

BRB Nos. 08-0619  
and 08-0619A

H.W. )  
 )  
 Claimant )  
 Cross-Petitioner )  
 )  
 v. )  
 )  
 RIO DOLCE PASHA )  
 )  
 and )  
 )  
 STATE COMPENSATION INSURANCE ) DATE ISSUED:  
 FUND ) 03/11/20092009  
 )  
 Employer/Carrier- )  
 Respondents )  
 Cross-Respondents )  
 )  
 MARINE TERMINALS CORPORATION )  
 )  
 and )  
 )  
 SIGNAL MUTUAL INDEMNITY )  
 ASSOCIATION )  
 )  
 Employer/Carrier- )  
 Cross-Respondents )  
 )  
 STEVEDORING SERVICES OF AMERICA )  
 )  
 and )  
 )  
 HOMEPORT INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Cross-Respondents )  
 )  
 MARINE TERMINALS CORPORATION )

and )  
 )  
 MAJESTIC INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Cross-Respondents )  
 )  
 METROPOLITAN STEVEDORE )  
 COMPANY )  
 )  
 Self-Insured Employer )  
 Cross-Respondent )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Petitioner )

DECISION and ORDER

Appeals of the Decision and Order of William Dorsey, Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry & McAdams, LLP), San Pedro, California, for claimant.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for Marine Terminals Corporation and Signal Mutual Indemnity Association.

Alexa A. Socha (Aleccia, Conner & Socha), Long Beach, California, for Stevedoring Services of America and Homeport Insurance Company.

Peter B. Silvain, Jr. (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director) appeals and claimant cross-appeals the Decision and Order (2005-LHC-000861-00865, 02477-02478) of Administrative Law Judge William Dorsey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed claims against various longshore employers for injuries occurring in 1995, 1998, 2003, and 2005. Specifically, claimant slipped while shoveling coal and injured his neck, left shoulder, and back on December 28, 1995, during the course of his employment with Metropolitan Stevedore Company (Metropolitan). Claimant fell out of a moving truck on May 26, 1998, during the course of his employment for Rio Dolce Pasha (RDP); he reported re-injuring his neck, left shoulder, and back, as well as sustaining injuries to his right shoulder, left hip, arms and legs. Claimant alleged that he sustained psychological injuries on August 23 and September 4, 2003, during the course of his employment for Marine Terminal Corporation (MTC/Majestic).<sup>1</sup> Claimant alleged that he aggravated pre-existing incontinence, developed chest pains and a hernia, and injured his neck and back moving a cone basket on September 8, 2003, during the course of his employment for Stevedoring Services of America (SSA). Claimant injured his left shoulder and neck on January 11, 2005, during the course of his employment with MTC (MTC/Signal).<sup>2</sup> On March 5, 2005, claimant injured his left shoulder, neck and back during the course of his employment with MTC/Signal.<sup>3</sup>

In his decision, the administrative law judge found that claimant sustained work-related neck, left shoulder, and lumbar spine injuries and that RDP is the responsible employer under the Act for permanent disability resulting from these injuries. The

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<sup>1</sup>Majestic Insurance Company was on the risk at the date of these injuries.

<sup>2</sup>Signal Mutual Indemnity Association was on the risk for this injury.

<sup>3</sup>In his decision, the administrative law judge declined to consider as evidence of another aggravating injury a March 19, 2007 incident during the course of claimant's employment for SSA. The administrative law judge found that this new injury was not discovered until after the week-long formal hearing and that adding another employer and re-opening the proceedings post hearing would waste judicial resources.

administrative law judge found that claimant's 1998 injury with RDP aggravated his pre-existing orthopedic condition from his 1995 injury with Metropolitan. The administrative law judge found that claimant's injuries in 2005 with MTC/Signal resulted in only a temporary aggravation of claimant's orthopedic condition. The administrative law judge found that claimant reached maximum medical improvement after his May 26, 1998, injury with RDP on August 16, 1999. The administrative law judge found that claimant did not establish that his incontinence was aggravated by his longshore employment with SSA, nor did he sustain work-related hernia, cardiac and psychological injuries.<sup>4</sup>

The administrative law judge accepted the parties' stipulation of an average weekly wage of \$1,338.95 at the time of claimant's 1998 injury, and he found, pursuant to Section 10(c), 33 U.S.C. §910(c), that claimant's average weekly wage with MTC/Signal in 2005 is \$1,332.64. Decision and Order at 45. The administrative law judge found that, while claimant alleged in his pre-trial statements a loss of wage-earning capacity after each of his work injuries, claimant did not pursue a wage-loss claim in his post-trial filings, as, in his post-trial brief, claimant instead requested only a nominal award. *Id.* at 46. The administrative law judge found that claimant has a permanent physical impairment from his orthopedic injuries. However, in the absence of a proven loss in wage-earning capacity the administrative law judge found that claimant is limited to a nominal award of \$1 per week as the medical evidence demonstrates a significant potential that claimant's injuries could cause a future loss of wage-earning capacity. Accordingly, he found claimant entitled to a nominal award of \$1.00 per week continuing from August 16, 1999.<sup>5</sup> Finally, the administrative law judge found RDP entitled to Section 8(f) relief, 33 U.S.C. §908(f), based on claimant's prior neck and left shoulder injury in 1995 with Metropolitan. Decision and Order at 49-50.

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<sup>4</sup>The administrative law judge also found that the hernia claim was untimely.

<sup>5</sup>The administrative law judge held Metropolitan liable for temporary total disability benefits from December 29, 1995 through June 30, 1996, and July 3 through November 2, 1997. The administrative law judge held RDP liable for temporary total disability benefits from May 27 through December 14, 1998, and February 20 through August 12, 1999. The administrative law judge held MTC/Signal liable for temporary total disability benefits from March 6 through April 18, 2005. The administrative law judge also found that claimant is not entitled to compensation from May 25, 2001, to June 6, 2002, while he underwent treatment for prostate cancer, from September 17, 2003, to March 16, 2004, while he was suspended from work for misconduct, and from February 25 to October 20, 2006, due to a non work-related injury claimant sustained. The administrative law judge denied RDP's contention that MTC/Majestic is responsible for some of claimant's medical expenses that had been paid by RDP.

On appeal, the Director challenges the administrative law judge's grant of Section 8(f) relief. BRB No. 08-0619. No responses to this appeal have been filed.<sup>6</sup> Claimant cross-appeals the administrative law judge's nominal award, contending he is entitled to compensation for permanent partial disability based on a loss of wage-earning capacity. BRB No. 08-0619A. RDP has not responded to claimant's appeal. MTC/Signal and SSA respond to claimant's cross-appeal, urging affirmance of the administrative law judge's findings which have not been challenged on appeal.

We first address claimant's contention that the administrative law judge erred in failing to award him permanent partial disability benefits for a loss in wage-earning capacity. Claimant contends the difference between his average weekly wage of \$1,338.95 with RDP and his average weekly wage of \$1,332.64 at the time of his 2005 work injuries with MTC/Signal demonstrates a loss of wage-earning capacity when the effect of inflation is included in the comparative wage calculation.<sup>7</sup> See 33 U.S.C. §908(h); see generally *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9<sup>th</sup> Cir. 2002).

The administrative law judge found that although claimant alleged in his pre-hearing statements a loss of wage-earning capacity after each of his work injuries, in his Proposed Findings of Fact and Conclusions of Law submitted post-hearing at the administrative law judge's request, claimant made no claim for permanent partial disability benefits based on a loss of wage-earning capacity, but instead sought only a nominal award. Decision and Order at 46; see Claimant's Proposed Findings of Fact and Conclusions of Law at 8, 13, 24. Moreover, the administrative law judge found that claimant offered no evidence in support of his pre-hearing wage loss claims other than his assertion that he had a \$950 wage-earning capacity after each work injury; the administrative law judge noted that claimant made this assertion in the pre-hearing statement he filed for each injury.

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<sup>6</sup>In his brief, the Director states that RDP does not oppose his motion for summary reversal. Director's Motion for Summary Reversal at 5.

<sup>7</sup>Claimant also argues that the administrative law judge erred by granting employer Section 8(f) relief since he found claimant entitled to only a nominal award. See discussion, *infra*. We note that claimant does not have standing on appeal to challenge employer's entitlement to Section 8(f) relief. See generally *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988). Claimant does not challenge the administrative law judge's findings regarding his average weekly wage at the time of his 1998 and 2005 work injuries.

We reject claimant's contention of error as the administrative law judge rationally found, based on claimant's post-hearing filing, that claimant was not pursuing a claim for permanent partial disability benefits for an actual loss of wage-earning capacity. *See Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990) (Board declines to address issue relating to temporary total disability as administrative law judge rationally found that claimant did not pursue this claim after the hearing). Accordingly, claimant cannot raise his entitlement to an award based on a loss of wage-earning capacity on appeal.<sup>8</sup> *Id.* As the administrative law judge's nominal award is supported by substantial evidence, it is affirmed. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9<sup>th</sup> Cir. 2004).

The Director moves for summary reversal of the administrative law judge's grant of Section 8(f) relief to RDP. The Director asserts that, pursuant to *Todd Shipyards Corp. v. Director, OWCP [Porras]*, 792 F.2d 1489, 19 BRBS 3(CRT) (9<sup>th</sup> Cir. 1986), RDP is not entitled to Section 8(f) relief on its liability for a nominal award. The administrative law judge found that claimant's manifest pre-existing permanent partial disabilities rendered claimant's current permanent physical impairment materially and substantially greater than it would have been due to the subsequent injury alone. Decision and Order at 49.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. *See also* 33 U.S.C. §944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9<sup>th</sup> Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

In *Porras*, the United States Court of Appeals for Ninth Circuit, in whose jurisdiction this case arises, held that when claimant receives a nominal award, the employer cannot establish that claimant's permanent partial disability is materially and

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<sup>8</sup>Claimant may file for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, to seek compensation for a loss of wage-earning capacity based on a mistake of fact or change of condition. *See Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed. Appx. 333 (4<sup>th</sup> Cir. 2004).

substantially greater than the disability resulting from the second injury alone. *Porras*, 792 F.2d at 1491-92, 19 BRBS at 5(CRT); *see also Peele v Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *cf. Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT) (4<sup>th</sup> Cir. 2001) (an award of \$3.78 week based on actual loss of wage-earning capacity is subject to Section 8(f) relief if the elements are satisfied). Thus, employer is not entitled to Section 8(f) relief in such a case.

*Porras* is controlling authority in this case, and the granting of Section 8(f) relief on a *de minimis* award of \$1 per week exemplifies the basis for the court's holding. The administrative law judge found that claimant's current physical impairment is materially and substantially greater due to the contribution of the pre-existing disabilities, but he did not find, and indeed is unable to do so, that claimant's current *disability* of \$1 per week is greater. Thus, consistent with *Porras*, we grant the Director's motion for summary reversal of the award of Section 8(f) relief.

Accordingly, the administrative law judge's award of Section 8(f) relief is reversed. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge