BRB No. 89-4068

GERALD LANGLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KELLERS' PEORIA HARBOR FLEETING	)	DATE ISSUED:
	)	
and	)	
	)	
HARTFORD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Diane E. Greanias (Warren E. Danz, P.C.), Peoria, Illinois, for claimant.

Robert H. Jennetten (Quinn, Johnston, Henderson & Pretorius), Peoria, Illinois, for employer/carrier.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

DOLDER, Acting Chief Administrative Appeals Judge:

Employer appeals the Order (87-LHC-2466) of Administrative Law Judge G. Marvin Bober dismissing 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 Longshore Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

On August 13, 1984, claimant sustained a back injury while working on a barge, owned by employer, which was moored on the Illinois River. As a result of this injury, claimant filed claims for compensation under both the Longshore Act and the Illinois Workers' Compensation Act (IWCA). Pursuant to the Longshore Act, employer voluntarily paid claimant temporary total disability compensation from August 13, 1984 to July 10, 1987, 33 U.S.C. §908(b), and sought relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), which was denied by the district director. On September 11, 1987, the case was referred to the Office of Administrative Law Judges for a hearing.

On February 29, 1988, claimant, relying upon a September 8, 1987 arbitration decision regarding his IWCA claim, in which an arbitrator found that IWCA coverage was not preempted by Longshore Act jurisdiction, advised the administrative law judge that he wished to pursue his state claim and requested that his Longshore Act claim be held in abeyance pending review of the arbitrator's decision by the Illinois Industrial Commission. Over employer's objection that it wished to proceed to a hearing on the issue of its entitlement to relief pursuant to Section 8(f), the administrative law judge granted a continuance. Claimant subsequently filed a motion to continue and/or dismiss his Longshore Act claim, noting that the arbitrator's finding of state jurisdiction was affirmed by the Illinois Industrial Commission and that claimant, therefore, was claiming the lifetime benefits to which he was entitled under the IWCA.

In opposition to claimant's motion, employer, noting that jurisdiction under the IWCA is not exclusive, argued that there would be irreparable harm to its rights under Section 8(f) of the Longshore Act if claimant was allowed to unilaterally dismiss his Longshore Act claim and proceed exclusively under the IWCA inasmuch as the state statute does not provide for second injury relief in the type of claim made by claimant. In response to a subsequent order to show cause why the claim should not be dismissed, employer contended that its right to pursue relief under Section 8(f) should not be dependent on claimant's decision to pursue a remedy under the IWCA. The Director, Office of Workers' Compensation Programs (the Director), after noting that claimant's motion to withdraw his claim under the Longshore Act was governed by the procedures for withdrawal of a claim set forth at 20 C.F.R. §702.225, responded that he had no objection to claimant's withdrawal of the claim without prejudice as it was in claimant's best interest to allow him to choose the forum in which to pursue his rights. Claimant similarly asserted that withdrawal of his Longshore Act claim in favor of his IWCA claim was for a proper purpose and in his best interest inasmuch as a state award of permanent total disability benefits was expected to be made by an arbitrator, entitling

claimant to lifetime compensation, medical benefits, annual benefit adjustments, and a 50 percent penalty on past due benefits.

Thereafter, in an Order dated October 10, 1989, the administrative law judge, after determining that the regulatory criteria set forth at 20 C.F.R. §702.225 were both presumptively valid and satisfied by claimant, granted claimant's motion to withdraw his Longshore Act claim. In thus allowing claimant to withdraw his claim for compensation under the Longshore Act, the administrative law judge, citing *Robertson v. Donovan*, 219 F. Supp. 364, 366 (E.D. La. 1963), stated that the filing of a claim under the Longshore Act should not preclude claimant from withdrawing his claim if he later decides he has erred in choosing his remedy. Lastly, the administrative law judge determined that, absent a pending claim for compensation by claimant, he lacked jurisdiction to consider employer's request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's decision to allow claimant to withdraw his Longshore Act claim while employer is pursuing Section 8(f) relief under that same statute; additionally, employer contends that the administrative law judge erred by failing to address its application for relief under Section 8(f) of the Longshore Act. The Director has filed a response brief which, after urging the Board to affirm the administrative law judge's decision to allow claimant to withdraw his Longshore Act claim, asserts that employer has an independent right to an adjudication of its request for Section 8(f) relief even after the employee's claim for compensation has been withdrawn. Claimant, in response, urges the Board to affirm the administrative law judge's decision in its entirety.

Employer initially contends that the administrative law judge erred in allowing claimant to withdraw his Longshore Act claim. It is well-established, however, that claimant is entitled to pursue his claim under either applicable federal or state statute, or both, where federal and state jurisdiction run concurrently; it is claimant's decision as to where to pursue his remedy. *See Sun Ship, Inc. v. Pennsylvania*, 477 U.S. 715, 12 BRBS 890 (1980). While the Longshore Act itself does not specifically address the procedure for the withdrawal of a filed claim, Section 702.225 of the implementing regulations provides that a claimant may withdraw his previously filed claim provided, *inter alia*, that claimant files with the district director a written request for the withdrawal stating the reasons for the withdrawal, the claimant is alive at the time of the request, and the district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest. 20 C.F.R. §702.225. In *Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155 (1978), the Board determined that an administrative law judge has the authority to approve a request for the withdrawal of a claim, holding that approval of such requests must be made in accordance with the regulatory guidelines for withdrawal;[1] thus, the Board concluded that an administrative law judge, in addressing a request for withdrawal, must determine, consistent with the regulatory guidelines, whether the request for withdrawal is for a proper purpose and whether approval of the request is in the claimant's best interest. *Graham*, 9 BRBS at 159.

[1]At the time of the Board's decision in *Graham*, the regulation currently found at 20 C.F.R. §702.225 was designated as Section 702.216, 20 C.F.R. §702.216.

In the instant case, the administrative law judge determined that claimant was in compliance with the applicable regulation governing the withdrawal of a claim filed under the Longshore Act; specifically, the administrative law judge found that claimant filed a written request stating the reasons for his requested withdrawal, that claimant was alive, and that claimant's withdrawal request was for a proper purpose since claimant's success under the IWCA would entitle claimant to lifetime compensation, medical and surgical benefits, and an annual benefit adjustment. Thus, the administrative law judge, pursuant to Section 702.225 of the regulations, allowed claimant to withdraw his claim for compensation filed under the Longshore Act. Based upon the record before us, we cannot say that the administrative law judge abused his discretionary authority when he granted claimant's request to withdraw his claim pursuant to Section 702.225 of the applicable regulations, since his findings are supported by substantial evidence and his decision is consistent with applicable law. We therefore affirm the administrative law judge's decision to grant claimant's request to withdraw his claim for compensation under the Longshore Act. *See Graham*, 9 BRBS at 159.

Next, employer contends that the administrative law judge, after allowing claimant to withdraw his Longshore Act claim, erred by failing to address employer's request for Section 8(f) relief under the Longshore Act; specifically, employer alleges that its right to pursue an adjudication of its application for Section 8(f) relief is independent of claimant's right to pursue his claim for compensation under the Act.[2] Similarly, the Director, after

[2]Section 8(f) of the Act, 33 U.S.C. §908(f), provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks where an employee suffers from a manifest pre-existing permanent partial disability which combines with a subsequent work-related injury so that the employee's disability thereafter is not due to the work-related injury alone. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

noting that any liability assigned to the Special Fund in the instant case would be completely offset pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e)(1988),[3] by the state benefits paid by employer to claimant, asserts that employer is entitled to a hearing regarding its request for Section 8(f) relief since a finding of Special Fund liability would benefit employer with respect to the calculation of employer's assessment under Section 44(c) of the Act, 33 U.S.C. §944(c)(1988). Section 44(c)(2) of the Act, 33 U.S.C. §944(c)(2)(1988), provides for funding the Special Fund through assessing self-insured employers and carriers that make payments under the Longshore Act; each carrier's or self-insured employer's assessment to the Special Fund is based on the proportion of its total payments made under the Act in relation to the total of such payments made by all carriers and self-insured employers and the proportion of Section 8(f) payments attributable to such carrier or self-insured employer in relation to all payments made by the Special Fund. *See Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993). The Director therefore concludes, based on the premise that employer remains obligated to pay benefits under the Longshore Act even after the claimant has elected to pursue his claim under state rather than federal law, that the compensation paid by employer, although technically paid pursuant to the IWCA, is included in the Section 44(c) calculation of the total payments made under the Act by employer.[4] Thus, since the amount paid by employer in compensation under the IWCA directly affects the amount that employer is assessed under Section 44(c) of the Longshore Act, the Director contends that employer is entitled to a hearing on its request for Section 8(f) relief regardless of whether claimant has withdrawn his claim for benefits under the Longshore Act.

Congress delegated to the Secretary of Labor the authority to prescribe rules and regulations under the Act. *See* 33 U.S.C. §939(a). In turn, the Secretary of Labor delegated to the Office of

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[3]Section 3(e) states:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or Section 688 of Title 46 (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this chapter.

33 U.S.C. §903(e)(1988).

[4]While we make no determination as to the proper formula to be utilized by the Office of Workers' Compensation Programs in calculating employer's Section 44 assessment, we note that Section 44 contains no specific requirement for including payments of state compensation in the calculation of employer's Special Fund assessment; rather, the statutory language provides that the assessment be based on the carrier's payments "under this Act." 33 U.S.C. §944(c)(2)(A). However, the instructions for Form LS-513, which the employer must file to give information for determining its Special Fund assessment, states that "[c]ompensation paid under any state act and credited against any Longshore Act obligation is reportable."

Workers' Compensation Programs, the head of which is the Director, "all functions of the Department of Labor with respect to the administration of benefits programs" under the Act. *See* 20 C.F.R. §§701.201, 701.202. Because the Director, as the administrator of the Special Fund, concedes that employer is entitled to a hearing on its request of relief pursuant to Section 8(f), we defer to his position and, accordingly, remand the case to the administrative law judge for a hearing on employer's request for Section 8(f) relief.[5] *See, e.g., Director, OWCP v. General Dynamics Corp. (Bergeron)*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992).

We note that if employer, on remand, establishes entitlement to relief pursuant to Section 8(f) of the Longshore Act, that relief will not affect employer's obligations under the IWCA. *See Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991). In *Stewart*, the Board, after noting that it is well-established that a claimant can obtain concurrent state and federal awards payable by the same employer for the same injury so long as employer receives a credit to avoid double payment to claimant, held that when an employer is paying compensation under a state statute and is thereafter found to be entitled to Section 8(f) relief under the Longshore Act, the Special Fund is entitled to credit employer's state payments pursuant to Section 3(e) against its liability under Section 8(f).[6] *Stewart*, 25 BRBS at 154-55. Thus, pursuant to the Board's decision in *Stewart*, employer cannot utilize the Special Fund to offset its state liability and will be liable for the benefits owed claimant pursuant to the IWCA regardless of the outcome of its request for Section 8(f) relief under the Longshore Act.

[5]We note our dissenting colleague's analysis of the Director's position, in which he concludes that the Section 44 assessment will not be affected as there is no Longshore obligation against which the state award will be credited. Adjudication of the Section 8(f) claim should determine the respective liabilities of the parties. In any event, on this issue we believe it is appropriate to defer to the opinion of the Director.

[6]Unlike *Stewart*, the administrative law judge, after approving the withdrawal of claimant's claim under the Longshore Act, made no determination as to whether claimant was in fact entitled to benefits under that act. In this regard, we note that employer, in its pre-hearing statement, controverted the issues of causation and the nature and extent of claimant's disability.

Accordingly, the administrative law judge's Order is affirmed with respect to approval of claimant's request for withdrawal of his claim for compensation under the Longshore Act. The administrative law judge's finding of lack of jurisdiction to consider employer's claim for Section 8(f) relief is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring and dissenting:

Although I agree with my colleagues' affirmance of the administrative law judge's decision to allow claimant to withdraw his claim for compensation under the Longshore and Harbor Workers' Compensation Act, I respectfully dissent from their decision to remand the case to the administrative law judge for a formal hearing on employer's request for Section 8(f) relief. It is my opinion that, after the claim for compensation was properly withdrawn by claimant, no authority remained to proceed to a hearing on employer's Section 8(f) claim or on any other aspect of the Longshore Act. The Longshore claim no longer exists. I note that neither the employer nor the Director cites any authority for the assertion that a claim for relief under Section 8(f) can proceed when there is no existing claim under the Act. There isn't any.

Employer refers to *Atlantic & Gulf Stevedores v. Donovan*, 274 F.2d 794 (5th Cir. 1960). But that case is simply inapposite. The Director also cited it, but did not argue that it was on point, simply saying "see generally" *Atlantic & Gulf Stevedores v. Donovan.* No other cases were cited by either party as authority. Furthermore, the majority in this case chose not to cite *Atlantic & Gulf Stevedores*. The majority simply says, in two instances, that it will defer to the opinion of the Director. On the other hand, I question whether the extension of deference should be given under the circumstances of this case, where an interpretation of the Act is involved, and no authority is cited by the Director for his position.

My interpretation of Section 44 of the Longshore Act, 33 U.S.C. §944, differs from that of the Director. Specifically, a review of Section 44 indicates that, contrary to the Director's assertion, any payments made by employer under the Illinois state workers' compensation statute would have no effect on employer's assessment to the Special Fund since, once the Longshore Act claim is withdrawn, there is no continuing federal claim on which a Section 44 assessment may be based.

In the instant case, employer voluntarily paid $27,180 in benefits to claimant under the Longshore Act prior to claimant's withdrawal of his federal claim. Employer is now entitled to credit these federal payments against its liability to claimant under the state statute; therefore, as there is no continuing federal claim, employer's total payments under the federal statute are zero and, thus, employer's assessment to the Special Fund would not be affected. Furthermore, while my colleagues refer to the requirement that state compensation payments are to be reported on Form LS-513, *supra* at n. 4, I would point out that state compensation payments are reportable only so that they may be credited against a continuing longshore claim, as was the case in *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991). In the instant case, there no longer is a longshore claim nor are there continuing longshore payments due; thus, the increased assessment liability alleged by the Director is baseless and without authority.

Another puzzling aspect of this case is the assertion of the Director that the employer is still obligated to make payments under the Longshore Act and that until the employer gets the relief it is seeking under Section 8(f), its assessments under Section 44(c) of the Act will be higher. Director's brief at p.7. Furthermore, in footnote 4 of the Director's brief, he cites only the first leg of the formula to determine assessments, that is, the comparison of payments made under the Act by the employer against the total payments made by all employers and carriers. The higher any particular employer's ratio is, the higher its assessment will be. On the other hand, the lower the ratio, the lower a particular employer's assessment will be. *See* 33 U.S.C. §944(c)(2)(A). The Director makes no reference to the second leg of the formula for obtaining assessments which clearly increases assessments for a particular employer in relation to the extent the employer makes use of the fund. This portion of the formula is determined by the ratio of payments made under Section 8(f) on behalf of a particular employer to the total of such payments attributable to all employers and carriers. *See* 33 U.S.C. §944(c)(2)(B). An analysis of the complete formula is clearly set forth in the majority opinion. If the Director and employer proceed with a determination of Section 8(f), according to the Director's theory, it could very well result in an increase, rather than a decrease, in employer's Section 44 assessments. Accordingly, I would affirm the administrative law judge's determination that he lacked jurisdiction, subsequent to claimant's withdrawal of his Longshore Act claim, to consider employer's request for Section 8(f) relief under the Longshore Act.

JAMES F. BROWN
Administrative Appeals Judge