

ARTHUR CARPENTER)	
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Claimant)	
)	
v.)	
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CERES MARINE TERMINALS, INCORPORATED)	DATE ISSUED: <u>April 20, 2001</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, Errata Order, and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert A. Rapaport and Dana Adler Rosen (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for self-insured employer.

Geoffrey K. Collver (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo, 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order, Errata Order, and Order (99-LHC-1399) of Administrative Law Judge Fletcher E. Campbell, Jr., 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On January 5, 1992, claimant injured his lower back unlocking a shipping container during the course of his employment. An MRI showed degenerative disc disease at L4-5 and L5-S1 and a bulging disc at L5-S1. On April 21, 1992, claimant underwent a laminectomy and extrusion of a ruptured disc at L5. Claimant previously sustained back injuries in 1978, 1985, and 1987. Employer voluntarily paid claimant compensation for permanent total disability from January 16, 1992. 33 U.S.C. §908(a). The sole issue before the administrative law judge was employer's request for Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f). Employer asserted before the administrative law judge that claimant had a manifest pre-existing permanent partial disability as a result of his five previous back injuries and that this disability contributes to claimant's ultimate permanent disability. The Director, Office of Workers' Compensation Programs (the Director), responded that claimant's prior back injuries do not constitute a pre-existing permanent partial disability for purposes of obtaining Section 8(f) relief. The Director conceded that claimant's degenerative disc disease constitutes a pre-existing permanent partial disability that contributes to claimant's permanent disability; however, the Director contended that the record evidence fails to establish that claimant's degenerative disc disease was manifest to employer prior to claimant's January 5, 1992, work injury.

In his Decision and Order, the administrative law judge stated that the issue requiring his resolution was only whether employer established the manifest requirement necessary for Section 8(f) relief. The administrative law judge next summarized the pertinent medical evidence of record. The administrative law judge found, as a matter of law, that a *post hoc* diagnosis of degenerative disc disease will not establish the manifest element for Section 8(f) relief. The administrative law judge concluded that, notwithstanding that employer established a pre-existing disability that contributes to claimant's permanent total disability, employer failed to establish the manifest element for obtaining Section 8(f) relief. Accordingly, the administrative law judge denied employer's request for Section 8(f) relief. On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director responds, urging affirmance.

Section 8(f) shifts liability to pay compensation for permanent total disability from the

employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent total disability is not solely due to the subsequent work-related injury. See *Director, OWCP v. Newport News Shipbuilding & 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. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). Employer asserts that the administrative law judge misconstrued its contention regarding Section 8(f) relief. Employer contends that claimant's five back injuries prior to his January 5, 1992, back injury establish a manifest pre-existing permanent partial disability which contributes to claimant's permanent total disability, and that the administrative law judge erred in focusing on claimant's degenerative disc disease. The Director agrees that the administrative law judge's focus "lacks precision," but he nevertheless contends that the denial of Section 8(f) relief should be affirmed.

The record contains evidence of five incidents wherein claimant injured his back. On October 22, 1978, claimant fell approximately 67 feet and he reported injuries to his head, neck, right shoulder and scapular area, and right wrist and hand. EX 13. The diagnosis included a contusion and upper back strain. Claimant was advised he could return to work on November 13, 1978. On November 15, 1978, claimant reported inter-scapular back pain after lifting a 150 pound bag. After receiving treatment, claimant was advised he could return to work on November 20, 1978. On February 1, 1979, claimant's treating physician, Dr. Heide, diagnosed back strain, stated that claimant is considered fit for full duty, and opined that claimant's symptoms will subside after two or three months. *Id.* Claimant was next diagnosed with low back strain by Dr. Wagner on March 14, 1985. EX 1a. Claimant returned to work on March 28, 1985; however, he aggravated his lower back injury on April 22, 1985, from lifting approximately 200 pounds. EX 1b. Dr. Wagner reported that claimant returned to full duty on May 6, 1985, and he opined on July 31, 1985, that claimant will not have any permanent disability as a result of his injuries. EX 1c. Finally, claimant sustained a work-related lumbosacral strain on December 9, 1987, and he was released by Dr. Wagner to return to regular duty on January 4, 1988. EX 1d, e, f. Subsequent to claimant's January 5, 1992, work injury, Dr. Wagner opined that claimant's disability is from the combination of his 1985, 1987, and 1992 injuries. EX 1j; EX 3. Dr. Russ conducted an independent medical exam and opined on March 2, 1995, that claimant's back condition is due to pre-existing degenerative disc disease and claimant's January 1992 work injury. EX 11.

After review of the record, we hold that the administrative law judge's denial of Section 8(f) relief must be vacated and the case remanded for the administrative law judge to address employer's contention, explicitly raised before both the administrative law judge and

on appeal, that claimant's five prior back injuries in 1978, 1985, and 1987, demonstrate a pre-existing partial disability which contributes to claimant's permanent total disability.¹ *See generally Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990); *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988). Specifically, in its brief to the administrative law judge, employer argued only that claimant's five prior back injuries establish the pre-existing permanent partial disability element for Section 8(f) relief, *i.e.*, employer never asserted that claimant's degenerative disc disease, by itself, is a pre-existing permanent partial disability for purposes of obtaining Section 8(f) relief. *See* Brief in Support of Employer's Request for Section 8(f) Relief at 1-5. In his response brief to the administrative law judge, the Director challenged employer's contentions that claimant's prior back injuries demonstrate a pre-existing permanent partial disability which contributes to claimant's permanent total disability. Director's Brief in Response at 8. Furthermore, while the Director conceded that claimant's degenerative disc disease satisfies the pre-existing permanent partial disability and contribution elements for Section 8(f) relief, the Director contended that claimant's degenerative disc disease was not manifest to employer prior to claimant's work injury on January 5, 1992. *Id.* at 8-9, 11.

¹Inasmuch as the administrative law judge did not make necessary findings of fact, we decline the Director's invitation to affirm the administrative law judge's decision on other grounds. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982)

In his Decision and Order, the administrative law judge did not address employer's assertions regarding claimant's prior work injuries. Instead, the administrative law judge stated that the sole issue presented is whether employer established the manifest element for Section 8(f) relief. Decision and Order at 2, 5. While the administrative law judge correctly concluded that a *post-hoc* diagnosis of degenerative disc disease does not satisfy the manifest element necessary for Section 8(f), *see Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983), he did not address employer's entitlement to Section 8(f) relief based on the claimant's five prior back injuries. On remand, therefore, the administrative law judge must consider the relevant evidence and address whether these five prior injuries establish that claimant had a manifest pre-existing permanent partial disability and whether claimant's permanent total disability is not due solely to the last injury.² *See generally Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT); *Langley*, 676 F.2d 110, 14 BRBS 716; *see also Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2^d Cir. 1992); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

Accordingly, the administrative law judge's denial of Section 8(f) relief 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

²In this regard, we note that employer was aware of claimant's five prior back injuries from medical records in existence prior to the January 5, 1992, work injury. The inquiry concerning the manifest element is related to that presented by the pre-existing permanent partial disability element: was employer aware of a serious lasting physical problem pre-dating the last injury. *See generally Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990).

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge