BRB No. 99-862

LUIS PADILLA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAN PEDRO BOAT WORKS	)	DATE ISSUED: May 17, 2000
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry, III (Pierry & Moorhead), Wilmington, California, for claimant.

William N. Brooks, II (Law Offices of James P. Aleccia), Long Beach, California, for employer/carrier.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN

Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration (98-LHC-699) of Administrative Law Judge Paul A. Mapes 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 worked for employer as a welder. On May 28, 1996, he tripped while walking on a gangway and fell, landing on both of his knees. Claimant alleged this incident injured his left knee, left shoulder and low back. He underwent a total knee replacement in September 1996, physical therapy thereafter, and was also diagnosed with lumbar disc disease. In November 1997, claimant underwent surgery to repair the torn rotator cuff in his left shoulder. He filed a claim for benefits for these injuries.

The administrative law judge found that the parties agreed claimant sustained injuries to his left knee and low back in the work incident in 1996. He found, however, that the shoulder condition was chronic and was not related to the work injury. Therefore, he denied any benefits related to the left shoulder condition. Decision and Order at 11-12. The administrative law judge also found that claimant's back condition was aggravated by the work accident and was permanently impaired as a result, and he found that the back and knee conditions reached maximum medical improvement on November 19, 1997. Decision and Order at 13-14. He concluded that claimant sustained a 50 percent impairment to his left lower extremity and a permanent impairment to his low back. Inasmuch as employer established the availability of suitable alternate employment, the administrative law judge awarded claimant benefits under Section 8(c)(2), 33 U.S.C. §908(c)(2), for the impairment due to the knee injury and under Section 8(c)(21), 33 U.S.C. §908(c)(21), for a loss in wage-earning capacity due to the back injury, to run concurrently. To prevent the award from exceeding the statutory maximum weekly benefit of 66 2/3 percent of claimant's average weekly wage, the administrative law judge ordered employer to pay the benefits under the schedule at a portion of claimant's compensation rate until they are paid in full.[1] *Id.* at 20. The administrative law judge denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief, finding that it failed to establish that pre-existing left knee and right shoulder disabilities contributed to claimant's low back condition. He also denied relief with regard to

[1]The administrative law judge granted employer's request for a credit against a settlement for a previous left knee injury. Thus, he awarded employer a credit for $17,399 against its obligation for benefits under Section 8(c)(2) for the knee injury. Decision and Order at 23.

the benefits due under the schedule, stating that employer did not seek relief for those benefits and, in any event, that the period of employer's liability for those benefits did not exceed 104 weeks. *Id.* at 20-23. Thereafter, the administrative law judge denied employer's motion for reconsideration, affirming his decision regarding the nature and extent of claimant's back disability. The administrative law judge declined to reconsider the issues concerning the concurrent awards and the denial of Section 8(f) relief. Order Denying M/Recon. at 2-3. Employer appeals the decisions, and claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

Disability

Employer first contends the administrative law judge erred in finding that claimant's low back injury resulted in a permanent disability; rather, it alleges claimant sustained only a temporary exacerbation, which has since resolved. Employer argues that no evidence of record supports the conclusion that claimant cannot return to his usual work as a result of his back condition, as claimant's testimony was discredited and as Dr. Hunt's opinion is equivocal. Claimant responds that there is substantial evidence of record to support the administrative law judge's decision.

The parties agree some harm came to claimant's back as a result of the May 28, 1996, incident; thus, there is no question that claimant sustained a work-related injury to his back. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The question which remains relates to the nature and extent of any disability arising therefrom. It is claimant's burden to establish his inability to perform his usual work due to his work injury, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), and he must satisfy this burden by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996).

In this case, claimant testified to continuing back pains; however, given apparent misrepresentations, the administrative law judge credited only the initial complaints of back pain and discredited later "exaggerations." Decision and Order at 12-13. The administrative law judge found nonetheless that "there still remains a bare preponderance of the evidence favoring the conclusion that the claimant's work-related injury probably did result in some kind of permanent back impairment of at least mild severity." Decision and Order at 13. He highlighted evidence showing that claimant began complaining of back pains within two weeks of the injury, suggesting a traumatic injury or an aggravation of pre-existing degenerative disease due to claimant's altered gait (as a result of the injured knee). He also gave weight to Dr. Hunt's testimony that a disc bulge (revealed by MRI), which the doctor opined was caused or aggravated by the work injury, could cause claimant's back pain upon

exertions such as prolonged bending, lifting, standing or sitting. Decision and Order at 13; Cl. Ex. 11 at 39-40. In his order denying reconsideration, the administrative law judge noted that Dr. London found claimant's initial complaints of back pain credible and that this finding was corroborated by Dr. Hunt. He also cited Dr. Hunt's opinion that claimant's low back injury caused him to lose 85 percent of his ability to lift and 50 percent of his ability to bend, turn or twist his spine. Order at 2; Cl. Ex. 11 at 203-204. In light of this evidence, the administrative law judge found that claimant has a permanent impairment to his low back.

The administrative law judge also found that claimant cannot return to his usual work as a welder as a result of his back impairment. He noted that although no doctor specifically said so, he has the authority to draw such an inference based on Dr. Hunt's determination that claimant's back restrictions are incompatible with the welding duties claimant described. Claimant testified that as a welder he was required to carry his equipment (often up to 40 pounds) and sometimes carry items weighing up to 90 pounds; he was also required to kneel, stand, crawl or lay down for prolonged periods of time to complete his work. Tr. at 40-42. Dr. Hunt stated, in his deposition, that claimant could experience back pain if he were to engage in prolonged bending, lifting, sitting or standing, so he is prohibited from doing so. Cl. Ex. 11 at 39-40, 205.

We affirm the administrative law judge's finding that claimant has an impairment to his back that precludes him from performing his usual work, as it is rational and supported by substantial evidence. The administrative law judge rationally inferred from the medical evidence, specifically the testimony of Dr. Hunt, that claimant has a permanent disability. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge has the authority to address questions of witness credibility and to weigh the evidence, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), we affirm his conclusion that claimant has a permanent disability to his back as a result of his work-related injury on May 28, 1996.[2] Moreover, it was rational for the administrative law judge to infer from Dr. Hunt's testimony concerning claimant's restrictions, and claimant's testimony regarding his work requirements, that claimant can no longer perform the duties of a welder and, therefore,

[2]We reject employer's assertion that it was denied due process because it did not have the opportunity to present evidence of claimant's usual duties and his ability to perform them in light of his low back injury. The issue of claimant's back injury/disability and his ability to return to his usual work has been at issue throughout the course of this case. Claimant listed the back injury on his claim for compensation, Cl. Ex. 1, and he testified as to his usual duties at the hearing. Tr. at 40-42.

cannot return to work as a welder.[3] *Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67, 70 n.5 (1998), *modified on other grounds*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

Concurrent Awards

As we affirm the administrative law judge's determination that claimant sustained a permanent disability to his back, as well as to his left knee, as a result of the work injury, and is entitled to benefits for both conditions, we next address employer's contention that the administrative law judge erred in awarding concurrent benefits. Specifically, employer argues that the award of benefits under the schedule for a period of over 245 weeks is contrary to the Act because the Act requires full payment of benefits over the period of time mandated in the schedule. Employer suggests establishing a method whereby the scheduled award is paid first and in full, and payment of the unscheduled award commences thereafter. It argues that this manner of payment is consistent with the Act, is consistent with precedent established in *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995), and properly factors out any effects of the injury to the scheduled member from the award under Section 8(c)(21). Claimant argues that he is entitled to concurrent awards, and he urges affirmance of the administrative law judge's decision. The Director, who previously promoted the employer's position herein in *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999), *modifying* 32 BRBS 67 (1998), declines to express an opinion, stating he is "in the process" of reconsidering his statutory construction in light of the Fourth Circuit's decision in *Green*.

[3]Employer does not dispute that claimant's knee condition prevents him from returning to his usual work.

After determining that claimant is entitled to both an award of benefits under Section 8(c)(2) for his knee injury and under Section 8(c)(21) for his back injury, the administrative law judge had to determine how those awards should be paid. Based on the decisions in *Green*, 185 F.3d at 239, 33 BRBS at 151(CRT), and *Brady-Hamilton*, 58 F.3d at 419, 29 BRBS at 101(CRT), the administrative law judge concluded that claimant is entitled to benefits for both injuries to be paid concurrently. He realized that payment in full of both awards at the same time would exceed the maximum benefit claimant is permitted under the Act, 33 U.S.C. §908(a), so he awarded claimant's weekly unscheduled benefits to be paid at the full compensation rate and awarded weekly scheduled benefits to be paid in a amount equal to the difference between 2/3 of claimant's average weekly wage and claimant's weekly unscheduled benefits. Payments under the schedule would be made until such time as employer paid that compensation in full and unscheduled benefits would continue for the duration of the disability.[4] 33 U.S.C. §908(c)(2), (21); Decision and Order at 18-20.

[4]Based on employer's demonstration of the availability of suitable alternate employment, the administrative law judge found that claimant is entitled to an award under Section 8(c)(21) of $228.74 per week. Claimant's full compensation rate based on two-thirds of his average weekly wage is $381.68 per week, and the difference between these figures, $152.94, is the rate calculated for the award under the schedule. Pursuant to Section 8(c)(2), claimant is entitled to $54,961.92 in compensation for the knee injury. Subtracting the credit for benefits from a previous injury to the same knee, $17,399, awarded by the administrative law judge, claimant is entitled to $37,562.92. Dividing that number by the calculated compensation rate of $152.94 results in scheduled payments continuing for 245.61 weeks.

The United States Court of Appeals for the Ninth Circuit has held that, although concurrent awards for permanent partial disability and permanent total disability are allowable in some instances, the combined payment of such dual awards cannot exceed the statutory limit set forth in Section 8(a) for permanent total disability. *Brady-Hamilton*, 58 F.3d at 421, 29 BRBS at 103(CRT). In that case, the claimant sustained a compensable injury in 1977 and another in 1982. The Ninth Circuit, noting that the claimant was entitled to benefits for both injuries, remanded the case for the administrative law judge to "make whatever adjustments [are] necessary to insure that the combined disability award does not exceed the statutory limit mandated by Congress."[5] *Id.*, 58 F.3d at 422, 29 BRBS at 103(CRT).

In conjunction with this Ninth Circuit precedent, the administrative law judge considered the *Green* case which was decided last year by the United States Court of Appeals for the Fourth Circuit. In that case, the court affirmed the conclusion that the claimant was entitled to concurrent benefits for his ankle and shoulder injuries, rejecting the Director's position that the claimant should get consecutive awards; however, it modified the Board's concurrent award of benefits, holding that in no instance may the compensation rate for partial disability, or a combination of partial disabilities, exceed the compensation rate for total disability. *Green*, 185 F.3d at 243, 33 BRBS at 142(CRT). Thus, it held that the claimant was entitled to benefits under Section 8(c)(21) for his shoulder injury at the full compensation rate, plus approximately half the compensation rate under the schedule for twice the number of weeks in the schedule, until the award is paid in full. This resulted in the claimant's receiving $400 per week, the maximum allowable for him, for 102.5 weeks ($200 each per week for the scheduled and unscheduled awards) and then $200 per week thereafter pursuant to Section 8(c)(21). *Id.*

As stated previously, employer's position herein that payments should be made consecutively is the same position advocated by the Director in *Green* and rejected by the

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[5]In *Brady-Hamilton*, the Ninth Circuit noted that the United States Court of Appeals for the D.C. Circuit approved a method of compensating a claimant which "adjusted the total permanent disability award to account for the fifteen percent partial disability award so that the total did not exceed the statutory limit." *Brady-Hamilton*, 58 F.3d at 422, 29 BRBS at 103(CRT) (citing *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984)).

Fourth Circuit. In rejecting that argument, the court stated that the Act does not permit it to deprive a claimant of his entitlement to benefits. *Id.* If the award under the schedule is to be paid first, then the claimant is deprived of his entitlement to compensation under Section 8(c)(21) for whatever period it takes to pay off the award under the schedule. Employer argues that, despite the Fourth Circuit's determination, consecutive payments would appropriately factor out any effects of the award under the schedule, permitting proper compensation under Section 8(c)(21), and that the case at bar arises in the Ninth Circuit, which is not bound by the Fourth Circuit's decision.

In light of the facts and case precedent, we affirm the administrative law judge's awards. Under *Brady-Hamilton*, the administrative law judge can make "whatever adjustments" are necessary to prevent overpayment, and he has made the adjustment here by following the lead of the Fourth Circuit. Thus, as *Green* is the only authority on calculating concurrent Section 8(c)(21) and scheduled awards for permanent partial disability, and as the method established in *Green* complies with *Brady-Hamilton*, we conclude that the administrative law judge's adjustments to the awards in this case are reasonable. We therefore reject employer's request to modify the awards from concurrent to consecutive, as such would deprive the claimant of his entitlement to compensation under Section 8(c)(21) for the duration of his entitlement to compensation under the schedule. Consequently, we affirm the administrative law judge's awards of benefits.

Section 8(f)

Employer next contends the administrative law judge erred in denying it Section 8(f) relief from continuing liability for benefits. Employer argues that it is entitled to relief from paying benefits for claimant's knee injury under the schedule, as claimant was awarded benefits for more than 104 weeks, as well as for the continuing benefits for claimant's back condition, as it sought relief from benefits for claimant's "overall condition." The Director asserts that an employer must establish its entitlement to Section 8(f) relief separately for each claim presented. Thus, in this case, employer would have to show entitlement to Section 8(f) relief for the Section 8(c)(2) award and for the Section 8(c)(21) award individually, and he argues that employer has not done so.

The administrative law judge found that employer is not entitled to Section 8(f) relief. First, he presumed that employer was not seeking relief from liability for the benefits under the schedule, and that, nevertheless, Section 8(f) would not apply to those benefits because employer is liable for fewer than 104 weeks of benefits as a result of its credit for the previous knee injury.[6] Secondly, he determined that claimant had manifest pre-existing

[6]Application of the $17,399 credit would reduce the payout of the award at the full compensation rate from 144 weeks to approximately 98 weeks, and the administrative law judge compared the latter figure to the 104-week requirement.

permanent partial disabilities to his left knee and right shoulder and pre-existing disabilities to his low back and left shoulder which were not manifest. He concluded that the manifest pre-existing disabilities to the left knee and right shoulder did not make claimant's back disability materially worse, although they did contribute to a greater overall physical disability. Decision and Order at 20-22. He also found that the disability related to claimant's back was due to the combination of the pre-existing non-manifest condition and the work injury. As employer failed to establish the contribution element, the administrative law judge denied relief from the Special Fund. Decision and Order at 23.

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); *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Where a claimant files claims for two types of benefits, an employer must raise and show entitlement to Section 8(f) relief for each claim separately. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993) (death benefits and permanent partial disability benefits); *Cooper v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 284 (1986) (permanent partial disability benefits and permanent total disability benefits).

The Director contends this "separate entitlement" aspect applies to the two types of permanent partial disability benefits herein, as the Act provides different methods of apportioning liability between an employer and the Special Fund for each type of award. Section 8(f)(1) specifically provides:

> If following *an injury falling within the provisions of subsection (c)(1)-(20) of this section*, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, *the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater*, except that, in the case of an injury falling with the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

> *In all other cases in which the employee has a permanent partial disability*, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, *the employer shall provide* in addition to compensation under subsections (b) and (e) of this section, *compensation for one hundred and four weeks only*.

33 U.S.C. §908(f)(1) (emphasis added). Although employer argues that it sought relief for claimant's "overall" partially disabling condition, given the language of the Act providing for potentially differing periods of liability for the scheduled and unscheduled awards, the Director's position has merit.[7] *See generally Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131 (CRT)(4th Cir. 1990).

[7]Other cases involving concurrent awards and Section 8(f) relief shed little light on the matter because they do not involve claimants with multiple pre-existing disabilities who sustained multiple simultaneous work injuries. *See Hansen v. Container Stevedoring Co.*, 31 BRBS 155, 160-161 (1997); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Wilson v. Matson Terminals, Inc.*, 21 BRBS 105 (1988).

Claimant sustained work-related injuries to his left knee and to his low back as a result of the 1996 incident. We have affirmed the administrative law judge's finding that employer is liable for benefits for both conditions separately. As claimant is not being compensated for one "overall" disability, it is logical to require employer to establish entitlement to Section 8(f) relief from both awards individually, especially in view of the potential statutory differences in employer's liability in cases of scheduled partial disability as opposed to those involving an award for a loss in wage-earning capacity. Moreover, showing an increased impairment to a claimant's overall condition, *i.e.*, a greater impairment due to the combined injuries, could, but does not necessarily, establish the contribution element. *Two "R" Drilling Co.*, 894 F.2d at 748, 23 BRBS at 34(CRT); *Abbott v. Louisiana Ins. Guar. Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Consequently, we reject employer's assertion that it is entitled to Section 8(f) relief based on its liability for benefits for claimant's "overall" disability.[8] As employer alleges no other error on the part of the administrative law judge, we affirm the denial of Section 8(f) relief from the Section 8(c)(21) award. The administrative law judge found, and this finding was not appealed, that claimant's current back disability is the result of his work injury and his pre-existing, non-manifest, degenerative disc disease. Decision and Order at 23; Cl. Ex. 11 at 40-41. As the administrative law judge stated, there is no evidence showing that the manifest pre-existing conditions to claimant's left knee and right shoulder were contributory. Thus, employer has

[8]Although employer argues that it presented evidence of economic contribution given claimant's overall condition, we affirm the administrative law judge's determination that this is insufficient to show contribution for purposes of Section 8(f) in this case. The Ninth Circuit has affirmed the submission of vocational evidence to demonstrate that a claimant's pre-existing condition contributed to his "ultimate disability" in that the limit on the claimant's post-injury wage-earning capacity was materially and substantially greater than it would have been absent the pre-existing condition. *Quan*, 203 F.3d at 664, 33 BRBS at 204(CRT). While the Ninth Circuit spoke of an "ultimate" condition, *Quan* is distinguishable, as it involved only one pre-existing condition and one work-related injury which could have resulted in the claimant's "ultimate" compensable condition. Here, however, claimant has two compensable conditions – both of which the administrative law judge found individually prevented claimant from returning to his usual work. The administrative law judge noted that, in theory, employer might have attempted to show that claimant's left knee and right shoulder conditions "combined with his back injury in a way that reduced his post-injury wage-earning capacity to a materially and substantially greater extent than the back injury alone would have reduced his earnings, but no such evidence is in the record." Decision and Order at 23. Thus, in theory, employer would have to show which jobs were available or unavailable due to each condition, as well as prove the "materially and substantially greater" element.

not satisfied all the elements for application of Section 8(f) and is not entitled to such relief. *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989). The remaining question is whether the administrative law judge properly denied Section 8(f) relief from benefits due under the schedule.

With regard to the claim for Section 8(f) relief for the knee injury, the administrative law judge found that claimant sustained an injury to his left knee in 1989 which resulted in a 16 percent impairment according to a 1990 doctor's report, for which he received settlement proceeds of $17,399. Decision and Order at 21. The administrative law judge also found that claimant's left knee is now 50 percent impaired as a result of the work injury. *Id.* at 20. Under Section 8(c)(2), a claimant is entitled to 288 weeks for the full loss of a leg. 33 U.S.C. §908(c)(2). Thus, claimant is entitled to 144 weeks of benefits for his 50 percent impairment at his weekly compensation rate of $381.68, and the total due him is $54,961.92. Decision and Order at 20. However, the administrative law judge determined that a credit of $17,399 for claimant's settlement related to the earlier left knee injury reduces the total liability for the current condition to $37,562.92. Decision and Order at 23. The administrative law judge then used claimant's full compensation rate to calculate the number of weeks it would take to pay $37,562.92, and he found that full payment would occur over the course of 98.4 weeks. The administrative law judge thus based his denial of Section 8(f) relief from payment of the scheduled benefits, in part, on the fact that employer's liability, as calculated above, does not exceed 104 weeks. Decision and Order at 20 n.11. Employer asserts that the administrative law judge's adjustment to the award (due to claimant's entitlement to concurrent awards), resulting in benefits payable over the course of over 245 weeks, makes it eligible for Section 8(f) relief.

As stated previously, the Act provides that an employer is liable for 104 weeks or the number of weeks of benefits due pursuant to the schedule for the subsequent injury, whichever is greater. 33 U.S.C. § 908(f)(1); *Strachan Shipping Co. v. Nash*, 751 F.2d 1460, 17 BRBS 29(CRT) (1985), *modified on other grounds on recon. en banc*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). An employer is thus liable for the entire amount due as a result of the subsequent work injury and the Special Fund would be liable for any remaining amounts which are related to the pre-existing disability. *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986). In *Brown*, the United States Court of Appeals for the Fifth Circuit held that, in cases involving the application of both the credit doctrine and Section 8(f), the Special Fund is to obtain the benefit of the credit for previous benefits paid, and that this "Fund-first" rule is consistent with the language of Section 8(f)(1), 33 U.S.C. §908(f)(1), in that it ensures that, "at the very least, the employer will compensate the employee for the entire second injury." *Brown*, 868 F.2d at 762, 22 BRBS at 50(CRT); *see also General Dynamics Corp. v. Director, OWCP [Blanchette]*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993); *Davis v. General Dynamics Corp.*, 25 BRBS 221 (1991) (Special

Fund to receive credit for payments made in prior hearing loss claims).

We reject employer's assertion that the administrative law judge erred in denying it Section 8(f) relief from liability for compensation for the knee injury, although we do so on grounds other than those expressed by the administrative law judge. Theoretically, Section 8(f) could be applicable to this injury because the Section 8(c)(2) award is based on claimant's entitlement to 144 weeks of benefits, even though the administrative law judge altered the payment allocation in accordance with *Green*. However, assuming, *arguendo,* that the elements for Section 8(f) relief are established, employer cannot benefit from such relief. Under Section 8(f)(1), employer is liable for the full extent of benefits to which claimant is entitled as a result of the work injury; moreover, employer is liable for the *greater* of 104 weeks or the number attributable to this second injury. *Davenport*, 18 BRBS at 194. Here, those benefits would be for a 34 percent impairment (50 percent minus 16 percent), and employer is liable for all payments based on this impairment under the specific language of the Act even if that number exceeds 104 weeks. Thus, regardless of whether employer's liability is for the normal 144 weeks under Section 8(c)(2) or the greater period calculated under the *Green* decision employer must pay *all* of the benefits attributable to the second injury.

In most cases, Section 8(f) would still be at issue, as the Fund could be liable for the pre-existing percentage if the elements for Section 8(f) entitlement were met. In this case, however, a credit is due for the prior 16 percent of disability as benefits for this injury were paid. This credit for payments made on the previous injury applies to the liability of Special Fund in the first instance. *Brown*, 868 F.2d at 762, 22 BRBS at 50 (CRT). Since the Fund receives the benefit of the credit, employer remains liable for the full remaining amount as this disability is attributable to the second injury. Consequently, we need not determine which number of weeks of benefits, 144 or 98 or 245, is the proper basis for determining liability under Section 8(f). Regardless, employer is liable for the full number of weeks exceeding the weeks necessary to account for the benefits paid for the 16 percent pre-existing disability. The denial of Section 8(f) relief on the award of benefits for claimant's knee injury therefore is affirmed.

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge