BRB Nos. 09-0265
09-0265A and 09-0265B

G.P.	)	
	)	
Claimant-	)	
Cross-Respondent A	)	
Cross-Petitioner B	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 10/16/2009
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners A	)	
	)	
IAP WORLDWIDE SERVICES	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Cross-Respondents A	)	
Cross-Respondents B	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

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

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Grover E. Asmus (Asmus and Gaddy, LLC), Mobile, Alabama, for Service Employees International Incorporated and Insurance Company of the State of Pennsylvania.

Keith L. Flicker and Brendon E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for IAP Worldwide Services and ACE American Insurance Company.

Kathleen H. Kim (Carol DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and Service Employees International, Incorporated (SEII) and claimant cross-appeal, the Decision and Order (2008-LDA-00126, 00127) 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 injured his right shoulder while working as a truck driver for IAP Worldwide Services (IAP) in Kuwait on November 24, 2004. After receiving initial treatment in Kuwait, claimant was sent stateside where Dr. Chandler, as a result of an MRI which revealed a possible rotator cuff tear, referred claimant to an orthopedic surgeon, Dr. John. Dr. John performed surgical procedures on claimant's right shoulder on June 13, 2005, and again on December 1, 2005. On August 16, 2006, Dr. John opined that claimant reached maximum medical improvement with a 12 percent permanent impairment to his right shoulder, and he released claimant to return to work with limitations on lifting and overhead work, and permanent restrictions of no pushing or

pulling. Claimant, however, remained off work because of continued pain prompting a referral by Dr. John to a pain specialist, Dr. Joiner, who treated claimant with a combination of pain and anti-inflammatory medications, physical therapy, and trigger point injections. Claimant stated that his condition improved to the point that, in June 2007, he applied for work with IAP and SEII.

On August 14, 2007, claimant signed a one-year contract to work as a heavy truck driver in Iraq for SEII.[1] As part of this agreement, claimant underwent orientation both in Houston, Texas, and upon his arrival in Iraq, and a medical evaluation; he also completed paperwork disclosing his prior shoulder surgeries and his current pain medications. Claimant, having been equipped with a flak jacket that weighed about 60 pounds, took a driving test on August 29, 2007, to determine his readiness to drive under Iraq's harsh conditions. Upon completion of the test, claimant stated that he carried the flak jacket for nearly one-quarter of a mile on rugged terrain back to his hut. Claimant stated that the next morning he awoke in extreme pain and went to the medical clinic. The examining medic opined that claimant sustained an aggravation of a right shoulder injury. As a result, claimant returned to the United States and began treating again with Drs. Joiner and John.

On September 19, 2007, Dr. Joiner opined that claimant had suffered an "exacerbation" of his right shoulder injury from "increased activity" relating to his work for SEII in Iraq. Claimant testified that his pain and symptoms have significantly increased since the August 2007 incident causing an increased lack of mobility and inability to return to work for SEII. Nonetheless, claimant requested that Dr. Joiner release him so he could return to work. On November 5, 2007, Dr. Joiner opined that claimant had reached maximum medical improvement, and was capable of returning to work with a lifting restriction of no more than 45 pounds.[2] In February 2008, Dr. John opined that claimant had sustained, as a result of his work with SEII, a flare-up of pain in his right shoulder related to his initial injury. Dr. John subsequently clarified that claimant's wearing of the body armor in his work for SEII exacerbated his prior injury.

Claimant stated that after SEII informed claimant that he could not return to work for them as long as he had his restrictions, he searched for, and eventually secured, a job as a dental technician with Saunders Dental Laboratories on March 25, 2008. Claimant

[1] IAP voluntarily paid temporary total disability benefits to claimant from November 29, 2004, through the date of claimant's subsequent work accident with SEII on August 29, 2007.

[2] SEII paid claimant temporary total disability and medical benefits from August 29, 2007, until November 7, 2007.

filed separate claims under the Act against IAP and SEII seeking additional benefits, and those claims were consolidated into a single action on April 22, 2008. In response, SEII filed an application seeking Section 8(f) relief, 33 U.S.C. §908(f).

In his decision, the administrative law judge found that claimant initially sustained an injury to his right shoulder while working for IAP in Kuwait on November 24, 2004, and that claimant's current condition is entirely the result of an aggravation of that pre-existing condition caused by his work for SEII on August 29, 2007. The administrative law judge thus concluded that SEII is the responsible employer. The administrative law judge next found that claimant is unable to return to his usual employment as a truck driver, and that although neither IAP nor SEII presented any evidence regarding the availability of suitable alternate employment, the record establishes that claimant returned to alternative employment within his restrictions as of March 25, 2008. The administrative law judge calculated claimant's average weekly wage at the time of the August 29, 2007, work injury as $1,615.38, based on the stipulated average weekly wage for claimant's 2004 injury with IAP. He thus found claimant entitled to, and SEII liable for, temporary total disability benefits from August 29, 2007, through November 5, 2007,[3] permanent total disability benefits from November 6, 2007, through March 25, 2008, and thereafter an ongoing award of permanent partial disability benefits, as well as all medical benefits associated with claimant's treatment for the August 29, 2007, injury. The administrative law judge granted SEII's application for Section 8(f) relief.

On appeal, the Director challenges the administrative law judge's finding that SEII is entitled to Section 8(f) relief. SEII responds to the Director's appeal, urging affirmance of the administrative law judge's Section 8(f) findings. In its cross-appeal, SEII challenges the administrative law judge's finding that it is the responsible employer, and alternatively the administrative law judge's calculation of claimant's average weekly wage at the time of his August 29, 2007, injury. Claimant and IAP each respond, urging affirmance of the administrative law judge's finding that SEII is the responsible employer. Claimant also urges the Board to affirm the administrative law judge's average weekly wage finding. In his cross-appeal, claimant submits that if the Board reverses the administrative law judge's decision against SEII, it must then remand the case to the administrative law judge for consideration of his claim against IAP.

SEII argues that the administrative law judge erred in finding it is the responsible employer in this case as the record establishes that claimant's current condition is due to

[3] The administrative law judge found, based on Dr. Joiner's assessment, that claimant's right shoulder condition reached maximum medical improvement as of November 5, 2007.

the natural progression of the initial shoulder injury he sustained while working for IAP. In this regard, SEII contends that any exacerbation experienced by claimant during his work with SEII was only temporary in nature.

In allocating liability between successive employers in cases involving traumatic injury, the employer at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004). Where claimant's work results in an aggravation of his symptoms, the employer and carrier at the time of the work events resulting in this aggravation are responsible for any resulting disability.[4] *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986).

The administrative law judge found, based on SEII's documentation of the August 29, 2007, work incident and the opinions proffered by Drs. John and Joiner, that the physical requirements of claimant's employment with SEII aggravated his pre-existing injuries. The record reflects that the SEII form for claimant's injury describes the August 29, 2007, incident as "rt. shoulder pain associated to carrying Kevlar Gear and previous injuries," and provides a medical assessment of "aggravation of rt. shoulder injury." IAP X 4. Dr. Joiner stated that claimant suffered an "exacerbation" of his chronic right shoulder injury from "increased activity" while working for SEII in Iraq. IAP X 7. Similarly, Dr. John stated that claimant had "a new injury to his right shoulder, neck and arm," corresponding with a "flare-up" of pain in his shoulder which was related to his initial injury but which was aggravated by his "wearing body armor" while working for SEII. CX 15. Dr. John stated at his deposition that claimant's activities with SEII caused claimant's right shoulder condition to become symptomatic. IAP X 8, Dep. at 48. As the administrative law judge's finding that the events associated with claimant's work for SEII on August 29, 2007, aggravated his pre-existing shoulder condition is supported by

[4] Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). It is immaterial whether an aggravation caused an attack of symptoms severe enough to disable claimant or altered the underlying disease process; in either event, the disability results from the aggravation. *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389, 13 BRBS 101, 106 (1st Cir. 1981). It follows that the employer at the time of the aggravation is liable for the resulting disability.

substantial evidence, it is affirmed.[5] Consequently, we affirm the administrative law judge's conclusion that SEII is the responsible employer in this case.[6] *Marinette Marine Corp.*, 431 F.3d 1032, 39 BRBS 82(CRT).

SEII next argues that the administrative law judge's use of the stipulated average weekly wage for the November 24, 2004, IAP injury, or the use of claimant's potential earnings under his 2007 employment agreement with SEII, to calculate claimant's benefits relating to the August 29, 2007, SEII injury is not a fair, reasonable, and realistic assessment of claimant's earning capacity at the time he went to work with SEII. Rather, SEII avers that the most realistic assessment of claimant's average weekly wage at the time of the 2007 accident should be claimant's actual earnings in his post-injury work as a dental technician.

After finding 33 U.S.C. §910(c), applicable,[7] the administrative law judge initially rejected SEII's proposal to base claimant's average weekly wage for the August 29,

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[5] We note that the administrative law judge's decision is further supported by claimant's testimony regarding his significant increase in symptoms following the August 29, 2007, work incident, HT at 47-48, 51, 101, as well as SEII's pre-hire physical examination form dated July 31, 2007, which while acknowledging claimant's surgeries in April and December of 2005, found claimant "qualified" for "any work consistent with skills and training," since the "examination revealed no immediately significant medical problems." SEII X 3. Following the August 29, 2007, incident, both Drs. Joiner and John stated that claimant was not capable of such work. CXs 15, 17

[6] In light of our affirmance of the administrative law judge's finding that SEII is liable for the payment of claimant's benefits, we need not address the contentions raised by claimant in his cross-appeal.

[7] The parties do not assert that the administrative law judge erred by finding inapplicable Sections 10(a) and (b), 33 U.S.C. §910(a), (b). Section 10(c) of the Act states that a claimant's average weekly wage shall be determined as follows:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in

2007, injury on his subsequent wages as a dental technician, approximately $340 per week, in essence because they did not accurately represent claimant's earnings at the time of his August 29, 2007, injury while working for SEII in Iraq. In reaching this conclusion, the administrative law judge found that despite the facts that SEII medical personnel performed examinations of claimant for a full day and that claimant disclosed his disability to SEII on multiple forms, SEII nevertheless concluded that he was suitable for employment in Iraq. Thus, the administrative law judge found that at the time of the August 29, 2007, injury claimant was capable of earning the wages paid to a heavy truck driver in Iraq. The administrative law judge next considered claimant's prospective earnings in his job with SEII, but found that the two weeks of actual earnings reflect too short a period to accurately calculate an average weekly wage. He thus found that the "more fair and accurate representation of the claimant's earning capacity at the time of the 2007 incident would be the stipulated average weekly wage while working with IAP," because claimant's job with SEII marked his return to the workforce after recovering from his 2004 injury and because it involved employment similar to that which he was engaged at the time of the second injury.

The Board has held that where, as here, claimant is injured while working overseas in a dangerous environment in return for higher wages under a long-term contract, his annual earning capacity should be calculated based upon the earnings in that job as they reflect the full amount of the earnings lost due to the injury. *K.S. v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009), *aff'd on recon*, ___ BRBS ___, BRB No. 08-0583 (Sept. 25, 2009) (*en banc*). Section 10(c) directs the administrative law judge to determine claimant's annual earning capacity "having regard to the previous earnings of the injured employee in the employment in which he was injured." The goal of Section 10(c) in this regard is intended to result in a sum that reflects the potential of claimant to earn absent injury. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). Average weekly wage calculations based solely on a claimant's new, higher wages have been affirmed where they reflect the potential to earn at that level. *Healy Tibbitts Builders, Inc.*, 444 F.3d 1095, 40 BRBS 13(CRT); *Bonner*, 600 F.2d 1288; *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981).

> self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

In this case, the administrative law judge properly rejected the assertion that claimant's average weekly wage should be based on his earnings in his post-injury job as a dental technician. This work bears no relation to claimant's pre-injury job as a truck driver and the wages cannot reflect his earning capacity at the time of injury. Moreover, the administrative law judge's finding that claimant's average weekly wage is properly based exclusively on the wages earned in his overseas work as a truck driver is rational, supported by substantial evidence, and in accordance with law. These wages were a primary reason for claimant's accepting employment under the dangerous working conditions existing in Iraq. Claimant's employment was to be full-time on a one-year contract. To compensate claimant for his injury at a lesser rate than that paid by the job in which he was injured distorts his earning capacity by reducing it to a lower level than employer agreed to pay claimant to work under the conditions in Iraq. *K.S.*, 43 BRBS 18. Therefore, as claimant's overseas earnings for IAP are comparable to those that he would have earned in his overseas employment with SEII, the administrative law judge's decision to apply the stipulated average weekly wage at the time of claimant's initial work injury November 24, 2004, to claimant's August 29, 2007, work injury is rational and thus, is affirmed. *S.K. v. Service Employers Int'l, Inc.*, 41 BRBS 123 (2007); *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006).

In his appeal, the Director argues that the administrative law judge's decision to grant Section 8(f) relief is contrary to law because SEII did not submit evidence sufficient to satisfy the appropriate standard for contribution as espoused by the United States Court of Appeals for the Fourth Circuit. Specifically, the Director asserts that since, as the administrative law judge explicitly found, employer did not offer any evidence to quantify the extent of disability that claimant would have suffered absent the pre-existing disability, it is error for the administrative law judge to conclude that claimant's ultimate disability was materially and substantially greater as a result of his pre-existing disability. Furthermore, the Director argues that the administrative law judge never analyzed whether claimant's current disability is attributable to the 2007 injury or merely a continuation of the 2004 injury.

Section 8(f) shifts the liability to pay compensation for permanent disability 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, as here, if it establishes that: 1) the claimant had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) the ultimate permanent partial disability is not due solely to the work injury and is materially and substantially greater than the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326

F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003); *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*, 514 U.S. 122, 29 BRBS 87(CRT) (1995).

There is no dispute that employer has satisfied the first two elements and that the only issue is whether it has satisfied the third element, the contribution element. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, the employer must quantify the level of the impairment that would ensue from the claimant's work-related injury alone. *Harcum I*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). In *Carmines*, the court further explained that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine whether the claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT); *see also Cherry*, 326 F.3d 449, 37 BRBS 7(CRT); *Ward*, 326 F.3d 434, 37 BRBS 17(CRT). The court also advised that an employer may make its showing of contribution by medical or other evidence, including vocational reports. *Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT).

As the Director notes, the administrative law judge, in addressing the contribution requirement, stated that "employer did not submit evidence to quantify the level of impairment resulting from the aggravation alone and/or in conjunction with the pre-existing injury." Decision and Order at 24. In light of this finding,[8] which is supported by substantial evidence, employer cannot, *per se*, establish the contribution element for purposes of Section 8(f) relief under the *Carmines/Harcum* standard since it has not

[8] Dr. Joiner stated at his deposition that although claimant experienced an increase in symptoms, the physician could not "really quantitate" the difference in claimant's right shoulder pain between June 2007 and September 2007. EX 7, Dep. at 72, 73. Dr. John's testimony regarding quantification can be described, at best, as equivocal. In this regard, he stated that while "from a standpoint of strength or range of motion limitations," claimant did not have any additional permanent anatomical physical impairment as of February 2008 compared to August 2006, "it's very difficult to get a pain rating and incorporate that into an impairment rating," but "that it's possible you could add with that." IAP X 8, Dep. at 46. Moreover, while, on August 16, 2006, Dr. John assigned claimant a 12 percent rating to claimant's upper extremity and a 7 percent rating to his whole body, CX 15, the record contains no post-August 2007 impairment assessment.

presented any "quantification" evidence. *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT); *Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT); *Harcum I*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). Moreover, the "materially and substantially" greater element is not satisfied by evidence that merely states that the pre-existing disability made the claimant's ultimate disability worse than it would have been with only the subsequent injury. *See Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 307-308, 31 BRBS 146, 148-149(CRT) (5th Cir. 1997); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997). Nor is it satisfied, as SEII intimates, merely by the showing that claimant had a history of disabling injuries to the same body part as that affected by the subsequent injury. *See Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990) (rejecting a "common sense test" which presumes contribution when the same body part is injured subsequently as previously). Thus, the administrative law judge's finding that claimant's current disability is materially and substantially greater because of the pre-existing disability is not supported by substantial evidence or in accordance with law. Consequently, that finding, as well as the administrative law judge's resulting conclusions that employer has met the contribution element for, and thus, is entitled to, Section 8(f) relief, are reversed.[9] *Ward*, 326 F.3d 434, 37 BRBS 17(CRT); *see also Cherry*, 326 F.3d 449, 37 BRBS 7(CRT).

[9] However, we reject the Director's contention that the administrative law judge never analyzed whether claimant's current disability is attributable to the 2007 injury or is merely a continuation of the 2004 injury. The administrative law judge found, in regard to the responsible employer issue, that claimant's current disability is a result of the aggravation injury claimant sustained while working for SEII on August 29, 2007. Decision and Order at 15.

Accordingly, the administrative law judge's finding that SEII is entitled to Section 8(f) relief is reversed. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge