



BRB No. 17-0062

MICHAEL BEVERLY)	
)	
Claimant)	
)	
v.)	
)	
VIRGINIA INTERNATIONAL)	
TERMINALS, LLC)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: <u>May 31, 2018</u>
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	ORDER on
Respondent)	RECONSIDERATION

The Director, Office of Workers' Compensation Programs (the Director), has filed a timely motion for reconsideration of the Board's decision in this case, *Beverly v. Virginia International Terminals, LLC*, BRB No. 17-0062 (Nov. 27, 2017) (Boggs, J., dissenting in part). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer did not respond to the motion for reconsideration.

We will briefly reiterate the facts. In July 2001, claimant suffered a left torn rotator cuff at work, for which he underwent surgery. He was assigned a 25 percent impairment rating for his left upper extremity and permanent work restrictions. EX 1 at 7-9. In 2003 and 2006, claimant was diagnosed with moderate to severe carpal tunnel syndrome. Dr. Wardell diagnosed claimant as having a rotator cuff tear in his right shoulder in August

2004 and recommended surgery which claimant decided to postpone so he could continue to work. EX 2 at 6-7.

On August 1, 2011, claimant fell at work and suffered a lumbosacral spine sprain, a right buttock contusion, and a medial meniscus tear of his right knee. EX 2 at 4-5. Claimant 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 knee injury. EX 1 at 16.

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 injury. The administrative law judge concluded that claimant is permanently totally disabled. Decision and Order at 13. Employer filed a claim for Section 8(f) relief, contending claimant had manifest, pre-existing permanent partial disabilities because of his carpal tunnel syndrome and his shoulder injuries that combined with the August 1, 2011 knee injury to render him permanently totally disabled.

With respect to employer's claim for Section 8(f) relief, the administrative law judge rejected employer's contention that the Director conceded the pre-existing, permanent partial disability element with regard to claimant's carpal tunnel syndrome and right shoulder injury. The administrative law judge also found that the evidence does not support a conclusion that claimant's right shoulder injury and bilateral carpal tunnel syndrome were "pre-existing disabilities," but that only claimant's left shoulder impairment constitutes a pre-existing permanent partial disability that was manifest to employer. The administrative law judge found that claimant's right knee, right shoulder, and bilateral carpal tunnel syndrome all were the "subsequent work-related injury," and that employer did not establish that claimant's permanent total disability is not due solely to these injuries. Decision and Order at 15. Accordingly, the administrative law judge denied employer's claim for Section 8(f) relief.

On appeal, the Board concluded that the administrative law judge rationally found that the Director had not conceded the existence of pre-existing disabilities. *Beverly*, slip op. at 5. However, the Board vacated the finding that the pre-existing permanent partial disability element was not met and remanded the case because the administrative law judge did not apply the correct legal standard. Specifically, he did not address whether claimant's carpal tunnel syndrome or his right shoulder injury was a "serious, lasting physical problem" such that a cautious employer would have been motivated to discharge the employee. *Id.* at 6. With respect to the contribution element, the Board also vacated the administrative law judge's finding that the carpal tunnel syndrome, right shoulder injury,

and knee injury together comprised the “subsequent injury” and remanded for him to further address the evidence relevant to that issue. *Id.* at 8.

In her motion for reconsideration, the Director seeks clarification of the Board’s decision and the instructions for the administrative law judge on remand on the contribution issue.

In order for an employer to qualify for Section 8(f) relief in a case where claimant is permanently totally disabled, an employer must establish that: (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 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).

The Director challenges the Board’s statement that “the knee injury was unquestionably the last in chronological time,” and that

[i]t would be possible to conclude from the evidence that claimant’s right knee injury alone is the subsequent injury because it occurred in a separate work incident that had no connection to the work incident giving rise to the claim for the right shoulder and carpal tunnel syndrome.

Beverly, slip op. at 7. To the extent these statements may be interpreted as a finding that only the knee injury was the “subsequent injury” for purposes of Section 8(f) relief, we grant the Director’s motion for reconsideration on this issue. We clarify that these statements merely mean that the incident in which claimant injured his knee was the last in chronological time because claimant worked until that incident, while the initial reports of injury regarding his shoulder and carpal tunnel syndrome occurred at an earlier date. These are facts for the administrative law judge to consider on remand in determining whether all these conditions constitute a “subsequent injury.” We reach no conclusion as to whether claimant’s carpal tunnel syndrome and right shoulder injury are “pre-existing disabilities” or also could be deemed the “subsequent injury” for purposes of Section 8(f), and we direct the administrative law judge on remand to consider the question in light of all relevant evidence.¹

¹ The Board’s decision noted that claimant filed separate claims on different dates for his injuries. *Beverly*, slip op. at 7.

The Director also requests that the Board state that employer cannot establish the contribution element for Section 8(f) relief unless the knee injury alone is deemed to be the “subsequent injury.” This we decline to do. The administrative law judge is to address on remand the contribution element in light of his findings regarding the “subsequent injury.” *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

Accordingly, the Director’s motion for reconsideration is granted in part and denied in part. The Board’s Decision and Order is clarified as stated herein, but is otherwise affirmed. The case is remanded for further proceedings consistent with this Order and the prior Decision and Order.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge