BRB No. 05-0347

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<tr><td>RONALD L. RUSHING

Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED

Self-Insured
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Petitioner</td><td>)
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DATE ISSUED: 12/20/2005

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order, Order Denying Director's Motion for Reconsideration, and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Jennifer R. Marion (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order, Order Denying Director's Motion for Reconsideration, and

Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration (2004-LHC-0635) of Administrative Law Judge C. Richard Avery 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 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).

Claimant worked for employer as an electrician. He injured his left knee on May 30, 1996, during the course of his employment for employer; this injury required surgery to repair a torn medial meniscus. Claimant's treating physician, Dr. Cope, opined on December 2, 1996, that claimant's knee was at maximum medical improvement. EX 15 at 10, 13. Employer voluntarily paid claimant compensation under the Act for a five percent permanent partial disability. 33 U.S.C. §908(c)(2). Claimant continued treating with Dr. Cope for bilateral knee pain, which Dr. Cope attributed to osteoarthritis. Claimant re-injured his left knee on December 12, 2001, during the course of his employment for employer, when a misstep exiting an elevator caused his knee to twist and make a popping sound. Tr. at 26-27. Claimant received treatment that day from a doctor at employer's facility, and he was placed on light duty. Dr. Johansen performed a total knee replacement of claimant's left knee on April 24, 2002. Claimant successfully returned to work on February 11, 2003. Claimant sought compensation under the Act for temporary total disability and for a 50 percent permanent partial disability of the left knee. Employer challenged the claim, and it alternatively sought Section 8(f) relief, 33 U.S.C. §908(f).

In his decision, the administrative law judge accepted the parties' stipulation that claimant sustained a work injury on December 12, 2001. The administrative law judge found that the December 12, 2001, work injury aggravated claimant's pre-existing knee condition and accelerated the need for claimant to undergo knee replacement surgery. The administrative law judge accepted the parties' stipulation that claimant's left knee condition reached maximum medical improvement on October 9, 2003. The administrative law judge found claimant entitled to compensation for temporary total disability, 33 U.S.C. §908(b), from April 20 to September 16, 2002, for temporary partial disability, 33 U.S.C. §908(e), from October 11, 2002, to February 10, 2003, and for permanent partial disability for a 50 percent leg impairment, 33 U.S.C. §908(c)(2). The administrative law judge next determined that employer established the elements entitling it to Section 8(f) relief. The administrative law judge limited employer's liability for permanent partial disability to 104 weeks, and found employer entitled to a credit of $5,573.67, for benefits which it previously paid claimant for a five percent permanent partial disability of the left leg. The administrative law judge ordered the Special Fund to pay claimant the remaining weeks of compensation due for the 50 percent leg impairment.

The Director and claimant filed motions for reconsideration. In his Order Denying Director's Motion for Reconsideration, the administrative law judge found that the Director's motion was untimely filed. The administrative law judge also summarily rejected the Director's motion on its merits. In his Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration, the administrative law judge amended claimant's average weekly wage from $648.25 to $650.75. Claimant's other arguments on reconsideration were summarily rejected.

On appeal, the Director challenges the administrative law judge's granting of Section 8(f) relief.[1] Alternatively, the Director contends that the administrative law judge erred in determining the degree of the Special Fund's liability. Employer responds, urging affirmance of the administrative law judge's granting of Section 8(f) relief. Employer, however, agrees with the Director that the administrative law judge misallocated the liability of employer and the Special Fund.

The Director first contends that employer failed to establish that claimant's current permanent partial disability is materially and substantially greater due to a pre-existing condition than that which would have resulted from the subsequent work injury alone. Specifically, the Director argues there is no evidence showing the extent of claimant's disability due solely to the December 2001 work injury. In his decision, the administrative law judge addressed the Director's contentions that claimant did not sustain a second injury on December 12, 2001, and, alternatively, that employer failed to establish that claimant is materially more disabled that he would have been solely from the December 12, 2001, work injury. Decision and Order at 13. The administrative law judge found that claimant had a manifest pre-existing permanent partial disability to his knee due to the 1996 work injury and his receiving ongoing treatment from Dr. Cope for the next five years. The administrative law judge credited Dr. Cope's January 7, 2002, note that claimant sustained a "re-injury" on December 12, 2001, and his recommendation at that time that claimant undergo a knee replacement.[2] The administrative law judge concluded that claimant's December 12, 2001, work injury

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[1] The Director also challenges the administrative law judge's finding that his motion for reconsideration was untimely filed. Employer concedes that the Director's motion was timely. Employer's Response Brief at 1. We agree that the motion was timely filed. *See generally Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001). Consequently, the Director's Notice of Appeal to the Board is timely. 20 C.F.R. §802.206; *see also Aetna Casualty & Surety Co. v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996).

[2] The Director does not challenge on appeal the administrative law judge's finding that claimant sustained a second injury on December 12, 2001. Director's Brief in Support of Petition for Review at 2 n.2.

combined with his pre-existing knee disability to cause the immediate need for knee replacement surgery, to cause claimant's inability to perform his usual work, and to increase his disability rating from five to 50 percent. He credited Dr. Cope's medical records to find that claimant might have been a candidate for knee replacement surgery prior to the December 12, 2001, work injury, but that this subsequent injury aggravated his pre-existing left knee condition and accelerated the need for a total knee replacement. Decision and Order at 7-8. The administrative law judge also credited Dr. Johansen's response to a form letter as indicating that claimant's May 1996 work injury played some role in the need for a knee replacement. *Id*. at 8.

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 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); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990).

The administrative law judge's summary of the law regarding the contribution element fails to state that it is employer's burden to establish that the current permanent partial disability is not due solely to the work injury, in addition to establishing that it is materially and substantially greater that that which would have resulted from the second injury alone. Decision and Order at 13; *see Louis Dreyfus Corp.,* 125 F.3d 884, 31 BRBS 141(CRT). Moreover, the administrative law judge did not discuss any of the relatively recent precedent issued by the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises. *See id.;* discussion, *infra.* Accordingly, we must vacate the administrative law judge's grant of Section 8(f) relief, and remand the case for reconsideration of all the relevant evidence of contribution pursuant to the applicable law. Specifically, the administrative law judge must determine, based on the evidence of record, whether employer established that claimant's current disability is not due solely to the December 2001 work injury, and whether claimant's current disability is materially and substantially greater as a result of the pre-existing disability than it would have been had he sustained only the December 2001 injury. *See Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 307-308, 31 BRBS 146, 148-149(CRT) (5th Cir. 1997).

However, we reject the Director's contention that employer's evidence is insufficient to satisfy the contribution element as a matter of law. The Fifth Circuit has declined to require an employer to present medical testimony which provides a rote

recitation of the legal standard for establishing contribution. *Ladner*, 125 F.3d at 307, 31 BRBS at 148-149(CRT); *Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997). In the absence of explicit testimony addressing whether claimant's permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent work injury alone, the administrative law judge's inquiry must be resolved by inferences based on such factors as the perceived severity of the pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them. *Ladner*, 125 F.3d at 307, 31 BRBS at 149(CRT). Moreover, we reject the Director's contention that the pre-existing disability cannot be found to have contributed to claimant's current permanent partial disability merely because claimant's 50 percent impairment rating is attributable to his undergoing knee replacement surgery. The pertinent inquiry in this case is whether claimant's pre-existing disability materially and substantially contributed to claimant's knee condition after the December 2001 work injury, and thereby contributed to claimant's need for a total knee replacement. *See Ladner*, 125 F.3d at 307, 31 BRBS at 148(CRT).

The Director next contends the administrative law judge erred by ordering employer to pay the first 104 weeks of compensation for claimant's permanent partial disability and the Special Fund to assume liability for the remaining compensation due thereafter. Employer concedes that the administrative law judge erred in this regard. In his decision, the administrative law judge found that claimant's left knee injury in 1996 resulted in a five percent impairment, for which he received $5,573.67 from employer. Decision and Order at 13-14. The administrative law judge also found that claimant's left knee is now 50 percent impaired. *Id*. Under Section 8(c)(2), a claimant is entitled to 288 weeks for the full loss of a leg. 33 U.S.C. §908(c)(2). Thus, claimant is entitled to 144 weeks of benefits for his 50 percent impairment at his weekly compensation rate of $650.75, and the total due him is $93,708. 33 U.S.C. §908(c)(19); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). The administrative law judge found that employer is liable for 104 weeks of compensation for claimant's 50 percent disability, or $67,678, minus a credit of $5,573.67, for employer's voluntary payment for permanent partial disability related to the earlier left knee injury. Decision and Order at 14. The administrative law judge ordered the Special Fund to compensate claimant for the remaining 40 weeks of compensation due, or $26,030.

The Act provides that when Section 8(f) is applicable an employer is liable for compensation for permanent disability for 104 weeks or the number of weeks of benefits due pursuant to the schedule for the subsequent injury, whichever is greater. 33 U.S.C. § 908(f)(1); *Strachan Shipping Co. v. Nash*, 751 F.2d 1460, 17 BRBS 29(CRT) (1985), *modified on other grounds on recon. en banc*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). An employer is thus liable for the entire amount due as a result of the subsequent work injury and the Special Fund is liable for any remaining amounts which are related to

the pre-existing disability. *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). In *Brown*, the United States Court of Appeals for the Fifth Circuit held that, in cases involving the application of both the credit doctrine and Section 8(f), the Special Fund is to obtain the benefit of the credit for previous benefits paid, and that this "Fund-first" rule is consistent with the language of Section 8(f)(1), 33 U.S.C. §908(f)(1), in that it ensures that, "at the very least, the employer will compensate the employee for the entire second injury." *Brown*, 868 F.2d at 762, 22 BRBS at 50(CRT); *see also Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993); *Davis v. General Dynamics Corp.*, 25 BRBS 221 (1991) (Special Fund to receive credit for payments made in prior hearing loss claims).

Should the administrative law judge grant employer Section 8(f) relief on remand, we agree with the Director that employer's liability for the second injury is not limited to 104 weeks. Employer is liable for the full extent of claimant's permanent partial disability due to the second injury. 33 U.S.C. §908(f)(1); *Nash*, 751 F.2d at 1464-1466, 17 BRBS at 32-33(CRT). Moreover, pursuant to *Brown*, the Special Fund is entitled to the credit for employer's prior payment of $5,573.67 against its liability for the extent of claimant's disability due to his pre-existing permanent partial disability. *Brown*, 868 F.2d at 762, 22 BRBS at 50(CRT); *see also Padilla*, 34 BRBS at 56. On remand, the administrative law judge must allocate the liability of employer and the Special Fund pursuant to this law.

Accordingly, the administrative law judge's award to employer of Section 8(f) relief is vacated, and the case is remanded for further proceedings consistent with this opinion. The administrative law judge's finding on reconsideration that the Director's motion was not timely filed is reversed. In all other respects, the administrative law judge's Decision and Order, Order Denying Director's Motion for Reconsideration, and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge