

LARRY J. MILLET	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
LOUIS DREYFUS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE	)	
COMPANY OF PITTSBURGH	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Sidney W. Degan, III and Foster P. Nash, III (Degan & Blanchard), New Orleans, Louisiana, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (94-LHC-1265) of Administrative Law Judge Quentin P. McColgin 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).

Claimant initially sustained a work-related back injury on May 14, 1991. Upon his subsequent return to work, claimant sustained a second injury to his back on May 13, 1992. In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from May 14, 1992 through November 3, 1994, and permanent partial disability compensation thereafter. 33 U.S.C. §908(b), (c)(21). The administrative law judge denied employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), finding that employer had failed to establish the contribution element necessary for such relief to be granted. Employer's motion for reconsideration was subsequently denied.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance.

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 partially disabled, the employer must also show that the current permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

After careful review of the record, we hold that the decision of the administrative law judge is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *see Two "R" Drilling Co.*, 894 F.2d at 748, 23 BRBS at 34 (CRT). Contrary to employer's contention, the opinions of Drs. Miranne, Nutik, and Adams, while supportive of a finding that claimant's present condition is related to a combination of his two back injuries, do not establish that claimant's current disability is "materially and substantially" greater as a result of the prior injury, or that claimant's compensable disability is not solely the result of his last injury. *See generally Abbott*, 27 BRBS at 192. Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, that finding is affirmed. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge