BRB No. 00-0605

NELSON SMALLWOOD	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 12, 2001
	)	
	)	
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 of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Julia Mankata (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Mark A. Reinhalter, Senior Staff Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-1509) of Administrative Law Judge Richard E. Huddleston 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 injured his neck and left shoulder at work on July 1, 1996. Employer voluntarily paid claimant periods of temporary total, temporary partial, and permanent partial disability benefits. The parties agreed that claimant is entitled to continuing permanent partial disability benefits of $506.08 per week. 33 U.S.C. §908(c)(21). The only issue before the administrative law judge was whether employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge denied employer Section 8(f) relief, finding that employer did not establish the contribution element.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Employer contends that the opinions of Drs. Reid and Wardell are sufficient to establish the contribution element. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related 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). The administrative law judge found, and the Director concedes, that claimant has a manifest, pre-existing chronic knee disability. The administrative law judge found, however, that employer did not establish the level of impairment that would ensue from the work-related neck and

shoulder injuries alone.

Employer contends that the administrative law judge erred by failing to find that it established the contribution element. In order to establish the contribution element for Section 8(f) relief in a case where claimant is permanently partially disabled, employer must establish that claimant's partial disability is not due solely to the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has addressed this standard in several cases. In *Harcum I*, 8 F.3d 175, 27 BRBS 116 (CRT), the Fourth Circuit held that in order to establish contribution in a permanent partial disability case, employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work injury alone. The court stated that a showing of this kind requires quantification of the level of the disability that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131 (CRT). Subsequently, in *Carmines*, 138 F.3d 134, 32 BRBS 48 (CRT), the Fourth Circuit applied the *Harcum I* holding in the context of an employer's seeking Section 8(f) relief for a permanent partial disability award to a claimant for work-related asbestosis. The court denied employer Section 8(f) relief because employer was unable to establish what degree of disability claimant would have suffered from the asbestosis alone, specifically holding that employer failed to meet its burden to quantify the disability that claimant would have suffered absent any pre-existing conditions. The court held that it is not proper simply to calculate the current disability and to subtract from this the disability that resulted from the pre-existing disability. *Id.*, 138 F.3d at 143, 32 BRBS at 55 (CRT). The court stated that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *Id.; see also Harcum II*, 131 F.3d 1079, 31 BRBS 164 (CRT).

In the instant case, the administrative law judge properly held that the opinions of Drs. Reid and Wardell are legally insufficient to establish the contribution element as they do not quantify the disability that would ensue from the current work injury alone in accordance with *Harcum* and *Carmines*. Dr. Reid stated in relevant part,

> Mr. Smallwood's disability is not caused by his left shoulder injury alone, but rather his disability is materially contributed to, and made materially and substantially worse(ned) by his pre-existing shoulder disability and left knee disability.

Emp. Ex. 3(e). Dr. Reid also stated that, "the primary reason for Mr. Smallwood's

disability is his permanent knee condition and not his July 1, 1996 left shoulder injury." Emp. Ex. 3(d). Dr. Wardell stated in relevant part:

> I have treated Mr. Smallwood for a neck injury sustained at work on July 1, 1996 and for a left knee injury sustained March 13, 1992. Mr. Smallwood's pre-existing condition had a material and substantial impact on his overall present disability. Had it not been for his left knee injury, his neck and left shoulder injury of July 1, 1996 would have resulted in the partial neck restrictions that I have placed him on. Please see attached sheet.

Emp. Ex. 8. There is no attached sheet. The administrative law judge rationally found that even if it is assumed that the October 1998 work restrictions found at Employer's Exhibit 5 are the restrictions referred to in Dr. Wardell's opinion the restrictions do not quantify the disability that would ensue from the work injury alone.[1] Dr. Wardell also stated that, "They contributed to his overall disability," in responding to the question of "What effect did Mr. Smallwood's pre-existing conditions have on his overall disability?" Emp. Ex. 7(b). Dr. Wardell checked "yes" to the question of "Would you agree that the pre-existing conditions materially and substantially contributed to his overall disability?" *Id.* As the administrative law judge properly held that the opinions of Drs. Reid and Wardell are legally insufficient to establish that claimant's permanent partial disability is not due solely to the work injury and that his disability is materially and substantially greater due to the contribution of the pre-existing knee injury, we affirm this finding.[2]

[1]With regard to the reference to the restrictions found in Dr. Wardell's opinion, the record contains separate restrictions for the neck and left shoulder injury and the pre-existing left knee disability. A comparison of these restrictions does not quantify the degree of disability that would ensue from the work injury alone. Emp. Exs. 3 at Exhibits 10, 26, 4-6.

[2]That the Director did not introduce any evidence in this matter has no bearing on the outcome as employer bore the burden of establishing its entitlement to Section 8(f) relief.

Consequently, the administrative law judge's finding that employer is not entitled to Section 8(f) relief is affirmed.

See Carmines, 138 F.3d 134, 32 BRBS 48 (CRT). Employer's reliance on *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Parkman]*, 122 F.3d 1060 (table), 32 BRBS 6 (CRT)(4th Cir. 1997)(unpublished), is misplaced as this case is unpublished and was superseded by *Carmines*, 138 F.3d 134, 32 BRBS 48 (CRT).

Accordingly, the administrative law judge's Decision and Order denying employer Section 8(f) relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge