

LAWRENCE KEYS)	
)	
Claimant)	
)	
v.)	
)	
CERES GULF, INCORPORATED)	DATE ISSUED: <u>July 23, 2004</u>
)	
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 Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

W. Chad Stelly (McQuaig & Stelly), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (02-LHC-0492) of Administrative Law Judge Clement J. Kennington 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

Claimant sustained an injury to his left shoulder and neck while working for employer on December 4, 1998, and employer voluntarily paid compensation for periods of temporary total and permanent partial disability. Claimant thereafter sought additional

benefits related to his alleged neck injury. In response, employer filed an application for Section 8(f) relief, 33 U.S.C. §908(f), based on pre-existing permanent partial disabilities, *i.e.*, a 1971 leg injury and diagnosis of spondylolisthesis, and a 1987 eye injury.

In his decision, the administrative law judge found claimant entitled to an award of temporary total disability benefits from January 11, 1999, to January 31, 1999, and from August 2, 1999, until December 22, 1999, an award of permanent total disability benefits from December 23, 1999, until April 16, 2000, and an award of permanent partial disability benefits from April 17, 2000. The administrative law judge denied employer Section 8(f) relief, as he found that claimant's current disability is due solely to his December 4, 1998, workplace injury, and not to any pre-existing impairments.

Employer thereafter appealed, challenging the administrative law judge's findings regarding claimant's post-injury wage-earning capacity and the date of maximum medical improvement, as well as his denial of Section 8(f) relief. Following the submission of its petition for review and supporting brief, employer filed on October 29, 2003, a motion for partial remand for approval of a proposed settlement agreement. The Director, Office of Workers' Compensation Programs (the Director), filed a response to employer's motion for partial remand, asserting that employer's request was prohibited by Section 8(i)(4), 33 U.S.C. §908(i)(4), as the execution and subsequent approval of the settlement agreement would foreclose employer from obtaining relief under Section 8(f). The Director therefore asked that the Board dismiss employer's appeal in light of the anticipated settlement agreement. Employer responded, asserting that it was not seeking reimbursement of any settlement amounts from the Fund but was pursuing Section 8(f) relief only for the period from maximum medical improvement to the date of settlement for which benefits were paid pursuant to the administrative law judge's decision.

The Board, by Order dated January 30, 2004, denied employer's motion for partial remand "as there is no procedural mechanism for bifurcating an appeal in this manner." *Keys v. Ceres Gulf, Inc.*, BRB No. 03-0745 (Jan. 30, 2004) (unpub.). Additionally, the Board dismissed employer's appeal and remanded the case to the district director for consideration of the parties' pending settlement agreement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). The Board stated that employer could seek reinstatement of its appeal following the district director's consideration of the settlement agreement, but that if it did so, "employer must provide specific reasons in its brief as to why the settlement does not affect the Special Fund's liability and violate Section 8(i)(4)." *Id.*

On March 16, 2004, employer sought reinstatement of its appeal, asserting that it should now be allowed to pursue its appeal regarding the administrative law judge's denial of Section 8(f) relief, despite the district director's approval of the settlement agreement, since it is not seeking contribution from the Special Fund for any amounts

paid in the settlement, thereby obviating the applicability of Section 8(i)(4). The Director did not respond to employer's petition for reinstatement. The Board, by Order dated April 13, 2004, granted employer's request and reinstated its appeal. *Keys v. Ceres Gulf, Inc.*, BRB No. 03-0745 (April 13, 2004) (unpub.).

On appeal, employer challenges only the administrative law judge's denial of its request for Section 8(f) relief. The Director has not responded to employer's appeal.

Employer contends that, contrary to the administrative law judge's determination, it has sufficiently established the contribution element for entitlement to Section 8(f) relief. Specifically, employer avers that the testimony of Dr. Laborde and Ms. Favaloro establish that claimant's pre-existing eye, leg, and lower back conditions combined with the work-related injuries sustained on December 4, 1998, to render claimant substantially more disabled than he otherwise would have been by the injuries he sustained in that work accident alone.

Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks where an employee suffers from a manifest, pre-existing, permanent partial disability. 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). In order to establish the contribution element in a case where a claimant is permanently partially disabled, employer must establish that claimant's permanent disability is not due solely to the subsequent work-related injury and is "materially and substantially greater" than that which would have resulted from the subsequent work-related injury alone. 33 U.S.C. §908(f)(1); *see Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997); *Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT).

In his decision, the administrative law judge concluded that claimant's disability is due solely to his December 4, 1998, workplace accident. In reaching this conclusion, the administrative law judge relied on the fact that claimant was able to engage in heavy or very heavy work prior to his workplace injury on December 4, 1998, and that it was only after that event, and specifically, due to the resulting injuries to his left shoulder and neck, that he became restricted to a medium work level and thus became unable to resume his usual employment. The administrative law judge recognized that while Dr. Licciardi opined on February 8, 1973, that claimant should avoid carrying heavy loads, walking on beams, or climbing heights because of claimant's weak ankle, claimant was, over time, able to return to work at full duty without any restrictions, as Dr. Licciardi

predicted, long before the December 4, 1998, work incident. In addition, the administrative law judge found that although Dr. Laborde and Ms. Favaloro testified that claimant's current condition was made materially and substantially worse because of his pre-existing impairment, there is no evidence that claimant suffered any permanent disability as a result of his pre-existing injuries, and that but for claimant's December 4, 1998, workplace injuries, he would have been able to continue in his usual longshore employment. As the administrative law judge's finding that employer did not establish the contribution element for Section 8(f) relief is rational, supported by substantial evidence, and in accordance with law, it is affirmed.¹

Accordingly, the administrative law judge's denial of employer's request for Section 8(f) relief is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

¹In light of our affirmance of the administrative law judge's denial of Section 8(f) relief, we need not reach the issue of whether Section 8(i)(4) likewise precludes employer's entitlement to Section 8(f) relief in this case.