

BRB Nos. 90-872  
and 90-0872A

ROBERT K. SPRIGGS )  
 )  
 Claimant )  
 )  
 v. )  
 )  
 NEWPORT NEWS SHIPBUILDING AND ) DATE ISSUED:  
 DRY DOCK COMPANY )  
 )  
 Self-Insured )  
 Employer-Respondent )  
 Cross-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Petitioner )  
 Cross-Respondent ) DECISION and ORDER

Appeals of the Decision and Order of Theodor P. von Brand,  
Administrative Law Judge, United States Department of  
Labor.

William C. Bell (Office of the General Counsel, Newport News  
Shipbuilding and Dry Dock Company) Newport News,  
Virginia, for employer.

Marianne Demetral Smith (Judith E. Kramer, Acting Solicitor  
of Labor; Carol DeDeo, Associate Solicitor; Janet  
Dunlop, Counsel for Longshore), Washington, D.C., for  
the Director, Office of Workers' Compensation Programs,  
United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and  
LAWRENCE, Administrative Law Judge.\*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the  
Director), appeals, and employer cross-appeals, the Decision and  
Order (88-LHC-3504) of Administrative Law Judge Theodor P. von  
Brand awarding benefits on a claim filed pursuant to the  
provisions

\*Sitting as a temporary Board member by designation pursuant to  
the Longshore and Harbor Workers' Compensation Act as amended in  
1984, 33 U.S.C. §921(b)(5)(1988).

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, an employee in employer's X-33 Painting Department, suffered a work-related back injury on March 21, 1977, while lifting a five gallon bucket of paint. Claimant was diagnosed by Dr. Garner as having a herniated disc and, on May 26, 1977, underwent a partial hemilaminectomy at L5-S1 on the left, with removal of a herniated nucleus pulposus. Claimant returned to work on September 19, 1977, with restrictions to avoid heavy lifting, repeated bending and straining with his back for one month. Claimant thereafter experienced a recurrence of back pain and was readmitted to the hospital on October 31, 1977, at which time he underwent a partial hemilaminectomy at L5-S1 on the right, with removal of a herniated disc. The parties stipulated that claimant reached maximum medical improvement on June 9, 1978. Claimant, however, was not able to return to work until April 27, 1981, at which time he was assigned to employer's MRA shop with light duty work restrictions. Employer voluntarily paid temporary total disability benefits to claimant for the periods March 22, 1977 through September 18, 1977, October 19, 1977 through April 26, 1981, June 12, 1985 through August 4, 1985, and October 13, 1986 through October 26, 1986. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge awarded claimant temporary partial disability benefits from September 19, 1977 through October 18, 1977, and permanent partial disability benefits from April 27, 1981 through June 11, 1985, August 5, 1985 through October 12, 1986, and October 27, 1986 and continuing, based upon a loss in wage-earning capacity of \$15 per week. In addition, the administrative law judge granted employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), on grounds that claimant's March 21, 1977 injury had resulted in a manifest pre-existing permanent partial disability which contributed to a greater degree of permanent disability following claimant's subsequent aggravation in September 1977.

On appeal, the Director challenges the administrative law judge's award of Section 8(f) relief, maintaining that the administrative law judge erred in both determining that claimant's March 21, 1977 injury resulted in a permanent partial disability and in determining that this prior injury contributed to claimant's current disability. The Director also contends that Section 8(f) is not applicable in the instant case since the administrative law judge's award of benefits is de minimis. Employer cross-appeals, urging affirmance of the administrative law judge's award of Section 8(f) relief and, in the alternative, arguing that claimant's 1974 and 1976 back injuries should be the

basis for Section 8(f) relief.

The only issue presented by this appeal is whether the administrative law judge properly awarded Section 8(f) relief to employer. Section 8(f) of the Act provides that the Special Fund will assume responsibility for compensation payments after 104 weeks in a case where claimant is permanently partially disabled if employer proves the following: (1) the claimant had a pre-existing permanent partial disability which (2) combined with the subsequent work-related injury to result in a materially and substantially greater degree of permanent disability or death, and (3) the pre-existing disability was manifest to the employer. See 33 U.S.C. §908(f); Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); Armstrong v. General Dynamics Corp., 22 BRBS 276 (1989).

The Director initially contends that the administrative law judge erred in determining that claimant's March 21, 1977 work injury resulted in a pre-existing permanent partial disability for the purpose of establishing entitlement to Section 8(f) relief. In support of this contention, the Director asserts that the administrative law judge cited no evidence which could support a finding that claimant's back condition between March and September 1977 was such a serious permanent disability that a cautious employer would be motivated to fire claimant, but for the availability of Section 8(f) relief. Additionally, the Director notes that the administrative law judge's own compensation order, which awards temporary partial disability benefits to claimant for his March 21, 1977 injury, is inconsistent with the Section 8(f) requirement that claimant's pre-existing disability be permanent.<sup>1</sup>

We reject the Director's argument. A pre-existing permanent partial disability, as the Director states, has been defined as a serious, lasting physical condition such that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. See, e.g., C & P Telephone Co. v. Director, OWCP, 564 F.2d 503, 512-513, 6 BRBS 399, 412-415 (D.C. Cir. 1977); Dugas v. Durwood Dunn, Inc., 21 BRBS 277 (1988). Thus, determining the existence of a pre-existing permanent partial disability for the purposes of Section 8(f) does not require a finding of maximum medical improvement. See Lockhart v. General Dynamics Corp., 20 BRBS 219 (1988). Furthermore, a medical condition need not cause economic disability to constitute a pre-existing permanent partial disability within the meaning of Section 8(f), but rather the pre-existing injury must produce some serious, lasting physical problem. See Bickham v. New Orleans

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<sup>1</sup> Temporary partial disability benefits were actually awarded from September 19, 1977 through October 18, 1977.

Stevedoring Co., 18 BRBS 41 (1986).

Our review of the record reveals that the administrative law judge's finding that claimant's March 21, 1977 work-related back injury resulted in a serious pre-existing permanent disability for purposes of Section 8(f) is supported by substantial evidence. Specifically, claimant, after undergoing a partial hemilaminectomy in May 1977, returned to work during September 1977 with significant light duty restrictions. Dr. Harmon subsequently opined that claimant's May 1977 disc surgery produced a permanent disability, in that there was an anatomical loss of structures involving the spine as well as functional loss, and weakened claimant's back. See Employer's Exhibit 11B. The fact that the administrative law judge ordered employer to pay compensation for the March 21, 1977, injury based on a finding of temporary partial disability does not preclude a finding that the March 21, 1977 injury resulted in a serious, lasting physical problem. See generally Preziosi v. Controlled Industries, Inc., 22 BRBS 468 (1989) (Brown, J., dissenting). Therefore, as substantial evidence supports the finding that claimant's March 21, 1977 work-related injury resulted in a serious and lasting physical problem, we affirm the administrative law judge's finding that claimant's pre-September 1977 back condition constituted a pre-existing permanent partial disability for purposes of Section 8(f). See Dugan v. Todd Shipyards, Inc., 22 BRBS 42 (1989).

The Director next argues that the administrative law judge erred in finding the contribution requirement of Section 8(f) satisfied by employer in the instant case. The Director asserts that claimant's loss in wage-earning capacity was no greater following his October 1977 injury than it was after he injured his back in March 1977.<sup>2</sup> We disagree. In order to satisfy the contribution element necessary to establish entitlement to Section 8(f) relief, the courts and the Board have generally required an employer to submit credible medical evidence which establishes that the employee's disability following his second injury was due to a combination of his pre-existing and subsequent injuries. See John T. Clark & Son of Maryland, Inc. v. Benefits Review Board, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980); C & P Telephone, 564 F.2d at 503, 6 BRBS at 399 (D.C. Cir. 1977). In order to determine whether a claimant has sustained a greater disability as a result of the combination of his pre-existing disability and the subsequent work-related injury, the claimant's ability to work must be viewed in the context of his physical impairment and

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<sup>2</sup>The administrative law judge awarded claimant temporary partial disability benefits at a rate of \$10 per week from September 19, 1977 to October 18, 1977, due to a loss of overtime wages. The administrative law judge's permanent partial disability award, commencing on April 27, 1981, was again \$10 per week based on the same loss in wage-earning capacity.

medical restrictions. See Readel v. Foss Launch and Tug, 20 BRBS 229, 233 (1988).

In the instant case, the administrative law judge, noting the testimony of Drs. Harmon and Garner, determined that claimant's pre-existing condition combined with his subsequent September 1977 work injury to result in a greater permanent disability. Dr. Harmon, after noting that claimant's May 1977 disc surgery created a permanent disability that weakened claimant's back, opined that claimant's disability is not the result of his March 1977 work injury alone, but is contributed to and made materially worse by the aggravation of his condition following his return to work in September 1977. Employer's Exhibits 11A, 11C. Similarly, Dr. Garner opined that claimant's back has been weakened by his two ruptured discs and the resultant surgeries. Employer's Exhibit 10Z. Our review of the record reveals that the testimony of Drs. Harmon and Garner is uncontradicted; thus, as this testimony is sufficient to establish that claimant's pre-existing injury combined with his subsequent work injury to result in a greater permanent disability, we affirm the administrative law judge's finding that employer has satisfied the contribution element necessary for Section 8(f) relief. See Maryland Shipbuilding & Dry Dock Co. v. Director, OWCP, 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980).

Lastly, the Director, citing Porras v. Todd Shipyards Corp., 17 BRBS 222 (1985), aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP, 792 F.2d 1489, 19 BRBS 3 (CRT) (9th Cir. 1986), contends that employer is not entitled to Section 8(f) relief for the permanent partial disability compensation awarded to claimant for his loss of wage-earning capacity occasioned by his loss of overtime since those benefits constituted a de minimis award. We disagree. In Porras, claimant was awarded temporary total disability compensation, followed by a one percent permanent partial disability award for the purpose of keeping available his right to seek modification of the award until the economic effects of the disability became apparent. The Board affirmed the administrative law judge's denial of Section 8(f) relief since there was no evidence which would support a determination that the claimant's subsequent disability was materially and substantially greater than that which would have resulted from his second injury alone. Porras, 17 BRBS at 224. The United States Court of Appeals for the Ninth Circuit affirmed, holding that when a de minimis award is granted, Section 8(f) relief is not appropriate. Todd Shipyards Corp., 793 F.2d at 1492, 19 BRBS at 5 (CRT).

Unlike Porras, the administrative law judge's award in the instant case was not granted for the purpose of protecting claimant's right to seek modification, but rather was based on the actual loss of wage-earning capacity experienced by claimant as a result of his inability to work overtime; we, therefore, reject

the Director's assertion that the instant award of benefits constituted a de minimis award. Thus, as substantial evidence supports that administrative law judge's determination that claimant's permanent disability is materially and substantially greater due to the combination of his March 1977 pre-existing injury and his subsequent work injury, we affirm the administrative law judge's award of Section 8(f) relief to employer. See Murphy v. Pro-Football, Inc., 24 BRBS 187 (1991), aff'd on reconsideration, 25 BRBS 114 (1991).

Because we affirm the administrative law judge's determination that employer is entitled to relief under Section 8(f), we need not address the issues raised by employer in its cross-appeal.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

LEONARD N. LAWRENCE  
Administrative Law Judge