BRB Nos. 96-0795,
96-0795A and 96-0795B

GEORGE W. SIPLE, JR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PENNSYLVANIA SHIPBUILDING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Respondent	)	
	)	
and	)	
	)	
SUN SHIPBUILDING AND DRYDOCK COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS' CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order, Order on Motion for Reconsideration, and Order of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Neil B. Kitrosser (Brookman, Rosenberg, Brown & Sandler), Philadelphia, Pennsylvania, for claimant.

Andrew B. Kabler (Weber, Goldstein, Greenberg & Gallagher), Philadelphia, Pennsylvania, for Pennsylvania Shipbuilding Company.

Stephen J. Harlen and Barbara D. Huntoon (Swartz, Campbell & Detweiler), Philadelphia, Pennsylvania, for Sun Shipbuilding and Drydock Company and Employers' Casualty Company.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Long shore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, Sun Shipbuilding and Drydock Company (Sun Ship), and the Director, Office of Workers' Compensation Programs (the Director), appeal the Decision and Order, Order on Motion for Reconsideration, and Order (90-LHC-1946) of Administrative Law Judge Frank D. Marden rendered on a claim filed pursuant to the provisions of the Long shore 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained an injury to his lower back on December 5, 1977, while working for Sun Ship. Claimant subsequently returned to work for Sun Ship with physical restrictions. Commencing in 1982, Sun Ship paid claimant compensation benefits at a rate of $100 per week. In 1982, Pennsylvania Shipbuilding Company (employer) succeeded Sun Ship at the facility at which claimant worked. As a result of claimant's physical restrictions, employer subsequently demoted claimant from being a first class mechanic/rigger to a third class mechanic/rigger with no opportunity for promotion. On February 9, 1988, claimant suffered a work-related injury to his upper back and neck while working for employer. He continued working until April 1, 1988, when his treating physician advised him to quit; claimant has not

been employed since that time.

In his Decision and Order Awarding Benefits, the administrative law judge found that: (1) claimant was totally disabled and reached maximum medical improvement as of August 18, 1992; (2) employer failed to establish the availability of suitable alternate employment and was thus responsible for paying claimant temporary total disability benefits from April 1, 1988, to August 18, 1992, and permanent total disability benefits thereafter; (3) employer is liable for the medical services of Drs. Romy and Ungar-Sargon, but not those of Dr. Hollander; (4) employer is entitled to relief pursuant to Section 8(f), 33 U.S.C. §908(f), of the Act; (5) Sun Ship is responsible for no further disability benefits after April 1, 1988; and (6) employer must reimburse Sun Ship for the compensation it paid claimant since the date he ceased working, April 1, 1988.

In his Order on Motion for Reconsideration, the administrative law judge addressed
the applicability of *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980), to the case at bar. Specifically, when considering the issue raised by the parties regarding whether claimant was entitled to receive permanent partial disability compensation concurrently with the permanent total disability compensation awarded, the administrative law judge concluded that continuing the prior award of $100 per week, payable by Sun Ship, concurrently with the award of $248.11 per week for permanent total disability, payable by employer, would exceed the statutory limit on compensation; accordingly, the administrative law judge affirmed his prior decision.

Both claimant and employer sought reconsideration of this decision. In an Order dated March 4, 1996, the administrative law judge: (1) denied claimant's request to reopen the record for the submission of additional evidence; (2) ordered employer to pay the medical bill of Bright Medical Technology, Inc., unless it could demonstrate that the services provided were not a valid medical expense; and (3) deleted his order that employer should reimburse Sun Ship for the monies it paid after April 1, 1988, and ordered claimant to reimburse Sun Ship for those benefits.

On appeal, claimant challenges the administrative law judge's decision to terminate Sun Ship's ongoing $100 per week payments of compensation, his decision to hold claimant liable for repaying the compensation Sun Ship paid him after April 1, 1988, and his refusal to order employer to reimburse claimant for the chiropractic services rendered by Dr. Hollander. BRB No. 96-0795. Sun Ship, in its cross-appeal, contends that the administrative law judge erred in reconsidering his first two decisions and in holding that claimant, rather than employer, should

reimburse it for the payments it made to claimant after April 1, 1988. BRB No. 96-0795A. The Director has also filed a cross-appeal, arguing that the administrative law judge erred in finding employer entitled to relief under Section 8(f); the Director, in his brief, also responds that the administrative law judge erred in concluding that claimant was not entitled to concurrent awards and that claimant must reimburse Sun Ship for those payments made to him after April 1, 1988.[1] BRB No. 96-0795B.

We will first address claimant's contentions regarding his treatment with Dr. Hollander and his assertion that the administrative law judge erred in terminating Sun Ship's payments of $100 per week to him. BRB No. 96-0795. Initially, claimant contends that the administrative law judge erred in failing to find employer liable for the medical treatment that he received from Dr. Hollander, a chiropracter. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment ... medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

[1]We reject employer's contention that the Director is without authority to appeal that portion of the administrative law judge's decision denying concurrent awards and ordering claimant to reimburse Sun Ship. Pursuant to the Board's implementing regulations, the Director has standing to appeal or respond to an appeal before the Board as a party-in-interest. *See* 20 C.F.R. §§802.201(a), 802.212; *see also* 20 C.F.R. §801.2(a)(10); *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995). Thus, the Director could properly appeal this issue to the Board. The issue of concurrent awards in this case, moreover, was raised by claimant in his appeal and thus that portion of the Director's brief addressing this issue is in response to claimant's appeal.

In his decision, the administrative law judge found that claimant failed to establish that the treatment rendered by Dr. Hollander was reasonable or necessary. In making this determination, the administrative law judge relied on Dr. Lerman's opinion that patients with claimant's condition should not undergo aggressive manipulation. Dr. Lerman's opinion is supported by the opinion of Dr. Leonard, who is also a chiropractor, and who stated that Dr. Hollander's treatment addressed claimant's condition arising out of his prior injuries and not the subject injury, as well as by the opinion of Dr. Saland, an orthopedic surgeon, who opined that none of the treatment rendered by Dr. Hollander was related to claimant's February 1988 work injury. Moreover, the administrative law judge relied on the opinions of these doctors that claimant was receiving the same treatment from his physical therapy as that provided by Dr. Hollander. It is well-established that the administrative law judge is entitled to evaluate the credibility of the medical evidence and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It was, therefore, within the administrative law judge's discretionary authority as factfinder not to credit Dr. Hollander's testimony regarding the necessity of his treatment of claimant and to rely instead on the contrary opinions of Drs. Lerman, Leonard, and Saland. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *McGrath*, 289 F.2d at 403. We therefore affirm the administrative law judge's determination that employer is not liable for the medical treatment rendered to claimant by Dr. Hollander, as that finding is rational and in accordance with law. *See generally Wheeler*, 21 BRBS at 35.

Claimant next contends that the administrative law judge erred in concluding that he, rather than employer, must reimburse Sun Ship for the compensation benefits paid to him by Sun Ship subsequent to April 1, 1988. Employer, Sun Ship, and the Director, in their respective briefs, support the position asserted by claimant. Sun Ship, however, asserts in its appeal that employer must reimburse it for these benefits.

Section 14(j) of the Act, 33 U.S.C. §914(j), provides the only method whereby an employer may be entitled to reimbursement of advance compensation payments made by it to a claimant. *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993). Specifically, Section 14(j) provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j). The Act, therefore, provides for reimbursement of advance compensation payments made by an employer only if unpaid installments of compensation remain owing. *See Ceres Gulf v. Cooper,* 957 F.2d 1199, 25 BRBS 125 (CRT)(5th Cir. 1992); *see also Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, 112 S.Ct. 3056 (1992). Thus, as the Act does not provide for the direct reimbursement by claimant to an employer for compensation paid by the employer, we hold that the administrative law judge erred in ordering claimant to repay Sun Ship all compensation that Sun Ship had paid subsequent to April 1, 1988. Accordingly, we reverse the administrative law judge's finding that Sun Ship is entitled to reimbursement from claimant of its post-April 1, 1988, payments to claimant. Moreover, employer is also not liable for reimbursement of benefits paid by Sun Ship for the 1977 injury as Section 14(j) does not allow reimbursement from unpaid installments due for a separate injury. *Vinson*, 27 BRBS at 223.

Claimant additionally asserts that the administrative law judge erred in determining that Sun Ship was no longer liable for any disability payments subsequent to April 1, 1988; specifically, claimant avers that concurrent awards of disability compensation are appropriate in the case at bar. Both employer and the Director are supportive of claimant's position regarding this issue. Sun Ship, in contrast, urges affirmance of the administrative law judge's decision to terminate its liability for ongoing permanent partial disability compensation.

Initially, we reject Sun Ship's contention that the administrative law judge was without authority to reconsider his decision for a second time in his Order dated March 4, 1996. BRB No. 96-0795A. An administrative law judge is not bound by formal rules of procedure, *see Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989); moreover, neither the Act nor the Act's implementing regulations prohibit an administrative law judge from reconsidering a prior Order on Motion for Reconsideration. *See Hamilton v. Ingalls Shipbuilding, Inc.*, 30 BRBS 84 (1996); *Bogdis v. Marine Terminals Corp.,* 23 BRBS 136 (1989); *see also* 20 C.F.R. §802.206(b)(1). Accordingly, we hold that the administrative law judge committed no error in reconsidering his Order on Motion for Reconsideration.

Next, we agree with claimant that the administrative law judge's decision to deny claimant concurrent disability awards cannot be affirmed. Where a claimant sustains an injury which results in a permanent partial disability award pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), and subsequently suffers a second injury which results in a permanent total disability, he may receive concurrent awards for the two disabilities. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Finch v. Newport News*

Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989). The concurrent awards must be calculated to fully compensate claimant for both injuries while avoiding the double recovery of benefits. *Id.* In this regard, *Hastings* holds that compensation is computed based on the average weekly wage of the injured employee at the time of the injury. *See* 33 U.S.C. §910. In general, claimant's earnings at the time of the second injury should reflect claimant's reduced wage-earning capacity as a result of the first injury, so that the combination of the two awards fully compensates claimant's loss in wage-earning capacity for both injuries. *See Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part and rev'd and rem. on other grounds,* 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984). While claimant's average weekly wage at the time of the second injury may be adjusted to correspond with his residual wage-earning capacity following the first injury, *see Crum*, 16 BRBS at 108, both *Hastings* and the Board's decisions thereafter recognize that increased earnings may also be considered. Where a claimant's earning capacity increases, he may be awarded benefits based on his average weekly wage at the time of the second injury and an adjustment of the initial permanent partial disability award may be made under the modification procedures in Section 22, 33 U.S.C. §922, if his wage-earning capacity has in fact increased. *Hastings*, 628 F.2d at 96 n.30, 14 BRBS at 354 n.30. Where claimant's increased earnings do not reflect increased wage-earning capacity, but result from such events as contractual wage increases, claimant may be entitled to benefits based on his full average weekly wage at the time of the second injury in addition to the continuing permanent partial disability award. *Morgan v. Marine Corps Exchange*, 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exchange v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). *See also Finch*, 22 BRBS at 196; *Kooley v. Marine Industry Northwest*, 22 BRBS 142 (1989). In a case involving multiple injuries, therefore, the administrative law judge has the authority to fashion awards which fully compensate claimant's loss in wage-earning capacity for both injuries.

In this case, the administrative law judge, after acknowledging the parties' assertions that *Hastings* must be applied in this multiple injury case in order to compensate claimant for his overall loss of wage-earning capacity, declined to render concurrent awards. Specifically the administrative law judge stated that, although claimant's classification changed from that of a first-class rigger in 1977 to that of a third-class rigger in 1988, "only theory was argued as to the effect or consequences of claimant's job classifications" and, moreover , no evidence was submitted regarding claimant's pay scales. The administrative law judge therefore utilized claimant's actual weekly earnings in 1977 and 1988 in concluding that claimant was entitled to only an award of permanent total disability compensation based on his 1988 earnings. In rendering this conclusion, however, the

administrative law judge failed to determine whether claimant's 1988 earnings fairly and reasonably represent his annual earning capacity.[2] *See* 33 U.S.C. §910; *see generally* 33 §908(h).

In the instant case, claimant testified as to the circumstances surrounding his

[2]The administrative law judge relied on the decision of the United States Court of Appeals for the Ninth Circuit in *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995), in terminating claimant's permanent partial disability award, reasoning that both a permanent total disability award based on claimant's 1988 average weekly wage of $372.17 and a $100 per week permanent partial disability award would exceed the statutory maximum. In *Brady-Hamilton*, the court approved concurrent awards under *Hastings*, but held the two awards combined should not exceed the 66 2/3 percent of average weekly wage maximum of Section 8(a), 33 U.S.C. §908(a). *Brady-Hamilton*, however, did not involve facts similar to the present case, where claimant's earnings at the time of permanent total disability arguably reflect reduced wage-earning capacity resulting from his reassignments. In the 11 years between injuries, claimant's average weekly wage increased only from $279.99 in 1977 to $372.17 in 1988, and the administrative law judge did not address the effects of claimant's first injury on his earnings thereafter. In *Brady-Hamilton*, moreover, the court did not simply eliminate the permanent partial disability award, but rather remanded the case for findings of fact as to the reason for claimant's increase in earnings from $435.93 in 1977 to $674.72 in 1982, and whether this increase represented increased wage-earning capacity.

demotion. *See* December 10, 1993 Tr. at 62. Additionally, claimant submitted into evidence documentation from employer acknowledging the effect of claimant's medical restrictions upon his wage-earning capacity. *See* CX-13. Claimant thus may be entitled to concurrent awards in order to fully compensate him for his loss in wage-earning capacity resulting from the combined effects of the two injuries. In order to resolve this issue, the administrative law judge must determine whether claimant's actual earnings in 1988 fairly and reasonably represent his wage-earning capacity. The absence of comparative first and third class rigger wage scales in 1977 and 1988, which seemed to deter the administrative law judge from making the necessary findings, *see* Order on Motion for Reconsideration at 2, does not negate the necessity to make such a finding. *See White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70 (CRT)(1st Cir. 1987). The administrative law judge could have adjusted claimant's earnings by using the changes in the National Average Weekly Wage as calculated under Section 6(b)(3), 33 U.S.C. §906(b)(3). *See Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 (1990). Moreover, it appears uncontroverted that claimant was demoted as a result of the physical restrictions placed on him following his 1977 work-related injury. Thus, the administrative law judge's findings on this issue are vacated, and the case remanded for the administrative law judge to properly determine claimant's wage-earning capacity and thereafter address the issue of whether claimant is entitled to concurrent awards under the proper standard. *Hastings*, 628 F.2d at 85, 14 BRBS at 354; *White*, 812 F.2d at 33, 19 BRBS at 70 (CRT).

We will now address the Director's appeal of the administrative law judge's award of Section 8(f) relief to employer. BRB No. 96-0795B. In his appeal, the Director contends that the administrative law judge erred in determining that employer established the contribution element necessary for such relief to be granted. We disagree. Section 8(f) shifts liability to pay compensation for permanent disability or death 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 totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his permanent total disability is not due solely to the subsequent work injury.[3] *See* 33 U.S.C. §908(f)(1); *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); *John T. Clark & Son of Maryland v. Benefits Review Board*, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980).

[3]The Director does not dispute that claimant has a manifest pre-existing permanent partial disability; employer has thus satisfied the first two elements necessary for Section 8(f) relief to be granted.

Thus, where an employee is permanently totally disabled, an employer must demonstrate that the total disability was caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. *See Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

After review of the record, we hold that the decision of the administrative law judge is rational, supported by substantial evidence in the record, and is in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe*, 380 U.S. at 359. In his decision, the administrative law judge found that employer, though the statements of Dr. Lerman, established the contribution element of Section 8(f). Dr. Lerman stated that claimant's current symptoms were related to an exacerbation of degenerative changes in the spine due to work-related causes, *i.e.*, both the 1977 and 1988 injuries. CX 63 at 25. Dr. Lerman opined that claimant's neck and shoulder symptoms were due to his 1988 injury, his lower back complaints to the 1977 injury and that neither separately totally disabled him but together they did. CX 63 at 32-33. Dr. Lerman's opinion is supported by the testimony of Dr. Saland, who opined that claimant had recovered from the 1988 injury and any remaining symptomolgy was the result of the 1977 injury and/or claimant's underlying degenerative condition which was aggravated by both injuries.

The administrative law judge's decision to rely upon this testimony is within his discretion as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, as there is credible evidence which demonstrates that claimant's total disability is the result of his pre-existing conditions and his 1988 work injury, the administrative law judge's conclusion that the contribution element of Section 8(f) is met must be affirmed. *See Cordero*, 580 F.2d at 1331, 8 BRBS at 744; *Dominey*, 30 BRBS at 134.

Accordingly, the administrative law judge's Decision and Order, Order on Motion for Reconsideration, and Order are affirmed in part, reversed in part, vacated in part, and remanded in part for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge