BRB No. 04-0489

HERSHEL DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DELAWARE RIVER STEVEDORES, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	DATE ISSUED: MAR 7, 2005
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting the Party-In-Interest's Motion for Summary Decision of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

John E. Kawczynski (Field, Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for employer/carrier.

Patricia M. Nece (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting the Party-In-Interest's Motion for Summary Decision (2003-LHC-1609) of Administrative Law Judge Ralph A. Romano 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The facts of this case are undisputed. Claimant was awarded ongoing temporary total disability benefits for work-related injuries to his right foot and left hip, and the Board affirmed the award. *Davis v. Delaware River Stevedores*, BRB No. 01-782 (June 24, 2002). On July 31, 2002, claimant requested an informal conference on the issue of permanent total disability benefits. ALJ Ex. 5 at exh. A. The district director held an informal conference via telephone on November 13, 2002. At that time, employer raised Section 8(f) relief as an issue, and the district director set December 13, 2002, as the deadline for her receipt of employer's Section 8(f) application.[1] Employer mailed its application for Section 8(f) relief to the district director on December 13, 2002. *Id.* at exh. C. On February 4, 2003, the district director acknowledged receipt of employer's application for Section 8(f) relief, but she denied employer's request because the application was received on December 18, 2002. Invoking the absolute defense, 33 U.S.C. §908(f)(3), she found that the application was not filed in a timely fashion. ALJ Ex. 6 at exh. 1. The district director then denied employer's motion for reconsideration. Emp. Ex. 12 at exh. 8.

On April 15, 2003, the case was referred to the Office of Administrative Law Judges (OALJ), and employer's pre-hearing statement identified the nature and extent of claimant's disability and employer's entitlement to Section 8(f) relief as issues to be addressed. ALJ Ex. 1. The Director, Office of Workers' Compensation Programs (the Director), moved to dismiss the application for Section 8(f) relief, contending the application had been untimely filed and invoking the Section 8(f)(3) absolute defense. ALJ Ex. 5. Employer opposed the motion to dismiss. ALJ Ex. 6. The administrative law judge found that employer's application for Section 8(f) relief was untimely pursuant to *Lassiter v. Nacirema Operation Co.*, 27 BRBS 168 (1993), and 20 C.F.R. §702.321, that the deadline set by the district director was reasonable, and that employer did not provide sufficient grounds to excuse its late filing. Decision and Order at 6-9. Accordingly, the

[1]The district director specifically stated that employer's "application will be considered timely if [it] is received in this office on or before December 13, 2002." ALJ Ex. 5 at Exh. B.

administrative law judge found there is no genuine issue of material fact, and he granted the Director's motion for summary decision. The administrative law judge, therefore, dismissed employer's request for relief from the Special Fund with prejudice. Decision and Order at 9.

Employer appeals the decision, arguing that the administrative law judge improperly granted the Director's motion to dismiss because employer reasonably relied on the past practices of the district director's office, under which employer alleges its application was timely, because the district director's deadline was arbitrary, and because the administrative law judge did not consider the equitable arguments it presented. The Director responds with a Motion to Vacate and Remand, contending that the administrative law judge did not issue a compensation order addressing the nature and extent of claimant's disability; therefore, he contends employer's appeal of the denial of Section 8(f) relief is premature. Alternatively, the Director argues that the administrative law judge's decision denying Section 8(f) relief should be affirmed. We reject employer's arguments, and we grant the Director's motion in part.

Initially, the Director correctly states that the administrative law judge did not address claimant's entitlement to disability benefits, despite its being identified as an issue in the pre-hearing statement. The private parties stipulated at the hearing, with no objections from the Director, that claimant is permanently totally disabled, and the administrative law judge stated that such an agreement must be encompassed in an order. Tr. at 5-6. Nevertheless, no such order was forthcoming: the administrative law judge did not address the issue in his Decision and Order nor did he issue a separate order awarding benefits pursuant to the parties' stipulations. It is incumbent upon the administrative law judge to address the compensation claim before addressing an employer's entitlement to Section 8(f) relief. *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). Any agreements between the parties must be embodied in a formal order issued by the district director or the administrative law judge. *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002); *Gupton*, 33 BRBS at 96; *see* 33 U.S.C. §919(c); 20 C.F.R. §§702.315, 702.348. In this case, there is no order awarding claimant permanent disability benefits for more than 104 weeks, which is a prerequisite for Section 8(f) relief. Consequently, the Director correctly contends that the case must be remanded for a formal decision addressing the nature and extent of claimant's disability to resolve the compensation claim. Therefore, we remand the case for entry of an order regarding claimant's claim for permanent total disability benefits.

Although this case must be remanded for resolution of the compensation claim, and, generally, it is premature to address the issue of Section 8(f) relief until a compensation order is issued, we reject the Director's argument that employer's appeal of the denial of Section 8(f) relief in this case is premature. In *Gupton*, the administrative law judge denied Section 8(f) relief on the grounds that the employer had not satisfied the

pre-existing permanent partial disability and contribution elements. 33 U.S.C. §908(f); *Gupton*, 33 BRBS at 95. He then remanded the case to the district director for issuance of a compensation order, as it appeared the parties had reached agreement on the compensation claim but had not submitted supporting documentation. The Board held that the administrative law judge abdicated his responsibility by remanding the case for resolution of the compensation claim and that he was procedurally prevented from addressing the Section 8(f) issue because the compensation claim had not been resolved. *Gupton*, 33 BRBS at 95-96. Unlike the situation in *Gupton*, the instant case involves the question of whether employer's request for Section 8(f) relief was filed in a timely manner and not whether employer satisfied the elements necessary for such relief. The issue of the timeliness of employer's application for Section 8(f) relief is not contingent upon the extent of claimant's permanent disability.[2] Accordingly, we shall address employer's arguments.

Employer contends the administrative law judge erred in applying the absolute defense of Section 8(f)(3) to bar its entitlement to Section 8(f) relief. Specifically, employer contends the administrative law judge erred in finding that the deadline for submitting the application for Section 8(f) relief was reasonable, and he erred in failing to excuse the late filing based on employer's reliance on past practices at that district director's office, on the application of the "mailbox rule," or for other equitable reasons. The Director asserts that the administrative law judge's decision applying the absolute defense should be affirmed. We reject employer's arguments, and we affirm the administrative law judge's denial of Section 8(f) relief.

Section 8(f)(3) requires an employer to present a request for Section 8(f) relief to the district director prior to her consideration of the claim; failure to do so bars the payment of benefits by the Special Fund, unless the employer demonstrates it could not have reasonably anticipated that Special Fund liability would be at issue. 33 U.S.C. §908(f)(3).[3] The regulation implementing this provision, 20 C.F.R. §702.321, provides

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[2]For example, the contribution element differs in permanent partial and permanent total disability cases, and the applicable standard cannot be determined without a compensation order. 33 U.S.C. §908(f)(1).

[3]Section 8(f)(3), 33 U.S.C. §908(f)(3), states:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore [sic], 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 to the

that an employer seeking relief under Section 8(f) must request such relief and file a fully documented application with the district director. Section 702.321(b)(3) states that an employer's failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the Special Fund. Such failure may be excused only 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.[4] 20 C.F.R. §702.321(b)(3).

Initially, employer argues that the district director set an arbitrary deadline for the filing of employer's Section 8(f) application. *See* Emp. Ex. 12 at exhs. 2, 5. We reject this argument. The record contains the testimony of Ms. Riley and Mr. McTaggart, both of whom the administrative law judge credited.[5] Ms. Riley testified that she considered the factors recommended in both the OWCP Procedure Manual, Chapter 6-201,[6] and the

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> 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.

[4]The regulation also states that the Section 8(f)(3) bar is an affirmative defense which must be raised and pleaded by the Director; the Director timely raised the defense in this case. *See Abbey v. Navy Exchange*, 30 BRBS 139 (1996); 20 C.F.R. §702.321.

[5]Mr. McTaggart was the district director for the Philadelphia office until his retirement in 2001. At that time, Ms. Riley became the district director for both the Philadelphia and Baltimore offices. In July or August 2002, the Philadelphia office closed and the cases were transferred to the Baltimore office. The due date for the Section 8(f) application herein, December 13, 2002, followed this period of office transition.

[6]Section 6-201(5) of the Division of Longshore and Harbor Workers' Compensation Procedure Manual states:

> 5. Submission of the Application.
>
> a. General Guidelines. The DD sets the date for the submission of the fully documented application. In setting this date the DD should allow sufficient time for the EC to gather the necessary information while insuring that the claimant's right to a timely hearing is preserved. The DD should also try to have the application submitted prior to the expiration of the 104 week period. This is desirable because the Special Fund has been found liable for interest on reimbursements to ECs for payments made in excess of the 104 week period and we want to minimize this liability. Particular attention should be given to cases where the EC continues to pay benefits voluntarily

regulation, 20 C.F.R. §702.321,[7] in setting a 30-day deadline for employer's application

> and the natural tendency would be to allow the application process to be prolonged. These are general criteria which the DD should apply to the facts of each case. More specific guidance on the selection of the date for submission of the application follows. Also see 20 C.F.R. section 702.321(b). ***
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> f. Other Factors and Extensions.
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> (1) In fixing the date for submission of the application under circumstances other than those described above, or in considering any request for an extension of the date selected, the DD shall review all the facts of the case, including, but not limited to:
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> (a) Whether the claimant is being paid compensation and the hardship to the claimant of delaying referral of the case to the OALJ;
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> (b) The complexity of the issues and the availability of medical and other evidence to the employer;
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> (c) The length of time the employer was or should have been aware that permanency or death is an issue; and
>
> (d) The reasons listed in support of a request, where the EC has requested an extension or a specific date.
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> (2) Extensions should only be granted for good cause and in such a way that the timely adjudication of the claim is not adversely affected. However, neither the date selected for submission of the fully documented application nor any extension therefrom can go beyond the date the case is referred to the OALJ for formal hearing.

[7]Section 702.321(b)(1)(i) requires the application to be submitted at the informal conference if all parties had notice that permanency was at issue prior to the informal conference. Subsection (b)(1)(ii) requires that when the issue of permanency is first raised at the informal conference, then the district director establishes the date "by which the fully documented application must be submitted" after reviewing the circumstances of the case. In setting a date for submission of the application in other situations or for granting an extension, subsection (b)(2) states that the district director shall consider the circumstances of the case, including but not limited to hardship on the claimant, the complexity of issues, the availability of medical and other evidence to the employer, the length of time the employer should have been aware permanency was at issue, and the reasons listed in support of the employer's request for a particular due date. 20 C.F.R. §702.321(b).

for Section 8(f) relief. She stated that employer gave no indication at the November 13, 2002, informal conference that 30 days was insufficient, and she received no request for an extension of time to file the application. Emp. Ex. 12 at 12, 25, 38-39, 42-44, 65, exhs. Riley 2, 4, 5. Mr. McTaggart testified that he would start with the minimum time of 30 days as a deadline for filing a Section 8(f) application, but if the claimant were being paid, he might give the employer whatever time it sought because there was no harm to the claimant. Emp. Ex. 13 at 11-12.

The administrative law judge found that Ms. Riley considered the factors set forth in Section 702.321(b) when setting her deadline and that employer did not seek an extension of time to file its application. He also found that the permanency of claimant's disability was put in issue by claimant's request for an informal conference, and, thus, employer was aware that permanency would be addressed. As employer was aware prior to the informal conference that permanency would be at issue, the administrative law judge determined that the additional 30-day period following the informal conference gave employer a reasonable amount of time to file its application for Section 8(f) relief. Decision and Order at 7-8; *see also* 20 C.F.R. §702.321(b)(1)(i), (ii). This finding is rational and is affirmed. *See Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142, 143 (1997). Because the deadline of December 13, 2002, was not arbitrary or unreasonable, and because it is undisputed that employer's application was received by the district director's office five days after the deadline, we next address employer's arguments that filing was timely under the "mailbox rule" or that an untimely filing should be excused on equitable grounds.

In this regard, employer asserts that Mr. McTaggart had adopted an informal "mailbox rule" such that employer's application would have been accepted as timely under Mr. McTaggart; therefore, employer had a reasonable expectation that the application would be considered timely under Ms. Riley. Alternatively, employer argues that it was unreasonable for Ms. Riley to adhere so strictly to the application deadline when she herself did not comply exactly with the other policies pertaining to the Section 8(f) application process.[8] We agree with the administrative law judge that neither of these arguments results in a conclusion that employer timely filed its Section 8(f) application. Employer's argument concerning the timeliness of its application for Section

[8]Employer contends Ms. Riley did not comply with the district director's policy manual because she did not: a) hold an informal conference within the recommended time frame; b) act on its application within the recommended time frame; c) require a duplicate application to be filed; d) transmit the application to the administrative law judge; e) transmit her denial of Section 8(f) relief to the administrative law judge; or f) consider the application on its merits until nine months later. *See* DLHWC Procedure Manual.

8(f) relief relies in part on regulations adopted by the Board and OALJ which provide additional time during which a document is considered received in the appropriate office when a filing is sent by mail. 20 C.F.R. §802.207; 29 C.F.R. §18.4(c).[9] Employer's application was mailed on the due date, December 13, 2002, and received on December 18. We reject employer's contentions regarding a "mailbox rule."

First, there is no provision in either the applicable regulations or the district director's procedure manual regarding the filing of documents by mail. 20 C.F.R. §702.321; DLHWC Procedure Manual. There is also no provision for applying either the OALJ or Board rules to documents filed with the district director. 20 C.F.R. §802.207; 29 C.F.R. §18.4(c). Moreover, regardless of how Mr. McTaggart processed applications for Section 8(f) relief in general or how he would have processed this particular application, Ms. Riley stated in her memorandum of informal conference that employer's "application will be considered timely if [it] is received in this office on or before December 13, 2002." ALJ Ex. 5 at Exh. B. This language is unambiguous, and it clearly states that the application must have been received by her office by the deadline in order to be timely. *See Lassiter,* 27 BRBS 168.[10]

[9]The "mailbox rule" for the OALJ is at 29 C.F.R. §18.4(c), and that section provides for the computation of the time for filing documents delivered by mail to the OALJ. Section 18.4(c)(1) states: "Documents are not deemed filed until received by the Chief Clerk at the [OALJ]. However, when documents are filed by mail, five (5) days shall be added to the prescribed period." 29 C.F.R. §18.4(c)(1). Section 802.207 of the Board's regulations, which addresses the time for filing a notice of appeal with the Board, provides that "a notice of appeal is considered to have been filed only as of the date it is received in the office of the Clerk of the Board." 20 C.F.R. §802.207(a)(1). However, if "the notice of appeal is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, it will be considered to have been filed as of the date of mailing." 20 C.F.R. §802.207(b).

[10]Although the Board's decision in *Lassiter* is instructive, it does not address the precise issue presented regarding the mailbox rule. In *Lassiter*, the issue involved whether the employer filed an application for Section 8(f) relief at all. The employer had evidence that it mailed an application, but there was no evidence that the application had ever been received by the OWCP. The Board held that an application for Section 8(f) must be filed with the district director and that the mailing of the application does not satisfy the filing requirement; thus, the application is not filed unless it is actually received by the district director. *Lassiter*, 27 BRBS at 170-172. The case at bar concerns the issue of when the application is considered received, rather than whether it was received.

In ascertaining whether the district director's office nonetheless applied a "mailbox rule" in general, the administrative law judge also considered the testimony of both Ms. Riley and Mr. McTaggart. Ms. Riley testified that although employer referred to a mailbox rule as accepted practice in Philadelphia, she knew nothing about it since neither the regulations nor the procedural manual contain a "mailbox" provision. She also stated that she did not know how Mr. McTaggart handled applications for relief from the Special Fund. Emp. Ex. 12 at 37-38, 71. Moreover, although Mr. McTaggart's testimony indicated that he may have been lenient regarding setting deadlines for receiving applications for Section 8(f) relief, he made no reference to a "mailbox rule" or to a specific "policy" of accepting applications mailed on the date they were due. Rather, Mr. McTaggart stated that, "in practice," the deadline he set was the date by which he expected to receive the application. Emp. Ex. 13 at 12-13. The administrative law judge found that the practices of Ms. Riley and Mr. McTaggart were consistent with each other and that employer's reliance on the "mailbox rule" was unsubstantiated. Decision and Order at 7. Employer has not established reversible error in the administrative law judge's findings in this regard.[11] Accordingly, it was rational for the administrative law judge to find that employer's purported reliance on the mailbox rule does not excuse its late filing. 20 C.F.R. §702.321(b)(3); *see Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Wiggins*, 31 BRBS 142; *Hargrave v. Cajun Tubing Testors, Inc.*, 24 BRBS 248 (1991), *aff'd*, 951 F.2d 72, 25 BRBS 109(CRT) (5th Cir. 1992); *see also Lassiter*, 27 BRBS 168 (mailing a document is not equivalent to "filing" it).

Employer lastly argues that the administrative law judge erred in not addressing its equitable arguments. Employer's contentions are based on its allegation that the district director selectively chose which regulations and policies to follow in processing the application for Section 8(f) relief and claimant's claim for permanent total disability benefits. *See* n.9, *supra*. The administrative law judge noted the district director's failure to meet certain policy deadlines, but stated it was insufficient to warrant excusing the untimely filing. Moreover, he stated: "While I recognize the equities invoked by Employer, I am not willing to accept such an argument without authority for doing so." Decision and Order at 8-9.

The regulations are clear that failure to submit a fully documented application by the date fixed by the district director shall be an absolute defense to the liability of the Special Fund. *See Container Stevedoring*, 935 F.2d 1544, 24 BRBS 213(CRT); *Wiggins*,

[11]Mr. McTaggart had been retired for the better portion of a year at the time Ms. Riley set employer's application deadline. Emp. Exs. 12-13. Employer has not asserted that Ms. Riley's decision adhering to the deadline was inconsistent with the manner in which she treated other applications for Section 8(f) relief.

31 BRBS 142; *Hargrave*, 24 BRBS 248. Section 702.321(b)(3) specifically provides that the failure to present a fully documented application in a timely manner "may be excused *only* 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(b)(3) (emphasis added). The district director's actions in processing this claim did not change the fact that employer was aware of the potential liability of the Special Fund prior to the date of the informal conference. Consequently, we affirm the administrative law judge's determinations that the filing of an untimely application in this instance is not excused, that the absolute defense of Section 8(f)(3) applies, and that employer is not entitled to relief from the Special Fund.

Accordingly, the administrative law judge's denial of Section 8(f) relief is affirmed. The case is remanded for resolution of claimant's compensation claim.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge