BRB Nos. 88-3552
and 88-3552A

PHILIP R. LOCKHART	)	
	)	
Claimant	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Decision and Order on Attorney Fee Application of R. S. Heyer, Administrative Law Judge, United States Department of Labor.

Donald R. Wilson (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

John Dudrey (Williams, Fredrickson, Stark & Weisensee, P.C.), Portland, Oregon, for employer/carrier.

Michael S. Hertzig (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits and employer cross-appeals the Decision and Order on Attorney Fee Application (87-LHC-2103) of Administrative Law Judge R. S. Heyer

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). An attorney's fee determination is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

Claimant, a raftsman with a prior history of multiple work-related injuries,[1] injured his lower back on May 9, 1985, while rafting logs for employer. A month later, Dr. Adams performed back surgery. On December 1, 1985, claimant was released to return to work on a modified basis limited to dock-side work. Claimant, however, continued to experience significant back and left hip pain and was again restricted from all work by Dr. Adams from May 9, 1986 until July 17, 1986. When claimant returned to work he was again limited to dock-side work, and the number of hours of work he was able to obtain decreased. Claimant sought permanent partial disability compensation under the Act pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21).

The administrative law judge awarded claimant permanent partial disability compensation under Section 8(c)(21), as well as medical benefits and interest. In addition, he found employer entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The Director appeals the award of Section 8(f) relief, and employer responds, urging affirmance. The Director has filed a reply brief.[2]

[1]On May 12, 1964, claimant injured his right knee and ultimately received compensation for a 20 percent permanent partial impairment. On November 2, 1982, claimant reinjured his right knee, and the resultant surgery required produced an additional 20 percent permanent impairment of the right leg. In January 1984, claimant was awarded a total of $27,034.64 for the November 2, 1982 injury which included $3,802.83 for temporary total disability and $23,231.81 for permanent partial disability. Dir. Ex. 1; Emp. Ex. 13, p. 27. Claimant apparently also sustained a thumb injury on May 4, 1980, an arm and neck injury on August 20, 1980, a back injury on July 15, 1981, and a chest injury on December 13, 1983.

[2]In his reply brief the Director reiterates the arguments made in his Petition for Review and requests that the instant case be held in abeyance pending the decision of the United States Court of Appeals in Director, OWCP v. Luccitelli, 964 F.2d 1303, 25 BRBS 1 (CRT)(2d Cir. 1992), rev'g Luccitelli v. General Dynamics Corp., 25 BRBS 30 (1991). That case, which has since been decided, is distinguishable from the present case in that it involves an award

Employer cross-appeals the administrative law judge's award of attorney's fees. Claimant responds, urging that the fee award be affirmed.

Initially, we direct our attention to the Director's assertion that the administrative law judge erred in awarding employer Section 8(f) relief.[3] Section 8(f) of the Act shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §908(f), 944. In order to be entitled to Section 8(f) relief where claimant is permanently partially disabled, employer must establish that claimant had a manifest pre-existing permanent partial disability, which combined with claimant's subsequent work injury, to produce a materially and substantially greater degree of disability than that which would have resulted from the subsequent work injury alone. Thompson v. Northwest Enviro Services, Inc., 26 BRBS 53 (1992); Readel v. Foss Launch & Tug, 20 BRBS 229 (1988); 33 U.S.C. §908(f)(1). See generally Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990).

In awarding employer Section 8(f) relief in the present case, the administrative law judge found that claimant's previous right knee injury, the subject of his prior compensation award in 1984, constituted a manifest pre-existing permanent partial disability which contributed to claimant's present degree of impairment. Decision and Order at 13. On appeal, the Director contends that the Section 8(f) contribution element was not met in this case because there is no medical evidence in the record sufficient to establish that claimant's disability following the May 9, 1985, injury was materially and substantially greater because of his pre-existing leg condition. The Director asserts that in finding otherwise, the administrative law judge impermissibly substituted his opinion for that of a medical expert.

We agree with the Director that the administrative law judge's award of Section 8(f) relief cannot be affirmed. In finding that employer established the contribution requirement of Section 8(f) the administrative law judge noted that it was

---

of Section 8(f) relief where claimant is permanently totally disabled. In cases of permanent total disability, employer must establish that claimant's disability was not due solely to the subsequent injury in order to establish entitlement to Section 8(f) relief.

[3]The administrative law judge's finding that employer's request for Section 8(f) relief was not barred pursuant to Section 8(f)(3), 33 U.S.C. §908(f)(3)(1988), is not challenged on appeal. Decision and Order at 9-12.

"reasonably inferable and indeed patently obvious" that the heavy labor which claimant performs requires cooperating strength and agility of the paraspinal structures and both legs, and that any permanent impairment to any of these three cooperating parts must necessarily produce an increase in a total level of disability of the other parts. The administrative law judge further reasoned that since claimant's pre-existing leg impairment due to the 1984 leg injury was material and substantial, it had to materially and substantially augment claimant's present back problems and indicated that to rely on the mere absence of a physician's statement of this obvious fact to deny Section 8(f) relief would be hypertechnical, mechanical and irrational.

As the administrative law judge correctly noted, the absence of medical evidence of contribution does not, in and of itself, preclude a finding of Section 8(f) contribution; vocational or other evidence of contribution will also suffice. See Pino v. International Terminal Operating Company, Inc., 26 BRBS 81 (1992). Nonetheless, the administrative law judge's finding of Section 8(f) contribution cannot be affirmed on the facts presented in this case because there is no record evidence of any kind sufficient to establish that claimant's pre-existing leg injury rendered his disability resulting from the May 9, 1985 injury materially and substantially greater than it otherwise would have been.[4] We decline to accept the administrative law judge's "common sense" approach which presumes, without any evidentiary basis in the record, that when a claimant who has had a previous injury subsequently sustains a work-related injury to another body part, the resultant disability must be materially and substantially greater, because it would in effect nullify the employer's burden of proof with regard to the contribution element of Section 8(f). See generally Two "R" Drilling, 894 F.2d at 748, 23 BRBS at 35 (CRT). Accordingly, for the aforementioned reasons, the administrative law judge's award of Section 8(f) relief is reversed.

On cross-appeal, employer argues that the attorney's fee awarded by the administrative law judge is excessive because the hourly rate claimant's counsel sought included an impermissible risk component. Claimant's counsel requested an attorney's fee of $4,759.37, representing 27.5 hours, at $162.50 per hour prior to 1988 and $175 per hour in 1988, plus $857.20 in costs. The administrative law judge awarded an attorney's fee of $4,400,

[4]Although employer also argues on appeal that it is entitled to Section 8(f) relief based on claimant's pre-existing back problems, we note that there is also no evidence in the record sufficient to establish that claimant's disability subsequent to the subject work injury was materially and substantially greater because of his pre-existing back problems.

reducing the hourly rate to $160 for all years and an expert witness's fee from $250 to $151.80. Employer avers that shorn of the impermissible risk increment in this case, the appropriate hourly rate is $125 and that a total fee of $3,437.50 would be appropriate.

Employer's argument with regard to the applicable hourly rate is rejected. Initially, we note that although claimant's counsel's fee petition stated that risk of loss is an appropriate factor to be considered in determining the hourly rate, no separate assessment was made for risk of loss. In entering the fee award, the administrative law judge specifically addressed the argument raised by employer on appeal and noted that the hourly rate awarded to counsel was to be based on a number of factors and that although risk of non-recovery was one factor to be considered, a separate special allowance for that contingency was inappropriate.[5] The administrative law judge then reasoned that, in any event, the risk of such loss did not appear great in this case, and that he did not give it much weight. Noting the high quality of representation, counsel's efficiency, as well as the amount at stake and nature of the recovery, the administrative law judge concluded that the $160 hourly rate as well as the total sum he ultimately awarded were reasonable for the services rendered in this case. Although employer argues that enhancement of an attorney's fee to cover risk of loss is contrary to the Supreme Court's holding in Pennsylvania v. Delaware Valley Citizens' Council for Clear Air, 483 U.S. 711 (1987), the administrative law judge in the present case did not augment counsel's fee to include such a contingency. Rather, the administrative law judge awarded what he considered to be a reasonable attorney's fee in light of all relevant factors consistent with Delaware Valley, see 483 U.S. at 727. See also Hobbs v. Stan Flowers, Inc., 18 BRBS 65, 67 (1986), aff'd sub nom. Hobbs v. Director, OWCP, 820 F.2d 1528 (9th Cir. 1987). Inasmuch as employer has failed to establish that the $160 hourly rate awarded by the administrative law was arbitrary, capricious, or an abuse of discretion, we affirm this finding. See Muscella, 12 BRBS at 274. See 20 C.F.R. §702.132.

[5]Although the administrative law judge's decision actually says "appropriate," it is clear from the context that the administrative law judge actually meant "inappropriate." Decision and Order on Attorney Fee Application at 1.

Accordingly, the administrative law judge's award of Section 8(f) relief to employer is reversed. In all other respects the Decision and Order Awarding Benefits is affirmed. The Decision and Order on Attorney Fee Application is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge