

CASIE JACKSON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GREAT LAKES DREDGE & DOCK COMPANY	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 07/22/2010
	)	
Employer/Carrier- Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Modifying Compensation Award and Vacating Award of Special Fund Relief of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Lisa Torron-Bautista (Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A.), Orlando, Florida, for employer/carrier.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Decision and Order Modifying Compensation Award and Vacating Award of Special Fund Relief (2007-LHC-02073) of Administrative Law Judge Daniel F. Sutton 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).

Claimant sustained injuries to his neck, back and leg when he fell from an ATV while working for employer as a heavy equipment operator on September 10, 2005. On September 12, 2005, Dr. Roche diagnosed claimant with a cervical strain, lumbosacral strain, right hip strain, and dizziness from vertigo, a condition for which claimant had previously sought treatment.<sup>1</sup> On September 19, 2005, claimant sought treatment for his vertigo with an ear, nose, and throat specialist, Dr. Morar, who referred claimant to Florida Balance Centers for vestibule-balance therapy. Following six weeks of therapy, employer's carrier inquired from Drs. Roche and Morar as to claimant's condition. Dr. Roche opined that claimant had returned to his pre-September 10, 2005, status with regard to his vertigo, and added that he anticipated a full-duty release with regard to claimant's work injuries during November 2005. Dr. Morar similarly opined that claimant's acute exacerbation of dizziness had resolved and that claimant had returned to his pre-September 10, 2005, vertigo status. Dr. Morar added, in correspondence dated November 11, 2005, that he had no evidence or knowledge that claimant's vertigo worsened after the work accident. Dr. Tarras, who saw claimant in January 2006, reiterated his previous diagnosis of episodic, benign, positional vertigo and added that claimant's vertigo seemed to be in check but that the condition prevented him from doing his previous work.

Prior to a formal hearing on his claim, claimant and employer entered into a "Stipulation Resolving Issues," which resolved all disputed issues in the case except for attorney's fees and employer's request for Section 8(f) relief, 33 U.S.C. §908(f), which it

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<sup>1</sup> On April 11, 2004, claimant was diagnosed by Dr. Awad with positional vertigo. Dr. Awad released claimant with the notation that he could participate in "activities as tolerated." EX 6. Claimant had several recurrences of vertigo, specifically in November or December of 2004, and in July of 2005, prompting Dr. Tarras to conclude, both following the latter episode and claimant's September 10, 2005, work accident, that claimant suffered from episodic, benign, positional vertigo.

based on claimant's pre-existing vertigo.<sup>2</sup> In his decision dated January 12, 2009, the administrative law judge adopted the parties' stipulations and ordered employer to pay claimant permanent total disability and medical benefits from November 21, 2005, and continuing.<sup>3</sup> In his decision dated June 29, 2009, the administrative law judge granted employer's request for Section 8(f) relief.

Employer thereafter filed a motion requesting that the administrative law judge correct all language in his decisions referencing permanent total disability benefits to reflect the parties' stipulation, dated January 9, 2009, that claimant is entitled to ongoing compensation for a nonscheduled partial loss in wage-earning capacity. In response, the Director, Office of Workers' Compensation Programs (the Director), moved that the administrative law judge make specific factual findings pursuant to the correct legal standard in determining employer's entitlement to Section 8(f) relief. In his decision dated October 15, 2009, the administrative law judge: 1) modified his January 12, 2009, decision to reflect claimant's entitlement to permanent partial rather than permanent total disability benefits; 2) vacated his June 29, 2009, decision granting employer Section 8(f) relief; and 3) reconsidered and thereafter denied employer's application for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director responds, urging affirmance.

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<sup>2</sup> The parties' stipulations included agreements that: employer pay claimant a lump sum for past due compensation; claimant reached maximum medical improvement with regard to all of his injuries as of November 22, 2005; claimant is entitled to ongoing compensation for a loss in wage-earning capacity beginning on January 1, 2009; and claimant is entitled to medical benefits for past, present and future treatment of his work-related conditions.

<sup>3</sup> The administrative law judge ordered employer to pay claimant \$160,000, representing a lump sum for all past due compensation covering the period between November 21, 2005, and December 31, 2008, continuing permanent total disability benefits commencing from January 1, 2009, at a weekly compensation rate of \$1,047.16, as well as all outstanding medical benefits for treatment from Dr. Klieman, Dr. Morar and Florida Balance Centers.

Employer contends that the administrative law judge erred in finding that claimant's pre-existing vertigo did not contribute to a greater disability than that resulting from his work-related neck, back and leg injuries alone. Employer specifically asserts that Dr. Roche's testimony that claimant's pre-existing vertigo progressed significantly after his work accident to the point that claimant could no longer work as a heavy machine operator establishes that claimant's current disability due to the work-related aggravation of his pre-existing vertigo is materially and substantially greater than that which would have resulted from his work-related neck, back and leg injuries alone.

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5<sup>th</sup> Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT) (5<sup>th</sup> Cir. 1997). The administrative law judge found that claimant's vertigo constitutes a manifest, pre-existing permanent partial disability. The remaining issue is thus, whether employer established that claimant's pre-existing condition contributed to his permanent partial disability under the standard above.

Employer may establish the contribution element with medical or other evidence. See *Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5<sup>th</sup> Cir. 1997). Moreover, the contribution inquiry "may be resolved by inferences based on such factors as the perceived severity of the pre-existing disability and the current employment injury, as well as the strength of the relationship between them." *Ladner*, 125 F.3d at 307-308, 31 BRBS at 148-149(CRT), citing *Allred*, 118 F.3d at 391, 31 BRBS at 94(CRT). It is not sufficient, however, for employer merely to establish that the disability is related to both claimant's pre-existing vertigo and the work injury. *Louis Dreyfus Corp.*, 125 F.3d 884, 31 BRBS 141(CRT).

The administrative law judge's finding that employer did not satisfy the contribution element for purposes of Section 8(f) is rational and supported by substantial evidence. The administrative law judge found that employer has, via Dr. Roche's opinion, established that claimant's inability to perform his usual work is attributable to both his pre-existing vertigo and the neck and back injuries sustained as a result of the

September 10, 2005, work accident.<sup>4</sup> This evidence is not sufficient to establish the contribution element for purposes of Section 8(f) relief. *Id.* He also found that employer did not provide any evidence which might enable him to discern whether claimant's current permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent work injury alone. Employer did not offer evidence of the type and extent of the disability claimant would suffer if the pre-existing vertigo did not exist.<sup>5</sup> *Ladner*, 125 F.3d 303, 31 BRBS 146(CRT). We therefore affirm the administrative law judge's finding that employer has not met the contribution element of Section 8(f), and his consequent denial of Section 8(f) relief.

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<sup>4</sup> Dr. Roche stated that while he did not have an opinion as to whether claimant could perform any type of work, he felt that claimant was incapable of performing his prior work as a heavy equipment operator because of his recurring dizziness and the restrictions resulting from his cervical and upper back conditions. EX 8, Dep. at 16. Dr. Roche's statement in this regard contradicts employer's position that claimant could return to his usual employment but for his vertigo. Additionally, Dr. Roche stated that he could not make a judgment as to "how much the back contributed to his inability to function," *id.* at 16-17, and although Dr. Roche commented that claimant could, with regard to physical restrictions relating to his neck and back conditions, probably function "somewhat" if "he was sitting at a desk or something," the physician did not explain whether claimant's ability to perform such work would necessarily be hampered by his pre-existing vertigo. *Id.*

<sup>5</sup> In this regard, Dr. Roche's opinion that claimant is incapable of performing his usual work as a heavy equipment operator because of his pre-existing vertigo and restrictions imposed due to his work-related neck and back injuries does not establish that claimant's vertigo rendered him incapable of performing any work which claimant otherwise would have been capable of performing given his other work injuries. Moreover, the medical professionals who treated claimant's vertigo, *i.e.*, Drs. Awad, Morar and Tarras, and Thomas Patullo, AP, OTR, did not address claimant's ability to work as a result of any restrictions imposed due to his work-related neck and back conditions. In addition, the record is devoid of any vocational evidence or analysis. *See, e.g., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 132 F.3d 1079, 31 BRBS 164(CRT) (4<sup>th</sup> Cir. 1997).

Accordingly, we affirm the administrative law judge's Decision and Order Modifying Compensation Award and Vacating Award of Special Fund Relief.

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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REGINA C. McGRANERY  
Administrative Appeals Judge