

LARRY BURNS, JR.)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: <u>7/7/2000</u>
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Christopher A. Taggi (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Andrew D. Auerbach (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Joshua T. Gillelan, II, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (87-LHC-2513) of Administrative Law Judge Richard K. Malamphy 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a rigger, injured his neck, back and right leg after falling backwards into a manhole on June 17, 1983. Employer voluntarily paid claimant temporary total disability benefits for this injury from June 25, 1983, to August 28, 1983. Claimant also injured his neck, back and right side on April 1, 1985, when he was struck by boards as they were being loaded on a fork lift.¹ For the 1985 injury, employer voluntarily paid claimant temporary total disability benefits from April 3 to May 8, 1985, on June 3, 1985, and from June 10 to June 30, 1985. Claimant was administratively passed out of his light duty job in the MRA shop at employer's facility on April 17, 1987, and held a new job as a security guard with a different employer for one year, after which he was removed from that job.

In a 1988 Decision and Order, Administrative Law Judge Glenn Robert Lawrence awarded claimant periods of temporary total and partial disability benefits for his injuries. *See* Emp. Ex. 5 (1991). Subsequently, both claimant and employer sought modification of this decision after claimant reached maximum medical improvement in November 1988. Employer also sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), by application dated March 27, 1989. In the Section 8(f) application, employer asserted that the 1983 injury was a manifest pre-existing permanent partial disability which contributed to any disability resulting from the 1985 injury. Emp. Ex. 6 (1991).

¹Claimant's claim for compensation for the June 17, 1983, injury states he injured his back and right foot. Emp. Ex. 3 at 2 (1988); Emp. Ex. 2 at 2 (1991). Claimant's claim for compensation for the April 1, 1985, injury states he injured his back and right leg. Emp. Ex. 5 at 2 (1988); Emp. Ex. 4 at 2 (1991). However, the administrative law judge stated that claimant injured his right leg in 1983 and his right side in 1985 based on claimant's testimony to that effect. *See* Appendix to Dir. Br. at 3; Emp. Ex. 5 at 3 (1991); 1988 Tr. at 32, 37-38.

In a January 24 and February 22, 1991, Decision and Order and Amended Decision and Order, Administrative Law Judge Richard K. Malamphy (the administrative law judge) ordered employer to pay claimant permanent partial disability benefits in the amount of \$158.87 per week from November 23, 1988, except for a period of temporary total disability benefits from March 17, 1989, through July 31, 1990.² After 104 weeks from November 23, 1988, the administrative law judge ordered the Special Fund to pay claimant's disability benefits, as he concluded that employer satisfied all requirements for Section 8(f) relief.³ *See* Emp. Exs. 1, 2 (1999).

In February 1998, claimant sought a 10 percent scheduled permanent partial disability award under Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), for his right leg injury, in addition to his ongoing award of permanent partial disability benefits under Section 8(c)(21). Cl. Ex. 1b (1999). Employer agreed that claimant is entitled to this scheduled award under Section 8(c)(2), but asserted that the Special Fund is liable for these benefits.

In his 1999 Decision and Order, the administrative law judge ordered the Special Fund to pay claimant the 10 percent scheduled permanent partial disability award.⁴ The administrative law judge reasoned that employer's liability ceased after it paid claimant for 104 weeks of permanent disability benefits, relying on the fifth sentence of Section 8(f)(1) of the Act, 33 U.S.C. §908(f)(1), which states that employer is liable for compensation for 104 weeks only, and the line of cases holding that employer is liable for only one 104-week

²The permanent partial disability benefits were based on claimant's loss in wage-earning capacity, and therefore were awarded pursuant to Section 8(c)(21), although the administrative law judge did not so state. *See* Emp. Ex. 1 at 3 (1999).

³The administrative law judge concluded that claimant's 1983 back injury was a manifest pre-existing permanent partial disability because employer had paid compensation for this injury prior to the second work injury. Emp. Ex. 1 at 5 (1999). After noting that the neck impairment was previously determined to be attributable to both work injuries, the administrative law judge found that employer has shown that claimant's second injury materially and substantially contributed to his current level of partial disability. Emp. Ex. 1 at 6 (1999).

⁴The scheduled award is for 28.8 weeks but the administrative law judge distributed it over approximately 53 weeks to avoid claimant's receiving more than two-thirds of his average weekly wage (the compensation rate for total disability). 1999 Decision and Order at 8 n. 1, 2; Dir. Br. at 7 n. 3. The Director notes that an allocation in accordance with the holding in *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139 (CRT)(4th Cir. 1999), *modifying* 32 BRBS 67 (1998), might require that claimant's scheduled award be paid over the course of 81 weeks. Dir. Br. at 7 n. 3; 9 n. 4.

period, pursuant to Section 8(f), for all permanent disabilities arising out of the same injury. *See, e.g., Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), *aff'd on recon.*, 25 BRBS 114 (1991), *rev'd mem. on other grounds*, No. 91-1601 (D.C. Cir. Dec. 18, 1992); *see also Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985).

On appeal, the Director challenges the administrative law judge's decision ordering the Special Fund to pay claimant the 10 percent scheduled permanent partial disability award. Employer initially responds that the Director is barred from challenging the applicability of Section 8(f) for the first time on appeal as the Director neither challenged the applicability of Section 8(f) to this claim before the administrative law judge nor appealed the administrative law judge's 1991 decision granting employer Section 8(f) relief.⁵ Employer also responds in support of the administrative law judge's decision.

The Director argues that the administrative law judge erred in holding the Special Fund liable for the payment of claimant's scheduled award as claimant's leg injury was never found to have been made materially and substantially greater due to a manifest, pre-existing permanent partial disability. The Director also argues that employer is liable for claimant's scheduled award under Section 8(c)(2) as it is not for the same injury for which Section 8(f) was previously awarded and because it runs for fewer than 104 weeks. Employer responds that the Special Fund is liable for the payment of claimant's scheduled award under Section 8(c)(2) because employer's obligation to pay compensation was discharged in full after it paid 104 weeks of compensation under Section 8(c)(21), as both disabilities arose from the same work accident.

⁵This argument is without merit as the Director did assert before the administrative law judge that if claimant is entitled to a scheduled award for the injury to his right leg, employer would be liable for the full amount of such award because it will be payable for less than 104 weeks. 1999 Decision and Order at 5, 7; Dir. Statement (April 26, 1999) at 4. The Director further asserted before the administrative law judge that the Special Fund is not liable for claimant's scheduled award as claimant is not asserting any permanent increased loss of earning capacity under the Section 8(c)(21) award on which Section 8(f) relief was granted. 1999 Decision and Order at 6; Dir. Statement (April 26, 1999) at 4.

Section 8(f) shifts the liability to pay compensation for permanent disability or death benefits 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); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT)(4th Cir. 1998), *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. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff’d on other grounds*, 514 U.S. 122, 29 BRBS 87 (1995). Where a claimant files claims for two types of benefits arising from the same injury, an employer must raise and show entitlement to Section 8(f) relief for each claim separately. *See, e.g., Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Huneycutt*, 17 BRBS at 142. If Section 8(f) applies to both awards, employer is liable for only one period of 104 weeks. *Id.*; *Cf. Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131 (CRT) (4th Cir. 1990)(if injuries are unrelated, employer is liable for 104 weeks on each award). In a case involving both a scheduled award and a Section 8(c)(21) award, the Board recently has held that employer must establish entitlement to Section 8(f) relief for both awards individually as the Act provides different methods of apportioning liability between an employer and the Special Fund for each type of award.⁶ *See Padilla v. San Pedro Boat Works*, BRBS , BRB No.

⁶Section 8(f)(1) provides in relevant part:

If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater. . . .

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation for one hundred and four weeks only.

99-862 (May 17, 2000).

33 U.S.C. §908(f)(1).

We reverse the administrative law judge's finding that the Special Fund is liable for claimant's schedule award in this case. The administrative law judge ordered the Special Fund to pay claimant the scheduled 10 percent permanent partial disability award under Section 8(c)(2), as he found that employer's liability ceased after it had paid 104 weeks of compensation under Section 8(c)(21), and that employer is liable for only a single period of 104 weeks for all permanent disabilities arising out of the same injury. Contrary to the administrative law judge's finding and employer's contention, however, employer is not relieved of all liability after 104 weeks for all permanent disabilities arising from the same injury. Rather, Section 8(f) must be shown to be applicable to each disability. *See, e.g., Padilla*, slip op. at 8-9. In this case, the administrative law judge did not determine whether Section 8(f) applies to the schedule award, and moreover, there is insufficient evidence of record to establish the elements of entitlement to Section 8(f) relief on this award. Dr. Stiles identified the date of claimant's injury as April 1985, and he summarily stated on December 19, 1991, that, "[Claimant] has a 10% permanent disability in his lower extremity as a result of his knee problem. I do not think this is going to improve in the future." Emp. Ex. 4 (1999). On September 30, 1997, Dr. May diagnosed, among other things, a right knee tear, identified the date of claimant's injury as April 1, 1985, and summarized that, "[Claimant] tolerated the evaluation well [H]is range of motion for the right lower extremity totaled 10%" Cl. Ex. 1b (1999). Dr. May also noted that claimant has a prior medical history that is positive for injuries to his lower back and right knee resulting from falling into a manhole, *i.e.*, claimant's 1983 injury. *Id.* This medical evidence does not establish that claimant had a manifest pre-existing permanent partial disability, *see, e.g., Callnan v. Morale, Welfare & Recreation, Dep't of the Navy*, 32 BRBS 246 (1998), or 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." *See Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT). As employer did not establish Section 8(f) entitlement on claimant's award pursuant to Section 8(c)(2) separately from its entitlement to claimant's award pursuant to Section 8(c)(21), employer is not entitled to Section 8(f) relief on the scheduled award. *See generally Huneycutt*, 17 BRBS at 142. Consequently, the administrative law judge's decision ordering the Special Fund to pay claimant's scheduled permanent partial disability award under Section 8(c)(2) is reversed. The decision is modified to reflect employer's liability for this award.⁷

⁷In light of our disposition of this case, we need not address the Director's remaining contentions that the Special Fund is not liable for the scheduled award under Section 8(c)(2) as it runs for fewer than 104 weeks and because it does not compensate claimant for a

disability arising from the same injury as the previous award under Section 8(c)(21) for which Section 8(f) relief was granted. *See* Dir. Br. at 6-8, 10.

Accordingly, the administrative law judge's Decision and Order ordering the Special Fund to pay claimant a 10 percent scheduled permanent partial disability award under Section 8(c)(2) is reversed and modified to reflect that employer is responsible for the payment of this award.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge