

THOMAS M. GREENLAW	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NATIONWIDE BUILDING	)	DATE ISSUED:
MAINTENANCE, INCORPORATED	)	
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANIES	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Section 8(f) Relief of James Guill, Associate Chief Administrative Law Judge, United States Department of Labor.

Douglas L. Brown (Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, L.L.C.), Mobile, Alabama, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. De Deo, 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Section 8(f) Relief (94-LHC-969) of Associate Chief Administrative Law Judge James Guill 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant underwent three eye surgeries, in 1977, 1984 and 1988, to remove his pterygia.<sup>1</sup> On October 21, 1988, while maneuvering a forklift, claimant suffered a work-related injury when the cable holding the cargo broke, swung, and hit claimant in the face, resulting in a depression fracture of the skull, profound memory deficit, and a seizure disorder. Following this incident, employer voluntarily paid claimant permanent total disability benefits. 33 U.S.C. §908(a). Thereafter, employer sought relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In his Decision and Order, the administrative law judge, based on his finding that employer satisfied its burden of establishing that the pre-existing condition rendered claimant's visual disability materially and substantially greater than it would have been from the October 1988 injury alone, granted employer's request for Section 8(f) relief.

On appeal, the Director challenges the administrative law judge's award of Section 8(f) relief. Employer responds, urging affirmance of the administrative law judge's decision.

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 totally disabled, as in this case, the employer must show that claimant's total disability is not due solely to the subsequent work injury; specifically, a claimant's total disability must have been caused by both the work injury and the pre-existing condition. See *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). In a case where claimant is permanently partially disabled, however, employer satisfies the contribution element by establishing that claimant's compensable disability was made materially and substantially greater as a result of the prior disability. See *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996).

---

<sup>1</sup>A pterygia is defined as "a wing-like structure, applied especially to an abnormal triangular fold of membrane, in the interpalpebral fissure, extending from the conjunctiva to the cornea" of the eye. *Dorland's Illustrated Medical Dictionary*, 25th ed. (1974).

In this case, the Director did not challenge the existence of a manifest, pre-existing permanent partial disability; rather, the Director asserts that the administrative law judge erred in concluding that employer satisfied the contribution element necessary for employer to establish entitlement to relief under Section 8(f). Specifically, the Director contends that the administrative law judge erred in crediting the opinion of Dr. Bowden since that physician addressed only the impairment to claimant's eye rather than the current level of claimant's overall disability. We agree. In the instant case, the administrative law judge credited Dr. Bowden's testimony in finding the contribution element to have been established based upon the fact that that physician addressed the issue of whether claimant's disability was "greater" as a result of his work-injury. Specifically, in crediting Dr. Bowden's testimony, the administrative law judge stated that Dr. Bowden was the only physician of record to address the issue of whether claimant's pre-existing disability rendered his current disability greater than it would have been from the October 1988 injury alone; in this regard, the administrative law judge noted Dr. Bowden's opinion that claimant's visual disability is materially and substantially greater than would have resulted from his work-injury alone. *See* Decision and Order at 4. Contrary to the administrative law judge's rationale, however, in order to establish the Section 8(f) contribution element in cases involving permanent total disability, employer must demonstrate that the total disability is not solely the result of the subsequent work injury, but results from a combination of that injury and claimant's pre-existing condition. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT); *Two "R" Drilling*, 894 F.2d at 748, 23 BRBS at 34 (CRT); *Dominey*, 30 BRBS at 134. As it is uncontroverted that claimant is permanently totally disabled, the administrative law judge's determination that Section 8(f) was established must be vacated as the administrative law judge's decision to credit Dr. Bowden's opinion over others in the record was not in accordance with the applicable legal standard for establishing contribution. We therefore vacate the administrative law judge's decision, and his consequent finding that the contribution element is satisfied, and we remand the case for the administrative law judge to determine whether employer has established that claimant's work-injury alone would not have caused his permanent total disability. *See Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

Accordingly, the Decision and Order of the administrative law judge granting employer Section 8(f) relief is vacated, and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge