U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 23-0484
and 23-0484A

SOCORRO FIMBRES Claimant-Respondent Cross-Petitioner v. TOTAL TERMINALS INTERNATIONAL, LLC and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	**NOT-PUBLISHED** DATE ISSUED: 04/22/2025 DECISION and ORDER

Appeals of the Order Granting Benefits for Temporary Partial and Permanent Partial Disability Benefits and Denying Request for Section 8(f) Relief of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Patrick Muldoon (The Law Offices of Patrick Muldoon), Wilmington, California, for Claimant.

David L. Doeling (Aleccia & Mitani), Long Beach, California, for Employer and its Carrier.

Amanda Torres (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal, and Claimant cross-appeals,[1] Administrative Law Judge (ALJ) Christopher Larsen's Order Granting Benefits for Temporary Partial and Permanent Partial Disability Benefits and Denying Request for Section 8(f) Relief (2022-LHC-01049, 01050) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The Benefits Review Board must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries while working as crane operator for Employer.[2] On November 23, 2020, when lifting cargo from a ship, his crane "abruptly stopped" and

[1] Claimant filed a notice of cross-appeal "to support and uphold" Administrative Law Judge (ALJ) Christopher Larsen's Order Granting Benefits for Temporary Partial and Permanent Partial Disability Benefits and Denying Request for Section 8(f) Relief. The Benefits Review Board acknowledged Claimant's cross-appeal and assigned the case BRB No. 23-0484A. Subsequently, Claimant filed a "Cross Petition for Review and Brief," in which he "respectively submits" that the ALJ's order "is based on substantial evidence and in accordance with law." Cl's Cross P/R Br. at 1B. The nature of Claimant's submissions to the Board establishes his clear intent to respond to Employer's appeal in support of the ALJ's decision rather than to separately challenge the ALJ's order. We therefore dismiss Claimant's cross-appeal as he has not been "adversely affected or aggrieved" by the ALJ's order, 20 C.F.R. §802.201(a)(1); *see also* 33 U.S.C. §921(b)(3), and consider his submission in the context in which it was offered: as a response to Employer's appeal.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injuries in the ports of Los Angeles and/or

swayed side to side with the cargo attached. As a result, his upper torso and head severely whiplashed "fore and aft and sideways," HT at 23, causing immediate tightness in his neck and back. Nevertheless, Claimant climbed down from his crane and up into another crane to finish his shift that day. Afterward, Employer gave him a doctor's slip to go to the emergency room. EX 4, Dep. at 27-28. The next day he went to urgent care where he was examined, diagnosed with whiplash and neck spasms, given medication, and told he could return to work on the next shift without any restrictions. CX 16 at 2.

Claimant did not miss any work immediately after the incident. EX 4, Dep. at 25, 29. Continued pain prompted several follow-up trips to urgent care culminating in a January 27, 2021 visit in which Dr. Jonathan D. Neal instructed Claimant to remain "off work" until he received an orthopedic evaluation. CX 4. Claimant has not worked since that date and subsequently testified he can no longer work as a crane operator due to constant pain. HT at 12.

An MRI conducted on February 2, 2021, revealed Claimant has mild to moderate discogenic and degenerative abnormalities with neural foraminal stenosis at L4-L5 and L5-S1. CX 7. On March 29, 2021, he began treating with orthopedic surgeon Dr. James Loddengaard for cervical and lumbar spine pain.[3] CX 3. Dr. Loddengaard issued a "Final Report" on May 25, 2021, placing Claimant on permanent restrictions due to a combination of his specific work injury and his many years of crane operating work which, he opined, "effectively precludes" Claimant from returning to work on the waterfront. CX 1.

Claimant also was examined by Dr. James M. Fait, a board-certified orthopedic surgeon, who opined there is sufficient medical evidence to indicate Claimant sustained a cumulative trauma injury to the cervical and lumbar spines from his work for Employer, but there is no evidence Claimant sustained any specific injury from the work accident itself. CX 2. Dr. Fait further opined Claimant was capable of modified-duty work as of January 28, 2021, his condition had since reached maximum medical improvement (MMI), and as of July 30, 2021, Claimant could return to work on a full-duty basis.[4] *Id.* In a supplemental report dated May 25, 2022, Dr. Fait clarified Claimant was temporarily

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Long Beach, California. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[3] Meanwhile, Claimant also treated with chiropractor, Dr. Merick Abrajano, who advised him to remain off work from February 16, 2021, to May 17, 2021. CX 5.

[4] Dr. Fait opined Claimant has whole person impairment ratings of 3% relating to his cervical spine and 2% relating to his lumbar spine. CX 2.

partially disabled from the date he examined him on January 28, 2021, until he reached MMI on July 30, 2021. EX 8. He opined Claimant would have been capable of working with restrictions of no lifting, pushing, or pulling greater than fifteen pounds, no work above shoulder level, and no repetitive bending or twisting at the waist for more than four hours per shift. *Id.* He also reiterated his opinion that Claimant was, as of July 30, 2021, capable of returning to full-duty work without any permanent work restrictions. *Id.*

Thereafter, Employer obtained labor market surveys from vocational consultants Howard Stauber and Richard Marzano. EXs 11, 13. In his July 1, 2022 report, Mr. Stauber identified suitable alternative, off-waterfront, jobs within Dr. Fait's temporary restrictions; those jobs were in the Lake Hughes and Long Beach/Los Angeles labor markets. EX 11. Mr. Marzano analyzed the work dispatched to longshore workers and marine clerks in the Los Angeles/Long Beach harbor from January 28, 2021, to December 23, 2022. EX 13. In his report dated January 6, 2023, he identified several jobs within Dr. Loddengaard's permanent restrictions, as well as additional jobs consistent with Dr. Fait's temporary work restrictions and concluded Claimant should have been able to return to his usual crane work position. *Id.*

Claimant filed claims seeking benefits for a specific neck strain/whiplash injury due to the November 2020 work accident and for a cumulative trauma injury from his overall work culminating on January 27, 2021, his last day of work. Employer controverted the claims. EX 3. It also sought Section 8(f) relief, 33 U.S.C. §908(f), EXs 5, 6; however, the district director denied that request because Employer failed to satisfy the contribution element. The case was then forwarded to the Office of Administrative Appeals Judge for a formal hearing on issues relating to the nature and extent of the alleged injuries,[5] average weekly wage (AWW), entitlement to medical benefits, and Employer's entitlement to Section 8(f) relief. The ALJ held a two-day hearing remotely.

In his order, the ALJ found Claimant established a prima facie case of total disability, and Employer successfully rebutted the presumption with Mr. Stauber's labor market survey identifying fourteen non-longshore jobs suitable for Claimant in the Lake

[5] Claimant argued he is entitled to temporary total disability benefits from January 28, 2021, through May 24, 2021, and ongoing permanent total disability benefits from May 25, 2021, while Employer maintained Claimant is entitled only to temporary partial disability benefits from January 28, 2021, through July 30, 2021.

Hughes, California, area from January 27, 2021.[6] D&O at 13-18. He next found, based on Dr. Fait's opinion, that Claimant's condition reached MMI on July 30, 2021. Applying Section 10(a), 33 U.S.C. §910(a), and finding the date of disability is January 27, 2021, the ALJ calculated Claimant's AWW at $4,376.91. Using the wages of the positions Mr. Stauber identified, he computed Claimant's post-injury wage-earning capacity at $600 per week. Based on those figures, he found Claimant entitled to temporary partial disability benefits from January 27, 2021, through July 30, 2021, and permanent partial disability benefits thereafter based on the weekly maximum compensation rate for fiscal year 2021, $1,632.70, 33 U.S.C. §906(b)(1); *see also* 20 C.F.R. §§702.801-806. Finally, the ALJ determined Employer is not entitled to Section 8(f) relief as it did not establish Claimant's current disability is materially and substantially greater than that which would have resulted from Claimant's work injury alone.

On appeal, Employer challenges the ALJ's findings on the extent of Claimant's disability, AWW, and Section 8(f) relief. Claimant responds, urging affirmance of the ALJ's order. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting the ALJ's ultimate finding that Employer is not entitled to Section 8(f) relief may be affirmed as it is supported by substantial evidence and in accordance with law.

Extent of Claimant's Disability

Prima Facie Case of Total Disability

Employer first contends the ALJ erred in finding Claimant cannot return to his usual job as a crane operator. It maintains Drs. Fait and Loddengaard seemingly agree there is no objective basis for concluding Claimant cannot return to his usual work. Employer states Dr. Fait explicitly opined Claimant was capable of such work given the relatively benign findings on examination and objective studies, and Dr. Loddengaard admitted at the hearing that he would not provide any work restrictions to a 62-year-old crane operator who was working full-duty, full-time, and had imaging studies and examination findings identical to Claimant. Employer further asserts the record establishes Claimant's complaints of pain were not credible and, by 2022, established he had only intermittent and moderate pain which is insufficient to establish a prima facie case of total disability. Moreover, Employer asserts the ALJ's finding that Claimant cannot operate a crane for up to eight hours a day is not the appropriate query to discern whether he could return to his

[6] The ALJ, however, found Mr. Marzano's labor market survey, showing available longshore jobs in the Los Angeles/Long Beach port, did not constitute suitable alternate employment. D&O at 16-17.

usual work as a crane operator when previously he was required to operate the crane only up to four hours for each eight-hour shift.

Under the Act, disability is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. §902(10). To establish a prima facie case of total disability, a claimant must demonstrate an inability to perform his usual employment due to his work injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1328 (9th Cir. 1980); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). The ALJ must compare the employee's medical restrictions with the specific physical requirements of his usual employment. *See Obadiaru v. ITT Corp.*, 45 BRBS 17, 21 (2011); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176, 178 (1985). A claimant's credible complaints of pain alone may be enough to meet his burden of showing an inability to return to his usual work. *Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 936-938 (9th Cir. 2020); *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds,* 849 F.2d 1194 (9th Cir. 1988).

The ALJ found Claimant established that he is not able to perform his usual work as a crane operator -- based on a combination of his complaints of pain, Dr. Loddengaard's opinion, and a comparison of Dr. Loddengaard's physical restrictions with his testimony regarding his job duties -- Claimant stated he experiences consistent pain in his lower back and "sharp numbness pain shooting down" into his legs, and he can no longer work as a crane operator because his work duties cause pain in his back, neck, and shoulder, as well as a restriction of blood flow to his legs. HT at 46; EX 4, Dep. at 36-37, 56, 57. Dr. Loddengaard opined Claimant's pain permanently precludes him from "repetitive bending, heavy lifting, or prolonged sitting or standing." CX 1. The restrictions are necessary to relieve Claimant's pain which, according to Dr. Loddengaard, is related to "a combination" of the November 24, 2020 work injury and chronic neck and back pain from many years of operating a crane. *Id.* He opined, "[t]he combination of these restrictions effectively precludes [Claimant] from going back to work on the waterfront." *Id.*

Addressing this evidence, the ALJ found Claimant's complaints of pain are "consistent and credible."[7] He also found Dr. Loddengaard's opinion relies "primarily on

[7] The ALJ credited Claimant's testimony that operating the crane requires hard stops, bending over, looking down, and slouching his back, all of which cause him neck and back pain. ALJ Order at 4, 15 n.27 (citing EX 4, Dep. at 35-37). Additionally, the ALJ credited Claimant's statements that his repetitive use of a joystick causes shoulder pain and that sitting for long periods of time and being harnessed into the seat restricts the blood flow to his legs. *Id.*

[Claimant's] subjective complaints of pain," and Dr. Loddengaard "appropriately considered" Claimant's "credible complaints" of pain to support his conclusion that Claimant cannot return to work as a crane operator without experiencing significant pain. ALJ Order at 14-16. In reaching this conclusion, the ALJ found Dr. Loddengaard's restrictions for Claimant "are all physical requirements" of his usual employment as a crane operator. *Id.* at 15. He further found Dr. Fait's opinion, that Claimant can return to crane operator work, is premised, at least in part, on the legally incorrect belief that credible pain symptoms alone are not sufficient to prevent a person from returning to their previous work.[8] *Id.*

The ALJ extensively reviewed the record and gave a clear rationale for his conclusions; therefore, his crediting of Dr. Loddengaard's opinion over Dr. Fait's is rational and within his discretion as factfinder.[9] *Hawaii Stevedores Inc. v. Ogawa*, 608 F.3d 642, 650 (9th Cir. 2010); *Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 1321, (9th Cir. 1990). As Employer has not demonstrated any error, Claimant's credible testimony regarding his ongoing symptoms, in conjunction with Dr. Loddengaard's opinion, support the ALJ's finding Claimant is precluded from returning to his usual work as a crane operator. *Jordan*, 973 F.3d at 936-938. Consequently, we affirm the ALJ's conclusion that Claimant established a prima facie case of total disability as it is supported by substantial evidence. *Bumble Bee Seafoods*, 629 F.2d at 1328; *Obadiaru*, 45 BRBS at 21; *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 202 (1998).

Suitable Alternate Employment

[8] The ALJ also found it significant that although Dr. Fait found no objective evidence of disability and observed no "pain behaviors," he provided no indication that he thought Claimant was magnifying his symptoms. Moreover, the ALJ stated Dr. Fait "even suggests" there may be other causes contributing to Claimant's "perception of pain." HT at 220.

[9] At the hearing, Dr. Loddengaard reiterated his opinion that Claimant is incapable of performing his usual crane operator work, HT at 242, 251, 269, including the belief Claimant would be in too much pain to work a whole eight-hour shift or even a four-hour on, four-hour off split shift, *id.* at 265-266. The ALJ's decision reflects he was cognizant of the split-shift aspect of crane operator work, ALJ Order at 6 n.9, and his conclusion that Claimant is incapable of returning to his usual employment, in contrast to Employer's contention, necessarily involved consideration of that factor.

Employer next contends the ALJ erred by refusing to consider the waterfront jobs Mr. Marzano identified at the Los Angeles/Long Beach harbor when addressing Claimant's post-injury wage-earning capacity. First, Employer states the 65-mile radius the ALJ relied upon to establish suitable alternate employment is arbitrary and lacks any legal basis because the relevant community determination requires consideration of a variety of factors, not just travel distance.[10] Second, it avers the record contains ample evidence establishing Claimant is capable of making a 200-mile or longer drive, and there is no factual basis to support the ALJ's finding that a 200-mile commute is inconsistent with Dr. Loddengaard's restrictions.[11]

Once a claimant establishes an inability to return to his usual work, the burden shifts to the employer to demonstrate the availability of suitable alternate employment (SAE). *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 968-969 (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). To be suitable, alternate employment must be available within the geographic area where the employee resides, and it must be work he can perform considering his limitations, age, education, background and restrictions. *Ogawa*, 608 F.3d at 652; *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *see generally Wilson v. Crowley Maritime*, 30 BRBS 199, 203 (1996). The proper community or geographic area in which an employer must identify suitable jobs is based on the facts of each case. *See generally Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 596 (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 383 (4th Cir. 1994); *Patterson v. Omniplex World Services*, 36 BRBS 149, 153 (2003); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23, 26 (2001); *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114, 118-119 (1977), *aff'd sub nom. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1033 (5th Cir. 1978). Typically, the relevant community is where the claimant resides or where he resided at the time of injury. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98, 101-102 (2005); *Wilson*, 30 BRBS at 203-204. In addressing this issue, the ALJ must compare the claimant's physical restrictions with the requirements of the positions identified by the employer to determine whether the employer has met its burden. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109, 112 (1998). If the employer meets its burden, the claimant's disability

[10] Employer additionally states there is no legal or factual basis for the ALJ's decision to exclude Los Angeles/Long Beach as the relevant community given Claimant's years-long commuting history.

[11] Employer alleges the evidence shows Claimant, post-injury, routinely made the 200-mile commute from his home to the Los Angeles/Long Beach area for medical treatment or personal reasons and otherwise regularly made various personal trips requiring long-distance driving.

is, at most, partial, unless the claimant establishes he diligently attempted to obtain employment and was unable to because of his work injury. 33 U.S.C. §908(c), (e); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92, 102 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835 (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013); *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46, 47 (2006).

The ALJ here found all the non-longshore jobs Mr. Stauber identified constituted suitable alternate employment. ALJ Order at 16-17. But he rejected all the longshore positions Mr. Marzano identified because he found they are not within the geographic area in which Claimant resides and, alternatively, because he found Dr. Loddengaard's work restrictions precluded Claimant's ability to make the daily commute from his home to the port. *Id.* at 17-18. In reaching this conclusion, the ALJ, albeit in terms of Claimant's ability to return to his usual employment, rejected Employer's position that the fact Claimant "occasionally" drives long distances "does not negate the pain he experiences;" the ALJ deemed Claimant's pain complaints "consistent and credible." *Id.* at 14.

The ALJ considered the appropriate factors enunciated in case precedent and permissibly determined that Los Angeles/Long Beach, "located nearly 100 miles from [Claimant's] home in Lake Hughes, California," does not constitute a relevant labor market for purposes of Employer's burden to establish the availability of suitable alternate employment. *Ogawa*, 608 F.3d at 648 (ALJ entitled to determine the weight to be accorded to the evidence); *Beumer*, 39 BRBS at 101-102. In making this determination, the ALJ recognized Claimant routinely commuted the "around 200 miles round-trip for his work at the Los Angeles/Long Beach port." ALJ Order at 17. Nevertheless, he permissibly relied on Dr. Loddengaard's restrictions, which, among other things, precluded Claimant from "prolonged sitting," to find Claimant "cannot drive nearly 200 miles or four hours round trip to the Los Angeles/Long Beach port every workday," *id. See generally Hernandez*, 32 BRBS at 112. Consequently, we affirm the ALJ's rejection of Mr. Marzano's identified jobs as it is rational, supported by substantial evidence, and in accordance with law. *Ogawa*, 608 F.3d at 653. We also affirm the ALJ's findings that Employer established the existence of suitable alternate non-longshore employment from January 27, 2021, that Claimant did not demonstrate an inability to secure such work, and that Claimant's work-related injuries reached MMI on July 30, 2021, as those findings are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007). Accordingly, we affirm the ALJ's conclusion that Claimant is entitled to temporary partial disability benefits from January 27, 2021, through July 30, 2021, and permanent partial disability benefits thereafter. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259-1260 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

Average Weekly Wage

Employer asserts the ALJ's calculation of Claimant's average daily wage and corresponding AWW does not accord with the fixed formula Congress adopted in Section 10(a) of the Act, 33 U.S.C. §910(a). Pursuant to that formula, Employer asserts Claimant's AWW under Section 10(a) is $4,108.30 and not the $4,376.91 calculated by the ALJ. In response, Claimant states he does "not object to [Employer's] calculation" of his AWW at $4,108.30. Cl's Br. at 14.

Section 10 sets forth three alternative methods for determining a claimant's AWW. 33 U.S.C. §910. Section 10(a) looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury. It states:

> If the injured employee shall have worked in the employment in which he was working at the time of his injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).[12] Section 10(a) thus requires the ALJ to determine the average daily wage the claimant earned during the preceding twelve months. *Ahuna v. SSA Pacific, Inc.*, 58 BRBS 11, 13 (2024). To calculate the average daily wage, the employee's actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period. *Martin v. Sundial Marine Tug & Barge Works, Inc.*, 12 F.4th 915, 919 (9th Cir. 2021); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998); *Ahuna*, 58 BRBS at 19. This average daily wage is then multiplied by 260 if the claimant was a five-day per week worker, or 300 if he was a six-day per week worker. The resulting figure is then divided by 52 pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), to yield the claimant's statutory AWW. *Id.*

Finding January 27, 2021, represents the date of disability and Section 10(a) applies, the ALJ looked to Claimant's earnings in the immediately preceding year, as documented in Claimant's wage records from the Pacific Maritime Association (PMA). ALJ Order at 19; EX 7. He calculated Claimant's AWW of $4,376.91 by dividing Claimant's total earnings in that year, $227,599.67 by 52 weeks. Therefore, as Employer asserts, the ALJ's AWW determination does not comport with the Section 10(a) formula for calculating

[12] Use of Section 10(a) arrives at a *theoretical* approximation of a claimant's AWW, as if he worked every available workday in the year preceding his injury. *See generally Trachsel v. Rogers Terminal & Shipping Corp.*, 597 F.3d 947, 951 (9th Cir. 2009).

Claimant's average annual wage. Applying the correct method, the ALJ should have divided Claimant's earnings in that year, $227,599.67, by his days worked, 277, which yields an average daily wage of $821.66. That figure is then multiplied by the statutorily prescribed 260 days for a 5-day per week worker then divided by 52 weeks which results in an AWW of $4,108.30. 33 U.S.C. §910(a), (d); *Ahuna*, 58 BRBS at 19; *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70, 75 (1997). As the PMA records contain all the information necessary for a proper AWW calculation under Sections 10(a) and (d), we modify the ALJ's calculation to reflect that Claimant's AWW is, as now agreed upon by the private parties, $4,108.30.[13] *See generally Obadiaru*, 45 BRBS at 24 (2011); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136, 141 (2001).

Section 8(f) Relief

Employer asserts the ALJ's finding that it did not establish the contribution element for Section 8(f) relief is flawed. First, it asserts the ALJ applied an improper legal standard by requiring Employer to quantify the level of impairment that would ensue from the work-related injury alone to determine whether the ultimate disability is materially and substantially greater than that which would have resulted from the work-related injury absent the pre-existing condition.[14] Second, Employer asserts because the ALJ found Claimant sustained two distinct work injuries, a November 23, 2020 injury and a cumulative trauma cervical and lumbar spine injury on January 27, 2021, he should have conducted two separate Section 8(f) analyses, one for each date of injury. Based, in part, on this logic, it maintains the ALJ should have found the contribution element established because the November 23, 2020 injury constituted a pre-existing permanent partial disability which resulted in a current level of disability for Claimant materially and substantially greater than it would have been from the January 27, 2021 cumulative injury alone. Third, Employer asserts Claimant's testimony regarding his pre-November 2020 chronic pain, along with his documented history of medical treatment prior to the work

[13] As this figure still results in the maximum compensation rate of Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1), the ALJ's error is harmless.

[14] Employer states the ALJ incorrectly cited and applied the more stringent Section 8(f) contribution element outlined by the United States Court of Appeals for the Fourth Circuit in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 184 (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122 (1995). It maintains the Ninth Circuit does not require the strict quantification espoused by the Fourth Circuit. *See generally Marine Power & Equip. v. Dep't of Labor* [*Quan*], 203 F.3d 664, 668 (9th Cir. 2000).

injuries and Dr. Loddengaard's unambiguous testimony, establish Claimant's present disability is materially and substantially greater than that from the work injury alone.

The Director asserts although the ALJ did not conclude there were two separate injuries,[15] which "complicates review of [his] Section 8(f) contribution conclusion," that failure is not "fatal to his conclusion that Employer" did not establish the requisite Section 8(f) contribution element. The Director states the ALJ clearly found Claimant was able to work full-time as a crane operator with some pain and discomfort prior to January 27, 2021, but immediately thereafter he was no longer capable of performing his usual work because of his cumulative trauma. The Director asserts this finding is supported by substantial evidence. Consistent with the Ninth Circuit's rationale in *Marine Power & Equip. v. Dep't of Labor* [*Quan*], 203 F.3d 664, 670 (9th Cir. 2000), the Director contends Employer has not established whether Claimant sustained "any further loss of earning potential" beyond that directly attributable to the work-related injury. Therefore, he argues Employer did not establish Claimant's present permanent partial disability is "materially and substantially greater" because of his alleged pre-existing conditions,[16] and the Board should reject Employer's contention.

In order for an employer to qualify for relief under Section 8(f) in a case where the claimant is permanently partially disabled, an employer must establish: (1) the claimant had an existing permanent partial disability; (2) the pre-existing partial disability was manifest to the employer; (3) the work injury alone did not cause the claimant's permanent partial disability; and (4) the claimant's ultimate disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone. 33 U.S.C. §908(f)(1); *Quan*, 203 F.3d at 670; *Sproull v. Director, OWCP*, 86 F.3d 895, 900 (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, unlike the United States Court of Appeals for the Fourth Circuit, has found it unnecessary to precisely define the degree of quantification needed to meet the "materially and substantially greater" standard under Section 8(f). *Quan*, 203 F.3d at 668. Rather, it holds evidence showing the current level of disability is the result of a combination of the pre-existing condition and the work injury may be sufficient to establish the contribution element. *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 1035-36

[15] The Director emphasizes, "Employer failed to make this two-injury argument to the ALJ." Dir's Br. at 3.

[16] For this reason, the Director maintains that any error created by the ALJ's reference to Fourth Circuit law regarding the contribution element is harmless.

(9th Cir. 1998). The employer also must establish the current disability is not due solely to the work injury. 33 U.S.C. §908(f)(1); *Quan*, 203 F.3d at 668.

Given the Director's focus in opposing Employer's application for Section 8(f) relief,[17] the ALJ narrowed his inquiry to the contribution element. Citing Ninth Circuit case law,[18] he stated he must determine whether Employer established: 1) the work injury was not the sole cause of Claimant's ultimate disability; and 2) the ultimate disability is "materially and substantially greater" than it would have been due to the work-related injury alone. ALJ Order at 21-22. Applying this standard to the relevant medical evidence, the ALJ found neither Dr. Fait's nor Dr. Loddengaard's opinions are sufficient to establish the contribution element. ALJ Order at 22-23.

In support of its application for Section 8(f) relief, Employer submitted Dr. Fait's August 27, 2021 report, which included Claimant's medical records, as well as summaries thereof, documenting his neck and back pain from April 20, 2017, through May 21, 2021.[19]

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[17] In the response submitted to the ALJ regarding Employer's request for Section 8(f) relief, the Director conceded Employer "submitted sufficient documentation" to support the existence of manifest, pre-existing conditions "for purposes of Section 8(f) relief." However, he argued Employer is not entitled to Section 8(f) relief because "the contribution criterion has not been met." Dir's Statement of Position dated December 29, 2022, at 2, 5, 7.

[18] It is undisputed the ALJ's inquiry regarding Employer's request for Section 8(f) relief contains references to both Fourth and Ninth Circuit case law. ALJ Order at 20, 21, 22 and 23 n.33. Nevertheless, his decision reflects he applied the appropriate contribution standard first, because in articulating it, he cited only to Ninth Circuit case law, *id.* at 21-22, and second, because his conclusion comports with that standard, *id.* at 22-23. Moreover, while the ALJ cited to the quantification standard espoused by the Fourth Circuit and found "no such showing in the record," *id.* at 23 n.33, his conclusion nevertheless falls within the framework discussed by the Ninth Circuit in *Quan*. Therefore, we reject Employer's contention that the ALJ applied an incorrect standard in addressing whether it established the Section 8(f) contribution element.

[19] Employer's applications for Section 8(f) relief were submitted via Office of Workers' Compensation Programs form LS-5. EXs 5, 6. In both instances, it generally stated "[t]he enclosed records show that Claimant may have had a pre-existing permanent partial disability which may have contributed to any current disability he may have." EXs 5, 6. In its post-hearing brief, Employer, in three sentences, argued it is entitled to Section 8(f) relief based on its submission of Claimant's medical "records from Vital Health Chiropractic which document his pre-existing conditions and complaints. (EX 5 at 70-

EXs 6 and 8. Dr. Fait diagnosed Claimant with chronic neck and low back pain, as well as lumbar spine degenerative disc disease at L2-3, L3-4 and L4-5 "with widespread mild disc bulging" per the February 3, 2021 MRI. *Id.* He opined Claimant "sustained a cumulative trauma injury to his cervical spine and lumbar spine as a result of his work with [Employer]" which "culminated on January 27, 2021." *Id.* He further opined Claimant "would have been characterized as temporarily partially disabled and capable of working on a modified-duty basis" when he first examined Claimant on January 28, 2021, but that from July 30, 2021, "permanent work restrictions are unnecessary" such that Claimant "may return to work on a full-duty basis." *Id.* Therefore, as the ALJ concluded, Dr. Fait's opinion fails to establish that the work injury was not the sole cause of Claimant's ultimate disability, let alone that his ultimate disability is "materially and substantially greater" than it would have been due to the work-related injury alone.[20]

In his May 25, 2021 report, Dr. Loddengaard stated his imposition of permanent restrictions on Claimant, culminating in Claimant's present permanent disability, is "[d]ue to a combination" of the specific work injury and "chronic neck and back pain from operating a crane for many years."[21] CX 1 at 4. This, as the ALJ found, establishes Claimant's ultimate permanent partial disability is the result of a combination of both the work injury and the pre-existing permanent condition of chronic neck and back pain as alleged by Employer. However, Dr. Loddengaard later testified that Claimant was "disabled from any work on the waterfront" because of the "November 2020 accident and the repetitive trauma through January 27, [2021]," *id.* at 244, which indicates, as the ALJ found, his belief that Claimant's ultimate disability is due entirely to the work accident and the subsequent repetitive trauma through his last day of usual work. Further, as the ALJ stated, nothing in Dr. Loddengaard's testimony or report demonstrates he thought the ultimate injury is "materially and substantially greater" than it would have been from the work-related injury alone. ALJ Order at 23.

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184)." Emp's PH Br. at 26. As Employer made no reference to its "two injury argument" to the ALJ, we reject that argument as it is being raised for the first time on appeal. *See Johnston v. Hayward Baker*, 48 BRBS 59 (2014); *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27, 32 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997).

[20] Moreover, Dr. Fait's opinion is insufficient to establish the contribution element because he never found Claimant had any permanent partial disability, either pre-existing or at present.

[21] Dr. Loddengaard reiterated in his hearing testimony that although the specific work injury is "what set off his increased pain," Claimant is "a person with a recent injury that had exacerbated his preexisting neck and back problems." HT at 235-236.

The record reflects the ALJ accurately set forth the medical evidence, including the opinions proffered by Drs. Fait and Loddengaard, and adequately explained the rational inferences he drew from this evidence as part of his Section 8(f) analysis. *Ogawa*, 608 F.3d at 648; *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46, 52 (1999). Examining those inferences in terms of the appropriate standard, he found Employer established that Claimant's pre-existing chronic neck and back pain may have combined with his work injury – the combination of the November 2020 accident and the cumulative trauma sustained through January 2021 – but not to a "materially and substantially greater" degree. However, given Claimant's work history, the ALJ rationally inferred from the totality of the evidence that Employer failed to demonstrate Claimant's work injury alone did not cause his diminished wage-earning capacity. ALJ Order at 23. This is exemplified, as the ALJ ultimately found, by the fact that Claimant had no loss in WEC prior to the work accident or even from the date of that accident until his last day of work. Employer has not established error in this finding. A claimant's disability must be due to both the pre-existing and current injuries. *See Quan*, 203 F.3d at 670; *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37, 44 (2015). We affirm the ALJ's finding that Employer did not establish the contribution element necessary to obtain relief under Section 8(f) and the denial of Section 8(f) relief. *Quan*, 203 F.3d at 670; *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354 (9th Cir. 1993); *Cutietta*, 49 BRBS at 44; *Neff v. Foss Mar. Co.*, 41 BRBS 46, 50 (2007).

Accordingly, we modify the ALJ's AWW finding. In all other respects, we affirm the ALJ's Order Granting Benefits for Temporary Partial and Permanent Partial Disability Benefits and Denying Request for Section 8(f) Relief.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge