No. 16-70549

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONES STEVEDORING COMPANY,

Petitioner

v.

STEVEN POPOVICH

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor

MAIA S. FISHER
Acting Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

BARRY H. JOYNER
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

TABLE OF CONTENTS

Page:

TABLE OF CONTENTS (cont'd)

Page:

TABLE OF AUTHORITIES

Cases **Page:**

TABLE OF AUTHORITIES (cont'd)

Cases: **Page:**

TABLE OF AUTHORITIES (cont'd)

Statutes: **Page:**

Regulations:

TABLE OF AUTHORITIES (cont'd)

Other: **Page:**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-70549

JONES STEVEDORING COMPANY,

Petitioner

v.

STEVEN POPOVICH

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

---

BRIEF FOR THE FEDERAL RESPONDENT

This case involves Jones Stevedoring Company's request for relief from compensation liability under Section 8(f) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 908(f). A United States Department of Labor (DOL) administrative law judge (ALJ) denied Jones Stevedoring's request for relief from its liability on Steven Popovich's LHWCA compensation claim because Mr. Popovich's permanent total disability was solely due to the injury he sustained while working

for Jones.[1] The Benefits Review Board affirmed the ALJ's decision, and Jones Stevedoring now petitions this Court to review the Board's decision. The Court should affirm the denial of relief.

STATEMENT OF JURISDICTION

The ALJ had jurisdiction under the LHWCA to resolve "all questions in respect of [Mr. Popovich's] claim," including Jones Stevedoring's request for relief under Section 8(f). *See* 33 U.S.C. § 919 (a), (d). The ALJ issued his decision on January 6, 2015, and it was filed by the DOL district director on January 12, 2015. *See* 33 U.S.C. § 919(e); 20 C.F.R. § 702.349(a). Jones Stevedoring timely appealed the ALJ's decision to the Board on February 10, 2015. *See* 33 U.S.C. § 921(a) (thirty-day period to appeal ALJ decision after filing by district director). The Board had jurisdiction to review the ALJ's decision under 33 U.S.C. § 921(b)(3). The Board issued its decision on January 14, 2016. Because it affirmed both the award of compensation and the denial of Section 8(f) relief, the

[1] The ALJ found that Mr. Popovich is entitled to compensation for permanent total disability due to a shoulder injury suffered while in Jones Stevedoring's employ. *See* 33 U.S.C. § 908(a). Mr. Popovich's entitlement to compensation is not at issue in this appeal.

Board's decision was a final order for purposes of 33 U.S.C. § 921(c).

Jones Stevedoring timely petitioned this Court for review of the Board's decision on February 26, 2016. *See id.* (sixty-day period to seek review of Board decision). Mr. Popovich's injury occurred in Oregon, within the Court's territorial jurisdiction. Thus, the Court has both appellate and subject matter jurisdiction over Jones Stevedoring's petition for review under Section 921(c).

STATEMENT OF THE ISSUE

Under the LHWCA, where an employee is permanently totally disabled after a work injury, his employer can obtain relief from its compensation liability under Section 8(f) only where it affirmatively proves that i) the employee had a pre-existing condition before his work injury; ii) the pre-existing condition was "manifest" (actually known to the employer or discoverable in the employee's medical records); and iii) the manifest pre-existing condition necessarily contributed to the employee's total disability—*i.e.*, his resulting disability was not due solely to his work injury. Here, Jones Stevedoring produced no evidence that any of Mr. Popovich's manifest pre-existing medical conditions contributed to his

permanent total disability after his shoulder injury. Did the ALJ therefore correctly deny Jones Stevedoring's request for 8(f) relief?

STATEMENT OF THE CASE

A. Statutory Background

The LHWCA, like most workers' compensation statutes, contains a "second injury" provision—Section 8(f), 33 U.S.C. § 908(f). This provision was enacted to overcome any potential incentive for employers to discriminate against handicapped employees that might result from the LHWCA's "aggravation rule." *Marine Power & Equipment v. Dep't of Labor*, 203 F.3d 664, 667-68 (9th Cir. 2000). Under that rule, if an employment injury aggravates, accelerates, exacerbates, contributes to, or combines with, a previous infirmity, disease or underlying condition, the employer is liable for compensation for the employee's entire resulting disability. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 650 (9th Cir. 2010).

Section 8(f) eases the burden placed on employers under the aggravation rule—and thus provides them an incentive to hire or retain previously injured workers—by relieving them of a portion of their compensation liability when an employee with a pre-existing

disability suffers a second, work-related injury. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 203-04 (1949); *Marine Power*, 203 F.3d at 668. It does so by limiting the employer's liability to pay compensation to a certain duration, with any remaining payments to the injured employee made by the Special Fund established under LHWCA Section 44, 33 U.S.C. § 944, rather than by the employer.[2]

Where, as with Mr. Popovich's shoulder injury, an employee obtains compensation for a "non-scheduled" injury,[3] Section 8(f) provides that:

> [i]n any case in which an employee having an existing permanent partial disability suffers injury, the employer

---

[2] The Special Fund is administered by the Secretary of Labor, 33 U.S.C. § 944(a), who has delegated that responsibility to the Director, Office of Workers' Compensation Programs. *See* Secretary's Order 10-2009, 74 Fed. Reg. 78834 (Nov. 13, 2009); 20 C.F.R. § 701.201.

[3] "Scheduled" injuries are injuries to the body parts listed in 33 U.S.C. § 908(c)(1)-(20). All other injuries are considered non-scheduled. 33 U.S.C. § 908(c)(21). A shoulder injury is a non-scheduled injury. *See id.*; *Keenan v. Director for the Ben. Rev. Bd.*, 392 F.3d 1041, 1045 (9th Cir. 2004); *Grimes v. Exxon,* 14 BRBS (MB) 573, 576 (BRB 1981).

> shall provide compensation for such disability as is found to be attributable to that injury . . . . In all other cases of total permanent disability . . . , found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall [pay compensation] for one hundred and four weeks only.

33 U.S.C. § 908(f)(1). After the employer's payment of compensation for those 104 weeks, the Special Fund pays any additional permanent disability compensation due to the injured employee. 33 U.S.C. § 908(f)(2)(A).

Relief, however, does not automatically flow from the existence of a prior injury. To obtain relief under Section 8(f) in permanent total disability cases, the employer must prove: "1) that the employee had an existing permanent partial disability[4] prior to the employment injury; (2) that the disability was manifest to the

---

[4] Consistent with the goal of preventing employers from firing or refusing to hire previously injured workers, a pre-existing "permanent partial disability" for purposes of Section 8(f) includes conditions that, while not necessarily compensable, "would have motivated a cautious employer to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145 (9th Cir. 1991) (quoting *C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 513 (D.C. Cir.1977)).

employer prior to the employment injury;[5] and (3) that the current disability *is not due solely to the most recent injury.*"[6] *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1352 (9th Cir. 1993) (internal quotation and citation omitted) (emphasis added). It is the final element (commonly referred to as contribution) that is primarily at issue in this case, although the manifest element is also implicated.

B. Statement of the Facts

1. Mr. Popovich's work injury and the extent of his disability thereafter.

The basic facts of Mr. Popovich's work injury, his course of treatment, and his ultimate extent of disability are now uncontradicted. He was employed by Jones Stevedoring as a

---

[5] A pre-existing condition is considered "manifest" if an employer had actual knowledge of the condition, or the condition was "readily discoverable from the employee's medical record." *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 1111 (9th Cir. 1991) (citation omitted).

[6] There is an additional requirement for relief in cases where the employee ultimately obtains permanent *partial* disability compensation. In those situations, the employer must also prove that the employee's resulting disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1); *see Marine Power*, 203 F.3d at 668.

"walking boss" or foreman, responsible for overseeing the unloading of ships. Petitioner's Excerpts of Record (PER) at 12; Hearing Transcript (HT)[7] at 318. His duties required him to climb ladders, climb through hatches, crawl, perform overhead work, and lift heavy objects. HT at 245-256.

On May 21, 2010, Mr. Popovich was in Portland, Oregon, overseeing the unloading of a ship carrying automobiles. PER at 13; HT at 236. He slipped as he was climbing a gangway to board the ship. PER at 13; HT at 237. He grabbed a stanchion to arrest his fall, but wrenched his right arm in the process. PER at 13; Employer's Exhibit (EX) 59 at 60-61.[8] He immediately felt pain in

---

[7] This case was heard before the ALJ on September 19-20, 2012, and December 6, 2012. The transcript is in three volumes, but the pages for all three are numbered sequentially.

[8] Exhibit numbers refer to the evidence submitted before the ALJ. *See* HT at 6-8. When Jones Stevedoring submitted its exhibits, it numbered the pages of all of its exhibits in one sequence (as if they were a single exhibit). The ALJ cited Jones Stevedoring's exhibits by exhibit number, but used the company's sequential numbering system to cite particular pages. For clarity, however, we will cite to the pages of each exhibit by that exhibit's internal numbering. For example, the first page of EX 61 would be cited as "EX 61 at 1," rather than "EX 61 at 230."

his right shoulder.[9] PER at 13; EX 59 at 62. He has not worked since that date. PER at 13; HT at 238; EX 59 at 62. After the injury, he sought compensation for permanent total disability. Jones Stevedoring, in addition to opposing Mr. Popovich's claim, requested partial relief from any potential compensation liability under Section 8(f).

Dr. Scott Jacobson, an orthopedic surgeon specializing in shoulder conditions, treated Mr. Popovich for the injury to his right shoulder. PER at 13; EX 61 at 6-7; Claimant's Exhibit (CX) 8. Dr. Jacobson initially diagnosed a likely rupture of the biceps tendon, along with inflammation of the shoulder joint. PER at 13; EX 61 at 7; CX 3. The doctor also noted evidence of mild degenerative changes in the shoulder. PER at 14; EX 61 at 8.

After conservative treatment failed to alleviate Mr. Popovich's pain, Dr. Jacobson performed arthroscopic surgery on the shoulder

---

[9] He also felt pain in his right elbow. PER at 13; *see* EX 44. A physician later determined that he had suffered a ninety percent tear of his triceps tendon as a result of his May 21, 2010, fall. EX 46. The triceps injury ultimately resolved with no lasting impairment, EX 48; *see also* EX 63 at 49, and is not at issue in the present appeal.

on September 30, 2010, to attempt to repair the damage from the fall. PER at 14; EX 61 at 7-8, 10. Post-operatively, the doctor diagnosed significant inflammation in the shoulder joint, some degenerative arthritic changes, a ruptured biceps tendon, and tears in the labrum and rotator cuff. PER at 14; EX 61 at 19-20. He attributed all of these conditions, except the degenerative changes, to the May 21, 2010, injury. EX 61 at 21.

After a period of recuperation, Dr. Jacobson found that Mr. Popovich reached the point of maximum medical improvement on February 7, 2011.[10] PER at 14; EX 55, 56, 61 at 6. At that time, he released Mr. Popovich to perform "medium" level work, but restricted him to lifting no more than fifty pounds to a horizontal (shoulder height) level, and no more than twenty pounds (on an intermittent basis) above shoulder height. PER at 15; EX 55, 56. Dr. Jacobson also restricted Mr. Popovich from climbing shipboard

[10] "Maximum medical improvement" refers to either "the point at which the injury has healed to the full extent possible and normal and natural healing is no longer likely," or the point at which "the condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration." *SSA Terminals v. Carrion*, 821 F.3d 1168, 1172 (9th Cir. 2016) (internal quotations and citations omitted).

ladders. *Id.* As a result of these restrictions, and in light of the exertional requirements of Mr. Popovich's employment, Dr. Jacobson concluded that Mr. Popovich was no longer able to perform his previous longshore work.[11] PER at 15; EX 61 at 64-65.

[11] Jones Stevedoring had Mr. Popovich examined by Dr. Marilyn Yodlowski, a board-certified orthopedic surgeon on May 7, 2012. PER at 17, 67; EX 63. She agreed with the specific exertional restrictions placed on him by Dr. Jacobson, but attributed those restrictions solely to arthritis in his shoulder—a condition pre-dating his shoulder injury. PER at 18-19, 78-80. Moreover, in her view, these limitations would not prevent Mr. Popovich from performing the work of a walking boss because, other than a slight reduction in range of motion, he had returned to his "preinjury condition." PER at 18-19, 59, 78, 81. As the ALJ put it, "Dr. Yodlowski believes that [Mr. Popovich] lost no functional ability from the [May 21, 2010] shoulder injury at work." PER at 19; *see* PER at 60 (Yodlowski testifying at hearing that "[i]f anything, he should be improved after the surgery . . . . if anything, his shoulder function should be better after that surgery"). The ALJ ultimately rejected Dr. Yodlowski's view, and credited Dr. Jacobson's conclusion that Mr. Popovich could no longer perform the work of a walking boss after the May 21, 2010, injury. PER at 21. Jones Stevedoring no longer challenges the ALJ's crediting of Dr. Jacobson's opinion (and his rejection of Dr. Yodlowski's) on this point.

2. Mr. Popovich's pre-existing conditions at the time of his work injury.

As noted in the preceding section, Dr. Jacobson noted degenerative changes in Mr. Popovich's shoulder. PER at 14; EX 61 at 8. This diagnosis, however, was not made until after Mr. Popovich's May 21, 2010 injury. *Id.*; *see also* CX 3.. There is no evidence that any physician found or diagnosed degenerative changes in Mr. Popovich's shoulder prior to that date.[12]

Mr. Popovich's medical records pre-dating the May 21, 2010, injury reflect that he had the following pre-existing conditions (*see generally* PER at 28-29, 43-45):

- various knee injuries beginning in 1991, ultimately resulting in total knee replacements in 2000 (right knee) and 2004 (left).[13] EX 1-5, 9, 16-20, 24.

---

[12] This distinction between pre-injury and post-injury medical records is important because conditions that are not reflected in a worker's pre-injury records (or actually known to the employer) are not "manifest" and therefore cannot be the basis of Section 8(f) relief. *See infra* at 22-24.

[13] In 2002, Jones Stevedoring agreed to pay Mr. Popovich compensation on account of his first knee replacement. EX 21. The record does not reflect any payment after the second procedure.

•a ruptured biceps tendon in the right arm in 1993 that was surgically repaired.[14] EX 8.

•a heart condition (first noted in 1998) that resulted in cardiac catheterizations in 2007 and 2008. EX 14, 28-30, 35-36.

•carpal tunnel syndrome, addressed by surgery in 2007. EX 32.

•foot pain beginning in 2008, and resulting in surgery to fuse a broken bone in 2009. EX 33-34, 38-40. It was ultimately determined that the fusion was unsuccessful. EX 47.

3. The alleged link between Mr. Popovich's pre-existing conditions and his post-work-injury permanent total disability.

The only evidence directly addressing the effects of Mr. Popovich's pre-existing conditions on his post-May 2010 status was Dr. Jacobson's deposition testimony. EX 61. When questioned

[14] In 1995, Jones Stevedoring agreed to pay Mr. Popovich compensation for the biceps rupture. EX 72 at 14. That same year, a physician diagnosed a five percent residual impairment of Mr. Popovich's right arm as a result of the biceps rupture. EX 72 at 43.

whether there were other conditions besides his shoulder condition "that would contribute to his inability to do the work on the vessels," the doctor responded: "[n]ot that I'm specifically aware of." EX 61 at 52. Later, when specifically asked whether he was aware of Mr. Popovich's two knee replacements and foot injury and, if so, whether those injuries would have affected his conclusions, he answered that knowledge of those conditions would not have affected his conclusions. EX 61 at 56-57. He explained that Mr. Popovich "could have been the healthiest person in the world, but with his shoulder function that he had, I wouldn't want him doing that type of activity." EX 61 at 57. He concluded that:

> [Mr. Popovich's] disability . . . with regard to his shoulder is a function, a combination of the acute injury that he had to his labrum and his rotator cuff and his biceps tendon and his underlying degenerative arthritis[15]. . . . [H]e had an asymptomatic shoulder with clear degenerative changes prior to his injury. He sustained clear injury to structures in his shoulder and after such injury was symptomatic. I think the primary contributing cause of his need for treatment for his shoulder and his ongoing disability was the injury.

---

15 As noted above, there is no evidence that the arthritis was ever diagnosed prior to the May 21, 2010, injury.

EX 61 at 57-58.[16]

C. Procedural History and Prior Decisions

1. The ALJ's Decision.

After informal proceedings before the district director failed to resolve either Mr. Popovich's compensation claim or Jones Stevedoring's request for 8(f) relief, the case was referred to the ALJ. He found that Mr. Popovich was entitled to permanent total disability compensation.[17] PER at 15-42. He found that Mr.

---

[16] Dr. Yodlowski's opinion, EX 63; HT at 102-66; PER at 48-84, is not relevant to the issue of whether Mr. Popovich's manifest pre-existing conditions contributed to his permanent total disability. In her view, the work restrictions that Dr. Jacobson placed on Mr. Popovich were solely the result of his non-manifest shoulder arthritis (which existed before the May 2010, injury), and did not prevent from him performing his usual longshore work, either before or after the May 2010 injury. PER at 78-81. As noted above, the ALJ discounted Dr. Yodlowski's opinion that arthritis was the sole cause of the (in her view) non-disabling limitations that Mr. Popovich currently experiences, and Jones Stevedoring does not challenge that determination.

[17] If an employee proves that his work-related injury "renders him unable to return to prior employment," and his employer then fails to establish the availability of "suitable alternative employment"—jobs in the area of the employee's residence that he would be capable of performing given his physical and vocational conditions and could obtain with diligent effort—then he is entitled to permanent total disability compensation. *General Constr. Co. v. Castro*, 401 F.3d 963, 969-70 (9th Cir. 2005) (citation omitted); *see* (cont'd . . .)

Popovich was unable to return to work as a foreman or walking boss because of his shoulder injury. PER at 15-36. In so doing, the ALJ credited Dr. Jacobson's opinion and rejected Dr. Yodlowski's contrary opinion. PER at 20-21. The ALJ further found that Jones Stevedoring failed to establish the existence of suitable alternative employment and, thus awarded permanent total disability compensation. PER at 36-42.

Turning to Section 8(f), the ALJ denied relief to Jones Stevedoring. PER at 42-45. While Mr. Popovich had several pre-existing conditions, the ALJ found that the company failed to prove that any of these conditions were both manifest and a necessary contributor to Popovich's total disability. Specifically, he found that the arthritis in Mr. Popovich's shoulder was not manifest to Jones Stevedoring prior to his May 2010 injury, and thus could not be the basis for relief. PER at 45.

With respect to conditions that were manifest to Jones Stevedoring prior to the work injury, the ALJ found that no

---

(. . . cont'd)
33 U.S.C. § 908(a).

physician opined that the 1993 biceps injury contributed to Mr. Popovich's current disability, despite the "common sense" suggestion that it could have. PER at 44. The ALJ also noted the evidence of other pre-existing conditions, including Mr. Popovich's knee replacements, but found that the employer failed to prove that he "would not have been [permanently totally disabled] absent those [pre-existing] disabilities." PER at 45. He explained that he found Mr. Popovich permanently and totally disabled because his shoulder injury resulted in restrictions that prevented him from returning to his usual work and or from performing other jobs that might be available.[18] *Id.* While noting that Mr. Popovich's pre-existing conditions "supported" this conclusion, the ALJ specifically found that it did not "depend upon his earlier disabilities," but was

[18] The ALJ described his findings—that Mr. Popovich could not return to the "active" list (the roster of employees cleared to perform the job of a walking boss) because of his work restrictions and that such restrictions precluded him from physically performing his usual longshore work or alternative employment—as "alternative and independent" bases for finding total disability. PER at 45. In our view, they are not alternatives, but rather two sides of the same coin. Mr. Popovich's restrictions prevent him from performing work, and because he cannot perform such work, he cannot return to the "active" roster.

"based on his May 21, 2010 shoulder injury." *Id.*

Jones Stevedoring then appealed both the ALJ's compensation award and his denial of Section 8(f) relief to the Board.

2. The Board's Decision.

The Board affirmed the ALJ's decision in all respects. PER at 1. After rejecting Jones Stevedoring's challenges to the ALJ's permanent total disability findings, PER at 3-6, the Board also upheld his denial of 8(f) relief. PER at 6-8. Noting that Jones Stevedoring cited no evidence showing that Mr. Popovich's work injury was not the sole cause of his disability, the Board affirmed the ALJ's denial of relief because "the credited medical evidence establishes that [Mr. Popovich's] work restrictions and inability to return to his usual work are due to his shoulder injury alone." PER at 7 (footnote and citations omitted). The Board also rejected Jones Stevedoring's "common sense" argument that Mr. Popovich's pre-existing conditions must have contributed to his total disability. PER at 8. The Board premised its holding on appellate court decisions rejecting the theory that relief can be based on a "common sense" assumption that a pre-existing condition contributed to the employee's ultimate disability, and requiring employers to produce

actual evidence of contribution. *Id.* (citing *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990)). Jones Stevedoring then petitioned this Court for review of the 8(f) determination.

SUMMARY OF THE ARGUMENT

The Court should affirm the denial of Section 8(f) relief. Although Mr. Popovich had pre-existing arthritis in his shoulder that contributed to his ultimate disability, this condition was not manifest to Jones Stevedoring before the May 2010 injury and, thus, cannot be the basis for 8(f) relief.

As for the conditions that were manifest to Jones Stevedoring (including prior knee injuries and a biceps rupture), the company failed to produce any evidence that these conditions were necessary contributors to Mr. Popovich's ultimate disability—*i.e.*, the employer did not prove that, *but for* the pre-existing conditions, Mr. Popovich would not be permanently totally disabled. Moreover, the ALJ specifically found that (excluding the non-manifest arthritis) Mr. Popovich's disability was solely due to the work injury to his shoulder. Thus, the ALJ correctly found that Jones Stevedoring failed to meet the contribution requirement for Section 8(f) relief.

Jones Stevedoring's contrary argument lacks merit. In the

absence of any evidence that Mr. Popovich's manifest pre-existing conditions contributed to his disability, the company seizes upon isolated statements by the ALJ that allegedly reach the same conclusion. But the ALJ explicitly repudiated that notion in his analysis of the Section 8(f) issue and his decision, read in its entirety, shows that he found that the shoulder injury alone resulted in Mr. Popovich's permanent total disability. Moreover, Jones Stevedoring's argument relies on the wrong legal standard for evaluating Section 8(f)'s contribution element (that the combination of the pre-existing conditions and the work injury caused greater disability than the work injury alone). Finally, the company relies on a so-called "common sense" theory that simply assumes that Mr. Popovich's pre-existing conditions must have contributed to his total disability. The courts and the Board have correctly rejected this chain of reasoning, which would effectively eliminate the contribution requirement from the test for Section 8(f) relief.

Jones Stevedoring was required to produce evidence—not merely assumptions—that Mr. Popovich's manifest pre-existing conditions were a necessary contributor to his total disability. It failed to do so. The decisions below should be affirmed.

ARGUMENT

A. Standard of Review

Jones Stevedoring's brief implicates both the ALJ's factual findings and questions of law. With respect to factual issues, the Court must accept the ALJ's findings if they are supported by substantial evidence, and may not substitute its views for those of the ALJ. *General Constr.,* 401 F.3d at 965. On questions of law, the Court's review is *de novo. SSA Terminals*, 821 F.3d at 1171. The Director's interpretation of the LHWCA, however, is entitled to deference if it is persuasive and reasonable. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 832 (9th Cir. 2012) (citing *Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944)).

B. The ALJ properly found that Jones Stevedoring failed to show that Mr. Popovich's permanent total disability was not due solely to his work injury and, thus, correctly denied the company's request for relief under Section 8(f).

The ALJ correctly found that Jones Stevedoring is not entitled to relief from its liability under Section 8(f). To obtain relief, Jones Stevedoring must prove that: i) Mr. Popovich had one or more pre-existing conditions; ii) those conditions were manifest to Jones Stevedoring prior to his May 2010 work injury; and iii) the May

2010 injury would not have been totally disabling but for those manifest pre-existing conditions (the "contribution" element). *See E.P. Paup*, 999 F.2d at 1352. Jones Stevedoring did not meet this burden.

Jones Stevedoring's brief on appeal is notably imprecise as to which manifest pre-existing conditions it believes contributed to Mr. Popovich's total disability. This lack of specificity from the petitioner, however, does not foreclose a clear resolution of the case. Jones Stevedoring cannot obtain relief based on *any* of the manifest conditions disclosed in the record. The only pre-existing condition that contributed to Mr. Popovich's ultimate permanent total disability—the arthritis in his shoulder—was not manifest to the company prior to the May 2010 injury. And the company failed to offer *any evidence* that his other pre-existing conditions were necessary contributors to his total disability. The Court should therefore affirm the ALJ's denial of relief.

1. The arthritis in Mr. Popovich's shoulder was not manifest to Jones Stevedoring prior to the work injury.

There is no question that Mr. Popovich had degenerative arthritis in his right shoulder when he further injured that joint on

May 21, 2010. *See* EX 61 at 8. Based on Dr. Jacobson's opinion, the ALJ specifically found that "[t]hese [degenerative arthritic changes] no doubt contributed to his current physical limitations."[19] PER at 20. But he also found—and Jones Stevedoring does not challenge—that "there is *no evidence* that these degenerative changes were manifest to the company before the May 21, 2010 injury." PER at 45 (emphasis added); *see Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (issues not raised by petitioner are waived). Where a condition was not known or clear from an employee's medical records before a work-related injury, it cannot be the basis for Section 8(f) relief. *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 1187 (9th Cir. 1989); *see Marine Power*, 203 F.3d at 668; *Bunge Corp.*, 951 F.2d at 1111. Thus, the ALJ correctly determined that Jones Stevedoring cannot obtain relief based on the pre-existing

---

[19] Dr. Yodlowski, Jones Stevedoring's expert, found that these changes were the *sole* cause of Mr. Popovich's post-injury limitations—limitations which, in her view did not prevent Mr. Popovich from returning to his prior longshore employment. PER at 78-81. The ALJ, as we have previously stated, effectively discredited Dr. Yodlowski's opinion.

arthritis in Mr. Popovich's shoulder. PER at 45.

2. Mr. Popovich's other pre-existing conditions did not contribute to his permanent total disability subsequent to his work injury.

Mr. Popovich had a number of other medical conditions that were manifest to Jones Stevedoring prior to his May 2010 shoulder injury, including replacement of both knees, a biceps tendon rupture, a fractured foot (that did not completely heal), heart disease and carpal tunnel syndrome. These are certainly the types of conditions that could justify relief under Section 8(f), *provided that* they were necessary contributors to Mr. Popovich's current total disability. The ALJ, however, correctly found that Jones Stevedoring failed to produce any evidence that Mr. Popovich "would not have been [permanently totally disabled] absent these [pre-existing] disabilities." PER at 45.

To meet the contribution requirement for relief under Section 8(f), Jones Stevedoring cannot simply show that the combination of his work-related shoulder injury and his pre-existing conditions resulted in a greater degree of disability than would have resulted from the shoulder injury alone. *See E.P. Paup*, 999 F.2d at 1353; *FMC Corp.*, 886 F.2d at 1186-87. Rather, it must prove "that the

second injury *alone* did not cause [the] permanent total disability." *E.P. Paup*, 999 F.3d at 1353 (citation omitted) (emphasis in original); *see also John T. Clark & Son of Maryland, Inc., v. Ben. Rev. Bd.*, 621 F.2d 93, 95 n. 2 (4th Cir. 1980) ("Where a subsequent injury and its effects are alone sufficient to cause permanent total disability the mere presence of a pre-existing disability will not warrant contribution from the special fund."). Thus, Jones Stevedoring cannot obtain relief under Section 8(f) unless it affirmatively proves that Mr. Popovich's manifest pre-existing conditions were necessary contributors to his permanent total disability—*i.e.*, that *but for* those pre-existing conditions, Mr. Popovich would not now be totally and permanently disabled.

The ALJ found (and the Board affirmed) that—excluding the non-manifest arthritis—Mr. Popovich's work restrictions and his resulting inability to return to his prior work as a walking boss were due to his May 2010 shoulder injury alone, with no contribution from his other pre-existing conditions that were manifest prior to the injury. PER at 7, 45. This finding is supported by substantial evidence and, thus, it and the ALJ's resulting denial of 8(f) relief should be affirmed. *See Duncan-Harrelson Co. v. Director, OWCP*,

644 F.2d 827, 834 (9th Cir. 1981) (affirming denial of 8(f) relief where ALJ's finding that work injury alone is permanently and totally disabling supported by substantial evidence).

The only medical (or other) evidence addressing whether Mr. Popovich's manifest pre-existing conditions necessarily contributed to his post-injury disability is the opinion of Dr. Jacobson (EX 61). He testified that he was unaware of any other conditions contributing to Mr. Popovich's inability to return to longshore work after the May 2010 injury aside from his shoulder condition. EX 61 at 52. He further stated that his disability-causation opinion would not change on account of Mr. Popovich's two knee replacements and foot injury, since "[he] could have been the healthiest person in the world, but with his shoulder function that he had, I wouldn't want him doing that type of activity." EX 61 at 57. Dr. Jacobson ultimately concluded that Mr. Popovich's permanent total disability "is a function, a combination of the acute injury . . . and his underlying degenerative arthritis. . . ." EX 61 at 57. This testimony plainly supports the ALJ's finding that (again excluding the non-manifest arthritis) Mr. Popovich's permanent total disability is the result of his shoulder injury, with no contribution from his manifest

pre-existing conditions.

Jones Stevedoring produced no evidence to the contrary, and cites none on appeal. *See Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1306 (2d Cir. 1992) ("employer must show, by medical or other evidence, that a claimant's second injury *alone* would not have caused the claimant's total permanent disability") (emphasis in original). Hence, in light of both Jones Stevedoring's failure to adduce evidence supporting its request for relief, and the ALJ's correct reliance on Dr. Jacobson's uncontradicted opinion in finding that Mr. Popovich's disability was due to shoulder injury alone, the Court should affirm the ALJ's denial of Section 8(f) relief. *See E.P. Paup*, 999 F.2d at 1353; *FMC Corp.*, 886 F.2d at 1186-87; *Duncan-Harrelson*, 644 F.2d at 834.

3. Jones Stevedoring's argument to the contrary is without merit.

Jones Stevedoring nonetheless contends that it is entitled to 8(f) relief. Instead of evidence, however, the company bases its argument for relief on statements made by the ALJ regarding whether Mr. Popovich was more likely to fall on account of his pre-existing conditions. In essence, Jones Stevedoring asserts that the

ALJ found that Mr. Popovich's "constellation" of manifest pre-existing conditions made it more likely that he would fall in the future if he returned to work. Pet. Br. at 9. Because of this increased likelihood of falling, Jones Stevedoring contends that the ALJ necessarily determined that "[t]he pre-existing disabilities and the right shoulder injury combined to produce an increased risk of future injury," and that Mr. Popovich's disability "was thus 'materially and substantially greater' because of his multitude of pre-existing disabilities." Pet. Br. at 9, 10. This argument fails on both factual and legal grounds.

Jones Stevedoring's argument lacks a factual basis. The ALJ's statements (PER at 24-25) discussing the likelihood of Mr. Popovich falling are not evidence. *Cf. Luccitelli*, 964 F.2d at 1306 (employer must establish entitlement to Section 8(f) relief based on "medical or other evidence"). No physician or other witness testified that, but for an increased propensity to fall on account of his manifest pre-existing conditions, Mr. Popovich would be able to return to work as a walking boss after his shoulder injury.[20]

[20] Jones Stevedoring's repeated citations to the opinion of Dr. (cont'd . . .)

Moreover, the ALJ's Section 8(f) findings make plain that he did not believe that Mr. Popovich's manifest pre-existing conditions were necessary contributors to his permanent total disability. He noted Mr. Popovich's prior biceps rupture, but found that "[n]o evidence has been presented [by Jones Stevedoring] to show that the earlier rupture contributed to [his] current disability." PER at 44. The ALJ also acknowledged that "[t]here is . . . evidence of other prior disabilities," and that "[Mr. Popovich's] other injuries lend support to [the permanent disability finding]." PER at 45. But he specifically concluded that the pre-existing conditions "*were not necessary for that finding.*"[21] *Id.* (emphasis added). Rather, the

---

(. . . cont'd)
Yodlowski are puzzling. She found that Mr. Popovich was able to work as a walking boss after his shoulder injury, and that the physical restrictions he did have were the result of his non-manifest arthritis. PER at 78-81. The ALJ rejected this opinion—a determination (again) that Jones Stevedoring does not challenge. A medical opinion that does not even address the key issue—whether Mr. Popovich's manifest pre-existing conditions were necessary contributors to his total disability—and which was essentially discredited by the factfinder, is plainly insufficient to support a request for relief under Section 8(f).

[21] As the Board noted, the import of the ALJ's discussion—in the context of his findings on the extent of disability—of Mr. Popovich's likelihood of falling is that "although [his] knee condition might (cont'd . . .)

permanent total disability finding is "based upon the May 21, 2010 shoulder injury." *Id.* Jones Stevedoring simply ignores this determination, but it is fatal to the company's argument. Even if the statements that the company cites might (standing alone) appear to support the company's position, the ALJ clarified in his 8(f) discussion that Mr. Popovich's pre-existing conditions were not necessary to his finding of permanent total disability. *See Markus v. Old Ben Coal Co.*, 712 F.2d 322, 327 (7th Cir. 1983) ("we will uphold an [ALJ's] decision of less than ideal clarity if [his] path may reasonably be discerned") (citation omitted).[22] Instead, the ALJ made clear that Mr. Popovich's shoulder injury alone was responsible for his permanent total disability.

(. . . cont'd)
cause him to fall more readily, his inability to support himself in the event of a fall is *due solely to the shoulder condition*." PER at 7, n.9 (emphasis added).

[22] *Markus* was a case under the Black Lung Benefits Act (the BLBA), 30 U.S.C. §§ 901-44. The BLBA is another compensation statute administered by the Director, and it incorporates the adjudicative structure of the LHWCA. *See* 30 U.S.C. § 932(a); *see generally Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 970 (9th Cir. 1993). Thus, case law under the BLBA is persuasive authority regarding the Court's review of an ALJ's findings under the LHWCA.

Jones Stevedoring's argument—that it can obtain relief if the effects of Mr. Popovich's pre-existing conditions combined with the disability from his May 2010 shoulder injury to create a greater degree of disability than would have resulted from the shoulder injury alone (Pet. Br. at 9, 10)—fares no better on the law.[23] The Court has expressly rejected this line of reasoning:

> It is not sufficient if the evidence indicates only that his two injuries create a greater disability than would his [work] injury alone. **If the later injury was enough to disable [him], it is *not relevant* that his preexisting . . . injury made his total disability even greater.**

E.P. Paup, 999 F.2d at 1353 (emphasis added) (citations omitted); *accord Luccitelli*, 964 F.2d at 1305-06 (citations omitted). Thus, even if there were actual evidence indicating that Mr. Popovich had a greater degree of disability from the combination of his pre-existing conditions and his shoulder injury, it would avail Jones

---

[23] Jones Stevedoring's position is exemplified by its inapposite citation of the additional requirement for relief under Section 8(f) in permanent partial disability cases—that the employee's resulting total disability is "materially and substantially greater" on account of the pre-existing conditions than it would have been from the subsequent injury alone. Pet. Br. at 10; *see Marine Power*, 203 F.3d at 668. That standard has no application here, as Mr. Popovich is permanently totally disabled. *See E.P. Paup*, 999 F.2d at 1353.

Stevedoring nothing, given the company's failure to prove that the shoulder injury was not in and of itself totally disabling.

Finally, as the Board's decision indicates, Jones Stevedoring's argument is ultimately a species of the so-called "common sense" argument. PER at 8. Under this line of reasoning, the mere fact of a pre-existing permanent partial disability (especially one affecting the same body part) gives rise to a "common sense" inference that the pre-existing condition must have, in some way, contributed to the employee's total disability, even where there is no evidence to support this inference. While this Court has not directly addressed the "common sense" argument, it has clearly held that an employer must prove contribution in order to obtain relief under Section 8(f). *See E.P. Paup*, 999 F.2d at 1353; *FMC Corp.*, 886 F.2d at 1186-87. Thus, the Court should join the Second and Fifth Circuits in rejecting the "common sense" argument. *See Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 888 (5th Cir. 1997); *Luccitelli*, 964 F.2d at 1306; *Two "R" Drilling*, 894 F.2d at 750.

As the Fifth Circuit explained, "[t]his argument reads the third element of proof [for 8(f) relief], that the current disability not be due solely to the subsequent injury, out of the test altogether."

Louis Dreyfus, 125 F.3d at 888; *accord Luccitelli*, 964 F.2d at 1306. In effect, it collapses the contribution requirement into the requirement that the employer prove the existence of a pre-existing condition. *Two "R" Drilling*, 894 F.2d at 750. The tests for Section 8(f) relief established by this and other courts, however make plain that an employer actually has to prove that a manifest pre-existing condition contributes to an employee's disability. Thus, the Court should join its sister circuits in rejecting the "common sense" argument as a basis for relief under Section 8(f).

In sum, the ALJ correctly found that Jones Stevedoring failed to prove that any of Mr. Popovich's manifest pre-existing conditions were necessary contributors to his permanent total disability, and that his total disability was due to his shoulder condition alone. Thus, he correctly found that Jones Stevedoring failed to establish its entitlement to Section 8(f) relief. *See E.P. Paup*, 999 F.2d at 1353; *FMC Corp.*, 886 F.2d at 1186-87; *Duncan-Harrelson*, 644 F.2d at 827. The Court should affirm that determination.

CONCLUSION

The Director requests that the Court affirm the decisions of the ALJ and the Board denying Jones Stevedoring's request for Section 8(f) relief.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

MAIA S. FISHER
Acting Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6

The Director is not aware of any related cases.

s/Barry H. Joyner
BARRY H. JOYNER

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)
and Ninth Circuit Rule 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief for the Federal Respondent is proportionally spaced, has a typeface of 14 points, and contains 6,811 words.

s/Barry H. Joyner
BARRY H. JOYNER

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2016, I electronically filed the foregoing Brief for the Federal Respondent through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

s/Barry H. Joyner
BARRY H. JOYNER

ADDENDUM

33 U.S.C. § 908(f)(1):

In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. * * * * In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. * * * *.