

RICHARD A. SMITH	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lynne M. Ferris (Knight, Dudley, Clarke & Dolph, P.L.C.), Norfolk, Virginia, for self-insured employer.

Laura Stomski (J. Davitt McAteer, 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (94-LHC-3064) of Administrative Law Judge Richard K. Malamphy 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).

Claimant initially sustained work-related injuries during the course of his employment in 1975, 1977 or 1978, and 1988. On November 14, 1991, claimant sustained a fourth work-related injury when he was hit by a truck. The parties agree that claimant is now permanently totally disabled. Thus, before the administrative law judge, the only issue presented for adjudication was whether employer is entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In his Decision and Order, the administrative law judge awarded claimant permanent total disability compensation as of June 24, 1992, and determined that employer was entitled to relief from the Special Fund commencing 104 weeks from that date.

On appeal, the Director challenges the administrative law judge's award of Section 8(f) relief to claimant, specifically contending that the administrative law judge erred in determining that employer established the contribution element necessary for such relief to be granted. Employer responds, urging affirmance.

Section 8(f) shifts 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 totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his permanent total disability is not due solely to the subsequent work injury.<sup>1</sup> See 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *John T. Clark & Son of Maryland v. Benefits Review Board*, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980). Thus, where an employee is permanently totally disabled, an employer must demonstrate that the total disability is caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. See *Dominey v. Arco Oil & Gas Co.*, BRBS , BRB No. 94-2471 (August 20, 1996).

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<sup>1</sup>Before the administrative law judge, the Director did not dispute that claimant has a manifest pre-existing permanent partial disability, see Decision and Order at 6; employer has thus satisfied the first two elements necessary for Section 8(f) relief.

After careful review of the record, we hold that the decision of the administrative law judge is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). In addressing the contribution element of Section 8(f), the administrative law judge found that employer, through the statements of Dr. Nichols and claimant's medical records, had established that claimant's ultimate disability is not due solely to his most recent injury. In this regard, Dr. Slone, claimant's treating physician, stated

[i]t is my opinion that [claimant] had an existing spinal condition before the injury of November 14, 1991. The injury of November 14, 1991 combined with the pre-existing spinal condition caused [claimant] to become disabled. I do not think the injury of November 14, 1991 by itself would have rendered [claimant] disabled."

EX 1. Dr. Magness opined that claimant sustained a 5 percent partial impairment of the whole man as a result of the 1991 accident and that his present state of disability is materially and substantially greater as a result of his accidents. EX 4. Lastly, Dr. Nichols opined not only that claimant's prior back injuries weakened his low back and pre-disposed him to the injury in 1991, but that the accumulation of minor injuries sustained over the years culminated in a more serious injury in 1991. EX 5. The administrative law judge's decision to rely upon this testimony is within his discretion as the trier-of-fact. *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). The administrative law judge properly recognized that employer must prove that claimant's ultimate disability is not due solely to his last injury. As the credited evidence supports his finding that employer met this burden. The administrative law judge's finding that the contribution element of Section 8(f) is met and must be affirmed.<sup>2</sup> See *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Dominey*, slip op. at 5.

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<sup>2</sup>We note that the Director's reliance on *Newport News Shipbuilding and Dry Dock v. Roughton*, No. 90-2157 (April 30, 1991, 4th Cir. 1991) (unpublished), is misplaced, since that case involves the contribution element where the employee is permanently partially disabled.

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge