

WALTER REISS)	
)	
Claimant)	
)	
v.)	
)	
GENERAL DYNAMICS)	DATE ISSUED:
CORPORATION)	
)	
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 Upon Remand of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Upon Remand Awarding Benefits (88-LHC-712/713) of Administrative Law Judge Gerald M. Tierney 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 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).

This case is on appeal before the Board for a second time. In his initial Decision and Order issued on February 28, 1989, the administrative law judge awarded claimant permanent total disability compensation commencing December 19, 1986, for a work-related back injury sustained on July 23, 1985. He also awarded employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), based on a prior work-related back injury claimant sustained in February 1984 and Dr. Browning's finding that the first injury contributed to a greater degree of disability than would have resulted from the second injury alone, with each injury causing a 7-1/2 percent impairment.

In the initial appeal, the Board rejected the Director's contention that the contribution requirement had not been established, and affirmed the administrative law judge's award of Section 8(f) relief. *Reiss v. General Dynamics Corp.*, BRB No. 89-1547 (Oct. 28, 1991) (unpublished). The Director then appealed this determination to the United States Court of Appeals for the Second Circuit, where the appeal was consolidated with the Director's appeal of the award of Section 8(f) relief in *Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991), *rev'd sub nom. Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992). In *Luccitelli*, the Second Circuit agreed with the Director that in order to satisfy the contribution requirement of Section 8(f), it is not sufficient that a claimant's injuries combine to create a greater degree of disability than would have occurred based on the last injury alone. Rather, the court held that an employer must show, by medical or other evidence, that a claimant's subsequent injury alone would not have caused the claimant's total permanent disability. Consequently, the court reversed the awards of Section 8(f) relief and remanded both cases for further proceedings. *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992).

On remand, the administrative law judge in the present case found that the standard for establishing the contribution requirement set forth in *Luccitelli* was satisfied based on employer's submission of a report from Dr. Browning, and he again granted Section 8(f) relief. The Director now appeals the administrative law judge's Decision and Order Upon Remand, contending that because the administrative law judge failed to enunciate the *Luccitelli* standard and neither described Dr. Browning's findings nor explained how they satisfied that standard, his decision should be vacated and the case remanded for reconsideration of the contribution issue consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Employer responds, urging affirmance.

After review of the administrative law judge's Decision and Order on remand in light of the evidence of record, we affirm his award of Section 8(f) relief because it is rational, supported by substantial evidence and in accordance with applicable law. *O'Keefe*, 380 U.S. at 359. In his Decision and Order Upon Remand the administrative law judge acknowledged that this case was before him on remand for reconsideration of the contribution element in light of the Second Circuit's decision in *Luccitelli*, and it is evident from the context of his decision that he found the *Luccitelli* standard satisfied based on the January 13, 1993, opinion letter of Dr. Browning which employer introduced on remand. Inasmuch as Dr. Browning's January 13, 1993, opinion letter, which states that claimant's "present disability is not solely the result of the last (1985) injury, alone," is sufficient to establish the contribution element for Section 8(f) relief under *Luccitelli*, 964 F.2d at 1306, 26 BRBS at 7 (CRT), and the Director has failed to establish any reversible error made by the

administrative law judge, his award of Section 8(f) relief is affirmed. *See generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT) (2d Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Upon Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge