



June 15, 1987

No. 64

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

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

Reference: Industry Notice No. 58, February 28, 1985

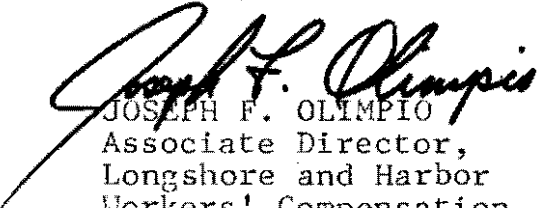
Section 8(f) of the Act requires a request for relief of liability, together with a statement of the grounds for such relief, to be presented to the deputy commissioner prior to consideration of the claim for compensation. This notice transmits revised procedures regarding the application for relief under Section 8(f) of the Longshore Act. These procedures are to be interpreted in a manner consistent with the intent of Congress that employers raise the Section 8(f) 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 Section 8(f) relief, before the claim is referred to the Office of Administrative Law Judges for hearing.

Failure to submit a timely and fully documented application for 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 Section 8(f) relief raised and considered early in the adjudication process. Only circumstances outside the control of the employer will be grounds to consider this exception.

For purposes of consideration of the Section 8(f) issue, the Director, OWCP has delegated to the Assistant Deputy Commissioner, DLHWC (ADC) the authority to receive and initially evaluate the application for relief. The ADC has the authority to require the submission of additional evidence when the application is found deficient and to resolve any outstanding medical issues. The ADC also has the authority to deny the application. However,

approval of the application needs the concurrence of the Associate Director, DLHWC. Once the application is in posture for administrative review the ADC will refer the matter to the Associate Director, DLHWC together with a recommendation. Where the injury is loss of hearing, the Associate Director has delegated to the ADC the authority to approve the application.

Nothing in these procedures should be interpreted in a manner contradictory to the Department's regulations concerning Section 8(F) relief which appear at 20 CFR 702.321. Any questions regarding these procedures should be directed to the Associate Director, Division of Longshore and Harbor Workers' Compensation, U.S. Department of Labor.


JOSEPH F. OLIMPIO
Associate Director,
Longshore and Harbor
Workers' Compensation

Attachment

Procedures In Regard to Section 8(f)

A Request For Section 8(f) Relief

A request for relief should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute. This could be when benefits are first paid for permanent disability, or at an informal conference held to discuss the permanency of the claimant's condition. Where the claim is for death benefits, the request should be made as soon as possible after the date of death. An application, as described below, must also be submitted in duplicate. Where possible, this application should accompany the request, but may be submitted separately, in which case the ADC shall, at the time of the request, fix a date for submission of the application. The ADC may grant an extension of the date for submission of the application for good cause, if petitioned by the applicant. Neither the date selected for submission of the application nor any extension can be beyond the date the case is referred to the Office of Administrative Law Judges (OALJ) for formal hearing.

Where the claimant's condition has not reached maximum medical improvement and/or no claim for permanency is raised by the date of referral to the OALJ, an application need not be submitted to the ADC to preserve the applicant's rights to later seek relief under Section 8(f). In all other cases, failure to submit a fully documented application by the date established by the ADC shall be an absolute defense to the liability of the Special Fund.

The Application

A fully documented application shall contain the following:

- 1) A specific description of the pre-existing condition relied upon as constituting 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. These reasons must be supported by medical evidence as outlined in 4) below.
- 3) The basis for the assertion that the pre-existing condition relied upon was manifest to the employer.
- 4) Documentary medical evidence to support the application. 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 claimant had already reached maximum medical improvement, a report prepared at that time will be satisfactory. If the current disability is total, the medical report must explain why the disability is not due solely to the second injury. If the current disability is partial, the medical report must explain why the disability is not due solely to the second injury and why the resulting disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. If the injury is loss of hearing the pre-existing hearing loss must be documented by an audiogram and a report explaining the results shown by the test. If the claim is for survivor's benefits, the medical report must establish that the death was not due solely to the second injury.

Any other evidence considered necessary for a full evaluation of the request for Section 8(f) relief must be submitted when requested by the ADC.

Consideration of the Application

Upon receipt of the application the ADC will review it to insure that all the evidence outlined above was submitted. If any required evidence is missing or the ADC determines that additional evidence is necessary, the applicant will be notified and given the opportunity to submit the evidence. If the applicant does not submit the evidence, or the evidence submitted is found to be unsatisfactory, the ADC will deny the application on the merits. The ADC will also consider whether the absolute defense should be asserted because of the failure to submit a fully documented application.

If the application was complete and the ADC agrees that Section 8(f) relief is appropriate, the application, with the administrative file, is forwarded for the concurrence of the Associate Director, DLHWC. Where the injury is loss of hearing, the ADC can approve the application for relief without concurrence of the Associate Director.

If the Associate Director or ADC determines that the facts do not warrant relief the applicant will be advised of the reason(s) for the denial. The application may then be considered by an administrative law judge.

Failure to submit a timely request or application for Section 8(f) relief will not prevent the ADC 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 will not unreasonably delay a formal hearing in cases where the claimant is not receiving compensation.

If a claim is being paid by the Special Fund and the claimant dies, an employer need not reapply for Section 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 ADC will issue a compensation order after a claim for survivor benefits is filed and entitlement of the survivors has been verified. Since the employer remains a party in interest to the claim, the ADC will notify the employer, and where appropriate the carrier, when a claim for survivor benefits is filed.

The Absolute Defense

The absolute defense is an affirmative defense which must be raised and pleaded by the Director, OWCP. The absolute defense will not be raised where permanency was not an issue before the ADC.

Any questions regarding these procedures or any problems you may have in following them should be addressed to the Associate Director, DLHWC.