BRB No. 98-1381

HIPOLITO B. QUILES	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED: July 19, 1999
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy and Beane), Boston, Massachusetts, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (95-LHC-43) of Administrative Law Judge David W. Di Nardi 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).

Claimant, a painter, injured his back at work on July 14, 1989. Claimant has

not returned to work since that injury. Claimant previously injured his back at work on January 25, 1989, and April 7, 1989, but returned to his usual work after both of these injuries after being off work from two to five days for each of them. Claimant had back surgery on May 15, 1990. Employer voluntarily paid claimant temporary total and permanent total disability benefits. 33 U.S.C. §908(a), (b). The administrative law judge awarded claimant temporary total disability benefits from July 17, 1989, through January 21, 1992, and permanent total disability benefits from January 22, 1992, to the present and continuing, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, did not file a response brief.

We first address employer's challenge to the administrative law judge's finding that it did not establish that claimant suffered from a pre-existing permanent partial disability. 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, 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 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); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). A pre-existing permanent partial disability is a serious lasting physical condition that would motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). In this case, employer alleged that claimant's pre-existing spondylolisthesis and spondylolysis and two prior back injuries on January 25, 1989, and April 7, 1989, support its claim for Section 8(f) relief.

The administrative law judge found that claimant's alleged pre-existing spondylolysis was not a pre-existing permanent partial disability because: (1) while the lumbosacral spine x-rays of June 23, 1986, and July 18, 1989, showed spondylolysis at L5-S1, the April 13, 1989, lumbosacral spine x-ray was normal; and

(2) claimant continued to work although he suffered two flare-ups on January 25, 1989, and April 7, 1989. Decision and Order at 31-32. As employer correctly contends, the administrative law judge did not discuss claimant's testimony that he worked in pain after his first two back injuries and continued working because he had a family to support and did not want to lose his job. RX 21 at 16-18. Moreover, a claimant need not be economically disabled in order to be considered disabled in the context of Section 8(f). *See Bergeron,* 982 F.2d at 790, 26 BRBS at 139 (CRT); *see also Morehead Marine Services, Inc. v. Washnock,* 135 F.3d 366, 32 BRBS 8 (CRT)(6th Cir. 1998). Nor did the administrative law judge discuss Dr. Browning's testimony that the April 13, 1989, x-ray reading is in error and that the 1986 finding of first degree spondylolisthesis demonstrates a permanent condition and rises to the level of being such a serious physical disability that someone who considered employing claimant would be concerned about an increased compensation risk. RX 24 at 6-7. As the administrative law judge did not discuss this relevant evidence, we vacate the administrative law judge's finding that employer did not establish that claimant suffered from a pre-existing permanent partial disability and remand this case to the administrative law judge for further consideration. *See Bergeron*, 982 F.2d at 790, 26 BRBS at 139 (CRT); RX 21 at 16-18, 24 at 6-7.

We next address employer's challenge to the administrative law judge's finding that it did not establish the contribution element required for Section 8(f) relief. Employer contends that the administrative law judge did not discuss Dr. Browning's testimony relevant to the contribution issue. In order to establish the contribution element, employer must show, by medical or other evidence, that claimant's subsequent injury alone would not have caused claimant's permanent total disability. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT).

The administrative law judge found, summarily, that because claimant had no pre-existing permanent partial disability, claimant's permanent total disability is due solely to his July 14, 1989, back injury, an injury which caused claimant to stop working for good and which required that he undergo a spinal fusion. Decision and Order at 32. In so concluding, the administrative law judge did not discuss Dr. Browning's testimony that the work injury in July 1989 was an aggravation of the underlying pre-existing condition and did not alone necessitate claimant's back surgery, that the physician's restrictions imposed in October 1989 were due to the July 1989 back sprain superimposed on the pre-existing spondylolisthesis and would not be in place if claimant only had the sprain, that the outcome of the July 1989 injury is materially and substantially worse than it would have been if not for the pre-existing condition, and that the July 1989 injury was not the sole basis of claimant's disability. RX 24 at 9-14. As the administrative law judge did not discuss this relevant evidence, as asserted by employer, we vacate the administrative law

judge's finding that employer did not establish the contribution element, and remand this case to the administrative law judge for further consideration consistent with law. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT); RX 24 at 9-14. If, on remand, the administrative law judge finds that employer has established that claimant suffers from a pre-existing permanent partial disability and that his permanent total disability is not due solely to the last injury, the administrative law judge must determine whether the pre-existing permanent partial disability was manifest to employer. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT)(2d Cir. 1993); *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997).

Accordingly, the administrative law judge's denial of Section 8(f) relief to employer is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge