

TOPIC 8.7 SPECIAL FUND RELIEF

8.7.1 Applicability and Purpose of Section 8(f)

Section 8(f) shifts part of the liability for permanent partial and permanent total disability, and death benefits, from the employer to the Special Fund established by Section 44, when the disability or death is not due solely to the injury which is the subject of the claim. The **Special Fund is not responsible for benefits pursuant to Section 8(f) if an employer fails to comply with Section 32(a) securing insurance or being designated as a self-insured employer.** Section 8(f)(2)(A). In Lewis v. Sunnen Crane Service, Inc., 34 BRBS 57(2000), the Board held that the applicability of Section 8(f)(A) is an issue which may be raised at any time since its language is mandatory rather than discretionary. Thus the Director was permitted to raise it for the first time in a motion for reconsideration before the ALJ, even if his doing so was the result of a lack of diligence in presenting his case. The Board noted that its holding “is bolstered by the limited legislative history of Section 8(f)(2), which, states only that an employer is “precluded from realizing a benefit by avoiding the insurability requirements of the Act.”

The Board has since distinguished Lewis. See Weber v. S.C. Loveland Co. (Weber III), ___ BRBS ___ (BRB Nos. 00-838, 00-838A and 00-838B) (Jan. 30 2002)(The Port of Kingston, Jamaica is a situs under the LHWCA; this is not an extension act case); Weber v. S.C. Loveland Co.(Weber I), 28 BRBS 321 (1994); Weber v. S.C. Loveland Co. (Weber II), 35 BRBS 75 (2001). In Weber III, the Director argued that the employer should not be entitled to Section 8(f) relief because the employer did not have longshore coverage in Jamaica. The Director further argued that Lewis was dispositive of this issue. The employer disagreed and countered that it had sufficient coverage for all work-related injuries as of the date of the claimant’s injury because, as of that date, injuries which occurred in foreign territorial waters had not been held covered under the LHWCA.(The employer had a foreign liability policy for injuries occurring outside of the United States and it had a separate LHWCA policy for injuries occurring within the United States.) Accordingly, the employer argued that it complied with Section 32. The Board found that in Weber III, the employer purchased insurance appropriate for covering the claimant’s injuries under the statute and case law existing at that time. It was not until the Board’s decision in Weber I that an injury in the Port of Kingston was explicitly held to be compensable under the LHWCA. In Weber I, the Board’s holding rested on cases holding that “navigable waters of the United States” could include the “high seas.” Thus, in Weber III, the Board held that Section 8(f)(2)(A) is not applicable to the facts of Weber III and does not bar the employer’s entitlement to Section 8(f) relief.

In construing Section 8(f), the courts have repeatedly stated that Section 8(f) was enacted to avoid discrimination against handicapped workers, which would naturally flow from the so-called aggravation rule. (See discussion of aggravation at Topic 8.7.2, infra.)

For example, the **District of Columbia** and **Ninth Circuits** have said:

[T]he Act makes the employer liable for compensation. Hence, the employer risks increased liability when he hires or retains a partially disabled worker. By virtue of the contribution of the previous partial disability, such a worker injured on the job may suffer a resulting disability greater than a healthy worker would have suffered. Were it not for the shifting of this increased compensation liability from the employer to the Special Fund under § 8(f), the Act would discourage employers from hiring and retaining disabled workers.

Director, OWCP v. Campbell Indus., 678 F.2d 836, 839, 14 BRBS 974 (**9th Cir.** 1982), rev'g Lostaunau v. Campbell Indus., 13 BRBS 227 (1981), cert. denied, 459 U.S. 1104 (1983), overruled by Director, OWCP v. Cargill 709 F.2d 616 (**9th Cir.** 1983) (quoting C & P Tel. Co. v. Director, OWCP, 564 F.2d 503, 512, 6 BRBS 399 (**D.C. Cir.** 1977), rev'g Glover v. C & P Tel. Co., 4 BRBS 23 (1976), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (**9th Cir.** 1983)). See also H. Rep. No 92-1441, 92nd Cong., 2d Sess. 8 (1972), reprinted in [1972] U.S. Code Cong. & Admin. News, pp. 4698, 4705-06; Larson, Workers' Compensation Law § 59.00 (1992).

Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949) is the leading **United States Supreme Court** case. The Special Fund is set up pursuant to Section 44 of the LHWCA, 33 U.S.C. § 944. The regulations are in 20 C.F.R. § 702.321.

Section 8(f) is, therefore, invoked in situations where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144, 25 BRBS 85 (CRT) (**9th Cir.** 1991). Relief is not available for temporary disability, no matter how severe. Jenkins v. Kaiser Aluminum & Chem. Sales, 17 BRBS 183, 187 (1985).

Most frequently, the effect of Section 8(f) is to limit the employer's liability to 104 weeks of compensation; thereafter, the Special Fund makes the compensation payments. (See discussion on duration of employer's liability at Topic 8.7.7, infra; and hearing loss cases, at Topic 8.13, infra.)

Many cases have stated the requirements for Special Fund relief in some variation of the following language:

To qualify for § 8(f) relief, an employer must make a three-part showing (i) that the employee had a pre-existing partial disability, (ii) that this partial disability was manifest to the employer, and (iii) that it rendered the second injury more serious than it otherwise would have been.

Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (**D.C. Cir.** 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989).

A more rigorous analysis, and a careful reading of the statute, shows that in cases of permanent total or permanent partial disability there are the following **requirements**: **1.** a new injury (or aggravation) (see 8.7.1, infra); **2.** a pre-existing permanent partial disability (see 8.7.2, infra); **3.** which was manifest (see 8.7.3, infra) to the employer; and **4.** the disability must not be due solely to the new injury (see 8.7.4, infra).

There is an **additional requirement in cases of permanent partial disability**: **5.** the disability must be materially and substantially greater than that which would have resulted from the new injury alone (see 8.7.5, infra).

[ED. NOTE: Where the employer is seeking Section 8(f) relief for both a permanent total disability and for death benefits, the courts have held that the requirements for entitlement must be satisfied for both claims individually. Perry v. Bath Iron Works Corp., 29 BRBS 57 (1995); Graziano v. General Dynamics Corp., 14 BRBS 950 (1982), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 705 F.2d 562 (1st Cir. 1983); See also Newport News Shipbuilding & Dry Dock Co. v. Howard, 904 F.2d 206 (4th Cir. 1990); Fineman v. Newport News Shipbuilding & Dry Dock Co., 27 BRBS 104 (1993); Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989). If Section 8(f) covers both claims, and the two claims arise from the same work-related condition, the employer is only liable for one 104 week period. Perry, 29 BRBS at 59 (1995); Bingham v. General Dynamics Corp., 20 BRBS 198 (1986).]

8.7.2 New Injury (or Aggravation) Required

If a claimant does not sustain an injury (see definition in § 2(2) of the LHWCA) while working for employer, employer is not liable for the claimant's condition and there is no occasion for limiting liability. Thus, if a claimant's current disability (or death) is due to the **natural progression** of the pre-existing condition, or is its natural consequence, the employer cannot be held liable for a "second" injury. Jacksonville Shipyards v. Director, OWCP, 851 F.2d 1314, 1316-17, 21 BRBS 150 (CRT) (**11th Cir.** 1988) (en banc), aff'g Stokes v. Jacksonville Shipyards, 18 BRBS 237 (1986) (claimant's exposure to silica extending over many years was one injury, precluding Special Fund relief for the last employer, notwithstanding that the last employer was liable under Director, OWCP v. Cooper Assocs. (Cooper), 607 F.2d 1385, 1390-91, 10 BRBS 1058, 1064-66 (**D.C. Cir.** 1979), rev'g Cooper v. Cooper Assocs., 7 BRBS 853 (1978) (claimant's depression which led to his suicide was one continuous injury because it resulted from one persistent problem, the decline of claimant's business); Travelers Ins. Co. v. Cardillo, 225 F.2d 137, 145 (**2d Cir.**), cert. denied, 350 U.S. 913 (1955)). (See Last employer rule, Topic 70, infra; "Natural Progression/Intervening Cause," Topics 2.2.7, 2.2.8, supra.)

It is possible for an aggravation to be considered a new injury. Bath Iron Works Corp. v. Director, U.S. Dept. of Labor, (Jones), 193 F.3d 27 (**1st Cir.** 1999)(Initial asbestos-related injury was

aggravated by further exposure to pulmonary irritants and was subsequently found to be a “new” injury resulting in an increase in benefits payable by a new carrier and based upon the average weekly wage at the time of the new injury).

Aggravation of a pre-existing disability during employment constitutes a second injury. Foundation Constructors v. Director, OWCP, 950 F.2d 621, 625, 25 BRBS 71 (CRT) (9th Cir. 1991), aff'g 22 BRBS 453 (1989) (claimant's pre-existing disability to his back was aggravated by six months of jack hammering); Director, OWCP v. Potomac Elec. Power Co. (Brannon), 607 F.2d 1378, 1385, 10 BRBS 1048 (D.C. Cir. 1979), aff'g Brannon v. Potomac Elec. Power Co., 6 BRBS 527 (1977) (work-related trauma (first injury) caused a mental disease which was aggravated by re-exposure to "energized" equipment (second injury) which led to claimant's suicide); C & P Tel. Co. v. Director, OWCP, 564 F.2d 503, 514, 6 BRBS 399 (D.C. Cir. 1977), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (9th Cir. 1983) (claimant's pre-existing "back problems" were aggravated by an elevator accident sustained at work); Ortiz v. Todd Shipyards Corp., 25 BRBS 228, 239 (1991) (claimant's intra cranial bleeding was aggravated by his employment which resulted in a stroke; the fact that there were only twelve days between the first and second injury does not negate the principle of aggravation).

Section 8(f) relief may be available even where the pre-existing disability and the second injury (or aggravation) result from the same course of employment with the same employer. Brannon, 607 F.2d at 1382-84. The Brannon court acknowledged that if Section 8(f) relief is awarded when employees are injured twice by the same employer it might "provide an incentive for venal employers to retain and injure their handicapped employees." Id. at 1384.

The Board has indicated, however, that if an employer **intentionally** placed an employee in a dangerous position for the purpose of invoking Section 8(f), the employer would be denied Special Fund relief. Frame v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 855, 856-57 (1978), aff'd sub nom. Director, OWCP v. Sun Shipbuilding & Dry Dock Co., 600 F.2d 440, 10 BRBS 621 (3d Cir. 1979) (citing Johnson v. Bender Ship Repair, 8 BRBS 635, 639 (1978)).

8.7.3 Pre-Existing Permanent Partial Disability

8.7.3.1 Disability Defined: Not Just An Economic Term

The **Supreme Court** considered the meaning of the word "disability" as used in Section 8(f), and concluded that Congress did not intend to use "disability" as a term of art in Section 8(f), i.e., the meaning given that term in Section 2(10) of the LHWCA. Lawson, 336 U.S. at 206. Although Lawson interpreted Section 8(f) as it existed prior to the 1972 Amendments to the LHWCA, the courts have concluded that no relevant change was intended by the rephrasing of "previous disability" in the original Section 8(f) to "existing permanent partial disability" in the amended version. C & P Tel. Co v. Director, OWCP (Glover), 564 F.2d 503, 512, 6 BRBS 399 (D.C. Cir. 1977), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (9th Cir. 1983); Atlantic & Gulf

Stevedores v. Director, OWCP, 542 F.2d 602, 606-08, 4 BRBS 79, 83-86 (3d Cir. 1976), rev'g 1 BRBS 541 (1975).

An oft cited definition of "**existing permanent partial disability**" under Section 8(f) is:

[t]o summarize, the term 'disability' in new [post-1972] § 8(f) can be economic disability under § 8(c)(21) or one of the scheduled losses specified in § 8(c)(1)-(20), but it is not limited to those cases alone. 'Disability' under new Section 8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

Glover, 564 F.2d at 513 (emphasis added). The Glover criteria is later referred to by the jurisprudence as the "**cautious employer test.**"

[ED. NOTE: Other laws may prevent an employer from discriminating against the handicapped. See, e.g., the Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794; Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101, et seq. It is unresolved whether such laws change the courts' definition for purposes of § 8(f).]

At one point, the Board held that "disability" in Section 8(f) is an economic and not a medical concept, i.e., that the claimant must have experienced a loss of earning capacity. E.g., Glover v. C & P Tel. Co., 4 BRBS 23, 26 (1976), rev'd, 564 F.2d 503 (D.C. Cir. 1977). This "economic" requirement has been rejected. Director, OWCP v. Campbell Indus., 678 F.2d 836, 840, 14 BRBS 974 (9th Cir.), cert. denied, 459 U.S. 1104 (1982), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (9th Cir. 1983); Equitable Equip. Co. v. Hardy, 558 F.2d 1192, 1197-98, 6 BRBS 666 (5th Cir. 1977), rev'g 3 BRBS 426 (1976); Atlantic & Gulf Stevedores, 542 F.2d at 608-09; Bickham v. New Orleans Stevedoring Co., 18 BRBS 41, 42 (1986); Burch v. Superior Oil Co., 15 BRBS 423, 428-29 (1983).

"Section 8(f) is to be read broadly, and this provision thus may encompass persons who are 'disabled' but who do not meet the standards of 'disability' set forth in other statutory schemes." Preziosi v. Controlled Indus., 22 BRBS 468, 473 (1989).

8.7.3.2 Mere Fact of a Previous Injury is Insufficient; Injury Must Produce Serious Lasting Problem

The permanent partial disability must predate the employment-related injury. Mikell v. Savannah Shipyard Co., 26 BRBS 32, 37 (1992). The mere fact of past injury, however, does not itself establish disability. Rather, "[t]here must exist, as a result of that injury, some serious, lasting

physical problem." Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991) (where there is both evidence of complete recovery from a prior back injury and evidence of permanent partial disability, the ALJ must decide the issue of seriousness); Director, OWCP v. Belcher Erectors, 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985).

See Todd Shipyards Corp. v. Director, OWCP, 793 F.2d 1012, 19 BRBS 1 (CRT) (9th Cir. 1986) (medical records showed no objective evidence of permanent disability and claimant resumed job with overtime); Director, OWCP v. Campbell Indus., 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (9th Cir. 1983) (employer did not meet the C & P Tel. Co. criteria because it did not prove that claimant's prior back injury was disabling--he returned to work with no restrictions and had no future medical problems--nor that he suffered from a disabling psychological condition).

See also Director, OWCP v. General Dynamics Corp., 982 F.2d 790, 796-97, 26 BRBS 139 (CRT) (2d Cir. 1992) (ALJ must decide whether a back disability asymptomatic for 16 years was so serious as to motivate a cautious employer to discharge employee); CNA Ins. Co. v. Legrow, 935 F.2d 430, 436, 24 BRBS 202 (CRT) (1st Cir. 1991) (after suffering back injuries, claimant resumed regular physical labor without medical restrictions or medical treatment including medication); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 23 (1990) (although claimant had gastrointestinal problems, he returned to work after each incident of abdominal pain and there was no evidence of impairment); Dove v. Southwest Marine, 18 BRBS 139, 142-43 (1986) (old ankle fracture did not produce serious lasting physical problem; award of Section 8(f) relief reversed).

Mental disabilities must also be lasting and serious. Illiteracy due to lack of education is not "permanent," because it is reversible if claimant seeks an education. State Comp. Ins. Fund v. Director, OWCP, 818 F.2d 1424, 1426, 20 BRBS 11 (CRT) (9th Cir. 1987) (if illiteracy stems from mental retardation or a learning disability, however, a permanent pre-existing disability could be found, see discussion, *infra*).

8.7.3.3 A Pre-Existing Disability Must Have a Physical or Mental Foundation

An existing permanent partial disability must have a physical or mental foundation. Director, OWCP v. Potomac Elec. Power Co. (Brannon), 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (mental).

[ED. NOTE: It is the employer's burden to show that it could not have reasonably anticipated the liability of the Special Fund as to the claimant's pre-existing condition. Farrel v. Norfolk Shipbuilding & Dry Dock Corp., 32 BRBS 118 (1998).]

Elements such as a claimant's background, age, limited education, language difficulties, and limited prior work experience do not constitute a previous disability. Cononetz v. Pacific Fisherman, Inc., 11 BRBS 175, 178 (1979); but see Todd Pac. Shipyards Corp. v. Director, OWCP, 913 F.2d

1426, 1432-33, 24 BRBS 25 (CRT) (9th Cir. 1990) (although illiteracy is not, mental retardation may be a pre-existing disability; see discussion, *infra*); State Comp. Ins. Fund v. Director, OWCP, 818 F.2d 1424, 20 BRBS 11 (CRT) (9th Cir. 1987); Greene v. J.O. Hartman Meats, 21 BRBS 214 (1988) (age-related physical conditions may qualify; this case discussed below). Neither do family dependents nor racial discrimination. Collins v. Todd Shipyards Corp., 9 BRBS 1015, 1023 (1979).

Examples of Specific Diseases/Conditions

Lifestyles, habits, and the aging process are not, in and of themselves, pre-existing disabilities. Physical impairments, diseases, or conditions which are the result of lifestyles, habits, or the aging process may, however, constitute pre-existing disabilities. The following cases are illustrative:

Degenerative disc disease, caused by aging, may be a pre-existing permanent partial disability. Greene v. J.O. Hartman Meats, 21 BRBS 214, 216-18 (1988);

Illiteracy is not a pre-existing permanent partial disability, though it may be a symptom of mental retardation and/or a learning disability, both of which have met the definition. State Comp Ins. Fund v. Director, OWCP, 818 F.2d 1424, 20 BRBS 11(CRT) (9th Cir. 1987);

Obesity, by itself, is not a pre-existing disability. Wilson v. Todd Shipyards Corp., 23 BRBS 24, 29 (1989). See also, Director, OWCP v. Bath Iron Works, 31 BRBS 155 (CRT) (1st Cir. 1997) (Record did not contain sufficient evidence to show that claimant's disability was "materially and substantially" greater than it would have been from claimant's industrial asbestosis injury alone.). A pre-existing disability must be a medically-cognizable physical ailment, rather than an unhealthy habit or lifestyle. Brogden v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 259, 260-61 (1984). Physically disabling symptoms attributable to obesity may, however, be sufficient to establish a pre-existing permanent partial disability. Vogle v. Sealand Terminal, 17 BRBS 126, 130 (1985); and

Smoking by itself, is not a qualifying disability until it results in medically cognizable symptoms that physically impair the employee. Smoking is a "socially pervasive risk." General Dynamics Corp. v. Sacchetti, 681 F.2d 37, 39-40, 14 BRBS 862 (1st Cir. 1982), *aff'g* 14 BRBS 29 (1981).

Many conditions that result in serious consequences (as discussed above) have been found to be pre-existing disabilities. The following are **examples of close questions**:

Alcoholism. Settles v. Lane Constr. Corp., 15 BRBS 148 (1982) (noting that the ALJ relied on Parent v. Duluth, Missabe & Iron Range Ry. Co., 7 BRBS 41 (1977), for the proposition that alcoholism can constitute a pre-existing disability under §

8(f), the Board stated, "[w]e have no quarrel with that proposition" (emphasis added); however, the Board did not find that alcoholism was a pre-existing condition in Settles. (Compare decisions under the Social Security Act, which hold that some severe alcoholism may be the basis for a disability award. See In re Petition of Sullivan, 904 F.2d 826, 842-46 (3d Cir. 1990));

Arthritic conditions. Currie v. Cooper Stevedoring Co., 23 BRBS 420, 426 (1990) (although claimant was asymptomatic and did not miss work, doctors' testimony established that the condition was serious because work restrictions would have been imposed and because claimant was susceptible to further injury); Gibbs v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 954 (1982) (reversed ALJ's failure to classify the arthritic condition as a pre-existing disability when x-rays and the uncontradicted testimony of three doctors established it; the Board failed to analyze whether the condition was serious, as is generally required in these cases, and in fact commented that the x-rays noted "mild degenerative changes");

Back Injuries. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991) (reversed the Board and affirmed the ALJ, noting that claimant's failure to completely recover from previous back injuries supported the ALJ's finding that the claimant suffered from chronic back pain and disc disease which constituted such a serious disability that a "cautious employer" would have been motivated to discharge him); Equitable Equip. Co. v. Hardy, 558 F.2d 1192, 1194, 6 BRBS 666 (5th Cir. 1977), rev'g 3 BRBS 426 (1976) ("pseudoarthrosis" or false fusion of the joints, a back impairment, is a permanent partial disability for purposes of § 8(f));

Diabetes and/or Hypertension and Heart Disease. Director, OWCP v. General Dynamics Corp., 787 F.2d 723, 18 BRBS 88 (CRT) (1st Cir. 1986) (where substantial evidence exists that claimant had debilitating hypertension, it is a pre-existing disability; the court contrasted these circumstances, which established pre-existing disability, with a situation in which there was but one elevated blood pressure reading followed by normal readings, where disability might not be established); Director, OWCP v. Universal Terminal & Stevedoring Corp., 575 F.2d 452, 454-57, 8 BRBS 498 (3d Cir. 1978), aff'g and rev'g in part 5 BRBS 723 (1977); Atlantic & Gulf Stevedores v. Director, OWCP, 542 F.2d 602, 608-09, 4 BRBS 79 (3d Cir. 1976); Dugan v. Todd Shipyards, 22 BRBS 42 (1989) (diabetes and hypertension are serious, even if claimant is not aware of having heart disease). Where pre-existing heart disease made ameliorative back surgery impossible, Section 8(f) relief was granted. Pino v. International Terminal Operating Co., 26 BRBS 81 (1992);

Hernias. Marko v. Morris Boney Co., 23 BRBS 353, 359-60 (1990);

Interstitial Fibrosis. Patrick v. Newport News Shipbuilding & Dry Dock Co., 15 BRBS 274, 276 (1983) (disease meets the "cautious employer" definition of a pre-existing disability);

Mental retardation and/or learning disabilities. Todd Pac. Shipyards Corp. v. Director, OWCP, 913 F.2d 1426, 1431-33, 24 BRBS 25 (CRT) (9th Cir. 1990) (claimant's mental retardation, as proved by psychological evaluations and vocational testing, which showed claimant's ability to perform tasks would not improve, was a "disability within the meaning of § 8(f)");

Psychiatric disorders. Brannon, 607 F.2d 1378 (claimant's mental condition, caused by previous on-the-job exposure to high voltage equipment, was a pre-existing disability); but cf. Betts v. Manson Constr. & Eng'g, 26 BRBS 778 (ALJ) (1993) (where pre-injury mental deficiencies that could be categorized as a learning disability were not so far from normal that they would motivate a cautious employer to discharge an employee);

Respiratory diseases. Preziosi v. Controlled Indus., 22 BRBS 468, 473 (1989) (remanded for ALJ to decide whether, under the "cautious employer" standard, claimant's respiratory condition constituted a pre-existing permanent partial disability); Armand v. American Marine Corp., 21 BRBS 305, 312 (1988) (**chronic obstructive pulmonary disease** and **bronchitis** are pre-existing disabilities because they are serious and lasting and a cautious employer would be motivated to discharge an employee suffering from either condition); Enos v. General Dynamics Corp., 13 BRBS 47, 49 (1980); Boies v. National Steel & Shipbuilding Co., 7 BRBS 81, 83 (1977); and

Thrombophlebitis. Stephens v. I.T.O. Corp. of Baltimore, 8 BRBS 406, 409 (1978) (reversed ALJ and found that thrombophlebitis constituted a pre-existing permanent partial disability, under the "cautious employer" definition in C & P Tel. Co. v. Director, OWCP (Glover), 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (9th Cir. 1983), because it is a "serious physical disability" which can flare up as a result of trauma).

8.7.4 Pre-Existing Disability Must Be Manifest To Employer

The requirement that a claimant's pre-existing disability must be manifest to the employer is not a statutory requirement of Section 8(f) but has been added by the courts. American Mut. Ins. Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). It is "a 'judicial gloss' which Congress has not acted to erase." American Shipbuilding Co. v. Director, OWCP, 865 F.2d 727, 730, 22 BRBS 15 (CRT) (6th Cir. 1989). The regulations have contained the requirement since 1985. 20 C.F.R. § 702.321(a), 50 Fed. Reg. 401 (1985), amended, 51 Fed. Reg. 4285 (1986).

The manifest requirement is regularly imposed "by all federal circuit courts which have addressed the issue." Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1, 5 n.2 (1987); C.G. Willis, Inc. v. Director, OWCP, 31 F.3d 1112 (11th Cir. 1994); Sealand Terminals, Inc. v. Gasparic, 7 F.3d 321, 323 (2d Cir. 1993); Director, OWCP v. Luccitelli, 964 F.2d 1303 (2d Cir. 1992), *rev'g* Luccitelli v. General Dynamics Corp., 25 BRBS 30 (1991); E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341 (9th Cir. 1993); Director, OWCP v. General Dynamics Corp. [Lockhart], 980 F.2d 74 (1st Cir. 1992); Bunge Corp. v. Director, OWCP [Miller], 951 F.2d 1109 (9th Cir. 1991); Director, OWCP v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990); Two R Drilling Co. v. Director, OWCP, 894 F.2d 748 (5th Cir. 1990); Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis], 202 F.3d 656, (3d Cir. 2000). The Supreme Court has not spoken on the validity of the requirement.

Only the **Sixth** and **Fourth Circuits** have not fully accepted the requirement. The **Sixth Circuit** holds that "the condition must have *manifested itself* to someone"; however, so long as it is documented prior to the second injury the employer need not have actual knowledge. American Shipbuilding Co. v. Director, OWCP, 865 F.2d 727, 731-32, 22 BRBS 15 (CRT) (6th Cir. 1989). The **Fourth Circuit** has declined to extend it to the area of post-retirement occupational diseases. Newport News Shipbuilding & Dry Dock Co. v. Harris, 934 F.2d 548, 551-53, 24 BRBS 190 (CRT) (4th Cir. 1991). As recently as October 1991, the Board called it "a well-settled concept." Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 99 (1991); Esposito v. Bay Container Repair Co., 30 BRBS 67, 68 (1996).

A useful function of the requirement is that it insures that a disability actually pre-existed the second injury. Although this function would be served if medical records sufficed to establish a condition that would deter a cautious employer from hiring or encourage a cautious employer to terminate the worker because of increased risk of compensation liability, the Board has held that "a *post hoc* diagnosis of a pre-existing condition, even a diagnosis based only on medical records in existence prior to the date of injury, is insufficient to meet the manifest requirement." Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 99 (1991); Hitt v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 353 (1984) (post injury re-reading of pre-injury x-rays showed changes consistent with asbestosis, but no findings specific for asbestosis).

[ED. NOTE: In Esposito v. Bay Container Repair Co., the Board held that: "It is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." 30 BRBS 67, 68 (1996); Wiggins v. Newport Shipbuilding & Dry Dock Co., 31 BRBS 142 (1997); *See also* Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989); Director v. Universal Terminal & Stevedoring Corp., 575 F.2d 452 (3d Cir. 1978); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). *The pre-existing condition need only have been of sufficiently seriousness that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of an employment-related accident and compensation liability.* Dugas v. Durwood Dunn, Inc., 21 BRBS 277 (1988); Wiggins v. Newport Shipbuilding & Dry Dock Co., 31 BRBS 142 (1997) ("medical

records need not indicate the severity or precise nature of the pre-existing condition in order for the condition to be manifest; rather, medical records will satisfy this requirement as long as they contain sufficient and unambiguous information regarding the existence of a serious lasting problem”) However, in Callnan v. Morale, Welfare & Recreation, Dept. of the Navy, 32 BRBS 246 (1998), although hospital records diagnosed claimant with a cyclothymic personality and indicated that she was receiving counseling from therapists, the ALJ rationally found that they did not establish the existence of a serious, lasting emotional problem. However, it should be noted that, in Callnan, deposition testimony supported the conclusion that the claimant did not have a diagnosed permanent psychiatric condition prior to her work injury.]

Actual knowledge of the disability will, of course, satisfy the manifest requirement, as where the claimant has been previously injured during his employment with the employer and received an award for permanent partial disability. In such situations, the manifest requirement is ordinarily admitted and not litigated. See, e.g., Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1989), aff'g in part, rev'g in part 19 BRBS 200 (1987), 20 BRBS 26 (1987).

Although one might assume an actual knowledge requirement might lead employers to insist on pre-employment physical exams, thereby creating barriers to the employment of the partially disabled, Director, OWCP v. Universal Terminal & Stevedoring (De Nichilo), 575 F.2d 452, 454-57, 8 BRBS 498 (3d Cir. 1978), the ADA must be taken into account. Under the ADA, the potential employer can neither insist on a physical examination nor force a potential employee to state any disabilities he may have.

At least one commentator has opined that, to the extent that the purpose of Section 8(f) is to discourage discrimination against the handicapped, the manifest requirement is counterproductive. See Schneider, Special Fund Relief Under the Longshore Act--The Manifest Requirement, 13 Tul. Mar. L.J. 51 (1988).

Medical Evidence

If the employer does not have actual knowledge of the pre-existing disability, constructive knowledge will satisfy the requirement. Constructive knowledge may be proved from medical records in existence at the time of the subsequent injury from which the condition was objectively determinable. De Nichilo, 575 F.2d at 457 (heart disease and diabetes mellitus were readily discoverable from claimant's medical record).

The **Sixth Circuit** holds that “the condition must have *manifested itself* to someone”; however, so long as it is documented prior to the second injury the employer need not have actual knowledge. American Shipbuilding Co. v. Director, OWCP, 865 F.2d 727, 731-32, 22 BRBS 15 (CRT) (6th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest, so long as there is sufficient information that might motivate a

cautious employer to consider terminating the employee because of the risk of compensation liability. Thus, pleural thickening shown by x-ray shows a serious lung disease and fulfills the requirement, even though it does not establish asbestosis. Topping v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 40, 43-44 (1983). The employer need not be absolutely sure that the condition is permanent; its permanence may be uncertain, and yet cause a cautious employer to discriminate. Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 80-83 (**1st Cir.** 1992).

_____Asymptomatic conditions that are objectively determinable may fulfill the manifest requirement. Currie v. Cooper Stevedoring Co., 23 BRBS 420, 427 (1990) (x-ray showed degenerative arthritis of hip; claimant was unaware of any restrictions; physician testified that hip motion was restricted, that claimant was susceptible to injury, and that he would have advised employer not to hire claimant).

The pre-existing disability need not be manifest at the time of hiring, but only at the time of the compensable subsequent injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616, 619, 16 BRBS 137 (CRT) (**9th Cir.** 1983) (en banc).

The **First Circuit** and the **District of Columbia Circuit** have upheld the Board's holding that the permanency of an employee's prior disability need not have been initially manifest to the employer in order to qualify for Section 8(f) relief. Director, OWCP v. General Dynamics Corp., 26 BRBS 116 (CRT) (**1st Cir.** 1992); Director, OWCP v. Berkstresser, 921 F.2d 306 (**D.C. Cir.** 1990) (court rejected the Director's argument that "what must be manifest to the employer is the existence of a permanent partial disability, i.e., a serious condition that actually impairs the employee"). The Berkstresser court reasoned that because "disability" under the LHWCA is not limited to economically disabling conditions, neither should the manifest requirement be limited to cases where the employee is actually prevented from performing some aspect of his job.

The **First Circuit** stated:

As we have previously held,..."[d]isability" under new § 8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability. ... This broad definition of "disability" governs the manifest requirement under § 8(f). When the evidence shows that such a "disability" was objectively apparent, the "manifest" requirement has been met. Thus, contrary to the Director's contention, the manifest condition need not be "a serious condition that actually impairs the employee" at the time of hiring or retention; an asymptomatic disability may be sufficient to motivate an employment decision and fulfill the "manifest" requirement.

General Dynamics Corp., 26 BRBS at 134 (CRT).

The following cases illustrate how the manifest issue has been treated.

Injury was manifest:

A secondary diagnosis of asymptomatic osteoarthritis in an x-ray report made five years prior to the claimant's subject hip injury met the manifest requirement even though the x-ray was intended to diagnose a kidney stone problem. Currie v. Cooper Stevedoring Co., 23 BRBS 420, 426-27 (1990).

Medical records establishing a three to four year history of diabetes and hypertension make these conditions manifest. Even if the claimant had been unaware of underlying heart disease, the manifest requirement would be satisfied. Dugan v. Todd Shipyards, 22 BRBS 42, 45 (1989).

Where a claimant's spinal condition was clearly shown on a previously un-read barium enema x-ray and "his 'list and tilt' were apparent to the naked eye," the court held that "proof that [claimant's] condition had manifested itself prior to his injury was uncontroverted. American Shipbuilding Co. v. Director, OWCP, 865 F.2d 727, 729, 732, 22 BRBS 15 (CRT) (6th Cir. 1989) (court found condition was manifest while at the same time declining to adopt the judicially-created manifest requirement).

Injury was not manifest:

An Orthopaedic Consultant Panel Report which concluded that there was no objective basis for a claimant's continuing reports of pain, did not constitute manifest evidence of an undiagnosed psychological disorder. The court acknowledged that a specific diagnosis is not always necessary, but found that this was not a situation where the disorder was so obvious from the available records that a formal diagnosis was not required. Bunge Corp. v. Director, OWCP, 951 F.2d 1109, 1111-12, 25 BRBS 82 (CRT) (9th Cir. 1991).

Where a worker's pre-injury medical reports established episodes of shoulder and neck pain but did not contain a specific diagnosis of cervical spondylopathy or any other cervical disease, the reports did not satisfy the manifest requirement. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 99-100 (1991).

Employer's knowledge of a claimant's illiteracy at the time of hiring did not constitute manifest evidence of his mental retardation or learning disability, particularly where neither condition was diagnosed until after the subject injury. Lacey v. Raley's Emergency Rd. Serv., 23 BRBS 432, 437-38 (1990).

Medical records which mentioned anxiety once and indicated that the claimant was prescribed valium for hand tremors (from 1979 until the subject injury in 1984) were not manifest

evidence that the claimant suffered from pre-existing depression. Hayes v. P & M Crane Co., 23 BRBS 389, 394 (1990).

Medical records which showed that the claimant had minimal spinal degeneration which was not medically significant, no worse than normal, and present in most people his age, did not meet the manifest requirement because they did not establish that claimant had a disability. Berkstresser, 921 F.2d at 310-11.

Where x-ray reports showed abnormalities but did not result in the diagnosis of a particular disease, no disease was manifest. Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 1224, 22 BRBS 11 (CRT) (**5th Cir.** 1989).

Multiple conflicting x-ray reports (a lung abnormality was described as a possibility) none of which contained a definitive diagnosis, do not satisfy the manifest requirement. Armstrong v. General Dynamics Corp., 22 BRBS 276, 278-79 (1989).

Where the claimant was tired and needed occasional decongestants for chest pain the judge held, and the Board affirmed, that there was insufficient medical evidence to suggest to the employer that the claimant had lung cancer. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-68 (1984).

In Transbay Container Terminal v. United States Department of Labor, Benefits Review Board [Dermont], 141 F.3d 907 (**9th Cir.** 1998), the **Ninth Circuit** held that Claimant's pre-existing cardiovascular atherosclerosis was not manifest for purposes of Section 8(f). Employer had argued that the ALJ's findings that the condition was not manifest were not supported by substantial evidence because several "risk factors" for cardiovascular disease and myocardial infarction were discoverable from claimant's medical records.

These factors included the claimant's four incidents of high blood pressure in six years, a 20-year smoking habit of two-packs a day, a family history of diabetes mellitus, and claimant being an obese male. In upholding the ALJ's finding that the claimant's condition was not manifest to the employer, the **Ninth Circuit** stated that the mere presence of certain "risk factors" is not legally sufficient. Without a documented diagnosis, there must be sufficient unambiguous, objective and obvious indication of a disability reflected by the factual information contained in the available records so that the disability should be considered manifest even though actually unknown by the employer.

In Director, OWCP v. Sun Ship, Inc., 150 F.3d 288 (**3rd Cir.** 1998), nine years after the claimant retired he was diagnosed with asbestosis resulting from his years of work-related asbestos exposure. The same month he was diagnosed, doctors discovered he also had a work-related pulmonary malignancy. At issue was whether the employer qualified for Section 8(f) relief because of the pre-existing (yet unknown) asbestosis.

The court held that the 1984 amendments to the LHWCA did not eliminate the judicially created "manifest" requirement of Section 8(f) Trust Fund relief. In this case the pre-existing injury

[asbestosis] did not become manifest until after the employee had retired and therefore the pre-existing disability was not manifest to the employer. Thus, the court found that the employer was not entitled to Section 8(f) relief.

Where hospital records diagnosed a claimant with a cyclothymic personality and indicated that she was receiving counseling from therapists to help her cope with problems she was facing with her work and marriage, the ALJ rationally found that the records did not establish the existence of a serious, lasting emotional problem. Callnan .v Morale, Welfare & Recreation, Dept. of the Navy, 32 BRBS 246(1998). However, it should be noted that subsequent deposition testimony supported the conclusion that the claimant did not have a diagnosed permanent psychiatric condition prior to her work injury. In fact, one doctor testified that the claimant had a latent dissociative identity disorder which was “triggered” by the work-related incident, and thus, speculated that her condition may not have manifested itself if she had not experienced what had happened on the job.

8.7.5 The Disability Must Not Be Due Solely to the New Injury

From 1927 to 1972, employers could seek Section 8(f) relief only in cases where a claimant's injury resulted in permanent total disability. According to the **1927 version** of the statute:

If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury.

33 U.S.C. § 908(f) (1927). The 1972 amendments broadened Section 8(f) relief to include permanent partial disability and in the course of doing so changed the language. Pub. L. No. 92-576, § 9(a).

In cases of permanent and total disability, the requirement that the two injuries "combine" was replaced by a requirement that the current level of "disability [be] found not to be due solely" to the most recent injury. As a result, in many cases the "combined with" and "not due solely" language is used either interchangeably or in conjunction. Either analysis appears to achieve the same result.

Simply proving a prior disability is not enough, however; the employer must show that the second injury by itself would not have led to total disability. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (**5th Cir.** 1990) (employer did not meet its burden of showing that the current total disability was not due solely to the employment injury because it failed to put on medical evidence to suggest that claimant's pre-existing back diseases contributed to his current total back disability).

See Director, OWCP v. Luccitelli, 964 F.2d 1303, 1306, 26 BRBS 1 (CRT) (2d Cir. 1992); rev'g Luccitelli v. General Dynamics Corp., 25 BRBS 30 (1991) (remanded two cases to judges to determine whether the second injury alone (a knee injury, in one case, and a back injury, in the other case), was sufficiently debilitating to have caused permanent total disability); FMC Corp. v. Director, OWCP, 886 F.2d 1185, 1186-87, 23 BRBS 1 (CRT) (9th Cir. 1989) (pre-existing bursitis and heart murmur are not evidence that back injury is not the sole cause of the disability).

In E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993), the employer failed to prove pre-existing hand impairment contributed to total disability caused by back injury; not enough that hand injury made total disability even greater. See also Director, OWCP v. General Dynamics Corp., 982 F.2d 790, 26 BRBS 139, 150 (CRT) (2d Cir. 1992).

Courts have sometimes suggested that Special Fund relief is assured in "aggravation cases." See, e.g., Brannon, 607 F.2d at 1382. The issue of "aggravation" has no bearing, however, on the element of Section 8(f) under discussion. Aggravation is a separate issue (see Topic 8.7.1, supra) pertaining to whether there was a second injury. If there was a second injury the employer must still prove that it alone would not have resulted in permanent total disability. See Jacksonville Shipyards v. Director, OWCP, 851 F.2d 1314, 1316, 21 BRBS 150 (CRT) (11th Cir. 1988).

An employer is entitled to Section 8(f) relief in a death claim if the death is not due solely to the work injury, a standard which can be met if the pre-existing condition hastens the employee's death. Requiring the employer to prove that the decedent would not have died at the time he did had he not suffered from the pre-existing condition is consistent with the hastening standard. Brown & Root, Inc. v. Sain, 162 F.3d 813, 32 BRBS 205 (CRT) (4th Cir. 1998). See also, Stilley v. Newport News Shipbuilding & Dry Dock Company, 33 BRBS 224 (2000)(evidence legally insufficient to establish that decedent's death was not due solely to mesothelioma) for a good example of insufficient medical evidence. Significantly, in Stilley, the decedent died within the expected time frame after having been diagnosed with mesothelioma. Additionally, the doctor did not state that the decedent would not have died when he did if not for the hypertension. The doctor's statement that death was hastened "to some degree" was vague and plainly insufficient to meet the standard of Sain. The medical opinion was also capable of several interpretations: did the hypertension hasten death, or did decedent's mesothelioma worsen the hypertension?

8.7.6 In Cases of Permanent Partial Disability, the Disability Must Be Materially and Substantially Greater than that Which Would Have Resulted from the Subsequent Injury Alone.

Where a claimant is permanently partially disabled, employer must also prove that the claimant's current level of disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1). See Sproull v. Director, OWCP, 86 F.3d 895 (9th Cir. 1996), cert. denied, 520 U.S. 1155 (1997); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997) (following the rationale in Two R Drilling); Director, OWCP v. Ingalls Shipbuilding, Inc., 125 F.3d 303, 306 (5th Cir. 1997); Director v. Newport News Shipbuilding & Dry Dock Co.[Harcum], 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), aff'd

on other grounds, 514 U.S. 122 (1995), 131 F.3d 1079 (4th Cir. 1997) (vocational rehabilitation expert can prove materiality prong of the contribution element); Two R Drilling v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990) (rejecting the “Common Sense Test”); Marine Power & Equipment v. Dept. Of Labor [Quan], 203 F.3d 664, (9th Cir. 2000).

[ED. NOTE: As was noted by the Fourth Circuit, “The ‘combination’ requirement should not be confused with the ‘contribution’ requirement imposed when determining an employer’s liability in the case of a permanent partial disability.” Tartan Terminals, Inc. v. Puller, (Nos. 98-1302, 98-1937)(4th Cir. 1999)(Unpublished).]

In Farrel v. Norfolk Shipbuilding & Dry Dock Corp., 32 BRBS 118 (1998), the Board vacated and remanded the ALJ's determination that the employer was not entitled to Section 8(f) relief. The claimant had a pre-existing mental impairment, evidenced by low Intelligence Quotient (IQ) test scores. The employer's vocational expert performed a transferable skills analysis to discern "what types of jobs or percentage of jobs were available first with regard to his work injury, and then upon consideration of his additional mental impairment." The vocational expert testified that the claimant's pre-existing mental impairment increased the number of jobs no longer available to the claimant for "generally transferable occupations" from 80 percent to 97 percent and for "unskilled occupations" from 48-49 percent to 76 percent.

The ALJ had found that this does not meet the "Harcum test" [see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum I), 8 F.3d 175 (4th Cir. 1993); and Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum II), 131 F.3d 1079 (4th Cir. 1997)], that is, the percentages given by the vocational expert did not reflect the extent of disability or impairment sustained by Claimant.

The Board, however, found that the evidence, if credited, demonstrated the level of impairment that would ensue from the work-related injury alone and thereby provides the ALJ with a basis to determine if the claimant's ultimate permanent partial disability is materially and substantially greater than his disability caused by the work-related injury alone. Since the ALJ had not considered this evidence, the matter was vacated and remanded.

In the **Fifth Circuit**, an employer must prove that without the prior injury the worker would not now be **totally permanently disabled** in order to meet the “not due solely” requirement. Two R Drilling, 894 F.2d 748, 750 (1997).

For **permanent partial disability** the employer need only show that an **increased** permanent partial disability resulted when the prior and subsequent injuries are combined. Director, OWCP v. Ingalls Shipbuilding, Inc., 125 F.3d at 307. This is still subject to the Congressional mandate that it be a “material and substantially” greater level of disability. Id. n. 6; 33 U.S.C. §908(f)(1); Director, OWCP v. Bath Iron Works Corp.[Johnson], 129 F.3d 45 (1st Cir. 1997); Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner], 125 F.3d 303 (5th Cir. 1997). The **Fifth Circuit**, has held that the lack of the magic words “materially and substantially” will not bar Section 8(f) coverage *per se*. Id. at 307, citing Ceres Marine Terminal v. Director, OWCP, 118 F.3d 387, 391 (5th Cir. 1997). Rather, when the ‘magic words’ are absent from the record, “the fact finder’s inquiry must of

necessity be resolved by inferences based on such factors as the disabilities and the current employment injury, as well as the strength of the relationship between them.” *Id.*

In the **First** and **D.C. Circuits**, the employer proves entitlement by “showing that ‘but for’ the pre-existing disability the claimant would be employable rather than by merely showing that the claimant’s pre-existing condition compounded his condition.” Dominey v. Arco Oil & Gas Co., 30 BRBS 134, 136 (1996); See also Director, OWCP v. Jaffe New York Decorating, 25 F.3d 1080 (**D.C. Cir.** 1994); CNA Ins. Co. v. Legrow, 935 F.2d 430 (**1st Cir.** 1991).

This requirement has been reiterated in case law although neither the Board nor the courts have fully addressed this requirement. In Sproull, the **Ninth Circuit** stated that an employer could “establish the contribution requirement by medical or *other* evidence.” Sproull, 86 F.3d at 900 (emphasis original); Director v. Newport News Shipbuilding & Dry Dock Co.[Harcum], 8 F.3d 175, 27 BRBS 116 (CRT) (**4th Cir.** 1993), aff’d on other grounds, 514 U.S. 122 (1995), 131 F.3d 1079 (**4th Cir.** 1997)(**vocational rehabilitation expert can prove materiality** prong of the contribution element); Director, OWCP v. Luccitelli, 964 F.2d 1303, 1306 (**2d Cir.** 1992), rev’g Luccitelli v. General Dynamics Corp., 25 BRBS 30 (1991). Two "R" Drilling Co., 894 F.2d at 750; Thompson v. Northwest Enviro Servs., 26 BRBS 53 (1992) (Board articulates proper standard and indicates that the ALJ did not apply it; however, the Board affirmed the ALJ because the "employer established the **contribution** [emphasis added] element necessary for § 8(f) relief"); Beltran v. California Shipbuilding & Dry Dock, 17 BRBS 225, 228 n.3 (1985) (court articulates standard but does not apply it in this case).

In Beckner, Jr. v. Newport News Shipbuilding & Dry Dock Co., 34 BRBS 181(2000), the Board reversed a Section 8(f) award finding that the claimant’s pre-existing bilateral amputations did not cause his asbestosis impairment to be substantially greater than that which would have resulted from the asbestos exposure alone.

Where a scheduled injury materially increases a pre-existing permanent partial disability and where the compensation due the employee on account of the overall resulting impairment exceeds 104 weeks' compensation, then whenever a credit for previous compensation paid is available to offset the amount due

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employee that credit shall first reduce the total award before there is any allocation of liability to the Special Fund. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 763 (**5th Cir.** 1989).

8.7.7 Duration of Employers' Liability Prescribed by Statute

Under the "aggravation rule" (see Topics 8.7.1, 2.26, supra), an employer is liable for the claimant's entire resulting disability when an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition. Strachan Shipping Co. v. Nash, 782 F.2d 513, 517, 18 BRBS 45 (CRT) (**5th Cir.** 1986) (en banc).

If an employer can prove entitlement to Section 8(f) relief, however, the Special Fund may assume responsibility for part of the employer's obligation. Where the Special Fund is implicated, an employer's obligation varies depending upon the type of injury (scheduled or non-scheduled) the claimant sustained while working for the employer, and the portion of the entire resulting disability which is attributable to the employment injury.

Under Section 8(f)(1):

- (1) If the employment injury is a **scheduled** (§ 908(c)(1)-(20)) injury (other than hearing loss) which results in permanent partial disability or permanent total disability, the employer is liable for the greater of 104 weeks or the number of weeks due for the subsequent injury; and
- (2) If the employment injury is a **non-scheduled** (§ 908(c)(21)) injury which results in permanent partial or permanent total disability or death, an employer's liability is limited to 104 weeks.

If the employment injury results in hearing loss, the employer's liability is limited to the lesser of 104 weeks or the number of weeks attributable to the injury. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 509, 23 BRBS 40 (CRT) (2d Cir. 1990), aff'g 22 BRBS 128 (1989). For a complete discussion see hearing loss at Topic 8.13, infra.

In each of the above scenarios, any remainder of compensation due is paid from a Special Fund created under Section 44 of the LHWCA, 33 U.S.C. § 944.

8.7.7.1 Multiple Disability Periods and Multiple Injuries

Employer's Liability Limited to One 104-Week Period

The Board has held that in cases where a **single injury** results in a period of permanent partial disability followed by permanent total disability, and Section 8(f) is applicable to both periods of disability, the employer is liable only for the period of permanent partial disability prescribed by statute.

The Special Fund pays the remainder of the permanent partial period, as well as the entire permanent total period. Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997). Davenport v. Apex Decorating Co. (Davenport II), 18 BRBS 194, 197 (1986), overruling Davenport v. Apex Decorating Co. (Davenport I), 13 BRBS 1029 (1981) (employer's liability was limited to 115.2 weeks where claimant suffered a permanent partial disability and a subsequent permanent total disability due to the same right hip injury); Huneycutt v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 142, 143 (1985) (employer's liability was limited to 104 weeks because claimant's asbestosis was a non-schedule injury).

Finding Davenport analogous, the Board held that the employer's liability is limited to one statutory period if one injury results in one period of permanent partial disability followed by a second period of permanent partial disability. Section 8(f) is applicable to both periods of disability. Murphy v. Pro-Football, Inc., 24 BRBS 187, 190-91 (1991).

Similarly, in cases where permanent total disability is followed by work-related death, and the elements of Section 8(f) are met with respect to both Section 8 and 9 benefits, the employer is only liable for one statutory period. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78, 86 (1989). The same rule applied where decedent died prior to the effective date of the 1984 amendments, even if the cause of death was unrelated to the employment. Estate of Hickman v. Universal Maritime Serv. Corp., 22 BRBS 212, 217 (1989).

Employer Liable for More than One 104-Week Period

The employer is liable for more than one statutory period where the claimant's permanent partial disability is followed by total disability caused by a **new distinct traumatic injury**. Cooper v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 284, 286 (1986) (claimant's permanent partial disability was precipitated by asbestosis; claimant's permanent total disability was precipitated by a totally unrelated back injury).

The employer is also liable for more than one statutory period where the claimant suffers **successive, unrelated injuries** in the workplace. Newport News Shipbuilding & Dry Dock Co. v. Howard, 904 F.2d 206, 210-11, 23 BRBS 131 (CRT) (4th Cir. 1990) (claimant's back injuries/arthritis and carpal tunnel syndrome were discrete injuries (though together they rendered the claimant permanently disabled); therefore, the employer was liable for more than one 104-week period).

In Matson Terminals, Inc. v. Berg, 279 F.3d 694 (9th Cir. 2002) the multi-scheduled injury issue once again was raised in the context of Section 8(f). Here **both of a claimant's knees were injured in one accident**. The **Ninth Circuit** noted that Section 8(c)(22) indicates that there should be two liability periods and that since the claimant's two knees were discrete injuries under Section 8(f), there should be two 104-week liability periods on the employer. "It is irrelevant that the injuries arose from the same working conditions or that they arose from a single cause or trauma. What is relevant is that the working conditions caused two injuries, each separately compensable under Section 8(f)."

8.7.8 Miscellaneous Substantive Special Fund Issues

The scheduled award or 104 weeks due under Section 8(f) must be paid **in addition to** payments for temporary total and temporary partial disability. Shaw v. Todd Pac. Shipyards Corp., 23 BRBS 96, 99-100 (1989).

The Special Fund is **not** liable for:

Medical benefits. Barclift v. Newport News Shipbuilding & Dry Dock Co., 15 BRBS 418, 421 (1983), rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984); Scott v. Rowe Mach. Works, 9 BRBS 198, 200-01 (1978); Spencer v. Bethlehem Steel Corp., 7 BRBS 675, 677 (1978); Duty v. Jet America, Inc., 4 BRBS 523, 531 (1976);

Attorney's fees. Director, OWCP v. Alabama Dry Dock & Shipbuilding Co., 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982), rev'g 12 BRBS 532 (1980), on remand, 17 BRBS 43 (1985); Director, OWCP v. Robertson, 625 F.2d 873, 877-81, 12 BRBS 550 (9th Cir. 1980), rev'g 7 BRBS 774 (1978); Bingham v. General Dynamics Corp., 20 BRBS 198, 205 (1988).

Funeral expenses. Perry v. Bath Iron Works Co., 29 BRBS 57 (1995); Bingham, 20 BRBS at 205.

An employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). Evangelista v. Bethlehem Steel Corp., 19 BRBS 174, 175 (1986) (Special Fund paid pursuant to § 10(h)(2)); Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 383 (1983) (not yet in issue because case was remanded to determine whether Section 8(f) was applicable); Still v. Todd Pac. Shipyards, 14 BRBS 890, 893 (1982) (Special Fund paid pursuant to § 10(f)); Lewis v. American Marine Corp., 13 BRBS 637, 639-40 (1981).

The employer is not entitled to Section 8(f) relief where the claimant receives a *de minimis* permanent partial disability award. Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133, 137-38 (1987); Porras v. Todd Shipyards Corp., 17 BRBS 222, 223-24 (1985), aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP, 792 F.2d 1489, 19 BRBS 3 (CRT) (9th Cir. 1986) (Board affirmed ALJ's finding that where there is a *de minimis* claim it is impossible to determine one of the elements of § 8(f)--whether claimant's disability was materially and substantially greater than it would have been from claimant's last injury alone). Cf. Murphy v. Pro-Football, Inc., 24 BRBS 187, 190-91 (1991) (Special Fund relief granted where employer paid substantial award for permanent partial disability for 104 weeks; claimant entitled to *de minimis* award against Special Fund).

However, overturning the Board, the **Fourth Circuit** held that a small disability award that reflects an actual loss in wage earning capacity does not preclude an employer from seeking relief under Section 8(f) of the LHWCA. Newport News Shipbuilding & Dry Dock Co. v. Stallings, 250 F.3d 868 (4th Cir. 2001), vacat'g Stallings v. Newport News Shipbuilding and Dry Dock Co., 33 BRBS 193 (1999). In Stallings the Board had determined that the policy behind Section 8(f) would

be undermined by allowing an employer to get Section 8(f) relief for a nominal award and, thereby, allowing the employer to avoid liability for a future substantial injury. However, the **Fourth Circuit** distinguished this case from one in which the award was “nominal.” In vacating the Board, the **Fourth Circuit** recognized that the \$3.78 per week is insubstantial and that the claimant’s disability does not greatly affect his wage-earning capacity. Important to the court was the fact that the employer had been ordered to pay compensation calculated on the basis of an actual loss in wage-earning capacity, to an employee with a permanent partial disability.

8.7.9 Procedural Issues

8.7.9.1 Standing

Claimant has no interest in the source of compensation and therefore has no standing to appeal the applicability of Section 8(f). Henry v. George Hyman Constr. Co., 749 F.2d 65, 69-70, 17 BRBS 42 (CRT) (**D.C. Cir.** 1984), rev'g 15 BRBS 475 (1983); Coats v. Newport New Shipbuilding & Dry Dock Co., 21 BRBS 77, 79 n.2 (1988); Dove v. Southwest Marine, 18 BRBS 139, 140 (1986); Price v. Greyhound Bus Lines, 14 BRBS 439, 440 n.1 (1981), dismissed for lack of subject matter jurisdiction, No. 81-2210 (**4th Cir.**), cert. denied, 459 U.S. 831 (1982). Embodied in these cases is the general principle that a claimant should not be concerned with the source of compensation once it has been awarded.

[ED. NOTE: Benefits received under the LHWCA and paid by the United States government, i.e., the Longshore Trust Fund, are garnishable for purposes of child support and alimony. See 5 C.F.R. §§ 581.101-103, especially 5 C.F.R. § 581.103(c)(5) which specifically lists "Benefits received under the Longshoremen's and Harbor Workers' Compensation Act." 5 C.F.R. § 581.101 et seq. was enacted to implement the objectives of 42 U.S.C. 659 and 666(a)(1) and (b), to make the United States or the District of Columbia subject to legal process brought for the enforcement of an individual's legal obligations to provide child support and/or to make alimony payments. See Moyle v. Director, OWCP, 147 F.3d 1116, 32 BRBS 107 (CRT) (9th Cir. 1998), cert. denied, 119 S.Ct. 1454 (1999).]

This regulation seemingly carves out an **exception to Section 16** of the LHWCA. Thus, a distinction can be drawn between compensation benefits payable by an employer/carrier and compensation benefits payable by the Trust Fund. Only the latter benefits would be garnishable. There are currently no published cases on this issue.

According to the **Circuit Courts** and the Board, the Director has a real interest in protecting the financial integrity of the Special Fund and has standing as the proper party to appeal an award of Section 8(f) relief. E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341, 27 BRBS 41 (CRT) (**9th Cir.** 1993); Henry, 749 F.2d at 69-70; Director, OWCP v. Cargill, Inc., 718 F.2d 886, 888, 16 BRBS 85 (CRT) (**9th Cir.** 1983); Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.(Langley), 676 F.2d 110, 114, 14 BRBS 716 (**4th Cir.** 1982); Hitt v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 353, 354 (1984); Powell v. Brady-Hamilton Stevedore Co., 17 BRBS 1, (1984) (Order on Reconsideration).

In Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122 (1995), the **Supreme Court** found that where Section 8(f) was not in issue, the Director lacked standing to appeal an order. Specifically, the **Court** found that the Director was not a “person adversely affected or aggrieved” within the meaning of the LHWCA by the Board’s decision [regarding the claimant’s level and degree of disability]. The **Court** went on to note that since the agency lacked specific authorization to appeal, it could not be adversely affected or aggrieved in its regulatory or policymaking capacity. In Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 U.S. 248 (1997), the **Court** held that the Department of Labor is the “agency” which must be named as respondent on review of decisions of the Benefits Review Board in LHWCA cases, pursuant to the rules of appellate procedure and thus, the Director of OWCP may be named as a respondent in the courts of appeal. However, Justice Scalia’s dissent is noteworthy. Justice Scalia stated:

Today’s opinion concludes, on the basis of Federal Rule of Appellate Procedure 15(a), that the Director of the Office of Workers’ Compensation Programs, a subagency within the Department of Labor, is a proper respondent in the courts of appeals when review is sought of an order of the Benefits Review Board (Board or BRB), an independent adjudicatory body within that Department. This conclusion is at odds with the plain language of the Rule, and produces a bizarre arrangement that will have troublesome consequences for both agencies and private parties. I respectfully dissent from the Court’s judgment on this issue.

Pursuant to the 1984 Amendments, the employer remains a party to the claim even after its liability terminates under Section 8(f) and retains all its rights under the LHWCA. 33 U.S.C. § 908(f)(2)(B). See H.R. Rep. 98-1027, 98th Cong., 2d Sess. 32, reprinted 1984 U.S.C.C.A.A.N. 2782.

8.7.9.2 Timeliness of Employer's Claim for Relief

Current Law: Post-1984 Amendments - Absolute Bar

The 1984 Amendments added Section 8(f)(3) specifying when the Section 8(f) issue must be raised:

Any request, filed after [September 28, 1984], for apportionment of liability to the special fund established under section § 44 of this Act for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner [now district director] prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. § 908(f)(3).

Only claims filed after the September 28, 1984 effective date of the 1984 Amendments are subject to the rules cited above. Verderane v. Jacksonville Shipyards, 772 F.2d 775, 778 n.5, 17 BRBS 154, 157 n.5 (CRT) (11th Cir. 1985); Scott v. S.E.L. Maduro, Inc., 22 BRBS 259, 261 (1989) (a claim occurring within the 11th Circuit which was referred to OALJ prior to the effective date of the 1984 amendments.).

However, in Lassiter v. Nacirema Operation Co., 27 BRBS 168, 171, the Board held that where a claim filed for permanent disability benefits prior to the effective date of the 1984 amendments, but the employer first requests Section 8(f) relief at the initial informal conference held in 1986, approximately one and one-half years after the effective date of the 1984 amendments, September 28, 1984, Section 8(f)(3) should be applied.

In Serio v. Newport News Shipbuilding, 32 BRBS 106 (1998), the Board held that Section 8(f) must be raised and litigated at the first hearing of a case. In this case, at hearing, the parties informed the ALJ that the only remaining issue was Section 8(f) relief. Shortly thereafter, by letter, the employer informed the ALJ that it was withdrawing its request for Section 8(f) relief and that it would not pursue a claim for Section 8(f) relief at that time. A compensation order awarding benefits consistent with the parties' stipulations was issued. Subsequently, the employer submitted a second request for Section 8(f) relief by way of a petition for modification. The Director opposed the Section 8(f) claim on the ground that the employer's withdrawal of that claim in the first hearing constituted a waiver which precludes employer's pursuit of that issue in a second hearing. Agreeing with the Director, the Board stated that the purpose of requiring an employer to raise and litigate Section 8(f) relief in the first proceedings wherein the permanency of a claimant's disability is at issue, is to facilitate the policy of finality in litigation and to avoid the bifurcation of issues.

A Section 8(f) request **first raised in a Motion for Reconsideration is untimely.** Ceres Marine Terminals v. Hinton, 243 F.3d 222 (5th Cir. 2001).

8.7.9.3 Filing for Section 8(f) Relief

[ED. NOTE: The following related issues are separated into two groupings: 1) filing for a claim pending before OWCP; and 2) filing for a claim that has been transferred to OALJ.]

Filing for a claim pending before OWCP

The regulations require:

An employer or insurance carrier which seeks to invoke the provisions of § 8(f) of the Act must request limitation of its liability and file, in duplicate with the district director a **fully documented application** ...[In addition, any] other evidence considered necessary for consideration of the request for § 8(f) relief must be submitted when requested by the district director...

20 C.F.R. § 702.321(a)(1) (emphasis added); Wiggins v. Newport Shipbuilding & Dry Dock Co., 31 BRBS 142 (1997). A fully-documented application includes a statement of the grounds for Section 8(f) relief; the grounds for relief must be supported by medical evidence. 20 C.F.R. § 702.321(a)(1)(i-iv) (1986); Cajun Tubing Testors v. Hargrave, 951 F.2d 72, 740 (5th Cir. 1992).

The filing of the Section 8(f) application is **not** accomplished by the act of mailing the required application to the district director. Lassiter at 172; See also Wiggins v. Newport Shipbuilding & Dry Dock Co., 31 BRBS 142 (1997). If Congress had meant for compliance with the requirements of Section 8(f)(3) to be accomplished by the mailing of an application for Section 8(f) relief, it would have included language similar to that in Section 30(d) in Section 8(f)(3) itself. Id.

Where an employer raises the Section 8(f) issue before the district director but fails to submit a complete application, the absolute defense may be raised and a judge cannot consider the merits of the employer's 8(f) request without initially considering whether the request submitted to the district director was sufficiently documented pursuant to 20 C.F.R. § 702.321. Tennant v. General Dynamics Corp., 26 BRBS 103 (1992) (employee had failed to provide district director with medical documentation or list a "permanent" defect).

The Board, in Tennant, remanded to the judge for *de novo* consideration as to whether the Section 8(f) application originally filed by the employer with the district director meets the requirements of Section 8(f) and the regulatory requirements under 20 C.F.R. § 702.321. See also Fullerton v. General Dynamics Corp., 26 BRBS 133 (1992).

A request for Section 8(f) relief should be made as soon as the permanency of a claimant's condition is known or is an issue in dispute. See 20 C.F.R. § 702.321(b)(1). An application need not be filed, however, if, prior to referral by the district director, the claimant's condition has not reached maximum medical improvement and a claim for permanent disability benefits has not been raised. See 20 C.F.R. § 702.321(b)(3).

The Board has held that a judge should only consider whether permanency **was** in issue, not whether **it should have been**. Brazeau v. Tacoma Boatbuilding Co., 24 BRBS 128, 131-33 (1990) (the Board reasoned that the "should have been" inquiry placed the *onus* of raising the issue of permanency on the employer rather than the claimant, which is inappropriate because the employer is not required to monitor a condition's permanency and thus preserve its right to relief under § 8(f)).

In Rice v. Newport News Shipbuilding & Dry Dock Company, 32 BRBS 102 (1998) the issue presented was the time frame in which an employer must request Section 8(f) relief after the "permanency of claimant's condition is known or is an issue in dispute." The Board upheld the ALJ's determination that the petition was timely filed where it was filed prior to the time that the permanency of the claimant's condition became an issue before the district director. While the Section 8(f) petition was filed five years after the claim was filed, at no point during the five year period was the permanency of the claimant's condition at issue. The employer is not required to monitor the claimant's condition to determine the point at which his disability has become permanent. The fact that the parties ultimately stipulated that the claimant is entitled to permanent disability benefits for a period which begins prior to the date of the filing of the Section 8(f) petition does not indicate that the permanency of the claimant's condition actually was at issue prior to the filing of the Section 8(f) petition.

The **Fifth Circuit**, however, requires the employer to raise the Section 8(f) issue when it has "**reason to believe**" that the claimant has suffered a permanent disability. Cajun Tubing Testors v. Hargrave, 951 F.2d 72, 75 (**5th Cir.** 1992). The employer has "reason to believe that permanency is in issue" when:

- 1) the employer has knowledge that the claimant is permanently disabled,
- 2) permanent disability benefits are paid, or
- 3) an informal conference is held to discuss permanency of the claimant's condition.

Id. at 75.

In the **Ninth Circuit**, the employer was put on notice that permanent disability was in issue where a claim document included a request for compensation for "severe permanent injuries" and a medical record indicated a three percent permanent partial disability. Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1546-48 (**9th Cir.** 1991); but see dissenting view, Container Stevedoring, 935 F.2d at 1552-54 (concurring opinion) (judge disagreed with the majority's interpretation of "permanency [as] either 'known' or 'in dispute' whenever it is mentioned in a compensation-related document, however tangential to the actual course of the proceedings." Here, such information was at odds with documents which indicated that only temporary disability was in issue before the OWCP claims examiner. The judge would not have drawn the conclusion that total disability was considered when the only available evidence contradicted such an assumption.).

In the **First Circuit**, the absolute bar has been upheld when permanency was not in issue, where an autopsy report and medical records, including x-rays showing a pre-existing condition (lung impairment) and asbestosis, were available to the employer prior to hearing, so that the employer could have "reasonably anticipated" the liability of the Special Fund. Bath Iron Works Corp. v. Director, OWCP, 950 F.2d 56, 58-59, 25 BRBS 55 (CRT) (**1st Cir.** 1991); but see Ortiz v.

Todd Shipyards Corp., 25 BRBS 228, 237 (1991) (where medical records which were available to the employer prior to the director's informal hearing merely indicated that the claimant was in pain, but did not specifically diagnose intra cerebral bleeding, the employer did not possess sufficient medical evidence at the time of the informal conference to have reasonably anticipated liability of the Special Fund).

Even where permanency is in issue, an employer's failure to submit a fully-documented application by the date established by the district director may not bar relief, if it is excused, because the employer could not have reasonably anticipated the liability of the Special Fund. 20 C.F.R. § 702.321(b)(3); Currie v. Cooper Stevedoring Co., 23 BRBS 420, 422-23 (1990) (after holding that "permanency" was in issue before the director, the Board rejected the absolute bar because the delay in filing the § 8(f) petition was caused by the employer's lack of access to documents which would prove the elements of § 8(f)).

Where a Section 22 Modification request is made (for an original award of temporary partial disability to be modified to an award of permanent partial disability), the employer must begin his request for Section 8(f) relief at OWCP. Firth v. Newport News Shipbuilding and Dry Dock Company, 33 BRBS 75 (1999). **Section 22 is of no relevance to the applicability of Section 8(f)(3).** Although a district director may not "modify" a decision of an ALJ regarding an issue in dispute, modification proceedings are properly initiated at the district director level and the district director does have the power, pursuant to Section 22, to review a compensation case in accordance with the procedure prescribed in respect of claims under Section 19 of the LHWCA. The statute does not provide an exception, applicable in modification cases, to the rule that a claim for Section 8(f)(3) applies to all claims for Section 8(f) relief.

Filing for a claim that has been transferred to OALJ

Section 8(f)(3) of the LHWCA provides:

Any request, filed after the dates of enactment of the Longshore and Harbor Workers' Compensation Amendments of 1984, for apportionment of liability to the special fund..., shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense..., unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

Section 702.321(a)(3), however, provides that:

Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, **an application need not be submitted to the district director** to preserve the employer's right to later seek relief under section 8(f) of the Act...The failure of an employer to present a timely and fully documented application for section 8(f) relief

may be excused...where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director.

20 C.F.R. §702.321(a)(3).

20 C.F.R. §702.336 provides that any newly raised issues of Section 8(f) relief are to be treated by the ALJ as he would any other new issue, which is also the thrust of 20 C.F.R. §702.345(a) (“When one or more additional issues are raised by the [ALJ] pursuant to §702.336, such issues may, in the discretion of the [ALJ], be consolidated for hearing and decision with other issues pending before him.”).

As is evident from these provisions and others, that the intent of the LHWCA and regulations is to provide quick and informal resolution to claims brought by injured claimants. In that accord, all issues should be adjudicated in one proceeding to avoid piecemeal litigation and procedural delays. 20 C.F.R. §702.338 (“The [ALJ] shall inquire fully into the matter at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters”. The LHWCA states in pertinent part: “With regard for the convenience and necessity of the parties of their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. §555(b).

The case law is also clearly weighed against compelling the employer to file a Section 8(f) request with the district director once the case is before OALJ. Once a matter is referred to OALJ the adjudicatory process commences. The transmittal itself begins the adjudicatory process. See 20 C.F.R. §702.317(d). In Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995), in an eight person majority opinion, the **United States Supreme Court** described the district director as having a “lack of control over the adjudicatory process.” 514 U.S. at 133. In Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates], 519 U.S. 248 (1997), the **Court** again referred to OALJ as the beginning of the adjudicatory process. In Atlantic & Gulf Stevedores, Inc. v. Donovan, the **Fifth Circuit** found that every agency has a duty to conclude any matter before it with reasonable dispatch and that the courts are essentially empowered to review the inaction of an agency and to “compel agency action unlawfully withheld or unreasonably delayed.” 274 F.2d 794, 802 (**5th Cir.** 1960).

The Board’s decisions also support the position that only the OALJ has jurisdiction over a case once it is transferred to OALJ for adjudication. See Boone v. Ingalls Shipbuilding, Inc., 27 BRBS 250 (1993), aff’d en banc, 28 BRBS 119, 122 (1994); Maine v. Brady-Hamilton Stevedore Company, 18 BRBS 129 (1986) (en banc); O’Berry v. Jacksonville Shipyards, Inc., 22 BRBS 430 (1989).

20 C.F.R. §702.317 provides that generally formal hearings are to address issues noted by the parties in pre-hearing statements submitted prior to the case being transferred to the OALJ. However, additional issues may be raised at the OALJ by amending an LS-18. See Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1, 3 (1990). 20 C.F.R. §702.336(a) provides that a

hearing may be expanded to allow consideration of new issues if the evidence presented warrants their consideration. See also 20 C.F.R. §702.336(b) (providing that the parties be notified and given the opportunity to present argument and new evidence on a new issue which arises during the course of a hearing). See also Currie v. Cooper Stevedoring Co., 23 BRBS 420, 424 (1990); Cowart v. Nichlos Drilling Co., 23 BRBS 42, 47-48 (1989), rev'd in part, 907 F.2d 1552, 24 BRBS 1 (CRT)(**5th Cir.** 1990), aff'd en banc, 927 F.2d 828, 24 BRBS 93 (CRT)(**5th Cir.** 1991), aff'd, 505 U.S. 469 (1992); Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182, 184 (1984); Taylor v. Plant Shipyards Corp., 30 BRBS 90 (1996); Lewis v. Todd Pacific Shipyards Corp., 30 BRBS 154 (1996).

In Cornell Univ. v. Velez, 856 F.2d 402, 21 BRBS 155 (CRT)(**1st Cir.** 1988), the **First Circuit** has ruled that an ALJ may raise a new issue — such as Section 8(f) — *sua sponte* where several conditions are met. These conditions are: (1) there is evidence at least arguably sufficient to come within the intent of the statute; (2) the case is not too far along; and (3) the petitioner's failure to plead the issue earlier was subject to some mitigating circumstances.

***[ED. NOTE:** Given the Director's infrequent appearances in matters before OALJ, as noted in Greenlaw v. Nationwide Bldg. Maintenance, Inc., 32 BRBS 323 (ALJ) (1997), it is noteworthy that the Director would seek to add a layer of bureaucracy, thus requiring additional time for the resolution of this matter. Both the courts [Ingalls Shipbuilding v. Asbestos Health Claimants, 17 F.3d 130 (**5th Cir.** 1994) (citing Atlantic & Gulf Stevedores, Inc. v. Donovan, 274 F.2d 794, 802 (**5th Cir.** 1960), reh'g denied, 270 F.2d 75 (**5th Cir.** 1960)] and Congress [Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996)] have recently made clear their frustrations as to the time it takes an LHWCA claim to travel through the adjudicatory process. Additionally, it is noted that slowing the adjudicatory process would be especially unfair to claimants as they have no standing as to Section 8(f) issues.]*

When an employer/carrier first becomes aware that Section 8(f) is at issue after a case has already been transferred to OALJ, the employer/carrier should submit its request for Section 8(f) relief directly to the administrative law judge. Likewise, when “permanency” of a disability is first raised as an issue while the claim is before the ALJ, the employer/carrier should file its Section 8(f) application with the ALJ. As noted *infra*, this view is supported by the LHWCA, regulations, and case law.

Adding a Late-Asserted Ground

Whether or not an employer could add a late-asserted ground for Section 8(f) relief was at issue in Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., [Dillard], 230 F.3d 126, (**4th Cir.** 2000). The employer asserted, and the Director did not dispute, that the employer was unaware of the critical information concerning the late-asserted ground. The ALJ allowed the late asserted ground and the Board found that the ALJ, in effect, must have found that the employer could not have reasonably anticipated the late-asserted grounds. The **Fourth Circuit** found that the ALJ had not determined whether or not the employer could have reasonably anticipated the ground at the time it initially filed its application with the district director.

8.7.9.4 Director's Burden to Raise the Absolute Bar

The Director bears the burden of affirmatively raising the absolute bar as a defense and forwarding a copy of the application for Section 8(f) relief to the judge along with other necessary documents. 20 C.F.R. § 702.321(b)(3); 20 C.F.R. § 702.321(c); Wiggins v. Newport Shipbuilding & Dry Dock Co., 31 BRBS 142 (1997); Tennant v. General Dynamics Corp., 26 BRBS 103, 107, 109 (1992). See Emery v. Bath Iron Works Corp., 24 BRBS 238, 241 (1991) (ALJs have "general adjudicatory powers" which afford them discretion as to when new issues may be raised; thus ALJs may, although they are not required to, raise new issues provided that the parties are given notice of the issue and time to respond to it; therefore, it was within ALJ's discretion to refuse to hear the newly raised § 8(f) issue). The absolute defense may not be raised by the Director for the first time on appeal. Marko v. Morris Boney Co., 23 BRBS 353, 359 (1990).

In Abbey v. Navy Exchange, the Director was estopped from asserting the absolute bar to the employer's 8(f) application because the Director "did not raise and plead the absolute defense **on his own behalf.**" 30 BRBS 139, 140 (1996) (emphasis added). The employer had requested Section 8(f) relief at the informal conference, however the claimant had not reached MMI. Upon his reaching MMI the district director advised the employer to submit the application within 45 days. The employer failed to file the application at all and the district director referred the case to the OALJ. In his referral, the district director noted, using a form letter with boxes checked, that no Section 8(f) application had been filed, the district director was asserting the absolute defense.

The Director made his first appearance in the case at the Board's hearing of the employer's appeal. In holding that the Director had waived his rights under Section 8(f)(3), the Board began with an analysis of the LHWCA and the Regulations. Starting with the LHWCA, the Board noted that Section 8(f)(3) does not identify "the entity who must raise and plead the absolute defense." Id. at 141. However the Director is the guardian of the Special Fund. Id.; Director, OWCP v. Newport News Shipbuilding & Dry Docks Co.[Harcum], 8 F.3d 175 (4th Cir. 1993), aff'd, 514 U.S. 122 (1995); Director, OWCP v. General Dynamics Corp.[Lockhart], 980 F.2d 74 (1st Cir. 1992). Section 702.321(b)(3) states that the Director, as guardian, must raise and plead the absolute defense. This is reinforced by the Comments which "restate the rule that the absolute defense is an affirmative defense and emphasize that 'it must be raised and specifically pleaded by the Director before the OALJ.'" Id.; 51 Fed. Reg. 4279 (Feb. 3, 1986).

The issue in Abbey revolved around whether the Director's obligation could be satisfied by the actions of the district director. The Board found clear authority for their holding that **in this situation** the district director could not act on behalf of the Director. The Board analyzed the differences in the two:

The district director fills the statutory role of the 'deputy commissioner,' a title found in the statute but replaced in the regulations by 'district director.' See 33 U.S.C. §919, 20 C.F.R. §701.301(a)(7). As such, the district director performs a wide range of duties related to the filing, investigation and informal resolution of claims under the provisions of the Act and the implementing regulation. The 'Director' is not a

creation of the statute, but of the regulations. Under the Act, certain duties, notably those involving medical care and vocational rehabilitation, 33 U.S.C. §§ 907, 939, are entrusted to the Secretary. By regulation, the Secretary's responsibilities under the Act are delegated to the Assistant Secretary of Labor for Employment Standards, who established the Office of Worker's Compensation Programs, headed by the Director, to administer the benefits program under the Act. 20 C.F.R. §§701.201, 701.202.

Abbey, 30 BRBS at 141.

The Board closed its analysis with a study of 20 C.F.R. 702.321. The Board found that filing must be with the district director [§702.321(a)(1)], the district director establishes a date for submission of the application [§702.321(b)(1)], and the district director has the authority to excuse late filings. Id. The Director is required to raise and plead the absolute defense. 20 C.F.R. §702.321(b)(3). Finally, "Section 702.321(c) requires the district director to award Section 8(f) relief after concurrence by the Associate Director, DLHWC, or his designee, if all relevant evidence is submitted and the facts warrant relief." Id. at 142. Thus, the Board concluded that if the both the district director and the Director could raise the Section 8(f)(3) absolute defense, then Section 702.321(b)(3) would have expressly stated the dual ability. See also Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524 (1985) (giving meaning to two different phrases); Bethlehem Steel Corp. v. Mobley, 920 F.2d 558 (9th Cir. 1990) (two terms equals two meanings).

When the Director has properly raised the Section 8(f)(3) absolute defense, a judge initially must give *de novo* consideration to whether the employer submitted a sufficient application requesting Section 8(f) relief, which is in compliance with the regulations at 20 C.F.R. § 702.321. Callnan v. Morale, Welfare & Recreation, Dept. of the Navy, 32 BRBS 246 (1998). The burden is on the employer to show that it could not have reasonably anticipated the liability of the Special Fund as to the claimant's pre-existing condition. Farrel v. Norfolk Shipbuilding & Dry Dock Corp., 32 BRBS 118 (1998).

If the absolute bar does not apply, the judge may then consider the merits of the employer's request for Section 8(f); if the bar applies, the request for Section 8(f) must be denied. Tennant, 26 BRBS at 108 (Board vacated ALJ's denial of Director's motion to dismiss employer's § 8(f) application and ALJ's award of § 8(f) relief and remanded the case to ALJ so that ALJ could determine whether the application was complete, and if so, whether employer had proved entitlement to § 8(f)); Fullerton v. General Dynamics Corp., 26 BRBS 133, 139 (1992).

8.7.9.5 Prior Law: Pre-1984 Amendments

In claims which were filed prior to 1984, an employer had to raise Section 8(f) at the first hearing wherein the claimant sought permanent disability benefits; if Section 8(f) was not raised, the claim was waived. Reynolds v. Cooper Stevedoring Co., 25 BRBS 174, 178 (1991). Once waived,

the claim could not be raised for the first time on appeal. Moore v. Paycor, Inc., 11 BRBS 483, 493 (1979).

The "use it or lose it" nature of Section 8(f) was affirmed by the circuit courts on appeal. Director, OWCP v. Edward Minte Co., 803 F.2d 731, 735, 19 BRBS 27 (CRT) (**D.C. Cir.** 1986), aff'g 16 BRBS 314 (1984); Brady-Hamilton Stevedore Co. v. Director, OWCP, 779 F.2d 512, 513, 18 BRBS 43 (CRT) (**9th Cir.** 1985), aff'g 16 BRBS 350 (1984); Verderane v. Jacksonville Shipyards, 772 F.2d 775, 778, 17 BRBS 154 (CRT) (**11th Cir.** 1985); American Bridge Div., U.S. Steel Corp. v. Director, OWCP, 679 F.2d 81, 83, 14 BRBS 923 (**5th Cir.** 1982), aff'g Carroll v. American Bridge Div., U.S. Steel Corp., 13 BRBS 759 (1981); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317, 12 BRBS 518 (**9th Cir.** 1980); Avallone v. Todd Shipyards Corp., 13 BRBS 348 (1981), petition for review denied, 672 F.2d 901 (**2d Cir.** 1981).

There have, however, been **exceptions** to the first hearing rule. There appear to be two types of exceptions: 1) the employer's apparent waiver was either excused, or not viewed as a waiver (the Board has characterized these as "**compelling circumstances**" cases--see Price v. Cactus Int'l, 15 BRBS 360, 363 (1983)); or 2) the employer proved either a change of condition or a mistake of fact as grounds for a **Section 22 modification**.

The employer's waiver has been excused in the following four situations:

- 1) Section 8(f) was properly raised as an issue and the judge failed to consider it during the hearing. Bacon v. General Dynamics Corp., 14 BRBS 408, 411 (1981).
- 2) A judge erroneously indicated that Section 8(f) was not properly before her and/or that it would be considered at a future proceeding. Davenport v. Daytona Marine & Boat Works, 16 BRBS 196, 200 (1984) (§ 8(f) was raised as an issue but employer abandoned its § 8(f) claim after ALJ indicated that it could be pursued separately before district director--Board held that ALJ erred in not considering § 8(f)); Tibbetts v. Bath Iron Works Corp., 10 BRBS 245, 252 (1979) (parties mistakenly believed that § 8(f) could not be raised where the claim was only for permanent partial disability and this belief was not corrected by ALJ); Egger v. Willamette Iron & Steel Co., 9 BRBS 897, 899-900 (1979) (§ 8(f) was raised at the first hearing but then withdrawn when ALJ indicated the case would be bifurcated and § 8(f) issue would be reached at a later date).
- 3) A Section 8(f) request could not have properly been before the ALJ at the first hearing. Washington Soc'y for the Blind v. Allison, 919 F.2d 763, 768 (**D.C. Cir.** 1990) (In a pre-1972 hearing, claimant was awarded permanent partial benefits. At that time, § 8(f) relief was only available for permanent total disability. In the late 1970's when claimant sought (but was denied) permanent total disability--the employer's request for § 8(f) was granted. The court reasoned that since only a change in claimant's status could have provided an occasion for a request for § 8(f) relief, employer **did not waive** § 8(f) relief by failing to assert it in 1969.).

4) After raising Section 8(f) initially, it was unnecessary for employer to raise it at "every turn in the proceedings." Reynolds v. Cooper Stevedoring Co., 25 BRBS 174, 177, 179 (1991) (employer timely and properly raised § 8(f) in pre-hearing statement and in every proceeding where it was in issue thereafter).

Modification may not be used to circumvent the rule that Section 8(f) relief is waived if not properly raised at the first opportunity. Dykes v. Jacksonville Shipyards, 13 BRBS 75, 76 (1981). Where permanency was raised for the first time in a modification proceeding, however, a request for Section 8(f) relief in that proceeding was timely. Moore v. Washington Metro. Area Transit Auth., 23 BRBS 49, 51-54 (1989).

The Board has held that modification may only be used in "compelling circumstances," and where the interests of justice outweigh the need for finality in judicial decision-making. Burke v. San Leandro Boat Works, 18 BRBS 44 (1986) (employer's failure to produce evidence of a pre-existing disability at the first hearing was viewed as a lack of diligence and as such could not be the basis for a modification because there were not compelling circumstances to support modification); Price v. Cactus Int'l, 15 BRBS 360, 363 (1983), aff'd, 733 F.2d 903 (5th Cir. 1984) (Table).

It is unclear whether a "**waived**" claim may be revived through modification. Verderane v. Jacksonville Shipyards, 772 F.2d 775, 780, 17 BRBS 154 (CRT) (11th Cir. 1985) (court noted the controversy regarding the waiver issue and found that even assuming waiver did not bar modification, employer's evidence did not meet § 22 requirements). See American Bridge Div., U.S. Steel Corp. v. Director, OWCP, 679 F.2d 81, 83 n.6, 14 BRBS 923 (5th Cir. 1982).

In a case where the waiver of Section 8(f) relief was not properly raised, employer was allowed to pursue Section 8(f) after satisfying the grounds for modification, without "compelling circumstances" or "interest of justice" analyses. Director, OWCP v. Edward Minte Co., 803 F.2d 731, 735, 19 BRBS 27 (CRT) (D.C. Cir. 1986).

8.7.9.6 The Effect of Settlements and Stipulations

Current Law: Post-1984 Amendments

Section 8(i)(4) of the LHWCA provides:

The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under [a § 8(i)] settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

33 U.S.C.A. § 908(i)(4).

Settlements and Section 8(f) Relief

The Board has interpreted this amendment to preclude employer from seeking post-settlement Section 8(f) relief after the date Section 8(i)(4) was enacted, or in a case pending at the time of enactment. Brady v. J. Young & Co., 17 BRBS 47, 52 (1985), aff'd on recon., 18 BRBS 167, 170, 171 n.5 (1985) (see also Byrd v. ADDSCO, 27 BRBS 253 (1993) (joint stipulations treated as § 8(i) settlements were vacated where the Director did not participate, explicitly or constructively; remanded for ALJ to adjudicate Section 8(f) claims).

[ED. NOTE: A careful reading of the ALJ's opinion in Byrd indicates that there was an adjudication of the compensation issue in Byrd and that only the issue of medical benefits was intended to be settled. Byrd v. Alabama Dry Dock and Shipbuilding Corp., (Docket No. 91-LHC-262)(1991)(Unpublished). The parties (claimant and self-insured employer) filed a "Joint Stipulation of Suggested Findings of Fact and Conclusions of Law" which was supplemented by a filing entitled "Joint Submission of Evidence and Joint Waiver of Formal Hearing." Both filings showed service upon the Regional Solicitor and the District Director. No formal objections were filed. The ALJ adopted the stipulations, findings of fact and conclusions of law. The joint stipulation also contained an agreement to settle the claimant's claim for future medical benefits. This agreement was treated as a Section 8(i) settlement agreement. (Medicals can be settled without settling compensation.)]

In Strike v. S.J. Groves and Sons, 31 BRBS 183 (1997), aff'd mem. sub nom. S.J. Groves & Sons v. Director, OWCP, 166 F.3d 1206 (3d Cir. 1998) (Table), a Section 8(i) settlement case, the Board expanded on the rationale in Brady. Liability for the Special Fund is directly tied into the employer's liability following the outcome of a trial. The basis for this liability revolves around the issues of nature and extent of liability, average weekly wage, and causation. As a result these issues must be litigated in order for the Fund to be responsible, as the case law recognizes that the Fund should only be liable where all ambiguity has been resolved by a fact finder. The Board went on to state that unlike the absolute defense of Section 8(f)(3), the Director is not required to take direct action to oppose the **settlement** under Section 8(i)(4). As a matter of law, Section 8(i)(4) voids settlement provisions either reserving or setting liability on the Fund.

In Cochran v. Matson Terminals, Inc., 33 BRBS 187 (1999), the Board found that where an Section 8(i) settlement is entered into, no Section 8(f) relief is allowed. In Cochran the Board rejected the employer's argument that Strike applies only where Section 8(f) is requested after the settlement is approved. In Cochran, the simultaneous submission of a settlement agreement and the stipulations and exhibits in support of the employer's claim for Section 8(f) relief foreclosed the ALJ's consideration of the request for Section 8(f) relief. There is no mechanism in the LHWCA to permit the tolling of the 30 day automatic approval period while the ALJ adjudicates a claim for Section 8(f) relief. Cochran at 191.

Stipulations and Section 8(f) Relief

Often an employer/carrier and claimant (the private parties) reach an agreement on all issues between themselves, with the sole remaining issue being whether the employer/carrier is entitled to

Section 8(f) relief. Handled properly, there may be a finding of fact as to both these stipulations and Section 8(f) relief.

In the Pre-1984 Amendments case of Brady v. J Young & Company, 16 BRBS 31(ALJ) (1983), the ALJ had found that after approving a Section 8(i) settlement, the employer was free to pursue Section 8(f) relief and the Trust Fund was ordered to reimburse the employer for all sums paid to the claimant under the approved settlement. Section 8(i)(4) was enacted to specifically overturn Brady. According to H.R. CONF. Rep. No. 1027, 98th cong., 2d Sess. 28, reprinted in 1984 U.S.C.C.A.N. 2783-2787, Section 8(i)(4) was enacted in 1984 in order to prevent employers from seeking relief from the Special Fund after reaching a settlement with a claimant in a case that otherwise would be assigned to the Fund. Specifically, the report stated, “A settlement shall operate as a release from further liability as to the employer and carrier. The fund, furthermore, shall not be liable for the reimbursement of the costs of any settlement or for the costs of any voluntary payments of compensation made by the employer prior to a settlement. This provision is intended specifically to overturn the [ALJ’s] decision in Brady v. J. Young & Company, 16 BRBS 31 (ALJ) (1983).”

After the 1984 Amendments, there developed a method of maneuvering around the letter of Section 8(i)(4) by either remanding any matters which had “settled” or by allowing the private parties to enter into stipulations between themselves with only the Section 8(f) issue remaining for trial. Different locales developed their own methods and preferences for addressing this situation.

Subsequently, the case law developed making it clear that the private parties cannot bind the Special Fund absent the Director’s agreement to the stipulations. Brady v. J. Young & Company, 17 BRBS 46 (1985), aff’d on recon, 18 BRBS 167 (1985); Director v. Coos Head Lumber & Plywood Co. (Ibarra), 194 F.3d 1032 (9th Cir. (1999), originally unpublished at 156 F. 1236 (9th Cir. 1998)(table); E. P. Paup Company v. Director, OWCP (McDougall), 999 F.2d 1341 (9th Cir. 1993) (agreements between an employer and a claimant that affect the liability of the special fund cannot be used against Director who is the only party with a real interest in protecting the financial integrity of the special fund); Younger v. Washington Metropolitan Area Transit Authority, 16 BRBS 360 (1984)(settlement agreement between employer and claimant which affects the liability of Special Fund is not binding on the Fund absent the participation of Director); Erickson v. Crowley Maritime Corp., 14 BRBS 218 (1981)(employer and claimant may not stipulate to Section 8(f) applicability without the acquiescence of the Director; Director shall be given the opportunity to either consent to the application of Section 8(f) or to submit evidence on this issue); Collins v. Northrop Corp., 12 BRBS 949 (1980)(holding private parties may not agree to facts affecting application of Section 8(f) in a settlement agreement; also indicates, ALJ should not merely accept stipulations, but rather should take evidence regarding crucial issues or make necessary findings.)

As noted in Collins v. Northrop Corp., 12 BRBS 949 (1980), the claimant and employer’s argument that they can unilaterally stipulate to the liability of the Special Fund as well as to facts which impact upon Section 8(f) applicability was unacceptable. The Board, in Collins, explained that allowing such a practice would provide the claimant with an advantage in the negotiations and place the Director in an untenable position. As the Board pointed out in Azzolino v. Marine Terminals Corp., 9 BRBS 566, 569 (1978),

If the claimant is not entitled to compensation under the Act or if there are valid defenses to all or part of the claim, it is not the purpose of Section 8(f) to facilitate claimant's bargaining against employer's valid [sic] defenses or to provide claimant with a strategic advantage by shifting to the Director the burden of asserting employer's defenses.

In Azzolino, the first case to address the issue at hand, the Board first found that a claimant is not a proper party to assert a claim against the Special Fund under Section 8(f). Next the Board addressed the practical aspects involved and noted that the Director had arrived at the hearing expecting only to have to raise the usual arguments concerning the applicability of Section 8(f) and was not prepared to assert the employer's defenses to liability which would affect the liability of the Special Fund or to participate in litigation to determine the extent of the claimant's disability. "Indeed, the evidence concerning those issues was most likely in the hands of employer who, having reached an agreement with claimant, no longer was concerned with pursuing or producing evidence on the issues." *Id.*

In the recent unreported case of Brown v. Brady-Hamilton Stevedore, (BRB Nos. 98-0599 and 98-0599A) (Jan. 21, 1999) (Unreported), the Board cited 29 C.F.R. § 18.51 for the proposition that the Director, as representative of the Special Fund, could not be bound by stipulations to which he was not a party. Brown was a Section 22 Modification case in which the Board held that since the Special Fund had previously assumed liability for the payment of claimant's permanent partial disability benefits, its rights and liabilities were necessarily affected by resolution of the issues presented by the Section 22 request and therefore, the modification petition could not be decided on the basis of stipulations without the participation of the Director.

The wording of 29 C.F.R. § 18.51 itself is noteworthy:

Stipulations. The parties may by stipulation in writing at any stage of the proceeding, or orally made at hearing, agree upon any pertinent facts in the proceeding. It is desirable that the facts be thus agreed upon so far as and whenever practicable. Stipulations **may** be received in evidence at a hearing or prior thereto, and when received, shall be binding on **the parties thereto**. (Emphasis added.)

First, the use of the word "may" indicates that the ALJ is not bound to accept stipulations but rather has discretion to accept or reject them. Second, stipulations are only binding on the parties that enter into the stipulations. Thus, from a reading of the regulation itself, one can argue that if only the private parties enter into the stipulations, and they are accepted by the ALJ, only they are bound.

There are several cases wherein the Director, through inaction, has been bound by the stipulations agreed to by the private parties, i.e., the employer/carrier and claimant. In the recent **Ninth Circuit** case of Ibarra, the ALJ found that the employer was entitled to Section 8(f) relief after the private parties had entered into stipulations. However, significant, in Ibarra, the **ALJ did not simply rely on the stipulations of the private parties; he based his findings on substantial evidence. Furthermore, he invited the Director to submit evidence and proposed findings but**

the Director elected not to do so. In approving the ALJ's actions in Ibarra, the **Ninth Circuit** stated:

The stipulation did not bind the Director, however, and he was free to introduce evidence to the contrary before the ALJ. His election not to offer any evidence or suggest any inference from the evidence that would be contrary to the stipulation waived his right to challenge the ALJ's determination subsequently....The Director was on notice that his failure to appear would constitute a waiver.

Ibarra at 1032-33.

In making the above observation, the **Ninth Circuit** cited the case of Duncanson-Harrelson Co. v. Director, OWCP, 644 F.2d 827, 832 (9th Cir. 1981) for the proposition that "...[I]n the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceedings at the appropriate time."

In Dickinson v. Alabama Dry Dock & Shipbuilding Corp., 28 BRBS 84 (1993) a letter signed by the Director, approving the amount of Special Fund relief (Section 8(f) has been considered and approved and will not be an issue at the formal hearing.") as well as notice of appearance before the ALJ, was found to have signified the Director's approval of the Special Fund's liability although the Director did not overtly participate in the settlement. The Board found that the Director constructively participated in the settlement process and gave approval of the disbursement from the Special Fund consistent with the settlement agreement. See also Phelps v. Newport News Shipbuilding And Dry Dock Company, 16 BRBS 325 (1984) (where Director has been notified of the stipulations, or at the least does not allege improper notice, but has not participated before the ALJ, stipulations between the employer and claimant regarding facts which affect Section 8(f) may be accepted by the ALJ if the stipulations are supported by substantial evidence in the record).

Noteworthy, in Phelps is the fact that in deciding the Section 8(f) issue, the ALJ had rejected some of the private parties' stipulations and found that there was no credible evidence that the claimant suffered any medical or economic disability as a result of the combination of his pre-existing impairments and work-related injury. Nevertheless, the ALJ found that the employer was still liable for payments of benefits based upon the stipulations entered into with the claimant. The Board found that the ALJ erred when he led the parties to believe that their stipulations would be accepted or, at the least, that the stipulations were supported by substantial evidence. The Board found that the parties justifiably relied upon their stipulations and had an insufficient opportunity to prepare for litigation.

In Nelson v. Stevedoring Services of America, (BRB No. 99-1056) (May 10, 2001) (Unpublished), re-affirm'g, 34 BRBS 91 (2000), the Director was provided the opportunity to defend, and in fact, conceded the liability of the Special Fund prior to the time that a settlement agreement was entered into by the parties. The Board originally held that the purpose of Section 8(i)(4) had been satisfied and the employer was entitled to Section 8(f) relief. In Nelson the Director made his pre-hearing concession when he thought the case in chief was going to be decided at hearing. Soon after the hearing began, the proceedings turned into a settlement conference.

Subsequently the ALJ approved the settlement agreement and awarded Section 8(f) relief. The Board had found that the Director was now precluded by equitable estoppel from altering his position which he had consciously made and articulated to the ALJ well before the time the Section 8(i) agreement was made. (The conditions precedent for conceding the employer's entitlement to Section 8(f) relief stated by the Director were met during the ensuing "adjudication" of this case.)

On Reconsideration, the Director argued that the agreement was not a stipulation, but rather was a settlement and therefore, the employer's settlement of its liability extinguished, as a matter of law, the Special Fund's derivative liability pursuant to Section 8(i)(4). In re-affirming its original ruling, the Board held that even if the ALJ's decision was an approval of a settlement (rather than approval of stipulations), "the peculiar facts of this case nevertheless support the [ALJ's] finding that Section 8(f) relief is appropriate."

[ED. NOTE: In Nelson, the Board opined that an order based on stipulations accepted into the record is subject to "normal standards of proof."]

In Gupton v. Newport News Shipbuilding & Dry Dock Company, 33 BRB 94 (1999), the Board has provided some guidance as to how the ALJ should proceed in the situation where an employer and claimant are in agreement as to all issues between themselves, with the sole remaining issue being whether the Employer is entitled to Section 8(f) relief.

At the hearing in Gupton, only the employer appeared and stated that all issues between the employer and claimant had been resolved. However, no official had approved the parties' stipulations and the employer did not have a copy to present to the ALJ for approval. The employer's post-hearing brief was the only place that set out the alleged stipulations. The ALJ therefore stated that after he decided the Section 8(f) issue, he would remand the case to the district director for issuance of a compensation order. The Board vacated the ALJ's Order and remanded the matter to the ALJ.

The Board found it incumbent upon the ALJ to inquire fully into the underlying compensation claim prior to addressing an employer's entitlement to Section 8(f) relief. When the district director transferred Gupton to OALJ, there was clearly no agreement between the parties, based on the parties' pre-hearing statements in the administrative file. Thus, the ALJ, according to the Board, should have required the parties to submit their stipulations to him for approval and to obtain evidence necessary to resolve issues on which the parties did not agree. Additionally, the Board found that the ALJ must deal with any unresolved issues and not remand the matter to the district director

In Gupton, the Board found that the **ALJ must make an underlying award before addressing the Section 8(f) issue.** Either the Director must agree to the private parties' (claimant and employer/carrier) stipulations, or the ALJ must address all elements of entitlement based on the record evidence before addressing Section 8(f).