**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0504

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| MICHAEL BEVERLY | ) | |
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| Claimant | ) | |
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| v. | ) | |
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| VIRGINIA INTERNATIONAL TERMINALS, LLC | ) | |
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| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED | ) | DATE ISSUED: 05/25/2021 |
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| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand Denying Special Fund Relief of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

R. John Barrett (Vandeventer Black LLP), Norfolk, Virginia, for Employer/Carrier.

Ann Marie Scarpino (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer appeals Administrative Law Judge Paul C. Johnson Jr.'s Decision and Order on Remand Denying Special Fund Relief (2016-LHC-00201, 2016-LHC-00202) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has been appealed to the Benefits Review Board. Claimant started working for Employer in 1995. In July 2001, he fell on his left shoulder while working, tearing his rotator cuff for which he underwent surgery. EX 1 at 7-9. After the shoulder injury, Claimant was assigned permanent work restrictions and worked strictly as a hustler driver, a job which entailed driving big trucks and trailers around the terminal. *Id.* at 10. He continued to experience problems with his shoulder, as well as bilateral carpal tunnel syndrome.

Claimant saw Dr. Arthur Wardell for the first time in August 2004 complaining of pain in his shoulders and was diagnosed a rotator cuff tear in his right shoulder. EX 2 at 6. Dr. Wardell recommended surgery which Claimant decided to postpone so he could continue to work. *Id.* at 6-7.

On August 1, 2011, Claimant fell at work, suffering a lumbosacral spine sprain, a right buttock contusion, and a medial meniscus tear of his right knee. EX 2 at 4-5. He underwent an arthroscopic partial medial meniscectomy of his right knee in March 2012. Dr. Wardell also performed carpal tunnel surgeries on claimant's wrists in August 2011 and October 2011. *Id.* at 10-11. Claimant underwent surgery to repair a torn rotator cuff in his right shoulder in November 2013. *Id.* at 10.

Claimant has not worked since his 2011 injury. EX 1 at 16. The right knee surgery resulted in a four percent impairment of the lower extremity. EX 2 at 12. Dr. Wardell stated that if Claimant had suffered only the August 1, 2011 knee injury, he would be able to work most jobs at Employer's facility, provided they do not require repetitive squatting and climbing ladders. *Id.* at 13-14. He further opined Claimant's permanent total disability results from the combination of all his injuries to his shoulders, wrists, right hip, and right knee injury. *Id.*

Claimant filed a claim for compensation for his bilateral shoulder injuries and carpal tunnel syndrome on August 1, 2011, and another claim on August 9, 2011 for his right knee and hip injuries. Employer filed a claim for Section 8(f) relief, 33 U.S.C. §908(f), contending Claimant had manifest pre-existing permanent partial disabilities due to his carpal tunnel syndrome and shoulder injuries that combined with the subsequent August 1, 2011 knee injury to render him permanently totally disabled.

The administrative law judge found, inter alia, that Claimant is permanently totally disabled and that Claimant's right knee, right shoulder, and bilateral carpal tunnel syndrome were the subsequent work-related injuries for purposes of Section 8(f) relief. He concluded Employer did not establish the pre-existing permanent partial disability element for Section 8(f) relief, or that Claimant's permanent total disability is not due solely to these injuries. First Decision and Order at 15. Accordingly, the administrative law judge denied Employer's claim for Section 8(f) relief.

Employer appealed to the Board, which vacated the administrative law judge's denial of Section 8(f) relief. The Board held the administrative law judge applied an incorrect standard in concluding Claimant's right shoulder injury and bilateral carpal tunnel syndrome were not pre-existing permanent partial disabilities. The Board further held the administrative law judge did not address all the evidence of record prior to concluding the carpal tunnel syndrome, right shoulder injury, and knee injury together comprised the "subsequent injury." *Beverly v. Virginia Int'l Terminals*, BRB No. 17-0062 (Nov. 27, 2017) (unpub.) (Boggs, J., dissenting in part), clarified in part on recon., (May 31, 2018). The Board remanded the case for reconsideration of Employer's entitlement to Section 8(f) relief.[1]

On remand, the administrative law judge found Claimant's bilateral carpal tunnel syndrome and right shoulder injury are manifest pre-existing permanent partial disabilities. *See* Decision and Order at 3-4. He further found Claimant's right knee injury alone is the "subsequent injury."[2] *See id.* at 7. He concluded, however, Employer did not establish Claimant's preexisting bilateral carpal tunnel syndrome and shoulder injuries contributed to Claimant's total disability because Dr. Wardell's opinion is insufficient to establish Claimant would not have been able to return to his previous job as a hustler driver but for

[1] On reconsideration, the Board clarified that it had not held that claimant's knee injury alone was the "subsequent injury" for Section 8(f) purposes and reiterated that the administrative law judge was to reconsider the issue in light of all the evidence. Order at 3.

[2] These findings are not at issue on appeal.

his pre-existing permanent partial disabilities. *See id.* at 8. He therefore denied Section 8(f) relief. *See id.*

Employer appeals the administrative law judge's decision on remand, arguing he applied the wrong standard in considering whether Claimant's pre-existing disabilities contributed to his total disability. The Director agrees with Employer and argues the case should be remanded for reconsideration. We agree, and for the reasons that follow, again remand the case.

In order for an employer to qualify for Section 8(f) relief where, as here, the claimant is permanently totally disabled, an employer must establish: (1) the employee had an existing permanent partial disability; (2) the pre-existing partial disability was manifest to the employer; and (3) the ultimate permanent total disability is not due solely to the subsequent work-related injury. *See, e.g., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). "[T]he existence of multiple injuries that combine to increase a claimant's disability will satisfy the contribution requirement when the pre-existing injuries are necessary to push the claimant 'over the hump' from partial to total disability." *Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 391, 31 BRBS 91, 93(CRT) (5th Cir. 1997). In other words, an employer must show that the employee would have been able to continue working after the subsequent work injury if he had not already been suffering from a pre-existing permanent partial disability. *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 660-661, 34 BRBS 55, 58(CRT) (3d Cir. 2000).

The administrative law judge found Dr. Wardell's opinion that claimant would not have been totally disabled by the right knee injury alone to be poorly reasoned because he "failed to explain how Claimant's bilateral rotator cuff tears or bilateral CTS contributed in any way to Claimant's inability to drive a hustler." Decision and Order at 8. He stated there is insufficient evidence in the record as to Claimant's duties as a hustler driver so it is not clear whether Claimant would have been able to perform that job if it were not for his knee injury alone. *See id.* He thus concluded Dr. Wardell's opinion is insufficient to establish Claimant would have been able to return to his previous employment as a hustler driver "but for the pre-existing permanent partial disabilities." *See id.* He therefore denied Section 8(f) relief.

The Board has stated that the proper standard under Section 8(f) is whether the present total disability is "not due solely to" the work injury, clarifying "the 'but for' language is simply descriptive of acceptable evidence which will satisfy the statutory mandate." *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134, 136 (1996). The administrative law judge erroneously focused on whether "but for" Claimant's pre-existing disabilities,

he would have been able to return to his usual work. The first relevant inquiry in determining whether the contribution element has been met is whether Claimant is totally disabled solely because of his knee injury. If he is, Section 8(f) relief is precluded. If he is not, the administrative law judge must address whether the right shoulder injury and/or the carpal tunnel syndrome contributed to Claimant's total disability. *See Dominey*, 30 BRBS at 137.

Thus, we vacate the denial of Section 8(f) relief, and remand the case for the administrative law judge to address the relevant evidence under the proper standard. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997) (permitting the administrative law judge to consider "medical or other" evidence); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). This evidence includes Dr. Wardell's opinion,[3] Claimant's earlier medical records and his previous restrictions, and Claimant's testimony about the effect of his injuries. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Wheeler*, 39 BRBS 49. If Employer establishes Claimant's disability is not due solely to his knee injury, the administrative law must consider whether Claimant's prior disabilities contribute to his total disability.[4]

[3] The administrative law judge rejected Dr. Wardell's opinion because he did not explain how Claimant's "bilateral rotator cuff tears or bilateral CTS contributed in any way to Claimant's inability to drive a hustler." Decision and Order at 8. The administrative law judge did not, however, initially address Dr. Wardell's opinion and other relevant evidence under the correct standard, i.e., whether it credibly proves that Claimant would have been only partially disabled by his right knee injury alone. For example, Dr. Wardell advised prior to Claimant's last work injury that his work duties were aggravating his CTS and rotator cuff tears. *See* EX 15. In addition, after Claimant's first injury in 2001, Dr. Cohn restricted Claimant from much crawling, climbing ladders, and working above his shoulders with his left arm, which necessitated Claimant's being limited to working as a hustler driver. *See* EX 10; *see also* EX 1 at 8-9 (Claimant's testimony that after his prior injuries, he was physically limited to being a hustler driver and he was "put in a sling" to help with his ongoing shoulder and CTS problems). There is evidence in the record which, if credited, would permit a fact-finder to infer that Claimant's job as a hustler driver primarily involved strain on his upper extremities. *See, e.g., Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000).

[4] We are not constraining the administrative law judge from assessing the credibility or sufficiency of any evidence, but merely remanding for application of the proper standards as Employer requests, the Director of the program and administrator of Section

Accordingly, we vacate the administrative law judge's Decision and Order on Remand Denying Special Fund Relief and remand the case for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to remand this claim. The administrative law judge's finding that Employer cannot limit its liability under Section 8(f) of the Longshore Act, 33 U.S.C. §908(f), is consistent with the law and supported by the evidence. It therefore must be affirmed. *See O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 477-78 (1947).

Under Section 8(f), an employer's liability for permanent total disability benefits is limited to one hundred and four weeks of compensation if it establishes that the disability is not "due solely" to the claimant's work injury, but is also due to a preexisting partial disability. 33 U.S.C. §908(f)(1); *see Maryland Shipbuilding & Dry Dock Co. v. Director, OWCP*, 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). As the Board instructed in its prior decision, an employer satisfies its burden only if it proves the claimant's total disability is caused by both the work injury and the preexisting condition. *Beverly*, slip op. at 6-7 (citing *Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997) (stating that the contribution element is met where "pre-existing injuries are necessary to push the claimant 'over the hump' from partial to total disability.")). If this "contribution

8(f) funds concedes, and Claimant does not oppose. *See generally Roush v. Bath Iron Works*, 49 BRBS 5 (2015); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

element" is met, liability for the remaining payments transfers to the Special Fund. 33 U.S.C. §908(f)(2); *see* 33 U.S.C. §944.

It is undisputed that Claimant had preexisting shoulder and carpal tunnel injuries, subsequently injured his knee while working for Employer, is permanently and totally disabled by one or more of these injuries, and is entitled to benefits under the Longshore Act. The sole remaining question in this claim, therefore, is whether Claimant's work-related knee injury, considered by itself, is permanently and totally disabling. If it is, Employer cannot shift liability to the Special Fund under Section 8(f). If, however, Employer establishes that Claimant is totally and permanently disabled only by virtue of the fact that his preexisting shoulder and carpal tunnel disabilities combined with his knee disability, it can invoke Section 8(f).

Dr. Wardell offered the only medical opinion supportive of Employer's burden. He did not discuss total disability as it relates to Claimant's hustler driver job specifically. Rather he opined that when considering the knee disability by itself, Claimant could work "almost any job" except those requiring repetitive squatting and climbing ladders. EX 2 at 14. But, when considering the combination of all three injuries, Claimant is permanently totally disabled and is incapable "of any gainful employment." *Id.* at 12.

The administrative law judge identified the correct legal standard for determining whether an employer can invoke Section 8(f) and accurately stated he "must determine whether Claimant would have been totally disabled due to the right knee injury alone." Decision and Order at 4-5, 7. He also properly considered Dr. Wardell's opinion in terms of whether the physician's identification of exertional limitations, or lack thereof, credibly establishes whether any of Claimant's injuries, or some combination thereof, prevent him from working as a hustler driver. *See Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013) (stating total disability is defined as an inability to return to one's previous longshore employment). On that question, he found Dr. Wardell's opinion "poorly-reasoned" and therefore gave it "no weight with the respect to the contribution element." Decision and Order on Remand at 8.

The administrative law judge noted that although Dr. Wardell opined Claimant could perform "almost any job" with his knee injury, the physician elaborated that the knee injury precludes Claimant from repetitive squatting and climbing ladders. Decision and Order on Remand at 7. Because the record is "notably silent" and "unclear" as to whether "Claimant was required to repetitively squat or climb ladders to perform his previous hustler driver job," the administrative law judge permissibly found Dr. Wardell's opinion insufficient to establish that Claimant's knee injury is not permanently and totally disabling. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT) (4th Cir. 2003); Decision and Order on Remand at 8. The administrative

law judge next permissibly rejected Dr. Wardell's conclusory statement that Claimant's shoulder and carpal tunnel injuries combined with his knee injury to render him permanently and totally disabled because he "failed to explain how [they] contributed in any way to Claimant's inability to drive a hustler." *Cherry*, 326 F.3d 449, 37 BRBS 6(CRT); Decision and Order on Remand at 8. Thus, having rejected the totality of Dr. Wardell's opinion on the contribution element, the administrative law judge permissibly denied Employer's request to limit its liability under Section 8(f).[5]

The majority holds the administrative law judge misapplied the law by concluding that Dr. Wardell's opinion is "insufficient to establish Claimant would have been able to return to his previous hustler driver position but for the pre-existing permanent partial

[5] Drs. Cohn's and Wardell's 2003 and 2006 opinions regarding Claimant's upper body injuries were provided several years prior to his 2011 knee injury. *See* EX 10; EX 15. Thus, neither opinion addresses the first requirement for Employer to meet its burden under Section 8(f): the later-in-time knee injury alone is not totally and permanently disabling. 33 U.S.C. §908(f)(1). Even assuming these opinions could constitute proof of that fact, neither addresses the second requirement: the earlier rotator cuff tear and carpal tunnel syndrome combined with the later knee injury to render Claimant permanently and totally disabled from working as a hustler driver. *Id*.

Dr. Cohn acknowledged that Claimant was working as a hustler driver at the time of his opinion, but focused his analysis on whether Claimant could return to work as a "set up man," ultimately concluding Claimant's upper body injuries do not disable him from that job. EX 10 at 1. He also provided a general list of functional limitations but did not relate them to Claimant's work as a hustler driver. *Id*. at 2-3. Dr. Wardell's two-sentence letter merely states that Claimant's "job related activities" (without specifying the job to which he was referring) "exacerbate" and "worsen" his shoulder and carpal tunnel injuries; he did not address whether those injuries are disabling. EX 15. Meanwhile, the 2003 functional capacity evaluation on which Dr. Cohn appears to have based his opinion conveys Claimant's contemporaneous view that, even with his upper body injuries, he was "able to perform the duties of a hustler driver . . . ." EX 11 at 2; EX 10 at 1 (Dr. Cohn's notation he "reviewed [Claimant's] functional capacity evaluation").

To the extent these records are either silent on the relevant issues or confirm Claimant's ability to work as a hustler driver (and, for that matter, a set up man), they support rather than undermine the administrative law judge's conclusion that Employer failed to establish either that Claimant's knee injury, considered by itself, is not permanently and totally disabling or that his shoulder and carpal tunnel injuries contribute to that disability.

disabilities." *See supra* at p. 4; Decision and Order on Remand at 8. The administrative law judge's analysis, however, belies the majority's assessment that he improperly "focused" on a "but for" test. As explained, he identified the proper legal standard and considered and permissibly rejected every aspect of Dr. Wardell's opinion on the contribution element. Given the administrative law judge's complete rejection of Dr. Wardell's opinion, it cannot satisfy Employer's burden to establish entitlement to Section 8(f).[6]

I, therefore, would affirm the administrative law judge's denial of Employer's request to transfer liability to the Special Fund.

GREG J. BUZZARD
Administrative Appeals Judge

[6] I also see no error in the administrative law judge's partial use of the term "but for" to describe the insufficiency of Dr. Wardell's opinion. Dr. Wardell essentially stated that Claimant would not be totally disabled but for his shoulder and carpal tunnel conditions, i.e., Claimant is not disabled by his knee injury alone, but is permanently and totally disabled when considering his preexisting conditions along with his knee injury. Having rejected both aspects of Dr. Wardell's opinion, the administrative law judge rightly concluded the physician did not persuasively explain his view that Claimant would not be totally disabled but for the preexisting conditions.