

BRB No. 92-2490

EUGENE L. MORRIS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MAERSK CONTAINER LINES)	DATE ISSUED:
)	
and)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Lawrence M. Vincent, Towson, Maryland, for claimant.

Suzanne T. Berger (Dirska & Levin), Columbia, Maryland, for employer/ carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-0373) of Administrative Law Judge Aaron Silverman awarding benefits 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 findings of facts and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In the course of his employment on March 31, 1988, claimant sustained an injury to his left eye when an air hose nozzle separated from its connection and struck him. Employer paid compensation for temporary total disability from April 1, 1988 through May 25, 1988, when claimant returned to work. 33 U.S.C. §908(b). Thereafter, claimant filed a claim seeking

compensation for permanent partial disability under the schedule at 33 U.S.C. §908(c)(5),(16), (19).¹

¹Section 8(c)(5) provides benefits for the loss of an eye. Section 8(c)(16) provides compensation for loss of binocular vision, and states that loss of vision of 80 percent or more shall be the same as for loss of the eye. Section 8(c)(19) provides proportional compensation for partial loss or loss of use of any scheduled member.

Dr. Blum stated that claimant has a 78 percent impairment of the left eye. Tr. at 26. Dr. Lapinsky initially stated that claimant has a 40 percent impairment of the left eye, Emp. Ex. 2 at 31, but then stated claimant's impairment is 80 percent. *Id.* at 40. In his decision, the administrative law judge gave less to the weight to the rating of Dr. Lapinsky because the reasons for the change in his opinion are not clear. In crediting the consistent opinion of Dr. Blum, however, the administrative law judge found that he failed to account for claimant's pre-existing eye conditions, which Dr. Lapinsky stated accounted for 75 percent of claimant's impairment. The administrative law judge therefore factored out the 75 percent disability attributed by Dr. Lapinsky to claimant's pre-existing conditions, and concluded that claimant is entitled to benefits for a 19 percent loss of his left eye pursuant to Sections 8(c)(5), (19).² The administrative law judge denied employer's request for relief under Section 8(f) of the Act, 33 U.S.C. §908(f), inasmuch as Section 8(f) is inapplicable to an award of fewer than 104 weeks.

On appeal, claimant contends that the administrative law judge erred in failing to compensate his entire left eye impairment under the aggravation rule. Claimant also contends that the administrative law judge erred in not finding that he has an 80 percent impairment so that, pursuant to Section 8(c)(16), he would be entitled to an award for the loss of an eye pursuant to Section 8(c)(5). *See* n.1, *supra*. Employer responds, urging affirmance, and in the alternative seeks relief under Section 8(f).

An award for loss of vision under the schedule is based on uncorrected vision. *McGregor v. National Steel & Shipbuilding Co.*, 8 BRBS 48 (1978), *aff'd sub nom. National Steel & Shipbuilding Co. v. Director, OWCP*, 703 F.2d 417, 15 BRBS 146 (CRT)(9th Cir. 1983). Compensation can be awarded both for loss of visual acuity, *i.e.*, ability to accurately detect objects at both near and far distances under Section 8(c)(16), and for loss of visual efficiency, *e.g.*, light sensitivity, under Section 8(c)(5). *Banks v. Moses-Ecco Co.*, 8 BRBS 117 (1978).

²The administrative law judge determined the rating of 19 percent by adopting Dr. Blum's rating of 78 percent, and discounting it by the amount Dr. Lapinsky attributed to the prior conditions, 75 percent ($.78 \times .75 = .19$).

We agree with claimant that the administrative law judge erroneously factored out claimant's pre-existing eye conditions in determining the extent of his impairment. Under the aggravation rule, if an employment-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant disability is compensable. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT) (4th Cir. 1982); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). The aggravation rule does not permit apportionment between work-related and non work-related causes merely because the percentage of impairment attributable to each cause may be ascertained from the record. *Fishel*, 694 F.2d at 327, 15 BRBS at 52 (CRT). Consequently, we vacate the administrative law judge's award of benefits for a 19 percent impairment and we remand the case to the administrative law judge for an award of benefits consistent with the aggravation rule.³ If on remand the award is for more than 104 weeks, the administrative law judge should consider employer's entitlement to Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

³On remand, the administrative law judge should consider claimant's contention that he is entitled to be compensated for a 100 percent loss of his left eye inasmuch as there is only a two percentage points difference between the rating of Dr. Lapinsky (80 percent) and Dr. Blum (78 percent). *See* 33 U.S.C. §908(c)(16).