

CARL REINERTSEN)	
)	
Claimant)	
)	
v.)	
)	
RAYMOND INTERNATIONAL)	DATE ISSUED: <u>Nov. 26, 1999</u>
BUILDERS)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Section 8(f) Claim of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Timothy D. Wolf (Fowler, White, Gillen, Boggs, Villereal & Banker), Tampa, Florida, for employer/carrier.

Kristin M. Dadey (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Section 8(f) Claim (95-LHC-0854) of Administrative Law Judge Pamela Lakes Wood 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 dock builder, injured his head, neck, and back during the course of his employment for employer on March 22, 1983, when an approximately seven foot wave lifted him off of a float stage and threw him against a concrete piling. Claimant returned to work full-time in December 1983. On January 24, 1984, claimant again injured his head, neck, and back during the course of his employment for employer when he slipped on ice and fell. Claimant has not returned to work since the date of this second work incident. Employer voluntarily paid claimant permanent total disability benefits under the Act from the date of this incident. 33 U.S.C. §908(a). The sole issue before the administrative law judge was employer's entitlement to Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f).

In her Decision and Order, the administrative law judge found that employer established a pre-existing permanent partial disability that was manifest to employer.

She next found, however, that employer failed to establish the contribution element necessary for Section 8(f) relief. Specifically, the administrative law judge found that employer failed to submit sufficient evidence that claimant's second injury in January 1984 alone would not have caused claimant's permanent total disability. Accordingly, employer's request for Section 8(f) relief was denied.

On appeal, employer challenges the administrative law judge's denial of its request for Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance.

Section 8(f) shifts liability to pay compensation for permanent disability 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 had 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. See 33 U.S.C. §908(f). Where, as in the instant case, it is uncontroverted that claimant is permanently totally disabled, the employer must show that claimant's total disability

is not due solely to the subsequent work injury; specifically, in order to be entitled to Section 8(f) relief, the employee's total disability must be caused by both his work injury and his pre-existing condition. See *Director, OWCP v. General Dynamics Corp.[Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

After review of the record, we hold that the administrative law judge's denial of Section 8(f) relief is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe*, 380 U.S. at 359; see *Dominey*, 30 BRBS at 137. Contrary to employer's contention, the opinions of Drs. Strouse and Gallagher, as well as the testimony of claimant, while supportive of a finding that claimant's present condition is related to a combination of his two work-related injuries, do not establish that claimant's total disability is not solely the result of his last injury. See Employer's Exhibits 2, 3; Director's Exhibit 2. Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, that finding is affirmed. See *Bergeron*, 982 F.2d at 790, 26 BRBS at 139 (CRT).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge