WALTER J. CUMMINGS	)	BRB No. 92-924
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	
	)	
Self-Insured Employer/Respondent	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	
	)	
Carrier-Petitioner	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DATE ISSUED_____
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

WALTER J. CUMMINGS	)	BRB No. 92-2551
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	
	)	
Self-Insured Employer/Respondent	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
	)	
Carrier-Party-in-Interest	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, the Decision on Motion for

Reconsideration -- Denying Reconsideration, and the Decision and Order -- Granting Modification of Anthony J. Iacobo, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Steven D. Bither, Joseph M. Hochadel, and Elizabeth P. Eddy (Monaghan, Leahy, Hochadel & Libby), Portland, Maine, for self-insured employer.

James C. Hunt (Robinson, Kriger, McCallum & Greene, P.A.), Portland, Maine, for Birmingham Fire.

Kevin M. Gillis (Richardson & Troubh), Portland, Maine, for Liberty Mutual.

Stephen Hessert and Patricia A. Lerwick (Norman, Hanson & Detroy), Portland, Maine, for Commercial Union.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier, Birmingham Fire Insurance Company (Birmingham Fire), appeal the Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration -- Denying Reconsideration, and claimant appeals the Decision and Order -- Granting Modification (91-LHC-760), of Administrative Law Judge Anthony J. Iacobo 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer in the painting, cleaning and sandblasting department from 1964 through September 14, 1990, when his respiratory condition forced his retirement.[2] He became aware of work-related breathing problems in 1971, but he did not miss substantial time from work due to those problems until 1986. Dr. Cox diagnosed asbestos-related problems as well as

[1]By Order dated November 3, 1992, the Board consolidated claimant's appeal, BRB No. 92-2551, with Birmingham Fire's appeal, BRB No. 92-924.

[2]Claimant testified he was exposed, among other things, to asbestos, epoxy paints, urethane, and sandblasting dust.

allergies to epoxy and paint solvents. Cl. Exs. 13-14, 19. On December 30, 1986, claimant filed a claim for permanent total disability benefits for his respiratory condition. In 1990, Dr. Hess diagnosed probable asbestosis and hyper-reactive airways disease, and he recommended claimant avoid exposure to dust and noxious chemical vapors. Cl. Exs. 13, 15. Because the shipyard offered no work within these restrictions, claimant's employment ended on September 14, 1990.

The administrative law judge determined that claimant's notice of injury and claim for compensation were filed in a timely manner, as claimant became disabled on December 30, 1986. Decision and Order at 6. He also found that claimant is entitled to permanent total disability benefits based on his 1986 average weekly wage of $697.30, commencing on September 15, 1990. He held employer and Birmingham Fire liable for disability benefits, a Section 14(e), 33 U.S.C. §914(e), penalty, medical benefits, and an attorney's fee, and he denied Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation.[3] Decision and Order at 9-12. Additionally, the administrative law judge concluded that Section 33(g), 33 U.S.C. §933(g), does not bar claimant's claim; however, employer and Birmingham Fire are entitled to a Section 33(f), 33 U.S.C. §933(f), credit to offset claimant's net third-party recovery of $1,784.70. Decision and Order at 12. Thereafter, claimant and Birmingham Fire filed motions for reconsideration. The administrative law judge summarily denied both motions.

Employer and Birmingham Fire appeal the administrative law judge's decisions, contending he erred in holding Birmingham Fire liable as the responsible carrier and in denying Section 8(f) relief. Employer in its self-insured capacity and carriers Commercial Union and Liberty Mutual respond to the appeal, urging affirmance; however, each respondent agrees with Birmingham Fire regarding the applicability of Section 8(f). BRB No. 92-924. No party challenges claimant's entitlement to permanent total disability and medical benefits and a Section 14(e) penalty.

While the case was pending before the Board, claimant filed a motion for modification of the administrative law's judge's decision, seeking determinations as to the date claimant's condition reached maximum medical improvement and as to the commencement date of Section 10(f), 33 U.S.C. §910(f), adjustments for inflation. The administrative law judge found that December 30, 1986, was the date of injury for purposes of determining the timeliness of the claim and the applicable average weekly wage. Modif. at 2. Further, he concluded that claimant's injury became permanent on May 19, 1987, and that his disability commenced on September 15, 1990, after he was forced to stop working. *Id.* at 2-3. Consequently, he awarded disability benefits from that date and cost-of-living adjustments beginning on October 1, 1990. *Id.* at 3.

Claimant appeals the administrative law judge's decision on modification, contending September 15, 1990, is the proper date of injury and his benefits should be based on his average weekly wage as of that date. Alternatively, claimant avers the administrative law judge should have

[3]Commercial Union insured employer from January 1, 1963, through February 28, 1981; Liberty Mutual was on the risk from March 1, 1981, through August 31, 1986; Birmingham Fire was on the risk from September 1, 1986, through August 31, 1988; and employer has been self-insured since September 1, 1988.

awarded benefits based on a 1986 average weekly wage which has been adjusted to account for inflation. Employer in its self-insured capacity, Birmingham Fire, and Liberty Mutual respond to the appeal. All respondents urge affirmance of the administrative law judge's decision holding that Section 10(f) adjustments commence on October 1, 1990. Birmingham Fire agrees with claimant's argument that September 15, 1990, is the date of injury; however, it notes the inconsistency between findings in the original decision and the decision on modification. Therefore, in the alternative, Birmingham Fire suggests vacating the decisions and remanding the case for further consideration. Self-insured employer and Liberty Mutual urge affirmance of the date of injury. BRB No. 92-2551.

Under the Act, the employer responsible for disability benefits is the last employer to expose the employee to injurious stimuli prior to the date on which the employee became aware of the fact that he was suffering from an occupational disease. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991); *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). The responsible carrier is the carrier which last insured the liable employer during the period in which the claimant was exposed to injurious stimuli prior to the date he became disabled by his disease. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992). The United States Court of Appeals for the First Circuit, wherein jurisdiction of the present case resides, held that, in a case in which a claimant was aware of his occupational disease prior to the time he became disabled by it, the date on which he suffered a diminution in his wage-earning capacity is the date of disability for assigning the responsible carrier. *Id.*

In this case, the administrative law judge found that claimant became disabled on both December 30, 1986, and September 15, 1990. As these findings are inconsistent, and as the determination of the date of awareness affects nearly all the issues raised in this case, including the issue of responsible carrier, we vacate the administrative law judge's finding regarding claimant's date of awareness and all findings affected thereby, and we remand this case to him for reconsideration of the date on which claimant became aware of the relationship between his employment, his disease and his disability in light of the standard set forth in *Liberty Mutual*. Upon assessing the appropriate date of awareness, the administrative law judge must then determine the responsible carrier, the applicable average weekly wage, and the dates on which benefits and Section 10(f) adjustments commence.[4] *See Liberty Mutual*, 978 F.2d at 750, 26 BRBS at 85 (CRT); *Phillips v. Marine Concrete Structures*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); 33 U.S.C. §910(i) (1988).

Employer also contends the administrative law judge erred in denying Section 8(f) relief from continuing liability for benefits. 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 totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is

[4]In light of our decision to remand the case for further consideration, we need not address claimant's arguments specifically.

not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); *Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994) (McGranery, J., dissenting). An employment-related aggravation of a pre-existing disability will suffice as contribution to the total disability for purposes of Section 8(f). *Director, OWCP v. General Dynamics Corp. [Graziano]*, 705 F.2d 562, 15 BRBS 130 (CRT) (1st Cir. 1982); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Mere continued exposure to injurious stimuli is insufficient to show actual aggravation. *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In the instant case, the administrative law judge denied Section 8(f) relief because he found no evidence establishing that claimant's disability is "materially and substantially greater than it would have been without subsequent exposures." Decision and Order at 9. He did not specifically address the pre-existing permanent partial disability and manifest elements. Because this case involves a permanent *total* disability and not a permanent *partial* disability, the "materially and substantially greater" standard is not applicable. Therefore, we vacate the administrative law judge's denial of Section 8(f) relief. On remand, the administrative law judge must apply the correct legal standards and address all elements of Section 8(f), stating which evidence he relies on to support his conclusions. *See Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992); *Graziano*, 705 F.2d at 562, 15 BRBS AT 13 (CRT); *Goody*, 28 BRBS at 174.

Accordingly, the administrative law judge's award of benefits for permanent total disability and medical treatment is affirmed as unchallenged, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____

BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

NANCY S. DOLDER
Administrative Appeals Judge