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No. 58

NOTICE TO INSURANCE CARRIERS, SELF-INSURED EMPLOYERS UNDER
THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, AND
OTHER INTERESTED PERSONS

Subject: Procedures Regarding Application for Relief Under
Section 8(f) of the Act, 33 U.S.C. 908(f)

This notice transmits procedures regarding the processing of claims for relief under Section 8(f) of the Longshore Act. The Longshore Amendments of 1984 (Public Law 98-426) adds the requirement that any request for Section 8(f) relief must be presented to the deputy commissioner for consideration before such issue may be considered by an administrative law judge. Longshore Act Section 8(f)(3). Evidence to support the request for relief must also be presented to the deputy commissioner. Failure to comply with this requirement shall be an absolute defense to the Special Fund's liability. The attached procedures have been developed to insure compliance with the statute and applicable regulations §20 CFR 702.321 (50 FR 401, January 3, 1985).

The amendment to Section 8(f) became effective on September 28, 1984. Regulations implementing the 1984 amendments became effective on December 27, 1984 (50 FR 384). These procedures, therefore, apply only to those claims pending in the office of the deputy commissioner on or after December 27, 1984.

Because there were no regulations or procedures for implementing the new Section 8(f)(3) prior to December 27, 1984, the Director, OWCP, is of the opinion that Section 8(f)(3) should not be applied to claims referred to the Office of Administrative Law Judges (OALJ) for hearing before that date. Consistent with this policy, the Director will not challenge an ALJ decision affording relief under Section 8(f) in any case referred to the OALJ before December 27, 1984, on the ground that the employer/carrier failed to raise the Section 8(f) issue before the deputy commissioner. For this reason, it will not be necessary for an employer/carrier to request that such a claim be remanded to the deputy commissioner for consideration of its entitlement to Section 8(f) relief.

NEIL A. MONTONE
Associate Director,
Longshore and Harbor
Workers' Compensation

Attachment

Procedures In Regard To Sec. 8(f)

These procedures are to be interpreted in a manner consistent with the intent of Congress to encourage employers to raise the Special Fund issue early in the claims adjudication process. This will insure that the deputy commissioner and the Director, OWCP have the opportunity to examine the validity of the employer's request for Sec. 8(f) relief. Failure to submit a timely, documented application for Sec. 8(f) relief is an absolute defense to the liability of the Special Fund unless the employer could not have reasonably anticipated the liability of the Special Fund. This exception is to be narrowly construed and is not meant to allow an employer to disregard the Congressional intention to have the issue of Sec. 8(f) relief raised and considered early in the adjudication process.

The Longshore and Harbor Workers' Compensation Act Amendments of 1984 add a requirement that any request for Sec. 8(f) relief together with a statement of the grounds for application of this section must be submitted to the deputy commissioner prior to a consideration of the claim by the deputy commissioner. Failure to present such a documented request is an absolute defense to the liability of the Special Fund unless the employer could not have reasonably anticipated the liability of the Special Fund. This exception should arise infrequently. Only circumstances outside the control of the employer will be grounds to consider this exception.

This provision of the amendments became effective on September 28, 1984. However, the following procedures only apply to claims that were pending before the deputy commissioner as of December 27, 1984. The following procedures describe when a request for Sec. 8(f) relief must be made and what evidence must be submitted to support the request.

A request for Sec. 8(f) relief must be made on or before whichever of the following occurs first: 1) the date of the informal conference where the permanency of the claimant's condition is to be considered, or 2) the date when benefits are first paid for permanent disability.

When the request for Sec. 8(f) relief is made an application for such relief, together with all the evidence described below, must be submitted in duplicate to the deputy commissioner within ninety (90) days. This period may be extended by the deputy commissioner for good cause. However, this extension may not continue beyond the date of the informal conference where Sec. 8(f) relief or the permanency of the claimant's

condition is to be considered. Failure to submit a fully documented application by the date of that informal conference shall be an absolute defense to the liability of the Special Fund.

Failure to submit a timely request or application for Sec. 8(f) relief within ninety (90) days shall not prevent the deputy commissioner, at his or her discretion, from considering the claim for compensation and transmitting the case for formal hearing. This will insure that lack of timely submission of the documented application for Sec. 8(f) relief will not unreasonably delay a formal hearing in cases where the claimant is not receiving compensation.

The application for Sec. 8(f) must include: 1) a specific description of the pre-existing condition relied upon as having caused or constituted an existing permanent partial disability, 2) the reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent partial disability or that the death would not have ensued but for that disability, 3) the basis for the assertion that the pre-existing disability relied upon was manifest to the employer before the employment injury. Documentary medical evidence relied upon in support of the request for Sec. 8(f) relief shall also be submitted. This medical evidence shall include, but not be limited to, a current medical report establishing the extent of all impairments and the date of maximum medical improvement. If the current disability is less than total, the medical evidence must show how the subsequent disability is materially and substantially greater than that which would have resulted from the second injury alone. This application shall be submitted in duplicate to the deputy commissioner within the time frames described above. Any additional evidence considered necessary by the deputy commissioner after a review of the application shall also be submitted.

The deputy commissioner shall consider the application for Sec. 8(f) relief to determine if all the necessary evidence was submitted. If the application is found to be complete and the deputy commissioner agrees that Sec. 8(f) applies, the application, with the administrative file, is forwarded to the National Office for the concurrence of the Associate Director, DLHWC. The deputy commissioner will prepare an accompanying memorandum which fully discusses the facts of

the case and includes the recommendation of the deputy commissioner. However, if the case concerns a loss of hearing, the deputy commissioner does not need the concurrence of the Associate Director, DLHWC to award Sec. 8(f) relief if the facts of the case warrant it.

If all necessary evidence was submitted with the application for Sec. 8(f) relief and the deputy commissioner finds that the facts do not warrant relief under this section the deputy commissioner shall advise the employer of the grounds for the denial. The application for Sec. 8(f) relief may then be considered by an administrative law judge. An administrative law judge may also consider the application after a denial of Sec. 8(f) relief by the Associate Director, DLHWC. When a case is transmitted to the Office of Administrative Law Judges the deputy commissioner shall indicate whether the application for Sec. 8(f) was properly presented to the deputy commissioner for consideration and whether the employer is properly insured or permissably self-insured. The deputy commissioner shall also attach a copy of the application for Sec. 8(f) relief submitted by the employer, and the deputy commissioner's or Associate Director's denial of the application.

If the deputy commissioner determines that all the required evidence was not submitted with the application or that the submitted evidence is unsatisfactory the employer shall be so advised. If medical issues are not resolved by the documentation submitted by the employer/carrier or the claimant, the deputy commissioner shall direct that an impartial medical examination be conducted. Any additional evidence required by the deputy commissioner shall be submitted in a timely fashion. Failure to do so shall not prevent the deputy commissioner from considering the claim and transmitting the case for formal hearing.

If the claim is being paid by the Special Fund and the claimant dies, an employer need not reapply for Sec 8(f) relief. However, survivor benefits will not be paid until it has been established that the death was due to the accepted injury and the eligible survivors have been identified. The deputy commissioner will issue a compensation order once a claim for survivor benefits is filed and entitlement of the survivors to compensation has been verified. Since the employer remains a party in interest to the claim, the deputy commissioner will notify the employer and where appropriate the carrier when a claim for survivor benefits is filed.

As noted above these procedures are to be interpreted in a manner consistent with the Congressional intention to have the issue of Sec. 8(f) relief raised early in the adjudication process. Any questions regarding these procedures should be directed to the Associate Director, Division of Longshore and Harbor Workers' Compensation.