

ELTON I. CRUMP)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>Oct. 3, 2000</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order Granting Director's Motion for Summary Decision and Denying Employer's Cross-Motion for Summary Decision of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Order Granting Director's Motion for Summary Decision and Denying Employer's Cross-Motion for Summary Decision (99-LHC-2497) of Administrative Law Judge Fletcher E. Campbell, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*

(the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant suffered a work-related back injury on October 15, 1985, and underwent a laminectomy at the L5-S1 level on December 10, 1985. He returned to work in 1986 with physical limitations, but stopped working for employer on March 6, 1989. Employer voluntarily paid temporary partial disability compensation and temporary total disability compensation for various periods from October 16, 1985 through February 14, 1995, and permanent partial disability from February 15, 1995 until February 15, 1997.

A review of the procedural history of the instant case is necessary for its disposition. Employer filed its Section 8(f) application with the district director on April 28, 1995. On September 19, 1995, the case was referred to the Office of Administrative Law Judges. Employer’s pre-hearing statement listed Section 8(f) relief as the only issue to be resolved. On January 4, 1996, employer submitted its evidence before the administrative law judge and requested that the hearing, initially scheduled for January 10, 1996, be waived. The administrative law judge granted employer’s request on January 12, 1996, and set a briefing schedule. Employer submitted its brief before the administrative law judge with respect to the issue of Section 8(f) entitlement on February 2, 1996. The Director, Office of Workers’ Compensation Programs (the Director), filed his response brief on February 29, 1996. However, employer, on February 26, 1996, requested that the case be remanded to the district director, inasmuch as claimant had failed to sign stipulations. Employer renewed this request on April 10, 1996. Both the Director and claimant indicated to the administrative law judge that they had no objection to employer’s request; thus, on April 30, 1996, the administrative law judge issued an order remanding the case to the district director. On July 9, 1998, employer submitted a copy of the stipulations, signed by claimant and employer. On July 13, 1999, the matter was again referred to the Office of Administrative Law Judges. Thereafter, employer and the Director each filed a motion for summary decision.

In his Order Granting Director’s Motion for Summary Decision and Denying Employer’s Cross-Motion for Summary Decision, the administrative law judge granted the Director’s motion for summary decision and denied employer’s request for Section 8(f) relief. Relying on *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997), the administrative law judge found that as employer requested that the case be remanded to the district director, it failed to fully litigate the issue of Section 8(f) entitlement before the administrative law judge at the earliest possible opportunity. Thus, the administrative law judge concluded that employer’s right to litigate the issue of Section 8(f) relief was waived.

On appeal, employer challenges the administrative law judge’s denial of Section 8(f) relief. Specifically, employer contends that the administrative law judge erred in relying on

Universal Maritime, as that case is distinguishable from the instant case. The Director, upon closer examination of the instant case, agrees with employer that employer's claim for Section 8(f) relief was timely raised before the administrative law judge, and requests that the case be remanded to the administrative law judge for a hearing on the merits of employer's application for Section 8(f) relief.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

In the instant case, we agree with employer and the Director that employer's application for Section 8(f) relief was timely. In *Universal Maritime*, the employer raised its request for Section 8(f) relief in a petition for reconsideration after the administrative law judge awarded permanent partial disability benefits. The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, agreed with the Director's position that the employer was obligated to submit its documented application for Section 8(f) relief at the earliest time that it was aware of the claimant's alleged permanent disability and the possibility of Special Fund relief. Thus, the court held that the employer forfeited its Section 8(f) claim by its failure to raise the issue at the initial hearing before the administrative law judge on the merits of the claimant's claim.¹ *See Universal Maritime*, 126 F.3d at 267-268, 31 BRBS at 128 (CRT).

In the instant case, employer filed its Section 8(f) application with the district director on April 28, 1995, subsequent to a finding by Dr. Reid that claimant reached maximum

¹In both *Universal Maritime* and the instant case, the absolute defense under Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3), was not raised by the Director. *See* 20 C.F.R. §702.321(b)(3).

medical improvement on February 5, 1995. *See* Emp. Ex. 6. Thus, in contrast to the situation in *Universal Maritime*, employer submitted its application for Section 8(f) relief at the earliest time that it was aware of claimant's alleged permanent disability. Moreover, employer raised the issue of Section 8(f) relief before the administrative law judge. Unlike the situation in *Universal Maritime*, there has been no hearing on the merits of claimant's claim. Rather, the administrative law judge granted employer's request to remand the case to the district director, as claimant had failed to sign stipulations. Indeed, the administrative law judge was procedurally prevented from addressing the issue of Section 8(f) relief until the stipulations were signed, as Section 8(f) relief cannot be awarded if there is no underlying award of permanent disability in excess of 104 weeks. *See* 33 U.S.C. §908(f)(1); *Gumpton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). Thus, the administrative law judge's granting of employer's request to remand the case to the district director in order for the stipulations to be signed was proper, and employer cannot be denied a determination on the merits for requesting the remand. We therefore vacate the administrative law judge's decision, and remand the case for a hearing to determine employer's entitlement to Section 8(f) relief.

Accordingly, the Order Granting Director's Motion for Summary Decision and Denying Employer's Cross-Motion for Summary Decision of the administrative law judge is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge