BRB No. 86-2586

ANTONIO MARCHIOLLI	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Robert J. Brissenden, Administrative Law Judge, United States Department of Labor.

Daniel F. Valenzuela and N.R. Samuelson (Samuelson, Coalwell & Gonzalez), San Pedro, California, for employer/carrier.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (84-LHC-2924, 84-LHC-2925) of Administrative Law Judge Robert J. Brissenden 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 14, 1980, claimant, a shipwright/joiner for employer, fell and injured his lower back during the course of his employment. When he returned to work on November 13, 1980, he was offered lighter duty insulation work. On February 10, 1981, claimant's back condition flared up, and he was ultimately hospitalized. When claimant returned to work for the second time on January 25, 1982, he was assigned to performing light duty insulation work in the engine room. On February 2, 1982, claimant again fell, landing on his head. Claimant alleged that as a result of this accident, he re-injured his back and sustained a loss of hearing. Shortly after returning to work on December 6, 1982, claimant quit, allegedly because he was unable to do the overhead work required of an insulator, and he has not worked for employer since that time. Claimant, however, subsequently obtained part-time employment as a janitor. Claimant sought permanent total and permanent partial disability compensation under the Act for his work-related injuries.

The administrative law judge awarded claimant temporary total disability compensation from January 14, 1980, to October 30, 1981, for the days of work he missed, and permanent partial disability compensation thereafter based on the difference between his pre-injury average weekly wage and his post-injury wage-earning capacity as a part-time janitor.[1] The administrative law judge also determined that claimant was not entitled to compensation for the minimal hearing loss he sustained in the February 2, 1982, accident. Finally, the administrative law judge determined that employer was not entitled to Section 8(f), 33 U.S.C. §908(f), relief inasmuch as it failed to introduce any evidence which indicated that claimant suffered from a pre-existing permanent partial disability prior to the January 14, 1980, back injury. In denying Section 8(f) relief, the administrative law judge further determined that although the February 2, 1982, work injury and other incidents at work may have resulted in temporary flare-ups of claimant's back condition, claimant's permanent disability was due solely to the January 1980 back injury. Employer appeals the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

[1]The award of compensation is not challenged on appeal.

Section 8(f) shifts the liability to pay compensation for permanent partial and permanent total disability and death benefits after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, where certain pre-requisites are met. In a case where claimant is permanently partially disabled, employer is entitled to relief from the Special Fund where it establishes that the employee suffers from a manifest pre-existing permanent partial disability which combined with a subsequent work-related injury to result in a materially and substantially greater degree of permanent disability than that which would have resulted from the subsequent work-related injury alone. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 1 (1992); *Sproull v Stevedoring Services of America*, 25 BRBS 100, 111 (1991). Employment-related aggravation of a pre-existing disability will suffice as contribution for Section 8(f) purposes. *See Merrill v. Todd Pacific Shipyards, Corp.*, 25 BRBS 140, 147-148 (1991).

Employer argues on appeal that it is entitled to Section 8(f) relief on the basis that claimant's January 4, 1980, injury resulted in a pre-existing permanent partial disability which was aggravated by the subsequent February 2, 1982 work injury to result in claimant's disability. We reject this argument, as the administrative law judge's finding that claimant's disability is due to the 1980 injury is supported by substantial evidence.

Employer asserts that an x-ray dated April 28, 1980, which indicates that claimant exhibited mild spurring of the spine, in conjunction with Dr. Rhodes's September 11, 1981, opinion that claimant had at that time sustained "an acute progression of his intervertebral disc problem" is sufficient to establish that claimant's pre-existing January 1980, injury was aggravated by the February 2, 1982, work-related injury. As this evidence pre-dated the February 1982 work injury, we conclude that it cannot properly support employer's aggravation theory.

Employer, however, also cites Dr Rhodes' February 16, 1982, report in which he indicates that claimant suffered spasmatic increase in lower back pain which he describes as an exacerbation of his prior back injury. In addition, employer cites Dr, Rhodes' February 4, 1983, report which describes claimant as disabled due to unrelenting left low back and leg complaints, and his November 18, 1983, report which notes a "slow degeneration" of claimant's status since April 1983. Inasmuch, however, as Dr. Rhodes specifically opined that claimant's back condition represented a continuing manifestation of his prior 1980 work injury, and not, in fact, a new injury, when he first examined claimant on February 3, 1982, immediately following the occurrence of the February 2, 1982, work accident, we conclude that these medical records do not support employer's aggravation theory. *See generally Skeleton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993).

Employer also relies on Dr. Hunt's September 3, 1982, report in support of its argument. In this report, Dr. Hunt notes minimal annular indentation at L3-4 and L4-5, and minimal vertical indentation at C5-6 on claimant's myelogram, and indicates that claimant has suffered continuous low back pain since his injury, *i.e.*, a chronic low back strain. Dr. Hunt's medical reports, however, also will not suffice to establish that claimant's January 1980 back injury was aggravated by the subsequent February 2, 1982, work accident under the same rationale; he refers solely to the January 14, 1980, injury as the cause of claimant's problems. *Readel v. Foss Launch and Tug*, 20 BRBS 229,

232-233 (1988).

Finally, employer cites Dr. Cantor's diagnosis of a 7 1/2 percent monaural hearing impairment due to the February 1982, work injury and asserts that this impairment contributed to claimant's overall disability. We need not address this argument, however, because the administrative law judge rejected Dr. Cantor's assessment in favor of Dr. Irving Shapiro's opinion that claimant suffers from a very mild left ear hearing loss which did not result in any rateable impairment, as was within his discretion. *See Mijangos v. Avondale Shipyards, Inc.*, 942 F.2d 941, 944, 25 BRBS 78, 80 (CRT)(5th Cir. 1991). Accordingly, as both Dr. Rhodes and Dr. Hunt attributed claimant's disabling back condition solely to the January 1980 work injury, and inasmuch as there is no other evidence in the record sufficient to establish that claimant's February 1982 work injury resulted in a permanent aggravation of a pre-existing condition, the administrative law judge's denial of Section 8(f) relief is affirmed. *See Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT), *reh'g denied*, 859 F.2d 928 (5th Cir. 1988); *see generally E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1352, 27 BRBS 41, 52 (CRT)(9th Cir. 1993), *aff'g and modifying McDougall v. E. P. Paup Co.*, 21 BRBS 204 (1988);

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge