BRB No. 92-1268

EDGAR TREMBLAY, SR.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED: _____
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATED DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order-Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy and Beane), Boston, Massachusetts, for self-insured employer.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol A. De Deo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order-Awarding Benefits (89-LHC-1319, 91-LHC-1630) of Administrative Law Judge David W. Di Nardi rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On July 18, 1985, claimant sustained injuries to his lower back and right elbow while working for employer. Claimant underwent back surgery and thereafter returned to work on April 16, 1986. On August 27, 1987, claimant sought medical treatment after experiencing numbness in his fingers of both hands; claimant was diagnosed as having both carpal tunnel syndrome and vibration white finger disease. Subsequently, claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from January 30, 1988 through November 28, 1988, and permanent total disability compensation thereafter. 33 U.S.C. §908(a), (b). Additionally, the administrative law judge determined that employer was entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, the Director challenges the administrative law judge's decision to award employer relief from compensation liability pursuant to Section 8(f). Employer responds, urging affirmance.

Section 8(f) shifts the liability to pay compensation for permanent total disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently totally disabled, Section 8(f) relief is available to employer if employer proves the following: 1) the claimant had a pre-existing permanent partial disability which 2) combines with the subsequent work-related injury to result in permanent total disability, and 3) the pre-existing disability was manifest to employer. *See* 33 U.S.C. §908(f); *Director, OWCP v. Luccitelli,* 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992), *rev'g Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989).

The Director contends that the administrative law judge erred in awarding employer Section 8(f) relief; specifically, the Director contends that the medical evidence of record establishes that claimant's permanent total disability is a result of claimant's subsequent work-related hand conditions alone. We agree. In order to limit its liability and obtain Section 8(f) relief, the courts and the Board have generally required that an employer present credible evidence which establishes that claimant's total disability following the second injury is due to a combination of the pre-existing disability and subsequent injury. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT); *John T. Clark & Son of Maryland, Inc. v. Benefits Review Board*, 622 F.2d 93 n.5, 12 BRBS 229 n.5 (4th Cir. 1980); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Thus, in order to establish the contribution element of Section 8(f), employer must show, by medical or other evidence, that a claimant's subsequent injury alone would not have caused his permanent total disability. *See Luccitelli*, 964 F.2d at 1303, 1306, 26 BRBS at 1, 7 (CRT); *see also Maryland Shipbuilding and Dry Dock Co. v. Director, OWCP*, 618 F.2d 1082, 1084-1085, 12 BRBS 77, 82-83 (4th Cir. 1980). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that employer's burden of establishing that a claimant's subsequent injury alone would not have

caused claimant's total permanent disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. *See Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992).

In the instant case, the administrative law judge, based upon the opinions of Drs. German and Browning, concluded that employer had satisfied the contribution element of Section 8(f) since claimant's pre-existing disabilities combined with his subsequent work-related hand conditions to result in a greater degree of permanent disability. *See* Decision and Order at 15-16. Dr. German, however, made no finding regarding the extent of claimant's disability; rather, Dr. German opined that claimant's hand condition prohibited the use of vibratory equipment and that claimant has a 25-30 percent disability of the lower back. *See* CX-2. Dr. Browning, on August 17, 1990, opined that claimant could never return to his former job or most other jobs due to his hand condition, that claimant has a 50 percent permanent partial disability of each hand, one of the highest ratings he has ever given, and that "there is no way that carpal tunnel surgery would improve him [claimant] so that he could go back to his old job." *See* CX-5. These opinions do not establish that claimant's post-injury hand conditions are not in themselves totally disabling; rather, the opinion of Dr. Browning indicates that claimant's inability to perform his employment duties with employer is due solely to claimant's 50 percent permanent partial disability in each hand.[1] Employer therefore has not met its burden of establishing that claimant's carpal tunnel syndrome and vibration white finger disease are not in themselves totally disabling. We therefore reverse the administrative law judge's determination that employer has established the contribution element with regard to the relationship between claimant's multiple hand conditions and his pre-existing back condition. *See Bergeron*, 982 F.2d at 790, 26 BRBS at 139 (CRT); *Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT).

[1]We note that Dr. Browning's July 17, 1991, statement that claimant's pre-existing back condition "made him materially and substantially worse and limited his ability to work so that his total impairment of function is materially and substantially greater than it would be without the back," *see* EX-10, does not establish that claimant's hand conditions were not in themselves totally disabling.

Accordingly, the administrative law judge's determination that employer is entitled to relief pursuant to Section 8(f) 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, Acting Chief
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge