BRB Nos. 98-1301
and 98-1301A

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| MARK S. HAMILTON | ) | |
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| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| ARMY & AIR FORCE EXCHANGE SERVICE | ) | DATE ISSUED: June 28, 1999 |
| | ) | |
| and | ) | |
| | ) | |
| THE THOMAS HOWELL GROUP | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| Cross-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeals of the Decision and Order Granting Disability Benefits and Denying Section 8(f) Relief and the Decision Denying Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Gerard E.W. Voyer and Bradford C. Jacob (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

LuAnn B. Kressley (Henry L. Solano, Solicitor of Labor; Carol DeDeo,

Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Granting Disability Benefits and Denying Section 8(f) Relief and the Decision Denying Employer's Motion for Reconsideration (92-LHC-3653) 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 if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained an injury to his back on November 8, 1991, while working as a short haul road driver for employer. Claimant underwent surgery for a herniated disc, first, on July 23, 1992, and, again, on June 17, 1993. Following his back injury, claimant was unable to resume his usual employment. Claimant worked as a dispatcher for employer for a brief time prior to his first back surgery and, upon recovery from that surgery, from September 1992 until May 1993, when his second surgery was performed. After recovering from his second surgery, claimant worked from November 1993 until April 1994 as an order selection clerk for employer. Claimant next worked for employer as a shuttle driver from April 1994 until August 1996, when Dr. Foer advised him to discontinue this work. Having been informed by employer that no light duty work was available, claimant enrolled in courses at Rappahannock Community College in August 1996. In October 1996, claimant resumed working with vocational counselor Debra Puckett under a vocational rehabilitation program sponsored by the Department of Labor (DOL).[1] In February 1997, DOL officially approved vocational training for claimant through the business administration program at Rappahannock Community College with a start date of May 19, 1997, and a completion date of May 31, 1999. On May 28, 1997, employer rehired claimant in a part-time intermittent

[1]Claimant previously had worked with Ms. Puckett, under the direction of another vocational counselor, in a DOL-sponsored vocational rehabilitation program in 1992 and 1993. A proposed vocational plan involving coursework at Rappahannock Community College was never implemented, as employer subsequently provided claimant with work as a dispatcher.

dispatcher position, a position he continued to hold as of the date of the hearing. While working in the intermittent dispatcher job, claimant continued his course work at Rappahannock Community College, which was paid for by DOL. Employer voluntarily paid claimant compensation for temporary total disability and temporary partial disability for various periods. Claimant sought additional compensation for permanent partial disability from April 9, 1994 through August 6, 1996, permanent total disability from August 7, 1996 through May 27, 1997, and permanent partial disability from May 28, 1997 to the present and continuing.

In his Decision and Order Granting Disability Benefits and Denying Section 8(f) Relief, as amended by his subsequent Errata Order, the administrative law judge first denied the claim for permanent partial disability benefits from April 9, 1994, through August 6, 1996, on the basis that, as claimant's work as a shuttle driver was in the same job title and pay classification as his pre-injury work, claimant sustained no loss of wage-earning capacity during this period. Next, the administrative law judge awarded claimant permanent total disability benefits from August 7, 1996 through May 27, 1997, while claimant was enrolled in Rappahannock Community College and was not working. The administrative law judge further awarded compensation for permanent partial disability from May 28, 1997 and continuing, having found that claimant sustained a loss in wage-earning capacity while working for employer in the intermittent dispatcher position. Lastly, the administrative law judge denied employer's claim for Section 8(f), 33 U.S.C. §908(f), relief from continuing compensation liability. The administrative law judge subsequently denied employer's motion for reconsideration of his award of benefits for permanent partial disability commencing May 28, 1997.

On appeal, employer contends that the administrative law judge erred in awarding compensation for permanent total disability from August 7, 1996 through May 27, 1997, and for permanent partial disability from May 28, 1997, to the present and continuing. Employer further assigns error to the administrative law judge's denial of Section 8(f) relief. Claimant, on cross-appeal, challenges the administrative law judge's denial of permanent partial disability benefits from April 9, 1994 to August 6, 1996. In his response brief, claimant urges affirmance of the administrative law judge's award of compensation for permanent total disability from August 7, 1996 through May 27, 1997, and for permanent partial disability commencing May 28, 1997. The Director, Office of Workers' Compensation Programs (the Director), in his response brief, argues that the administrative law judge's denial of Section 8(f) relief should be affirmed.

**Claim for Permanent Partial Disability from April 9, 1994, to August 6, 1996**

We first address claimant's argument that the administrative law judge erred in denying permanent partial disability benefits for the period from April 9, 1994, through August 6, 1996, during which claimant worked for employer as a shuttle driver.[2] Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). In calculating claimant's post-injury wage-earning capacity, the administrative law judge, in order to neutralize the effects of inflation, must adjust the post-injury wage levels to the levels paid in that job at the time of injury so that they may be compared with claimant's pre-injury average weekly wage. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In the instant case, the administrative law judge determined that claimant's post-injury wages as a shuttle driver fairly and reasonably represent his wage-earning capacity. The administrative law judge further found that claimant sustained no loss in wage-earning capacity as claimant, while working as a shuttle driver, held the same job title and pay classification as he held prior to his work-related injury.

[2]We note that it is undisputed that claimant is unable to perform his pre-injury work as a short haul road driver. The administrative law judge determined that employer met its burden of establishing suitable alternate employment for the period from April 9, 1994 through August 6, 1996, by providing claimant a job as shuttle driver which claimant was capable of performing during this time period. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). Claimant does not contest this finding.

Initially, we note that employer voluntarily paid claimant partial disability benefits for this period, and argued below that it is entitled to a credit for only a portion of the payments it voluntarily made. *See* Employer's Post-hearing brief at 51-52. Thus, it was not disputed below that claimant sustained some loss in wage-earning capacity for this time period; rather, the parties disagreed only with regard to the extent of this loss of wage-earning capacity.[3] In his Decision and Order and subsequent Errata Order, however, the administrative law judge found that there was no loss in wage-earning capacity while claimant worked as a shuttle driver and that, consequently, compensation for this time period was to be denied. The administrative law judge further ordered that employer shall receive a credit for all compensation that has been paid during this period.

As the fact that claimant was in the same job and pay classification as pre-injury does not in and of itself lead to the conclusion claimant had no loss in wage-earning capacity, we vacate the administrative law judge's determination that claimant sustained no loss in wage-earning capacity, and is thus not entitled to compensation for this period, and remand the case for the administrative law judge to reconsider the extent of claimant's loss of wage-earning capacity. The administrative law judge rationally found that claimant's actual post-injury earnings represent his wage-earning capacity, yet he did not calculate a dollar figure representing these earnings which could be compared to claimant's pre-injury average weekly wage as is required in order to determine whether claimant sustained a loss in wage-earning capacity under Section 8(c)(21). Both parties appear to agree that a shuttle driver was paid $11.70 per hour in 1991. Using this rate and the total regular hours he worked during the period at issue, claimant argues that his average weekly post-injury earnings were $416.45, and that when these earnings are compared to his pre-injury average weekly wage of $812, a loss in wage-earning capacity is clearly established. As the administrative law judge made no specific calculations regarding claimant's post-injury earnings, this case must be remanded for further findings. On remand, the administrative law judge must address the record evidence regarding the wage rates earned by claimant, and, in order to neutralize the effects of inflation, calculate claimant's post-injury wage-earning capacity based on the rate paid at the time of injury. *See Cook,* 21 BRBS at 7. The administrative law judge must also calculate a dollar figure at the adjusted level for comparison to claimant's pre-injury average weekly wage. If claimant worked overtime hours or received shift differentials prior to his injury, these additional amounts are properly included in his average weekly wage and if claimant is no longer able to work these hours, claimant may have a loss in wage-earning

[3]At the hearing held on June 10, 1997, employer's attorney explained that although claimant's base hourly pay rate as a motor vehicle operator in 1991 was $11.70, the pre-injury average weekly wage of $812 to which the parties stipulated included overtime hours regularly worked and shift differentials regularly received by claimant prior to his injury. *See* Tr. A at 15-20.

capacity on this basis. *See, e.g., Everett v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 316 (1989). Therefore, the case is remanded for further findings regarding claimant's wage-earning capacity from April 1994 to August 1996.

**Claim for Permanent Total Disability from August 7, 1996, through May 27, 1997**

We next address employer's assignment of error to the administrative law judge's award of permanent total disability for the period from August 7, 1996, when claimant discontinued his work as a shuttle driver for employer, through May 27, 1997, when claimant returned to work for employer in an intermittent dispatcher position. We reject employer's initial argument that the administrative law judge erred in finding that, as of August 7, 1996, claimant was no longer physically capable of performing the job as shuttle driver and, accordingly, this job did not qualify as suitable alternate employment as of that date. We note in this regard that employer does not identify specific errors in the administrative law judge's consideration of the medical and other evidence relevant to the issue of claimant's ability to perform the shuttle driver job during the period of time in question. *See Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). As our review of the evidence reveals that the administrative law judge's finding that claimant was physically unable to work as a shuttle driver as of August 7, 1996, is supported by substantial evidence, we affirm the administrative law judge's determination that this job did not constitute suitable alternate employment subsequent to August 6, 1996.

Employer argues, in the alternative, that the administrative law judge erroneously failed to find that employer established the availability of suitable alternate employment with the labor market survey conducted by employer's vocational expert, Eileen Bryant. The administrative law judge found, on the basis of the decisions of the Board and the United States Court of Appeals for the Fifth Circuit in *Abbott v. Louisiana Ins. Guaranty Ass'n,* 27 BRBS 192 (1993), *aff'd,* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1995), that even if employer's vocational evidence were to establish the existence of suitable alternate employment, claimant nonetheless is entitled to total disability compensation for this time period by virtue of his enrollment in DOL-approved vocational training. In light of his finding that the *Abbott* decisions are controlling, the administrative law judge made no determination as to whether employer's labor market survey did, in fact, establish the availability of suitable alternate employment.

After consideration of the administrative law judge's decision in light of employer's argument that *Abbott* is distinguishable from the case at bar, we conclude that the administrative law judge's award of permanent total disability for this period must be

vacated, and the case remanded for the administrative law judge to fully consider the relevant factors under *Abbott. See also Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998); *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998). In *Abbott*, the Board and the Fifth Circuit relied on a number of relevant facts in upholding the administrative law judge's award of total disability benefits while claimant Abbott was precluded from accepting employment due to his participation in a DOL-sponsored vocational rehabilitation program. In the present case, the administrative law judge awarded total disability compensation based solely on claimant's enrollment in DOL-approved vocational training without considering all of the relevant factors underlying the *Abbott* decisions. We note, first, that in *Abbott*, the award of total disability benefits while the claimant was enrolled in the vocational rehabilitation program was predicated on the fact that the alternative jobs identified by the employer were not realistically available to the claimant because the terms of the rehabilitation program precluded the claimant from working. *See also Gregory*, 32 BRBS at 267. In the instant case, however, the administrative law judge did not determine whether claimant's enrollment in vocational training, in fact, precluded his reasonably securing the jobs identified by employer in its labor market survey. Thus, on remand, the administrative law judge must specifically address whether claimant's enrollment in vocational rehabilitation precluded him from working in the alternative jobs identified by employer.[4] Moreover, while the administrative law judge reasonably credited the opinions of Ms. Puckett and Dr. Foer that claimant's long-term interest would best be met by vocational training, he did not explicitly state whether completion of the program would increase claimant's post-injury wage-earning capacity and decrease employer's compensation liability.[5] *See Abbott*, 40 F.3d at 128, 29 BRBS at 26-27 (CRT); *Bush*, 32 BRBS at 217-218. The administrative law judge further did not make a specific finding as to whether claimant showed due diligence in completing the program. *See Gregory*, 32 BRBS at 266. On remand, the administrative law judge must address these and any other relevant factors in reconsidering claimant's entitlement to total disability benefits during his enrollment in vocational training.[6] If, on remand, the administrative law judge finds that *Abbott* is not

[4]In this regard, on remand, the administrative law judge must take into consideration the fact that claimant continued his coursework at Rappahannock Community College, paid for by DOL, after obtaining part-time employment with employer in the intermittent dispatcher position. *See Gregory*, 32 BRBS at 267.

[5]The Fifth Circuit in *Abbott,* recognizing the Act's goal of promoting the rehabilitation, held that such efforts should not be frustrated when they are reasonable and result in the long run in lower total compensation liability. *Abbott,* 40 F.3d at 128, 29 BRBS at 26-27 (CRT).

[6]The administrative law judge should address the evidence relevant to a determination of the precise period of time in which claimant was, in fact, enrolled in

applicable on the facts presented, he must make a determination as to whether the jobs identified in employer's labor market survey satisfy employer's burden of establishing the availability of suitable alternate employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). We note, with respect to the onset of permanent partial disability, that disability becomes partial only when job availability is shown. *See, e.g., Bush,* 32 BRBS at 220 n. 12. Thus, in the instant case, the earliest date that the administrative law judge could find that claimant's total disability became partial is the date that employer presented evidence of suitable alternate employment. *See Livingston v. Jacksonville Shipyards, Inc.,* 32 BRBS 123, 126 (1998).

**Claim for Permanent Partial Disability from May 28, 1997 to the Present and Continuing**

Employer also assigns error to the administrative law judge's award of permanent partial disability benefits, beyond those which employer has already paid, while claimant was working for employer in an intermittent dispatcher position. Employer contends that the administrative law judge erred in finding that claimant sustained a loss in hourly wage-earning capacity while working in this position.[7] We disagree. The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variables that could form a factual basis for the decision.

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the DOL-approved vocational training program.

[7]In light of our affirmance of the administrative law judge's determination that, as of August 7, 1996, claimant was no longer capable of performing the shuttle driver job, we reject employer's additional argument that as claimant remains physically able to work as a shuttle driver, his post-injury wage-earning capacity should be based on the earnings from that position.

*See Darcell v. FMC Corp., Marine & Rail Equip. Div.,* 14 BRBS 294 (1981); *Devillier v. National Steel & Shipbuilding Co.,* 10 BRBS 649 (1979).

In the present case, the administrative law judge noted that claimant, while working in the intermittent dispatcher position, was paid at his former hourly rate as a motor vehicle operator pursuant to the provisions of the Department of Defense's wage protection plan. The administrative law judge found that, consistent with the Board's decision in *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10, 16-17 (1980), the wages paid to claimant in his intermittent dispatcher job are not commensurate with the dispatcher work performed, and, thus, do not fairly and reasonably represent claimant's post-injury wage-earning capacity. In *Harrod*, the claimant, who had returned to work in a light duty truck driving and signalman position, retained the wage rate of his pre-injury job as a first-class rigger due to union policy. The Board held that, because the claimant's post-injury wages were higher than the wages the claimant otherwise could have earned solely on the basis of pay commensurate with the light-duty work he was capable of performing, his post-injury wages did not accurately reflect his wage-earning capacity. *Harrod,* 12 BRBS at 17. Based on our review of the evidence in the instant case, we uphold the administrative law judge's determination that the wages paid to claimant are not commensurate with the dispatcher work performed, and, therefore, do not fairly and reasonably represent claimant's post-injury wage-earning capacity. *See Harrod,* 12 BRBS at 17; *see also Harrison v. Todd Pacific Shipyards Corp.,* 21 BRBS 339, 345-346 (1988).

We also affirm the administrative law judge's determination that claimant's post-injury wage-earning capacity is reasonably represented by the hourly wages paid in the dispatcher's position at the time of claimant's injury. *See generally Grage v. J.M. Martinac Shipbuilding,* 21 BRBS 66 (1988), *aff'd sub nom. J. M. Martinac Shipbuilding v. Director, OWCP,* 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990) Moreover, contrary to employer's contention on appeal, we conclude that the administrative law judge's finding that claimant's post-injury wage-earning capacity is based on a 24-hour work-week is reasonable and supported by substantial evidence of record.[8] We therefore affirm the administrative law judge's award of permanent partial disability benefits from May 28, 1997 to the present and continuing.

[8]The administrative law judge acted within his discretion in refusing to consider on reconsideration new evidence regarding the number of hours claimant worked. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Brothers Co.,* 19 BRBS 228 (1987).

**Section 8(f) Relief**

The final issue to be addressed is employer's challenge to the administrative law judge's denial of Section 8(f) relief. Section 8(f) shifts liability to pay compensation for permanent disability compensation from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. Where an employee is permanently partially disabled, the employer must also show that the current permanent partial disability is materially and substantially greater than that which would have resulted from the work-related injury alone. 33 U.S.C. §908(f); *see 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 (1995); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT) (4th Cir. 1998).

In the present case, employer sought Section 8(f) relief based on claimant's pre-existing back and psychiatric conditions. The administrative law judge found that claimant's previous back strains did not rise to the level of a pre-existing permanent partial disability, and that, in any event, employer failed to establish the contribution element with respect to any pre-existing back condition. The administrative law judge further found that although claimant's pre-existing psychiatric condition constituted a manifest pre-existing permanent partial disability, there is no record evidence sufficient to establish the contribution element with regard to claimant's psychiatric condition.

We reject employer's argument that the administrative law judge erred in finding the record evidence insufficient to satisfy the contribution requirement of Section 8(f).[9] The

[9]In light of our affirmance of the administrative law judge's finding that employer failed to establish the contribution element, we need not address employer's contention that the administrative law judge erred in failing to find that claimant's pre-existing back condition is a pre-existing permanent partial disability which was manifest to employer. We agree with the Director, however, that the accident reports and accompanying attending physician's report that pre-date claimant's November 8, 1991, work injury are insufficient to establish the existence of a serious, lasting physical problem, *see Director, OWCP v. Belcher Erectors, Inc.,* 770 F.2d 1220, 17 BRBS 146 (CRT)(D.C. Cir. 1985), and that the post-injury medical

decisions of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Harcum I* and *II* establish that in order to satisfy the contribution element in a permanent partial disability case, the employer must present evidence quantifying the level of impairment that the claimant would have suffered from the latest work injury alone before the administrative law judge may determine whether the ultimate permanent partial disability is materially and substantially greater than that which resulted from the latest injury alone. *See Harcum II*, 131 F.3d at 1081-1082, 31 BRBS at 166-167 (CRT); *Harcum I*, 8 F.3d at 185-186, 27 BRBS at 130-131 (CRT); *see also Carmines*, 138 F.3d at 139, 32 BRBS at 50-51 (CRT).

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records cited in employer's brief constitute a *post-hoc* diagnosis, and, as such, do not satisfy the manifest requirement, *see Hitt v. Newport News Shipbuilding & Dry Dock Co.,* 16 BRBS 353 (1984).

In the instant case, we hold, first, that the inferences drawn by the administrative law judge with respect to Dr. Foer's opinion regarding the effect of claimant's back condition on his ability to work are rational.[10] *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). We therefore affirm the administrative law judge's conclusion that employer failed to present evidence sufficient for the administrative law judge to make the requisite comparison between any disability arising from the alleged pre-existing back condition and claimant's ultimate disability. *See Carmines*, 138 F.3d at 142-144, 32 BRBS at 53-55 (CRT). Next, as we uphold the administrative law judge's finding that employer has produced no current evidence, medical or other, to explain the combined effect of claimant's pre-existing psychiatric condition and his work-related injury, we affirm the administrative law judge's determination that employer has not provided any basis for determining whether claimant's ultimate permanent partial disability is materially and substantially greater than would have ensued from his November 8, 1991, back injury alone. *Id.* Because the administrative law judge's finding that employer did not establish the contribution element is rational and supported by the record evidence, we affirm his denial of Section 8(f) relief.[11] *Id.*

Accordingly, the administrative law judge's denial of permanent partial disability benefits for the period from April 9, 1994 through August 6, 1996, and his award of permanent total disability benefits for the period from August 7, 1996 through May 27, 1997, are vacated, and the case is remanded for further proceedings consistent with this opinion.

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[10]The administrative law judge inferred from Dr. Foer's opinion that the doctor's statement that claimant has "significant limitations" on his ability to perform gainful employment referred not to any pre-existing back condition but, rather, to the effects of claimant's November 8, 1991 back injury.

[11]We affirm the administrative law judge's denial of employer's request that the record be re-opened for the submission of additional evidence to support the contribution element of Section 8(f), as within his discretion as trier-of-fact. *See generally Smith,* 22 BRBS at 46; *Sam,* 19 BRBS at 228.

In all other respects, the administrative law judge's Decision and Order Granting Disability Benefits and Denying Section 8(f) Relief, as amended by Errata Order, and Decision Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge