BRB No. 01-0566

SHEILA HARRIS-SMALLWOOD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: April 3, 2002)
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Permanent Partial Disability and Denying Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Joshua T. Gillelan II (Eugene Scalia, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Permanent Partial Disability and Denying Section 8(f) Relief (98-LHC-1315) 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). 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).

This appeal involves a claim by claimant who alleged she sustained a left shoulder injury, culminating in October 1995, as a result of her employment as a sewing operator at employer's sail loft. Prior to October 1995, claimant sustained work-related injuries to her left hand in 1988, her right leg in 1990, and her right hand and wrist in 1991. An MRI of claimant's left shoulder taken on October 2, 1995, was interpreted as showing degenerative tendonopathy/chronic tendinitis, evidence of impingement, partial tearing of the rotator cuff, and associated degenerative joint disease. Claimant continued working as a sewing operator until June 1998, when she was laid off by employer. She obtained work as a counter person at a dry cleaners in March 1999. Claimant filed her claim for compensation under the Act for her left shoulder condition on May 18, 1999.

In his decision, the administrative law judge found that, assuming notice of the injury was not properly provided, employer had knowledge of claimant's shoulder injury in late 1995, and that there was no resulting prejudice to employer. 33 U.S.C. §912(a), (d). The administrative law judge found that the claim filed in May 1999 was timely because claimant filed within one year after she was laid off by employer in June 1998, when the administrative law judge found that claimant became aware that her shoulder impairment could affect her wage-earning capacity. 33 U.S.C. §913(a). The administrative law judge found that claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking her shoulder condition to her employment, that employer proffered substantial evidence to rebut the presumption, and that, based on the record as a whole, claimant sustained a work-related shoulder injury. The administrative law judge found claimant entitled to compensation for permanent partial disability, 33 U.S.C. §908(c)(21), (h), based on the difference between her wages for employer and the wages paid by her dry cleaning job. Finally, the administrative law judge denied employer's request for Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred in finding that the claim is not barred under Section 13, in finding that employer was aware in late 1995 that claimant's shoulder condition may be related to her employment, and, alternatively, in finding that employer was not prejudiced by any failure by claimant to provide timely notice of her injury under Section 12. Employer also asserts that the administrative law judge erred

by finding the Section 20(a) presumption invoked, and by concluding that claimant's shoulder condition is related to her employment based on the record as a whole. Finally, employer challenges the administrative law judge's finding that claimant's shoulder condition caused additional permanent disability that prevented her from performing her usual employment, and the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision in all respects, including the denial of Section 8(f) relief.

In the absence of substantial evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the notice of injury and the filing of the claim were timely. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). With regard to Section 12(d), the administrative law judge credited the medical records of claimant's initial treating physician, Dr. Kline, and found that claimant and employer were aware in late 1995 that claimant's shoulder condition was related to her employment.[1] The administrative law judge also found that employer had knowledge of claimant's injury on October 1, 1995, based on employer's statement to that effect in its October 29, 1999, Notice of Controversion. EX 34. Alternatively, the administrative law judge found employer was not prejudiced by claimant's failure to provide formal notice of her injury. With regard to Section 13, the administrative law judge found that claimant was, or should have been, aware of the relationship between her employment, her shoulder condition and her disability no later than June 15, 1998, when she was laid off by employer. Thus, he found that claimant's claim, filed on May 18, 1999, was timely under Section 13(a).

Claimant's failure to give employer timely notice of her injury pursuant to Section 12 of the Act is excused if employer had knowledge of the injury or if employer was not prejudiced by the failure to give proper notice. 33 U.S.C. §912(d)(1), (2). Prejudice under Section 12(d)(2) is established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate the claim in order to determine the nature and extent of the illness or to provide medical services.

[1]Dr. Kline reported on October 30, 1995, that, "I cannot help but feel that a major component of [claimant's] problem is that her new supervisor is not working well with her to determine the activities that are uncomfortable for her and avoid these. I discussed with Dr. Reid at the Shipyard." EX 38 at 44.

A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof. *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233 (1990).

In this case, employer asserts prejudice based on claimant's lack of memory and conflicting testimony as to the identity of her supervisor in October 1995 and the nature of her job duties. Employer's allegation of prejudice based on claimant's alleged lack of memory is insufficient to meet its burden in this case, as the administrative law judge credited employer's evidence that claimant was supervised during 1995 by Douglas Quinn. *See* Decision and Order at 6, 13. Moreover, the conflicting testimony of claimant and Mr. Quinn regarding claimant's job duties during 1995 is insufficient to show prejudice, as employer has failed to show that it was unable to effectively investigate the injury or to provide medical services.[2] *See Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). Consequently, we reject employer's assertions, and we affirm the administrative law judge's determination that employer was not prejudiced due to any failure by claimant to provide timely notice.[3] *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

We next address employer's contention that the claim for benefits was not filed in a timely manner pursuant to Section 13. Employer contends that evidence showing claimant was excused from work for approximately eleven days due to her shoulder condition by Dr. Kline between September 27, 1995, and October 30, 1995, and for two days by Dr. Mein in May 1996, establishes that claimant was aware that her shoulder condition might affect her wage-earning capacity prior to her being laid off by employer in June 1998.

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[2]Mr. Quinn testified that employer maintained employee-generated electronic records of its employees' daily job duties. Mr. Quinn stated that he did not review these records prior to testifying at the hearing nor was he sure that the records remained available. Tr. at 95-96.

[3]Accordingly, we need not address employer's contention that the administrative law judge erred by finding that employer had actual knowledge of claimant's shoulder injury in October 1995. *See* 33 U.S.C. §912(d)(1).

Section 13(a) of the Act provides a claimant with one year after she becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between her traumatic injury and her employment within which she may file a claim for compensation for the injury. 33 U.S.C. §913(a). In *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), the United States Court of Appeals for the District of Columbia Circuit held that the one-year limitations period does not commence to run until the employee reasonably believes that he has "suffered a work-related harm which would probably diminish his capacity to earn his living." *Stancil*, 436 F.2d at 279. Following *Stancil*, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, held that the limitations period in cases of traumatic injury does not commence until the employee knows or should know of the likely impairment of her earning capacity. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *accord Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991).

In this case, the administrative law judge found that claimant was aware that she sustained a work-related injury in October 1995, but she was not aware that the injury could affect her wage-earning capacity until she was laid off by employer on June 15, 1998. The administrative law judge reasoned that there is no evidence that claimant sustained an unpaid loss of time from work between late 1995 and the date of her layoff in June 1998. The administrative law judge therefore found timely the claim filed on May 18, 1999.

We affirm the administrative law judge's determination as it is supported by substantial evidence. Employer's contention establishes only that claimant lost approximately thirteen days of work due to her shoulder condition between September 1995 and June 1998. *See* CX 1 at OO; EXS 38 at 40, 42; 39 at 7-10. Employer does not challenge the administrative law judge's finding that claimant was paid her regular wages on these days when she was absent, and it is clear her absences were temporary as she returned to work. The administrative law judge rationally determined from the absence of evidence of unpaid lost time from work due to claimant's shoulder condition, and claimant's continued employment for employer, that she had no loss in wage-earning capacity until she was laid off by employer in June 1998. *See Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *Gregory*, 25 BRBS 188. Moreover, a period of temporary total disability does not necessarily lead to the conclusion that claimant was aware of the true extent of her injury at that time. *See Parker*, 935 F.2d 20, 24 BRBS 98(CRT). Therefore, as the administrative law judge rationally found that claimant did not become aware of the full extent of her injury until June 1998, the time for filing a claim based on this injury did not begin to run until June 1998. 33 U.S.C. §913(a); *Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *see also Welch v. Pennzoil Co.*, 23 BRBS

395 (1990). Thus, claimant's claim, filed in May 1999, is timely.[4]

We next address employer's arguments relating to the administrative law judge's determination that claimant sustained a work-related left shoulder injury during 1995. Employer contends there is no evidence supporting claimant's assertion that she injured her shoulder as a consequence of cumulative trauma during the course of her employment with employer. Claimant has the burden of proving the existence of a harm and that an accident occurred at work or that working conditions existed which could have caused the harm in order to establish a *prima facie* case. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of her *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge credited medical evidence in 1995 documenting claimant's shoulder complaints and the opinions of Drs. Kline, Mein, and Nichols, finding they related claimant's shoulder condition to her employment, and concluded that claimant established her *prima facie* case, entitling her to the Section 20(a) presumption. Employer asserts that these opinions are not credible because they are based on claimant's account of her work activities during 1995, which employer argues is contradicted by the more credible testimony of Mr. Quinn, who was claimant's supervisor from February 1995 until her layoff in June 1998. Mr. Quinn testified that claimant's job duties under his supervision consisted solely of sewing flushing bags and grinder hoods. Tr. at 88-89, 93. He also testified that flushing bags are made from a light-weight mesh material, a roll of which weighs less than five pounds. Tr. at 89. He stated that grinder hoods are made from light-

[4]We note, moreover, that there is no evidence of record that employer filed a first report of injury pursuant to Section 30(a), 33 U.S.C. §930(a). The time for filing a claim is tolled, pursuant to Section 30(f), 33 U.S.C. §930(f), if employer had knowledge of claimant's injury and did not file a Section 30(a) report. As we affirm the administrative law judge's finding that the claim was timely based on claimant's date of awareness, we need not address the issue of whether the statute of limitations was tolled based on employer's knowledge of claimant's injury.

weight cotton. Tr. at 91. Mr. Quinn testified that claimant was instructed to request help lifting, and that no overhead work is required. Tr. at 93-94. In contrast, claimant testified that she was assigned this lighter work only after she began treatment for her shoulder in November 1995; prior to that time, claimant testified that she worked with heavier materials, and performed lifting and overhead work. *See infra,* at 9.

It is well-established that claimant's theory as to how the injury occurred must go beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191(1990). In order to establish her *prima facie* case, claimant is not required to introduce medical evidence establishing that her employment in fact caused her shoulder condition, but she must show the existence of working conditions that could have caused the harm. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In this case, it is undisputed that claimant suffered a harm, *i.e.*, a left shoulder injury. Moreover, the administrative law judge properly relied on the opinions of Drs. Mein and Nichols that claimant's shoulder condition is related to her employment to find Section 20(a) invoked, as these opinions support claimant's allegation of a work-related shoulder injury.[5] *See Champion*, 690 F.2d 285, 15 BRBS 33(CRT); *see also Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The administrative law judge also rationally accorded little weight to Mr. Quinn's testimony regarding claimant's job duties in the sail loft on the basis that his knowledge appeared limited. Thus, employer's argument that Mr. Quinn's testimony is more credible must be rejected, as the administrative law judge is entitled to evaluate the credibility of witnesses. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the

[5]In his report dated August 31, 1999, Dr. Kline indicated his agreement with Dr. Hamilton that claimant's shoulder condition is not related to her employment. EX 36; *see also* EX 35. Any error in the administrative law judge's reference to Dr. Kline's opinion in finding claimant entitled to the Section 20(a) presumption is harmless, as Drs. Mein and Nichols unequivocally opined that claimant's shoulder condition is related to her employment. CXS 1K, L; 3E. *See generally O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

evidence credited by the administrative law judge is sufficient to entitle claimant to the benefit of the Section 20(a) presumption, we affirm the administrative law judge's finding in this regard. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Employer also contends that the administrative law judge erred in finding, based on the record as a whole, that claimant's shoulder condition is related to her employment. Specifically, employer asserts that the administrative law judge failed to provide a rational basis for crediting the opinion of Dr. Mein over the opinions of Drs. Kline and Hamilton. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Conoco , Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge must then weigh all relevant evidence and determine whether a causal relationship has been established, with claimant bearing the burden of persuasion. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

The administrative law judge found that employer established rebuttal of the presumption based on the opinions of Drs. Kline and Hamilton. Considering the evidence as a whole, the administrative law judge found that Dr. Mein provided the majority of claimant's treatment since 1996 and that his reports are the most credible in view of his extensive records. The administrative law judge specifically relied on the April 20, 1999, statement signed by Dr. Mein in which he agreed, *inter alia*, that the work claimant performed for employer during 1995 contributed to her shoulder condition. CX 1L. The administrative law judge also noted the May 11, 2000, report of Dr. Nichols, in which he opined that claimant's shoulder condition is the result of repetitively lifting heavy loads at employer's sail loft. CX 3E. The administrative law judge thus concluded that claimant's shoulder condition is work-related.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). In this case, the administrative law judge weighed the evidence of record, and provided a rational basis for relying on the opinion of Dr. Mein over those of the other physicians of record. *See Parks*, 32 BRBS 90. Contrary to employer's contention, the administrative law judge was not required to credit Drs. Kline and

Hamilton because they examined claimant contemporaneously with her injury in 1995 in view of Dr. Mein's treatment of claimant's shoulder condition since November 1995. *See generally* *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Meehan Seaway Service, Inc. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108(CRT) (8th Cir. 1993); *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997). Based on Dr. Mein's opinion, therefore, we affirm the administrative law judge's finding that claimant's shoulder condition is related to her employment, as this conclusion is supported by substantial evidence.

Employer next challenges the administrative law judge's compensation award for permanent partial disability. Employer does not contest the administrative law judge's finding that claimant sustained a loss of wage-earning capacity after she was laid off by employer on June 15, 1998. Rather, employer asserts that claimant failed to show that she sustained any physical disability due to her shoulder condition while she was employed with employer, and that, therefore, claimant's economic loss is not related to her shoulder condition. Specifically, employer argues there is no evidence that claimant was unable to perform her pre-injury work sewing hoods and flushing bags. Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must show that she is unable to perform her usual work. *See Harmon v. Sea-Land Service*, 31 BRBS 45 (1997); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In his decision, the administrative law judge noted that Dr. Kline imposed a ten pound lifting restriction in June 1995 due to claimant's pre-existing bilateral carpal tunnel syndrome. The administrative law judge also noted Dr. Mein's statement that Dr. Kline had restricted claimant for one year, beginning September 1995, from lifting over ten pounds, using vibratory tools, working overhead, and pulling cables. The administrative law judge next quoted from Dr. Nichols's evaluation of claimant's shoulder condition in May 2000. Decision and Order at 13-14. Specifically, the administrative law judge quoted, *inter alia*, Dr. Nichols's opinion that claimant is unable to return to her previous employment in the sail loft, and he imposed permanent restrictions of no overhead lifting, no lifting over five pounds with her left arm, and no working with her arm overhead. Finally, the administrative law judge credited employer's August 26, 1996, work restriction form limiting claimant to lifting and carrying up to ten pounds, with no crawling, climbing, or overhead work.

It is within the administrative law judge's authority to evaluate and draw inferences from the medical evidence of record. *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). In this case, the credited evidence shows an increase in claimant's work restrictions by Drs. Kline, Mein, and Nichols following the onset of claimant's shoulder symptomatology in July 1995. CXS 1K, L, FF, LL-NN; 2K-Z; 3; EX 47. Additionally, as noted above, the administrative law judge rejected Mr. Quinn's description of claimant's job duties in his causation findings. In contrast to Mr. Quinn's testimony, claimant testified that her job duties consisted solely of constructing flush bags and grinder hoods sometime after she began receiving treatment for her shoulder condition from Dr. Mein in November 1995. Tr. at 64. Claimant testified that, prior to her shoulder injury, she worked with Facilon, a plastic type material, fiberglass, and canvas. Tr. at 28. Claimant stated that these materials are on rolls weighing about 50 pounds, and that, in lifting and working with these materials, which included overhead work, she would favor her left arm in order to compensate for the permanent work restrictions resulting from her right arm injury in 1991. Tr. at 30-35. We hold that the administrative law judge's finding that claimant's shoulder injury resulted in additional permanent disability is rational and supported by substantial evidence. Thus, we affirm the administrative law judge's award of permanent partial disability benefits for a loss of wage-earning capacity.[6] *See generally* *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

Finally, employer challenges the administrative law judge's denial of Section 8(f) relief. Specifically, employer contends the administrative law judge erred in finding that claimant's pre-existing permanent partial disability did not contribute to claimant's ultimate disability. Employer argues that Drs. Hamilton and Kline attributed none of claimant's current disability to her shoulder condition, thus contending that claimant's pre-existing disability materially and substantially contributed to claimant's current disability. Alternatively, employer argues that Dr. Tornberg's opinion that claimant's pre-existing condition materially and substantially contributes to claimant's current level of disability is sufficient evidence establishing employer's entitlement to Section 8(f) relief.

To avail itself of Section 8(f) relief where an employee suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and is materially and substantially greater than the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding &*

[6]The administrative law judge's finding that claimant's benefits are to be based on claimant's wages at the dry cleaners adjusted to the minimum wage in 1995 is not challenged on appeal.

Dry Dock Co. [Harcum II], 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). The administrative law judge found that claimant's pre-existing left wrist, right leg, and right arm injuries constitute manifest permanent partial disabilities.

The administrative law judge found, however, that employer failed to show that claimant's ultimate permanent partial disability is materially and substantially greater than that which would have resulted from claimant's shoulder injury alone. In order to establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant's partial disability is not due solely to the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has addressed this standard in several cases. In *Harcum I*, 8 F.3d 175, 27 BRBS 116(CRT), the Fourth Circuit held that in order to establish contribution in a permanent partial disability case, employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work injury alone. The court stated that a showing of this kind requires quantification of the level of the impairment that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). Subsequently, in *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), the Fourth Circuit stated that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *Id.; see also Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT).

We affirm the administrative law judge's finding that employer failed to establish that any pre-existing permanent partial disability contributed to claimant's current disability. In this case, the record shows that, prior to the onset of her shoulder symptomatology in July 1995, claimant had work restrictions due to her bilateral carpal tunnel condition of no lifting over ten pounds and no usage of vibratory high torque tools. EX 47 at 8-11. We have affirmed the administrative law judge's findings, in awarding claimant compensation for permanent partial disability, that claimant subsequently received additional work restrictions due to her shoulder condition of no overhead lifting, lifting over five pounds with her left arm, working with her left arm overhead, crawling, climbing, and pulling cables. Accordingly, we reject employer's contention that none of claimant current disability is attributable to her shoulder condition.

Moreover, pursuant to *Carmines*, the opinion of Dr. Tornberg that claimant's ultimate disability is "materially contributed to, and made materially and substantially worsened by

her pre-existing permanent degenerative tendinopathy and chronic tendinitis" is legally insufficient to establish that claimant's pre-existing permanent partial disability contributed to her current disability. EX 46 at 4. Dr. Tornberg's opinion fails to quantify the disability that would have resulted solely from claimant's work-related shoulder condition and its consequent physical restrictions. *See* *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT); *see also* *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000). In the absence of any other evidence of record addressing the contribution of a pre-existing permanent disability to claimant's current permanent partial disability, we hold that the administrative law judge properly concluded that employer failed to establish the contribution element necessary for Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order Granting Permanent Partial Disability and Denying Section 8(f) Relief is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge