BRB No. 96-860

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| CARSON R. COATS | ) | |
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| Claimant | ) | |
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| v. | ) | |
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| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | |
| | ) | DATE ISSUED:_____ |
| Self-Insured Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Mark Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, 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, DOLDER and McGRANERY, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand (79-LHC-1440) of Administrative Law Judge Clement J. Kichuk 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the third time this case has come before the Board. The facts are not in dispute, but the case has a long procedural history, set forth as follows.

Claimant was exposed to asbestos during the course of his forty years with employer. In June 1978, while claimant was still employed with employer, he underwent x-ray examinations which revealed minimal calcification in his left hemidiaphragm consistent with exposure to asbestos; the physicians of record have referred to this condition as asbestosis. *See* 1Emp. Ex. 13; 2Emp. Ex. 18.[1] In November 1978, claimant was diagnosed as having histiocytic lymphoma (cancer of the lymph system) for which he underwent prolonged chemotherapy and treatment. 2Emp. Exs. 17, 23-25; 2Cl. Ex. 3. He worked until March 1979 when his treatment prevented him from continuing, and then he returned to work on December 5, 1979, after his treatments ceased. Claimant continued to work until August 28, 1991, and his retirement became effective on January 1, 1992. 2Tr. at 28-29.

In 1981, Administrative Law Judge Gray awarded claimant compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), for a one percent permanent partial disability due to asbestosis. Gray Decision and Order (Feb. 6, 1981) at 3. On its motion for reconsideration, Judge Gray awarded employer Section 8(f), 33 U.S.C. §908(f), relief in light of the combination of claimant's "pre-existing permanent partial disability of histiocytic lymphoma and the requisite treatment" and his asbestosis. Gray Supp. Decision and Order (April 13, 1981) at 1-2. No party appealed these decisions.

In 1983, claimant sought modification under Section 22, 33 U.S.C. §922, due to his allegation that his condition forced him to retire from work and that he therefore was totally disabled. The modification hearing was conducted before Administrative Law Judge Chao, who raised the issue of Section 8(f) relief for the first time at the beginning of the hearing.

[1]There were two hearings in this case; therefore, the exhibits are labeled as follows: 1Emp. Ex. (employer's exhibits from the first hearing); 2Emp. Ex. (employer's exhibits from the second hearing); 1Cl. Ex. (claimant's exhibits from the first hearing); 2Cl. Ex. (claimant's exhibits from the second hearing). The transcripts are identified in the same manner (1Tr. and 2Tr.).

Because of the late notice, neither employer nor the Director presented evidence on that issue. 2Tr. at 10.

In his decision rendered on November 29, 1984, Judge Chao found that claimant's lymphoma arose as a result of his work exposure to asbestos and he concluded that claimant was permanently totally disabled due to his lymphoma and resultant chemotherapy treatments and not to his asbestosis.[2] He also found that he was not bound by Judge Gray's previous award of Section 8(f) relief,[3] and he concluded that because claimant had no additional exposure to asbestos after his return to work in 1979, he did not sustain a second injury. Accordingly, Judge Chao denied employer's application for Section 8(f) relief. Chao Decision and Order at 5-9. Employer appealed Judge Chao's decision.

In its 1988 decision, the Board vacated Judge Chao's denial of Section 8(f) relief because Judge Chao failed to provide the parties with an adequate opportunity to present evidence and arguments pertaining to the issue. Consequently, the Board remanded the case for the submission of evidence relevant to the issue and for a new Section 8(f) determination. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

On November 3, 1988, Judge Chao issued an order indicating the scope of the issue to be determined on remand. He reiterated his finding that Judge Gray erred in awarding Section 8(f) relief based on the incorrect conclusion that claimant's asbestosis was diagnosed after his lymphoma. Therefore, pursuant to the Board's remand order, he permitted both employer and the Director an opportunity to submit new evidence concerning the applicability of Section 8(f), and he limited the scope of remand to that issue. In his decision

[2]Judge Chao credited a doctor's report which indicated the x-rays revealed that the calcification due to asbestosis detected in 1978 had not advanced by 1983. Chao Decision and Order at 5; 2Cl. Ex. 2.

[3]Judge Chao stated that Judge Gray awarded Section 8(f) relief based on different benefits and for a different time period. Chao Decision and Order at 7-8. Moreover, he noted a discrepancy in Judge Gray's findings regarding the order in which claimant's conditions were diagnosed. *Id.* at 8 n.4.

on remand, Judge Chao noted that employer submitted additional evidence, and that both parties briefed the Section 8(f) issue. Employer argued that claimant is totally disabled as a result of his both lymphoma and his pre-existing hearing loss. Judge Chao stated: "[i]t is impossible for the hearing loss to combine with the lymphoma" because he had previously found that "claimant was totally disabled by his lymphoma." Chao Decision on Remand (June 29, 1989) at 3. He then considered the new evidence presented by employer. However, he discredited Dr. Harmon's opinion that claimant was not totally disabled by his lymphoma alone and can perform sedentary work because the opinion was rendered five years after Judge Chao found that claimant was totally disabled by the lymphoma. Because that finding was not appealed to the Board, Judge Chao concluded it was a final determination and again denied Section 8(f) relief. *Id.* at 2-4. Nevertheless, on employer's motion for reconsideration, Judge Chao issued a supplemental decision on remand. In this decision, he revisited the Section 8(f) issue. He considered both the hearing loss and asbestosis as possible pre-existing permanent partial disabilities, but he discredited Dr. Harmon's opinion that claimant's hearing loss would prevent him from obtaining sedentary jobs because Dr. Harmon is not a vocational expert and because his opinion that claimant's asbestosis contributed to claimant's total disability did not support the original conclusion that claimant's total disability is due to the lymphoma alone. Consequently, Judge Chao reaffirmed his original denial of Section 8(f) relief. Chao Supp. Decision on Remand (Aug. 14, 1989) at 2-3.

Employer appealed Judge Chao's decisions on remand, and again the Board vacated his denial of Section 8(f) relief and remanded the case for further consideration. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 89-3372 (Jan. 31, 1994) (unpublished). The Board held that Judge Chao had the authority to address the Section 8(f) issue in its entirety by virtue of its earlier remand order, which established the law of the case, and the broad scope of Section 22. *Coats*, slip op. at 4; *Coats*, 21 BRBS at 80-81. Thus, the Board held that Judge Chao should have considered all the evidence, both old and new, and addressed the Section 8(f) issue in its entirety, including the issue of whether any condition other than lymphoma contributed to claimant's total disability. Additionally, the Board stated that Judge Chao's rationale for rejecting Dr. Harmon's opinion was problematic because a physician need not be a vocational expert to render an opinion on a claimant's ability to perform proffered jobs and because the credibility determination lacked a reasoned analysis. *Coats*, slip op. at 6-7.

On remand, Administrative Law Judge Kichuk[4] reviewed the procedural history of the case, considered all the evidence of record, and awarded employer Section 8(f) relief. Judge

[4]Judge Chao is no longer with the Office of Administrative Law Judges. Kichuk Decision and Order (Feb. 22, 1996) at 5 n.2.

Kichuk found that claimant's asbestosis and hearing loss constituted disabilities pre-existing his lymphoma. He found that both conditions were manifest to employer and that claimant's "lung impairment was the result of both his asbestosis and his lymphoma. . . ." Kichuk Decision and Order (Feb. 22, 1996) at 10. He further found that both the asbestosis and lymphoma contributed to claimant's total disability without regard for claimant's hearing loss. *Id.* As a result, he held that employer is entitled to relief from continuing liability for compensation from the Special Fund. The Director appeals this decision, and employer responds, urging affirmance.

The Director contends Judge Kichuk erred in awarding Section 8(f) relief because claimant sustained no second injury or aggravation because he was not exposed to asbestos after June 1978. The Director also argues that employer has not met the contribution element necessary for Section 8(f) relief. Employer counters these arguments, stating there is no need to show aggravation -- all it need show is a second injury and an occupational disease constitutes a second injury; therefore, the aggravation doctrine is irrelevant. Employer also argues that it met the contribution element, as the cumulative effect of claimant's disabilities renders him totally disabled.

Section 8(f) shifts the 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 current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992).

In this case, Judge Kichuk rationally found that claimant had a pre-existing permanent hearing loss and pre-existing asbestosis. Kichuk Decision and Order at 8. In 1974, claimant underwent an audiometric evaluation which revealed a 25.3 percent binaural impairment.[5] *See* 2Emp. Ex. 26. In early 1978, x-rays revealed calcification compatible with asbestosis, and he was awarded compensation for a one percent permanent partial disability. *See* 2Emp. Ex. 18; Gray Decision and Order. Claimant's lymphoma was diagnosed in November 1978. 2Emp. Ex. 17. Both asbestosis and hearing loss may qualify as pre-existing disabilities for purposes of Section 8(f) if they are serious lasting physical conditions, and the administrative law judge did not err in so finding on this record. *See Shrout v. General Dynamics Corp.*, 27

[5]According to Dr. Harmon, claimant was awarded workers' compensation benefits for this hearing loss. 2Emp. Ex. 26.

BRBS 160 (1993) (Brown, J., dissenting) (asbestosis); *Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting) (hearing loss); *Patrick v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 274 (1983) (interstitial pulmonary fibrosis).

Although the Director does not dispute that claimant suffers from lymphoma, asbestosis, and hearing loss, he argues there was no "second injury" with which to invoke Section 8(f) in this case. The Director correctly argues that the employer bears the burden of showing there was a second injury. *See generally Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in part and rev'd in part sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991). A second injury has not occurred when a claimant's condition is the direct or natural progression of his pre-existing disability. *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); *Vlasic v. American President Lines*, 20 BRBS 188 (1987). This case, however, does not fall into the "natural progression" framework. Despite conflicting medical evidence of record as to the cause of the lymphoma, Judge Chao found that claimant's histiocytic lymphoma is related to his asbestos exposure. Chao Decision and Order at 5-6; 2Cl. Ex. 1; 2Emp. Ex. 32. Given that claimant's lymphoma is cancer of the lymph system and his asbestosis is a pulmonary disease, we disagree with the Director's argument that there has been no second injury: the two conditions are not the same and neither is the natural result of the other. Claimant thus has two distinct “injuries” under the Act, although both are causally related to asbestos exposure.

Moreover, employer is correct in stating there is a distinction between a "second injury" and an "aggravation." Although an aggravation may constitute a second injury for purposes of Section 8(f) relief, *Director, OWCP v. General Dynamics Corp. [Graziano]*, 705 F.2d 562, 15 BRBS 130 (CRT) (1st Cir. 1983); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988); *Dugas v. Durwood Dunn*, 21 BRBS 277 (1988), a second injury need not be an aggravation of a pre-existing condition. *See, e.g., Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989) (pre-existing hypertension and diabetes contributed to total disability caused by arteriosclerotic heart disease); *Armand*, 21 BRBS at 312-313 (pre-existing chronic obstructive pulmonary disease, bronchitis and pneumonia combined with asbestosis caused total disability); *cf. Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104, 111 n.4 (1993) (Board noted if asbestosis is considered the pre-existing permanent partial disability in this case, then there has been "no work-related second injury or aggravation" on which to base a Section 8(f) claim). Thus, contrary to the Director's argument, continued exposure to injurious stimuli and an aggravation of a pre-existing condition are not prerequisites for a second injury and Section 8(f) relief. Consequently, a second occupational disease caused by the same injurious exposure constitutes a second injury. *Patrick*, 15 BRBS at 277; *see also Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996) (date of

injury need not be prior to date of last exposure to injurious stimuli).[6] Therefore, as asbestosis and hearing loss are claimant's pre-existing permanent disabilities, and as cancer of the lymph system is a viable "second injury," we affirm Judge Kichuk's finding that employer has established the existence of a pre-existing permanent partial disability and a second injury.

Contrary to our dissenting colleague's assertion, two injuries may arise from the same injurious exposure with an employer and the employer may be granted Section 8(f) relief if the criteria are satisfied. The Board has held that Section 8(f) does not require a certain amount of time to pass between injuries. *Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992); *see also Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). Thus, a second injury can occur from the same work exposure as the first injury. *Patrick*, 15 BRBS at 277. Additionally, the responsible employer rule, on which our dissenting colleague relies to bolster her opinion that a second injury, within the meaning of Section 8(f), cannot occur from the same exposure to injurious stimuli, is irrelevant to the Section 8(f) issue. *See Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988); *see also Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT) (D.C. Cir. 1987) (rejecting contention that under responsible employer rule a "second injury" occurs with every subsequent exposure).

[6]In *Ehrentraut*, the decedent was exposed to asbestos during the course of his employment until his voluntary retirement in 1981. In early 1990, prior to his death, he was diagnosed with both asbestosis and lung cancer. The Director and the employer stipulated that the decedent's exposure to asbestos caused both conditions: the pre-existing asbestosis and the lung cancer which constituted the second injury. *Ehrentraut*, 30 BRBS at 147.

We also hold that it was rational for Judge Kichuk to find that claimant's pre-existing conditions were manifest to employer.[7] Medical records prior to the diagnosis of histiocytic lymphoma clearly reveal claimant's prior conditions, and, having paid disability benefits, employer certainly was aware of these disabilities. Further, Judge Kichuk noted that no party disputed the fact that these conditions were manifest. Kichuk Decision and Order at 9. Thus, Judge Kichuk's determination regarding employer's satisfaction of the manifest element is affirmed. *See Armand*, 21 BRBS at 313.

[7]The Director does not specifically challenge the manifest finding. However, employer notes that under the jurisdiction of the United States Court of Appeals for the Fourth Circuit, wherein this case arises, the manifest element is unnecessary in occupational disease cases involving retirees. Contrary to employer's statement, the exception explicitly applies only to post-retirement occupational disease cases. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 553, 24 BRBS 190, 200 (CRT) (4th Cir. 1991). This case, however, is not a post-retirement occupational disease case, as claimant's conditions arose while claimant was working and led to his retirement.

The Director also contends Judge Kichuk erred in finding that employer satisfied the contribution element of Section 8(f). Specifically, the Director argues that Judge Kichuk failed to determine that "but for" the asbestosis, claimant would have been employable with lymphoma.[8] The Director asks the Board to require a quantified breakdown of the effects of the lymphoma versus the asbestosis before employer can be considered to have satisfied this element.[9] Recently, the Board held that the "not solely due to" and the "but for" versions of the contribution requirement of Section 8(f) "have the same implications[.]" That is, "a claimant's total disability must have been caused by both the work injury and the pre-existing condition" for an employer to receive Section 8(f) relief. *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134, 137 (1996). Thus,

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[8]The courts of appeals have framed the contribution requirement in a number of ways. Some circuits have stated that employers must show that "but for" the pre-existing disability the claimant would be employable, rather than by merely showing that the claimant's pre-existing condition compounded his present condition. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). The Fourth Circuit has required an employer to show that a claimant's total disability was caused in part by a pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Barclift]*, 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984).

[9]Although such a requirement may be necessary in a case involving benefits for a permanent partial disability, *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *aff'd*, ___ U.S. ___, 115 S.Ct. 1278, 29 BRBS 87 (CRT) (1995), the case at bar involves benefits for a permanent total disability.

> [w]hile the "not due solely to" language comes directly from the Act, . . . the "but for" language is simply descriptive of acceptable evidence which will satisfy the statutory mandate.

*Id.* at 136. The Board also stated that employer may establish contribution by "either medical or 'other' evidence which is to be interpreted and weighed by the administrative law judge." *Id.* at 137; *see also Luccitelli*, 964 F.2d at 1306; 26 BRBS at 7 (CRT).

In the case at bar, Judge Kichuk specifically set forth the statutory contribution requirement, as espoused in *Luccitelli*, 964 F.2d at 1306, 26 BRBS at 7 (CRT). Kichuk Decision and Order at 9. He then credited the opinions of Drs. Harmon and Ziem and concluded that "claimant's lung impairment [is] the result of both his asbestosis and his lymphoma, and . . . these conditions have both contributed to claimant's total disability." *Id.* at 10. Further, he concluded that claimant would have been totally disabled by his asbestosis and lymphoma "regardless of his hearing loss which also contributed to his disability."[10] *Id.* Dr. Harmon opined that claimant's asbestosis contributed to and hastened his retirement and that if claimant only had the lymph system cancer, he would not have been forced to retire. 2Emp. Ex. 32. Dr. Ziem believed claimant's asbestosis contributed to his shortness of breath and fatigue, and his lymphoma contributed to his fatigue and back pain. 2Emp. Exs. 22, 34. The administrative law judge found that these symptoms were some of the reasons claimant retired, and since both diseases cause these symptoms, the contribution element is satisfied. Kichuk Decision and Order at 10; 2Emp. Ex. 27; 2Tr. at 30. As Judge Kichuk's determination that claimant's pre-existing asbestosis contributed to his total disability is rational and supported by substantial evidence, we reject the Director's contention that employer failed to establish the contribution element. *See Dominey*, 30 BRBS at 137; *Pino v. International Operating Co.*, 26 BRBS 81 (1992). As we conclude that Judge Kichuk correctly determined that employer fulfilled the Section 8(f) criteria, we affirm his award of Section 8(f) relief.[11]

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[10]The vocational expert, Mr. DeMark, and Dr. Harmon were of the opinion that claimant's hearing loss contributed to his disability.

[11]Contrary to our dissenting colleague's opinion, the Fourth Circuit's decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Barclift]*, 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984), wherein the court remanded the case for further explanation of the administrative law judge's determination that the employer satisfied the contribution element, can be distinguished from the instant case. A comparison of the two reveals that the administrative law judge in *Barclift* did no more than state that the claimant had a pre-existing condition and that he sustained a second injury. Based on these facts, he

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's award of Section 8(f) relief in this case. Instead, I would hold that Judge Kichuk erred in concluding that claimant's lymphoma was a "subsequent injury" within the meaning of Section 8(f); thus, I would reverse Judge Kichuk's decision and deny Section 8(f) relief. Assuming *arguendo*, this determination was not error, I would hold that the administrative law judge failed to apply the statutory standard in awarding relief pursuant to Section 8(f), his decision should be vacated, and the case remanded for reconsideration.

On January 11, 1979, claimant filed a LHWCA claim for asbestos-related pulmonary disease. As a result of asbestos exposure by employer, claimant contracted asbestosis and lymphoma. The asbestosis was first revealed by x-rays taken on June 2, 1978. The lymphoma was diagnosed five months later, in November 1978. The evidence of record is

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stated: "It follows, therefore that [Section] 8f is applicable in this case." *Id.*, 737 F.2d at 1297, 16 BRBS at 110 (CRT). In the instant case, the administrative law judge discussed the relevant medical opinions and arrived at the rational and supported conclusion that both conditions contributed to claimant's total disability.

uncontradicted that claimant was unaware of any exposure to asbestos after May of 1978. 1Tr. at 174-175. Nevertheless, the administrative law judge awarded employer Section 8(f) relief because he determined that claimant's diagnosis of lymphoma, following the diagnosis of asbestosis, made lymphoma a "subsequent injury" within the meaning of Section 8(f).

Section 8(f) provides in relevant part:

> (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

33 U.S.C. §908(f)(1). When considered in the context of the statute, it is clear that "subsequent injury" refers to an event, either an accident or injurious exposure, which claimant suffered after being partially disabled by a different accident or injurious exposure. Reference to *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337 (2d Cir.), *cert. granted*, 117 S.Ct. 379 (1996), helps to explain why lymphoma due to asbestos exposure is not a "subsequent injury" within the meaning of Section 8(f). In *Buckley*, the United States Court of Appeals for the Second Circuit discussed asbestos exposure's insidious effects on the lungs as subcellular injuries which may eventually develop into deadly diseases. The court declared: "We cannot find as a matter of law that Buckley's injuries are not genuine simply because they are subcellular." *Id.* at 1344. Seen in this light, the injury from asbestos exposure long precedes the development of the asbestos-related diseases.

The statute limits the liability of the employer which is employing claimant at the time of the "subsequent injury." Section 8(f) cannot rationally apply to the facts of this case because the employer employing claimant at the time of the diagnosis of lymphoma could not be held liable on the basis of the time of the diagnosis since the lymphoma was caused by harmful exposure preceding the diagnosis. It is well-established that a subsequent employer who did not contribute to the harm cannot be held liable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991). Notwithstanding the majority's assertion to the contrary, the responsible employer rule is relevant to Section 8(f) because that section serves to limit the liability of the subsequent employer, and the responsible

employer rule establishes that a subsequent employer who does not cause the harm has no liability for Section 8(f) to limit.[12]

In the case at bar, because the same harmful exposure to asbestos caused both the asbestosis and lymphoma, there was no "subsequent injury" within the meaning of Section 8(f). The majority baldly asserts that "a second occupational disease caused by the same injurious exposure constitutes a second injury." *Coats*, slip op. at 6 (citing *Patrick v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 274, 277 (1983) (Kalaris, J., dissenting). A glance at *Patrick*, however, reveals that whether the same injurious exposure can cause a prior and "subsequent injury" within the meaning of Section 8(f) was not at issue in the case.[13] That issue is squarely presented in the case at bar.

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[12]The cases cited by the majority are totally inapposite. In *Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988), the court held that employer was not entitled to Section 8(f) relief because it had failed to prove an actual, work-related aggravation of a previous disability; the court also held that employer's liability as the last insurer was irrelevant to its burden of proving a "second injury" for purposes of Section 908(f). Similarly in *Bechtel Associates v. Sweeney*, 834 F.2d 1029, 1036 n.8, 20 BRBS 49, 61 n.8 (CRT) (D.C. Cir. 1983), the court held that application of *Cardillo* and the last employer rule did not relieve employer of its burden to prove that claimant had suffered a work-related aggravation of his lung condition, amounting to a "second injury" for purposes of Section 8(f).

[13]The issues in the majority opinion in *Patrick* were: one, whether fibrosis constituted a pre-existing condition when it does not require a distinct course of medical treatment; and

two, whether the evidence established that the decedent's death was due to a combination of his asbestosis and mesothelioma. The issue in the dissent was whether substantial evidence supported the administrative law judge's determination that death was due to mesothelioma alone.

Although lymphoma certainly satisfies the statutory definition of "injury," 33 U.S.C. §902(2),[14] such a construction of "subsequent injury" in Section 8(f) does not make sense. The rationale of *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949), is applicable to the instant case. In *Lawson*, the Supreme Court held that the statutory definition of disability in the Longshore Act, 33 U.S.C. §902(10), did not apply to the word "disability" as it is used in Section 8(f), because that construction would be inconsistent with one of the purposes of the second injury provision.

The majority's determination that claimant's lymphoma is a "subsequent injury" within the meaning of Section 8(f) is not a proper application of that section which was intended "to enhance employment prospects for the handicapped by alleviating employer fears that workers' existing disabilities will lead to inordinate compensation liabilities in the event of a later accident." *Brock v. Washington Metropolitan Area Transit Auth.*, 796 F.2d 481, 482-483, 19 BRBS 19, 20 (CRT) (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987). By focusing on the development of two diseases in claimant, as opposed to the unitary injurious exposure by employer, the majority limits the liability of an employer who could not have avoided liability for the lymphoma by refusing to retain or to hire claimant after his diagnosis for asbestosis. The purpose of Section 8(f), to encourage employers to retain and to hire the partially disabled worker, is not served by its application in the case at bar. The majority is simply giving employer a windfall. Accordingly, I would reverse Judge Kichuck's award of Section 8(f) relief.

I must also point out that even if the administrative law judge's determination that lymphoma was a second injury were correct, his award of Section 8(f) relief still could not stand because the administrative law judge failed to determine whether the lymphoma alone would be totally disabling. Section 8(f) authorizes relief to employers whose permanently partially disabled workers suffer a subsequent injury, rendering them permanently totally

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[14]Section 2(2) of the Act, provides in relevant part:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. . . .

disabled, if the total disability "is found not to be due solely to that [subsequent] injury...." 33 U.S.C. §908(f)(1). The United States Court of Appeals for the Fourth Circuit has held that an administrative law judge must expressly determine whether a claimant's subsequent injury is totally disabling, independent of his pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Barclift]*, 737 F.2d 1295, 1297, 16 BRBS 107, 113 (CRT)(4th Cir. 1984).

As the Director correctly argues, Judge Kichuk found that both asbestosis and lymphoma contributed to claimant's disability, but he did not determine whether 'but for' the asbestosis the claimant would have been employable with lymphoma. *Director, OWCP v. Luccitelli,* 964 F.2d 1303, 1305-1306, 26 BRBS 1, 5-7 (CRT) (2d Cir. 1992). Dir. Brief at 9. By making a factual distinction between the case at bar and *Barclift*, the majority attempts to gloss over the administrative law judge's failure to apply the statutory standard as explained by the Fourth Circuit in *Barclift.* But the majority cannot deny: first, that employer bears the burden of proving that the lymphoma alone was not sufficient to render the claimant permanently totally disabled; second, that Judge Kichuk did not apply this test; and third, given Judge Chao's previous finding that lymphoma alone was totally disabling, the evidence raises the question which only an administrative law judge can answer. Hence, the award of Section 8(f) relief should be vacated, and the case remanded for application of the statutory standard to the evidence. *Barclift,* 737 F.2d at 1295, 16 BRBS at 107 (CRT). In the event that the majority's decision is appealed to the circuit court, I do not believe that it would be necessary for the court to reach this issue because the award of Section 8(f) relief should be reversed where the evidence does not support a finding of a "subsequent injury" within the meaning of Section 8(f).

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REGINA C. McGRANERY
Administrative Appeals Judge