BRB No. 89-1357

JOSEPH M. SCOTELLA Claimant v. TODD SHIPYARDS CORPORATION and AETNA CASUALTY & SURETY COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of R. S. Heyer, Administrative Law Judge, United States Department of Labor.

Gerald A. Falbo, (Laughlin, Falbo, Levy, & Moresi), San Francisco, California, for employer/carrier.

BEFORE: STAGE, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (88-LHC-1725 and 88-LHC-1726) of Administrative Law Judge R.S. Heyer 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 the law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case involves employer's appeal of the denial of relief under Section 8(f) of the Act, 33 U.S.C. §908(f). On June 29, 1982, claimant, a marine machinist, injured his lower back when he slipped and struck a railing while attempting to step off a

scaffolding. After two years of conservative treatment, claimant was released by his treating orthopedic surgeons, Drs. Matan and Dedo, to return to work with a back brace. On July 16, 1984, however, when claimant returned to work, he felt his back give way with sudden severe pain as he was carrying a tool box up a gangway. Dr. Matan examined claimant the same day and determined that claimant suffered an aggravation of his longstanding back condition. Claimant continued to undergo medical treatment and ultimately returned to work as a service manager in a motorcycle repair shop from October 1985 until the end of 1986, when the shop closed. Claimant sought temporary total disability benefits from June 29, 1982, until June 21, 1983, and permanent disability compensation thereafter.

Employer and claimant entered stipulations regarding jurisdiction, the applicable average weekly wage, and the timeliness of the claim under Sections 12 and 13, 33 U.S.C. §§912, 913. Employer and claimant also stipulated that claimant was entitled to temporary total disability compensation from June 29, 1982 through June 21, 1983, the date that Dr. Matan found that maximum medical improvement had been achieved. The only issues remaining in dispute before the administrative law judge were claimant's entitlement to permanent partial disability compensation and employer's eligibility for Section 8(f) relief.

The administrative law judge awarded claimant permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(21) based on two-thirds of the difference between the stipulated average weekly wage of $395.20 and claimant's post-injury wage-earning capacity of $100 per week.[1] The administrative law judge denied employer Section 8(f) relief, however, finding that there was no persuasive evidence establishing that claimant sustained a second injury on July 16, 1984, or that the July 16, 1984 incident produced a greater degree of permanent disability than that resulting from the June 29, 1982 injury. In addition, the administrative law judge characterized the July 16, 1984 incident as no more than an attempt by employer to orchestrate an injury for Section 8(f) purposes.[2] Employer appeals the denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, has not responded to this appeal.[3]

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[1]The administrative law judge found that although claimant could not perform his usual work, he could perform telemarketing on a part-time basis, 20 hours per week at $5.00 per hour.

[2]On March 30, 1989, the administrative law judge issued an Order on Reconsideration in which he modified the applicable date of maximum medical improvement so that it would be consistent with his determination as to when claimant's temporary disability ceased.

[3]On October 21, 1992, the Board received the Director's second motion for an extension of time in which to file a response brief. In this motion, Director contends that the Board's September 11,

Section 8(f) shifts the liability to pay compensation for permanent partial and permanent total disability and death benefits after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently partially disabled, employer is entitled to relief from the Special Fund where it establishes that the employee suffers from a manifest pre-existing permanent partial disability which combined with a subsequent work-related injury to result in a materially and substantially greater degree of permanent impairment than that which would have resulted from the subsequent work-related injury alone. See Thompson v. Northwest Enviro Services, Inc., 26 BRBS 1 (1992); Sproull v. Stevedoring Services of America, 25 BRBS 100, 111 (1991). See generally Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1992).

On appeal, employer contends that the administrative law judge erred in finding that no new injury occurred on July 16, 1984, and in concluding that there was no evidence of increased permanent disability after the July 16, 1984 incident. In addition, employer objects to the administrative law judge's implication that it had tried to "stage" a second injury for the purpose of obtaining Section 8(f) relief.

Initially, we agree with employer that the administrative law judge's finding that no new injury occurred on July 16, 1984, can not be affirmed because the administrative law judge misconstrued and/or disregarded relevant evidence in making this determination. In denying employer Section 8(f) relief, the administrative law judge incorrectly determined that only one physician, Dr. DiRaimondo, found a new injury producing additional disability, when in fact, two other physicians, Drs. Matan and Sutherland, also rendered opinions consistent with a finding of an injury in July 1984. Dr. Matan, the treating orthopedist who examined claimant on the day of the alleged second injury, described claimant's back pain upon returning to work as an aggravation of his longstanding problem. In addition, Dr. Sutherland, who examined claimant initially on June 3, 1983, testified at the hearing that the July 1984 incident caused a permanent increase in the instability of claimant's underlying back problem.[4] Moreover,

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1991 Order granting Director's first extension had never been received. We deny Director's second extension request as our records reveal that Director received proper service of our September 11, 1991 Order.

[4]Although the administrative law judge found that no new injury occurred on July 16, 1984, he inconsistently determined that claimant exhibited increased symptoms at that time which suggested that the activities he performed were excessive for him, while

although claimant described the pain he experienced prior to returning to work on July 16, 1984, as barely there and his pain thereafter as significant, causing him to be unable to move or to breathe, Tr. at 133-134, the administrative law judge failed to discuss this testimony in finding that no new injury occurred.

As employment-related aggravation of a pre-existing disability is a second injury for Section 8(f) purposes, see Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 147-148 (1991), we hold that the administrative law judge's failure to consider this evidence in finding that no second injury occurred constitutes prejudicial error. Accordingly, the administrative law judge's finding that no new injury occurred on July 16, 1984, is vacated, and the case is remanded for reconsideration of this issue in light of all relevant evidence in the record. [5]

The administrative law judge's finding that the July 16, 1984 incident did not result in an increase in claimant's permanent disability level over that resulting from the June 29, 1982 injury also cannot be affirmed. In reaching this conclusion, the administrative law judge noted that neither Dr. DiRaimondo, nor any other witness, was able to identify any particular restriction or respect in which lasting impairment or disability extended beyond the level present from June 21, 1983 until July 16, 1984. In addition, the administrative law judge found that all of the other physicians, including treating physicians, who had greater familiarity with the progress of claimant's condition and possible greater expertise, concluded that the July 16, 1984 incident did not increase claimant's impairment or disability on a lasting basis, and that there was no medical evidence to suggest that claimant's impairment was greater after July 16, 1984 than it had been between June 21, 1983, the date claimant reached maximum medical improvement from the June 29, 1982 work injury, and July 15, 1984.

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also concluding that claimant did nothing which would be expected to cause a problem. Decision and Order at 5.

[5]In finding that no new injury occurred, the administrative law judge also erred in finding that the situation presented in this case was different from that where a worker showed his ability to do a job by doing it consistently for a considerable time and then feels the onset of a new pain and becomes unable to work without an obvious blow, fall, or other unusual events. The administrative law judge indicated that in those instances, it is common to find a new injury because the circumstances imply one. Section 8(f), however, does not require claimant to have worked for any prolonged period of time between injuries in order for employer to be entitled to Section 8(f) relief. See Ortiz v. Todd Shipyards Corp., 25 BRBS 228, 239 (1991).

Contrary to the administrative law judge's determination, the record contains evidence sufficient to support a finding that claimant's physical condition did deteriorate after the July 1984 incident and that claimant's permanent disability was greater after July 16, 1984 than it had been previously. As employer asserts, whereas three of the four orthopedists who evaluated claimant prior to this incident, Drs. Townsend, Dedo and Matan, found that claimant could return to work as a machinist, the physicians who examined claimant after this incident, Drs. Matan, Sutherland, and Fong, all opined that he could not do so. Moreover, while the September 23, 1983 report of Dr. Matan,[6] and the June 21, 1983 report of Dr. Jaskiewicz, describe claimant's physical and neurological exam as essentially normal, when claimant was examined by Dr. Fong on August 10, 1986, clear findings of nerve root involvement at L5 on the left were noted. In addition, Dr. Fong considered claimant to be Category D under the California Workers' Compensation Guidelines which generally precludes heavy lifting, bending, stooping, and reaching with the additional restriction of no ladder climbing. Moreover, although Dr. Matan based the permanent impairment rating in his September 1983 report on claimant's subjective complaints and his ruptured disk, Dr. Fong rated claimant's impairment based completely on objective evidence of loss of motion and his disk derangement. Dr. Fong found that claimant had lost 20 degrees of flexion, had lost all extension, and had sustained loss of lateral flexion and rotation.

Although the administrative law judge determined that all of the treating physicians found that the July 1984 incident did not increase claimant's impairment or disability on a permanent basis, in fact only Dr. DiRaimondo, whom the administrative law judge discredited, and Dr. Sutherland, whose opinion the administrative law judge failed to discuss, specifically addressed this question. When questioned at the hearing regarding whether the incident of 1984 caused a permanent change or exacerbation of claimant's underlying condition, Dr. Sutherland stated that every episode claimant experiences, including this episode, probably resulted in some amount of increasing permanent instability. Tr. at 57. Although Dr. Matan's July 16, 1984 report states that claimant was permanently disabled from his regular occupation, and that claimant had the same level of disability that he had previously

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[6] In this report, Dr. Matan did state that although claimant had no objective evidence of disability, he had a 40 percent impairment of the whole person under the American Medical Association Guides to the Evaluation of Permanent Impairment (1971), based on his untreated ruptured disk. In this report, Dr. Matan also stated that claimant cannot return to his usual work, an opinion he changed in June 1984. EX 4.

found in his September 1983 examination, Dr Matan's opinion on this point is conflicting because on June 22, 1984, Dr. Matan released claimant to return to his usual work. The administrative law judge, how-ever, never mentioned this inconsistency or attempted to resolve the conflict in Dr. Matan's testimony.

Because the administrative law judge failed to consider all of the relevant evidence in the record in determining that claimant sustained no increased permanent partial disability as a result of the July 16, 1984 work incident, as is required under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), we vacate this finding. See generally Cotton v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 380 (1990). If the administrative law judge determines that claimant sustained a second aggravating injury on July 16, 1984 on remand, he must also reconsider whether claimant's permanent partial disability was materially and substantially greater as a result of this incident in light of the relevant medical evidence previously discussed. See Merrill, 25 BRBS at 148.

Employer's contention that the administrative law judge erred in rejecting Dr. DiRaimondo's opinion in denying employer Section 8(f) relief is, however, without merit.[7] The administrative law judge acted within his discretion in finding Dr. DiRaimondo's analogy between intervertebral disks and mechanical shock absorbers unconvincing and in questioning Dr. DiRaimondo's ability to attribute 10 percent of claimant's overall disability to the July 16, 1984 incident[8] given the many hundreds of thousands of mini-traumas that claimant was subjected to over his lifetime. See Decision and Order at 4-5. Inasmuch as employer has failed to establish that the administrative law judge's discrediting of Dr. DiRaimondo's opinion was either inherently incredible or patently unreasonable, we affirm this credibility determination. See Uglesich v. Stevedoring Services of America, 24 BRBS 180, 183

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[7]Dr. DiRaimondo opined that the intervertebral disks function as shock absorbers and that they wear out by the process of many mini-traumas, each of which contributes some cumulative part to the resulting disability. Dr. DiRaimondo characterized the July 1984 incident as one of these traumas.

[8]After examining claimant on August 24, 1988, Dr. DiRaimondo opined that claimant suffered an injury on July 16, 1984, and that this injury aggravated his previously symptomatic underlying back condition. He found that claimant's pre-existing condition contributed 90 percent to his current physical condition and that the remaining 10 percent of his condition stems from the incident which occurred in July 1984. He also opined that claimant could return to work as a marine machinist. Ex. 1. At the hearing, however, he changed his opinion on this point. Tr. at 161.

(1991).[9]

Lastly, we agree with employer that the administrative law judge's conclusion that the July 16, 1984 incident was merely an attempt by employer to manipulate circumstances for litigation purposes is without an evidentiary basis in the record. Contrary to the administrative law judge's determination, the record indicates that claimant wanted to return to work and that several of his physicians, Drs. Townsend, Dedo, and Matan, believed that he could do so with the use of a back brace. While claimant testified that his lead man objected to his returning to work because he believed that claimant posed a danger to himself and others, we hold that this testimony is insufficient to establish that employer intentionally placed claimant in a position likely to increase his disability for Section 8(f) purposes. See Johnson v. Bender Ship Repair, Inc., 8 BRBS 635, 638 (1978). The administrative law judge's finding that employer "orchestrated" the July 16, 1984 incident for Section 8(f) purposes is, therefore, reversed.

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[9]Although the administrative law judge acted within his discretion in rejecting Dr. DiRaimondo's opinion that claimant sustained a second injury on July 16, 1984, it was improper for him to do so based on his finding that claimant did nothing that would be expected to cause a problem. Claimant need not anticipate the consequences of his actions in order to establish an injury under the Act. Moreover, this finding is inconsistent with his findings that claimant was already unable to do previous work when he "returned" to work on July 16, 1984, and that the increased symptoms he experienced at that time merely confirmed this inability.

Accordingly, the administrative law judge's Decision and Order denying Section 8(f) relief is vacated, and the case is remanded for further consideration of this issue consistent with this opinion. The administrative law judge's finding that employer orchestrated the injury on July 16, 1984, is reversed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge