June 19, 1985, and permanent partial disability benefits thereafter. Decision and Order at 6. Thus it is clear from the record that permanency was an issue at the hearing before the administrative law judge.

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. The original proceedings before the administrative law judge resulted in the final resolution of the question of the nature and extent of claimant's disability. Without deciding whether employer's alleged misconception regarding claimant's injuries constitutes circumstances sufficient to justify reopening the claim pursuant to Section 22,[5] we hold that, as permanency was at issue in the original hearing before the administrative law judge, and as employer did not raise Section 8(f) at that time, the issue is waived. *General Dynamics Corp.*, 673 F.2d at 26, 14 BRBS at 640.

Moreover, the administrative law judge's finding that employer was aware of two dates of injury from the outset of this case is rational and is supported by substantial evidence of record. The administrative law judge noted that claimant injured his back in June 1981, but had returned to his regular duties by the time of the November 1981 incident. Moreover, claimant's pre-hearing statement makes no mention of the events which caused the June 1981 injury, and claimant sought benefits as a result of the November injury. Further, according to Dr. Hurston's notes, in June 1981, claimant fell and injured his back, and in November 1981, he pulled a rope and re-injured his back. Emp. Ex. 5. Additionally, at claimant's deposition and the hearing, the attorneys for the parties stated that the claim is based on an injury which occurred in November 1981. *See* Tr. at 6-7, 34-35; Dep. at 8, 13, 19. Thus, the administrative law judge found there was no basis for employer to believe that the June injury was the only injury and employer has not shown a compelling reason for its failure to raise Section 8(f) at the first possible opportunity and cannot invoke Section 22 to correct its error or to circumvent the rule of waiver. *General Dynamics Corp.*, 673 F.2d at 26, 14 BRBS at 640; *see also Verderane*, 729 F.2d at 726, 17 BRBS at 154 (CRT); *American Bridge*, 679 F.2d at 81, 14 BRBS at 923. Therefore, we reject employer's contentions and affirm the administrative law judge's finding that employer's application for Section 8(f) relief was untimely.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

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[5]Given our disposition of this case, we need not address the Director's contention that employer must establish a mistake in a factual determination regarding the applicability of Section 8(f) in order to obtain modification on the grounds of mistake in fact in this case. The Director contends that modification on this basis is unavailable because the administrative law judge made no findings concerning the substantive applicability of Section 8(f) in the original decision.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge