SECTION 8(f)

Introduction

Section 8(f) shifts part of the liability for permanent partial and permanent total disability, and death benefits, from employer to the Special Fund created in Section 44 of the Act, 33 U.S.C. §944, when the disability or death is not due solely to the injury which is the subject of the claim. In construing this provision, the courts have acknowledged that Section 8(f) was enacted to avoid discrimination against handicapped workers, stating

> the purpose of new 8(f) is to prevent discrimination against handicapped workers in hiring and firing, a discrimination encouraged by the remainder of the Act were it not for §8(f). The Act makes the employer liable for compensation. Hence, the employer risks increased liability when he hires or retains a partially disabled worker. By virtue of the contribution of the previous partial disability, such a worker injured on the job may suffer a resulting disability greater than a healthy worker would have suffered. Were it not for the shifting of this increased compensation liability from the employer to the Special Fund under §8(f), the Act would discourage employers from hiring and retaining disabled workers.

Director, OWCP v. Campbell Indus., Inc., 678 F.2d 836, 839, 14 BRBS 974, 976 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983), *quoting C & P Tel. Co. v. Director, OWCP,* 564 F.2d 503, 512, 6 BRBS 399, 412 (D.C. Cir. 1977), *rev'g Glover v. C & P Tel.*, 4 BRBS 23 (1976). *See also* H. Rep. No. 92-1441 reprinted in 1972 U.S.C.C.A.N. 4698, 4705-06.

Section 8(f)(1) states the general rule that where an employee with an existing permanent partial disability suffers injury, the employer shall pay compensation for the disability due to that injury at the average weekly wage at that time. It then specifies requirements for obtaining Section 8(f) relief based on whether the pre-existing permanent partial disability is covered under the schedule or Section 8(c)(21) and whether claimant sustains permanent total disability or death, or permanent partial disability following the work-related injury which is the subject of the claim. Once the requirements for Section 8(f) relief are met, then employer's liability is generally limited to 104 weeks, although this period may vary in scheduled injury cases. *See* General Rules, *infra.*

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987); *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418 (1983), *rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107(CRT) (4th Cir. 1984); *Scott v. Rowe Machine Works*, 9 BRBS 198 (1978); *Spencer v. Bethlehem Steel Corp.*, 7 BRBS 675 (1978). Similarly, the Fund is not liable for funeral expenses. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*,

27 BRBS 104 (1993). The Special Fund also cannot be held liable for claimant's attorney's fees under Section 28, Section 26 or any other provision. *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995). Additional cases on this topic are digested in Section 28, Liability of the Special Fund. The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). *Lewis v. Am. Marine Corp.,* 13 BRBS 637 (1981); *Campbell v. Lykes Bros. Steamship Co., Inc.*, 15 BRBS 380 (1983) (Ramsey, concurring and dissenting)

Section 8(f)(2)(A) provides that after the end of the period of payments for which employer is liable under subsection (1), the Special Fund is liable for the remainder of the compensation due claimant, except that the Fund shall not be liable where the employer has failed to secure the payment of compensation as required by Section 32 of the Act. Thus, where employer fails to obtain insurance coverage as required by the Act, employer forfeits its right to Section 8(f) relief. *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000). *Compare Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

Section 8(f)(2)(B) provides that after the Special Fund assumes liability the liable employer or carrier remains a party to the claim and retains all rights under the Act. *See* Standing, *infra.*

Section 8(f)(3) provides that the request for Section 8(f) relief must be raised in the first instance before the district director and failure to do so bars Special Fund liability unless employer shows it could not have reasonably anticipated the Fund's liability. *See* 20 C.F.R. §702.321. Cases involving this provision are addressed *infra,* under Timeliness of Employer's Request.

Digests

The Board agreed with the Director that the administrative law judge erred in assessing funeral expenses against the Special Fund pursuant to Section 8(f) on the rationale that such expenses are included within definition of compensation found in Section 2(12). Relying on *Kahny*, 15 BRBS 212 (1982), the Board noted that the word "compensation" may have different meanings under different sections of the Act depending on the purpose of the section in which it is being used. The Board indicated that Section 8(f) was only intended to limit employer's liability for periodic payments of compensation and thus that funeral expenses are not included within the class of compensation for which the Special Fund could be liable under Section 8(f). *Bingham v. Gen. Dynamics Corp.*, 20 BRBS 198 (1988).

Funeral expenses cannot be assessed against the Special Fund, as they are not "compensation." *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

Section 8(f)(2)(A) provides that the Special Fund "shall not" be responsible for benefits pursuant to Section 8(f) if the employer fails to comply with Section 32(a), which requires the employer to have insurance. Due to the mandatory nature of the statutory language, the difference in the regulations implementing 8(f)(2)(A) and 8(f)(3), and based on an analogy with raising Section 14(e) issues, the Board held that Section 8(f)(2)(A) is an issue which may be raised at any time. The Board further held that the relevant time for determining if employer is insured is the time the injury occurred, as this interpretation is supported by the Section 44 assessment formula. As it was not contested that employer did not have insurance at the time of claimant's injury, the Board reversed the administrative law judge's finding that Section 8(f) relief was not barred in this case. *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000).

The Board rejected the Director's motion to reconsider the award of Section 8(f) relief on the ground that employer failed to secure payment of compensation under Section 32. The Board distinguished *Lewis*, 34 BRBS 57 (2000), stating that employer's effort herein to obtain the necessary coverage was a far cry from the *Lewis* employer's attempt to circumvent the Act. Thus, although, due to pronouncements in the law, employer's insurance ultimately contained a gap in policies which omitted coverage for claimant's injury at the Port of Kingston, such error does not mandate the conclusion that employer failed to secure payment of compensation under Section 32, and it does not bar employer from Section 8(f) relief pursuant to Section 8(f)(2). Consequently, the Board reaffirmed that the Special Fund shall assume payment for claimant's benefits after May 2, 1994. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

General Rules

To be entitled to Section 8(f) relief where the work injury results in permanent total disability or death, the employer must establish (1) that the employee had a pre-existing permanent partial disability; (2) that this disability was "manifest" to the employer; and (3) that the employee's permanent total disability is not due solely to the employment injury but is the result of the combination of the pre-existing permanent partial disability and the subsequent work-related injury. *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Jacksonville Shipyards Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987); *Director, OWCP v. Campbell Indus. Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C & P Tel. Co. v. Director, OWCP,* 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). When an employee is permanently partially disabled due to the work injury, in addition to these three elements the employer must show that the permanent partial disability being compensated "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1). The subsequent employment-related injury to which Section 8(f) applies is also known as the "second injury."

Employer bears the burden of proving each element of Section 8(f) relief. *See, e.g., Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). *Accord CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Two "R" Drilling*, 894 F.2d 748, 23 BRBS 34(CRT); *Stokes*, 851 F.2d 1314, 21 BRBS 150(CRT).

Section 8(f) does not apply where the disability is temporary. *Jenkins v. Kaiser Aluminum & Chem. Sales, Inc.*, 17 BRBS 183 (1985); *see Nathenas v. Shrimpboat, Inc.,* 13 BRBS 34 (1981) (where disability is temporary, it is error for administrative law judge to make Section 8(f) findings).

Section 8(f)(1) begins with the general proposition that where an employee with an existing permanent partial disability is injured, employer is liable for compensation for the disability due to that injury based upon his average weekly wage at that time. This statement is followed by four sentences stating limitations on employer's liability based on the whether claimant's injury is to a body part covered by the schedule or not and whether the injury resulted in permanent total or partial disability or death.

Where an employee having a pre-existing permanent partial disability sustains a second injury to a member which is *not* covered by the schedule of Section 8(c)(1)-(20), and that injury results in permanent total disability or death which is not due solely to the latter

injury, employer's compensation liability is limited to 104 weeks, with the remainder to be paid from the Special Fund created under Section 44 of the Act, 33 U.S.C. §944. Where such a second injury results in permanent partial disability and the employee had a pre-existing permanent partial disability, the statute states not only that the resulting permanent partial disability must "not be due solely to" the subsequent injury, but also that it must be "materially and substantially greater than that which would have resulted from the subsequent injury alone."

Where the second injury is to a member covered by the schedule and it results in permanent partial or total disability, the same standards apply in that the resulting disability cannot be solely due to the second injury and, in the case of partial disability, it must be materially and substantially greater than that which would result from the subsequent injury alone. However, in such cases, employer is liable for the *greater* of 104 weeks or the number of weeks due under the schedule for the subsequent injury, except in cases of hearing loss awards under Section 8(c)(13), where employer is liable for compensation for the *lesser* of such periods.

In many cases where the second injury results in scheduled permanent partial disability, Section 8(f) does not apply at all as the full award to claimant is less than 104 weeks. *See Strachan Shipping Co. v. Nash*, 757 F.2d 1461, 17 BRBS 29(CRT) (5th Cir. 1985), *on reconsideration en banc*, 782 F.2d 573, 18 BRBS 45(CRT) (5th Cir. 1986), *aff'g in relevant part* 15 BRBS 386 (1983); *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986).

The 1984 Amendments altered this result for Section 8(c)(13) hearing loss awards, as Congress sought to correct what the Board had recognized as a gap in the statutory scheme in *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980), which held that Section 8(f) could not apply to a hearing loss award of less than 104 weeks. *See also Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 757 F.2d 1461, 17 BRBS 29(CRT) (4th Cir. 1982), *aff'g* 14 BRBS 520 (1981). The Amendments exchanged the word "greater" for "lesser" in cases of hearing loss under Section 8(c)(13). Since employer is liable for the lesser of the number of weeks provided for the subsequent loss or 104 weeks, where employer can establish a manifest pre-existing hearing loss which combined with further exposure to noise to result in an increased loss, the Special Fund will be liable for some benefits. *See Reggiannini v. Gen. Dynamics Corp.*, 17 BRBS 254 (1985).

In scheduled cases other than hearing loss cases, where the award to claimant equals or exceeds 104 weeks and the subsequent injury's contribution is less than 104 weeks, employer is liable for 104 weeks. If the award to claimant equals or exceeds 104 weeks, and the subsequent injury's contribution exceeds 104 weeks, employer is liable for the full contribution of the subsequent injury. *See Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986). In all cases where the requirements of Section 8(f) are met, the Special Fund pays the remainder of the award.
Claimants have argued that Section 8(f) requires an award of at least 104 weeks when a

scheduled disability amounts to less than 104 weeks. This contention has been rejected. *Fishel,* 757 F.2d 1461, 17 BRBS 29(CRT)*; Strachan,* 757 F.2d 1461, 17 BRBS 29(CRT).

Under the aggravation rule, unless Section 8(f) applies, employer must pay the full award regardless of the amount of employer's contribution to the disability. *Fishel*, 757 F.2d 1461, 17 BRBS 29(CRT); *Ashley v. Todd Shipyards Corp.*, 10 BRBS 42 (1978), *aff'd sub nom. Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980).

The statute specifically states that awards under Section 8(f) must be paid in addition to payments for temporary total and temporary partial disability. *Romanowski v. I.T.O. Corp.,* 4 BRBS 59 (1976).

Digests

General Rules

Where claimant injured his toe, which resulted in the amputation of his foot as a result of the combination of claimant's work injury and his pre-existing diabetes, the Board held that employer was liable for the 205 weeks provided in the schedule for loss of a foot. The Board rejected employer's argument that its liability should be limited to 104 weeks as no scheduled award was entered, finding this argument contrary to the plain language of the statute which states that where a scheduled injury results in permanent total disability, and the permanent total disability is not due solely to this subsequent injury, employer is liable for the *greater* of 104 weeks or the applicable scheduled period of weeks for the injury. *Higgins v. Hampshire Gardens Apartments*, 19 BRBS 77 (1986) (Brown, J., dissenting), *aff'd on recon. en banc*, 19 BRBS 192 (1987).

Where claimant first injured his back in March and a second incident occurred in May following his return to work, the Board vacated the denial of Section 8(f) relief. The Board rejected the administrative law judge's finding that the short span of time between the two injuries precluded Section 8(f) relief, holding that Section 8(f) does not require that a certain amount of time pass between claimant's first injury and his subsequent injury before an employer is entitled to relief. To conclude, as the administrative law judge did, that a short span of time between a claimant's two injuries precludes the possibility of a Section 8(f) award, would eliminate recovery under the statute for recurrences or significant increases in an existing impairment, which would undermine the purpose of Section 8(f). *Lockhart v. Gen. Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992).

The Board affirmed the administrative law judge's finding that claimant's intracranial bleeding preceding a stroke constituted a pre-existing disability for purposes of Section

8(f) and that 12 days was a sufficiently long time for a pre-existing permanent partial disability to emerge. No specific amount of time must pass between the pre-existing condition and the work injury. The Board therefore rejected Director's argument that claimant's bleeding and stroke constituted one condition to which Section 8(f) relief would not apply. *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

Where the Board vacated the administrative law judge's concurrent awards for injuries in 1980 and 1983, it also vacated the findings that employer was not entitled to Section 8(f) relief for the compensation due on 1980 injury, but that Section 8(f) relief was available for the compensation owed claimant for his 1983 injury. The Board held that as claimant's first injury resulted in no loss in wage-earning capacity, the administrative law judge erred in fashioning an ongoing award for this injury, shifting this award to the carrier at the time of the second injury and then using claimant's remaining earning capacity as the basis for his 1983 award. Since claimant's disability was due to the aggravation of his 1980 injury by his 1983 injury, the Board remanded for one award for claimant's entire disability based on his earnings at that time. Since the administrative law judge's findings established that the requirements of Section 8(f) were met with regard to the last injury, the Board modified the award to hold that Section 8(f) was available on claimant's full disability award. *Kooley v. Marine Indus. Nw.*, 22 BRBS 142 (1989).

The Board held that Section 8(f)(1) specifically and unequivocally states that employer is liable for 104 weeks of permanent disability, in addition to compensation payments for temporary disability. Thus, employer is not entitled to credit payments for temporary disability against its Section 8(f) liability where the period of temporary disability falls between two periods of permanent disability. *Shaw v. Todd Pac. Shipyards Corp.*, 23 BRBS 96 (1989).

The Board held that 20 C.F.R. §702.145(b) does not exempt employer from paying temporary total disability benefits following the completion of the 104 weeks period of permanent partial disability for the same injury. The Board held that the proper interpretation is that an employer who qualifies for Section 8(f) relief is to provide permanent disability compensation of "only" 104 weeks and for "none other" periods of permanent disability. "In addition" employer must pay all compensation due for temporary disability whenever it occurs. *Sizemore v. Seal & Co.*, 23 BRBS 101 (1989).

The Ninth Circuit addressed an issue of first impression for the courts: whether a permanent partial disability may be recharacterized as temporary total during a period of recovery from surgery, in this case, five years later. The court holds that it may be, as "permanency" is not immutable. If claimant's condition deteriorates and medical intervention leads to a new healing period, the prior point of maximum medical improvement no longer holds. Any award for temporary total disability subsumes the underlying permanent partial disability such that only the former award is payable. Thus, the court affirmed the award of temporary total disability following surgery, and held that

employer must make these payments notwithstanding the award of Section 8(f) relief, as the Special Fund cannot be held liable for temporary disability benefits. *Pac. Ship Repair & Fabrication Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012).

Claimant initially injured his back at work in 1985 and subsequently returned to work until a 1987 lay-off. Following an incident at home during this time, claimant did not return to work. The Board affirmed a finding that the incident at home was not a new injury but was a continuation of claimant's recurring back pain. In remanding the case for the administrative law judge to consider whether claimant's work for employer after he returned following the 1985 injury resulted in an aggravation, and thus a second injury, the Board stated the incident at home was not relevant to the Section 8(f) inquiry and rejected the Director's argument that there was no "second injury." The Board stated that Section 8(f) relief was available if claimant's initial work-related injury resulted in a serious lasting problem, thus meeting the pre-existing permanent partial disability element, which was aggravated by his continuing work for the same employer, which could meet the contribution element, and remanded for consideration of these issues. *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140 (1991).

The Board rejected employer's argument that since the administrative law judge found in his initial decision that claimant was entitled to an award under Section 8(c)(21), he should have directed the Special Fund to reimburse employer for all sums it paid in excess of 104 weeks pursuant to a 1981 settlement. While the administrative law judge found that employer was entitled to Section 8(f) relief for claimant's back injury, the payments made under the 1981 settlement were for claimant's knee injuries alone, and there was no evidence of any pre-existing permanent partial disability which contributed to this disability to claimant's knees. Thus, the payments had no relevance to employer's entitlement to Section 8(f) relief for claimant's back condition, and the denial of reimbursement was affirmed. *Bass v. Broadway Maint.*, 28 BRBS 11 (1994).

The Board remanded the case for the administrative law judge to fully discuss the basis for his finding that employer was not entitled to Section 8(f) relief. The Board restated the elements of Section 8(f) and noted that the administrative law judge's decision failed to comport with the APA. *Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994)(McGranery, J., dissenting).

The administrative law judge did not address employer's contention, raised in its Application for Section 8(f) Relief, its post-hearing brief, and on appeal, that it is entitled to Section 8(f) relief based on claimant's having sustained prior permanently disabling back injuries while in its employ. The Board stated that a work-related condition may constitute a manifest, pre-existing, permanent partial disability for purposes of Section 8(f), that an employer is eligible for Section 8(f) relief where the employee's pre-existing disability and second injury both arise from the course of employment with the same

employer, and that the record contained evidence that claimant had a series of low back pain complaints and/or that he sustained back injuries during his work for employer. The Board remanded the case for the administrative law judge to address this theory of employer's entitlement to Section 8(f) relief, noting that, under its theory, employer must establish that claimant sustained a "second" injury, i.e., an aggravation, as opposed to the natural progression of a prior injury. *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015).

Where claimant was disabled due to both orthopedic and lung conditions, with the result that while claimant was permanently totally disabled by the lung condition in 1987 but employer did not have to commence such payments until 1989, the Board reversed the administrative law judge's determination that employer was entitled to Section 8(f) relief for the lung condition after 104 weeks from the 1987 date when claimant was adjudged permanently disabled. Section 8(f) states that "employer shall provide" compensation for a determined period of time and thereafter is entitled to Section 8(f) relief. The decision was thus modified to provide for the Special Fund's assumption of liability after employer actually paid permanent disability benefits for 104 weeks. *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

In the case of a scheduled injury, employer is liable for compensation for the greater of 104 weeks or the number of weeks in the schedule attributable to the subsequent injury. The administrative law judge here reasonably determined, based on Dr. London's report, that since as a result of a prior 1990 accident claimant had a 16 percent impairment to each leg, and the parties stipulated to a total 50 percent impairment to each leg as of June 1996, claimant sustained a 34 percent impairment to each knee as a result of claimant's employment. Employer was held liable for 104 weeks' compensation for each knee as this is greater than 34 percent of 288, 33 U.S.C. §908(c)(2). *Berg v. Matson Terminals, Inc.*, 34 BRBS 140 (2000), *aff'd*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002).

The Ninth Circuit affirmed the finding that claimant's pre-existing disability was 16 percent based on the opinion of employer's physician and thus a 34 percent impairment to both knees was attributable to claimant's work injury where the parties stipulated that the result of claimant's work injury was a 50 percent impairment to each knee. *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002), *aff'g* 34 BRBS 140 (2000).

Hearing Loss

The Board held that in apportioning Section 8(f) liability under the 1984 Amendments, the relevant hearing loss figures must be calculated in accordance with the AMA *Guides*. The Board rejected employer's proposal to compare claimant's pre-employment decibel-loss figure with a later decibel-loss figure. The Board also rejected employer's contention that the administrative law judge erred in calculating Section 8(f) liability by converting

claimant's pre-existing monaural hearing loss into binaural hearing impairment. *McShane v. Gen. Dynamics Corp.*, 22 BRBS 427 (1989).

Under the Act as amended in 1984, in hearing loss cases, employer's liability is limited to the lesser of 104 weeks or the extent of hearing loss attributable to the employment. Therefore, employer is only liable for its contribution to the hearing loss, and the Special Fund is liable for the remainder, even if the total award is less than 104 weeks. *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986).

Section 8(f) as amended in 1984 limits employer's liability in hearing loss claims to the lesser of 104 weeks or the extent of hearing loss attributable to the *subsequent injury*. *Machado v. Gen. Dynamics Corp.*, 22 BRBS 176 (1989). (Note: in *Reggiannini*, 17 BRBS at 257, the standard was referred to as "extent of hearing loss attributable to the *employment*")

Where claimant, who began working for employer in 1933, received his first audiogram in 1959 which indicated a 15.7 percent binaural hearing loss, and retired from his position with employer in 1975 with a 33.7 percent binaural hearing loss, the Special Fund was liable for the 15.7 percent hearing loss which occurred before the 1959 hearing test, and employer was liable for the remainder, based on the precept that Section 8(f) was enacted in part to encourage the retention of disabled workers. A pre-employment audiogram is not a prerequisite to Section 8(f) relief under the amended Act. *Risch v. Gen. Dynamics Corp.*, 22 BRBS 251 (1989).

Claimant was employed as a supervisor for employer from 1964 to 1983, at which time he had a 23.4 percent binaural hearing loss. Claimant was given a pre-employment audiogram in 1964 which indicated a high frequency hearing loss, but the hearing loss was too minimal to be quantifiable under the AMA *Guides*. Because the 1964 audiogram interpreted under the *Guides* indicated no binaural hearing loss, the Board held that the 1964 audiogram can not establish a pre-existing permanent partial disability cognizable under Sections 8(c)(13) and 8(f) of the Act as amended in 1984. The Board, however, remanded for the administrative law judge to determine whether other audiograms in the record could establish a pre-existing permanent partial disability based on the holding in *Risch* that audiograms taken during employment may suffice if employer continued to expose claimant to injurious noise which aggravated his condition. In so doing, the Board rejected the contention that claimant must have been informed of the results of the audiograms in order for employer to qualify for Section 8(f) relief based on them, stating that employer's knowledge, actual or constructive, is necessary only for a manifest pre-existing permanent partial disability. *Fucci v. Gen. Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J, dissenting).

Where there was no creditable evidence of the extent of claimant's hearing loss prior to 1984, and claimant left covered employment in 1971, the Board affirmed the administrative law judge's findings that employer did not meet its burden of establishing that claimant

had a pre-existing disability which was manifest to employer prior to his leaving covered employment. *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991).

The Board held initially that the administrative law judge erred in relying on a November 1984 audiogram to establish a pre-existing permanent partial disability where he also found claimant was not exposed to noise after October 1984. However, the Board modified the award of Section 8(f) relief based on the results of an earlier audiogram. The Board rejected the Director's contention that Section 8(f) should not apply in cases where the employer administered audiograms to claimant and allegedly did not inform him of the results or file an injury report with the district director. In this case there was no evidence that the results were concealed, and under Section 30(a) as amended in 1984, employer has no duty to report "no time lost" injuries. The Board also rejected Director's argument that the claim should be "amended" to include a claim based on the earlier hearing loss for which employer would be liable, as claimant did not file a claim after the earlier audiograms and there is no basis under the Act for a claim to be "amended" by the Director to include claims for prior hearing losses for the purpose of creating a credit for the Special Fund against its liability. *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993).

The Board rejected the Director's argument that 20 C.F.R. §702.321, which states that the pre-existing hearing loss "must be documented by an audiogram which complies with the requirements of Section 702.441," requires that employer produce a "presumptive" audiogram pursuant to 20 C.F.R. §702.441(b) in order for it to establish the pre-existing hearing loss requisite for its entitlement to Section 8(f) relief. The Board explained that the key question relating to hearing loss for purposes of Section 8(f) relief, as well as for establishing the extent of hearing loss in adjudicating any other aspect of the claim, is whether there is sufficient probative evidence, applying the AMA *Guides* and procedures of Section 702.441(d), to establish the extent of a claimant's permanent loss of hearing at a particular point in time. The Board rejected the Director's contention that the audiogram documenting claimant's pre-existing hearing impairment is deficient under 20 C.F.R. §702.441(d). The administrative law judge found that the examiner, type of equipment, and calibration date were on the audiogram results. The administrative law judge also found that claimant's current physical condition was noted in materials accompanying the audiogram. The administrative law judge relied on a doctor's testimony concerning the reliability of the audiogram, and the hearing loss was calculated under the AMA *Guides*. Thus, the Board affirmed the finding that the pre-existing permanent partial disability element for Section 8(f) relief was met, as well as the award of Section 8(f) relief. *R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008).

The administrative law judge erroneously addressed whether claimant's 2003 audiogram demonstrated a materially and substantially greater disability than that demonstrated on the 2002 audiogram before determining whether the 2003 audiogram showed a greater loss and was thus a second injury. However, the administrative law judge rationally credited uncontradicted medical evidence that audiogram test results at any particular frequency

that fall within a 5 decibel range of each other are within the range of test/retest variability and thus are a measure of the same hearing loss. In this case, the 2002 and 2003 audiogram results are within the range of test/retest variability such that the 2003 audiogram does not represent an increase in claimant's hearing loss since the 2002 audiogram. The Board, therefore, affirmed the administrative law judge's finding that employer did not establish a second injury for purposes of Section 8(f) by virtue of these audiograms. With regard to earlier audiograms, the Board held that the administrative law judge erred in rejecting employer's claim for Section 8(f) relief by finding that 20 C.F.R §§702.321, 702.441 requires that employer provide claimant with a copy of the audiogram and interpreting report in order for the test to be valid for purposes of Section 8(f). Claimant need not be informed of the prior test results for employer to be entitled to Section 8(f) relief. Moreover, employer's entitlement to Section 8(f) relief need not be predicated on an audiogram that meets all of the criteria of Section 702.441(b)-(d), *citing R.H.,* 42 BRBS 6. The Board remanded the case for the administrative law judge to address employer's entitlement to Section 8(f) relief based on any of the audiograms pre-dating the audiogram that established claimant's compensable second injury. *G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011).

Elements of Section 8(f) Relief

Pre-Existing Permanent Partial Disability

The Supreme Court considered the meaning of the word "disability" as used in requiring a previous disability in Section 8(f), and concluded that Congress did not intend to use "disability" as a term of art in Section 8(f). Thus, the Court concluded that in the context of Section 8(f), a prior disability need not fall within the definition of that term in Section 2(10) of the Act, 33 U.S.C. §902(10). *Lawson v. Suwannee Fruit and Steamship Co.*, 336 U.S. 198 (1949). Although *Lawson* interpreted Section 8(f) as it existed prior to the 1972 Amendments, the courts have concluded that no relevant change was intended by the rephrasing of "previous disability" in the original Section 8(f) to "existing permanent partial disability" in the amended version. *See, e.g., C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Atl. & Gulf Stevedores v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976).

The most often-cited definition of "existing permanent partial disability" under Section 8(f) was set forth in *C & P Tel.* In *C & P Tel.*, the court rejected the theory that an existing permanent partial disability under Section 8(f) was required to be an economic disability:

> To summarize, the term "disability" in new Section 8(f) can be economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. "Disability" under new Section 8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

564 F.2d at 513, 6 BRBS at 415. The "economic" disability theory has been rejected in several other circuits as well. *Todd Pac. Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25(CRT) (9th Cir. 1990); *Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *rev'g Lostaunau v. Campbell Indus., Inc.*, 13 BRBS 227 (1981), *cert. denied*, 459 U.S. 1104 (1983); *Equitable Equip. Co., Inc. v. Hardy*, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977), *rev'g* 3 BRBS 426 (1976); *Atl. & Gulf Stevedores*, 542 F.2d 602, 4 BRBS 79, *rev'g* 1 BRBS 541 (1975). *But see Duluth, Missabe & Iron Range Ry. v. U. S. Dep't of Labor*, 553 F. 2d 1144, 5 BRBS 756 (8th Cir. 1977) (court does not decide issue). The "cautious employer" test has now been widely adopted. *E.g., Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Director, OWCP v. Gen. Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991).

Although in the past the Board had required that claimant's pre-existing disability be economically disabling, the Board reversed its position and followed the lead of the appellate courts in not requiring economic disability. *See, e.g., Bickham v. New Orleans Stevedoring Co.*, 18 BRBS 41 (1986); *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983); *Shoemaker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 141 (1980); *Johnson v. Brady-Hamilton Stevedore Co.*, 11 BRBS 427 (1979); *Lawson v. Atl. & Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977); *Benoit v. Gen. Dynamics Corp.*, 6 BRBS 762 (1977). In addition, the Board has specifically applied the test established in *C & P Tel.* that a condition is a disability for purposes of Section 8(f) when it is such that a cautious employer would be motivated to discharge the employee because of a greatly increased risk of compensation liability. *See, e.g., Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988); *Johnson*, 11 BRBS 427; *Cononetz v. Pac. Fisherman, Inc.*, 11 BRBS 154 (1979).

The D.C. Circuit has also held that the mere fact of past injury does not itself establish a pre-existing permanent partial disability. Rather, "there must exist, as a result of that injury, some serious, lasting physical problem." *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146, 149(CRT) (D.C. Cir. 1985).

The Ninth Circuit reached a similar result in *Campbell Indus.*, 678 F.2d 836, 14 BRBS 974, holding employer did not meet the *C & P Tel.* criteria as it did not establish that claimant's prior back injuries resulted in a serious physically disabling condition and his psychological condition was not diagnosed until after the work injury. The court therefore reversed the Board's decision in *Lostaunau*, 13 BRBS 227, which had held that the prior conditions were sufficient. *See Dove v. Sw. Marine of San Francisco*, 18 BRBS 139 (1986) (old ankle fracture did not produce serious lasting physical problem; award of Section 8(f) relief reversed); *Bickham*, 18 BRBS 41 (mere diagnosis of a pre-existing condition is not necessarily sufficient).

A work-related condition may establish a pre-existing permanent partial disability for purposes of Section 8(f). *See Elec. Boat Corp. v. DeMartino*, 495 F.3d 14, 41 BRBS 45(CRT) (2d Cir. 2007); *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015), and cases discussed under the contribution element regarding aggravation.

The Board has stated that an existing permanent partial disability must be based on a physical foundation. Elements such as a claimant's background, age, limited education, language difficulties and limited prior work experience may not be used. *Cononetz*, 11 BRBS 154. *See Watts v. Marcel S. Garrigues Co.*, 19 BRBS 40 (1986), *aff'd sub nom. State Compensation Ins. Fund v. Director, OWCP*, 818 F.2d 1424, 20 BRBS 11(CRT) (9th Cir. 1987). *Compare Todd Pac. Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25(CRT) (9th Cir. 1990). Neither do family dependents nor social discrimination constitute a pre-existing permanent partial disability. *Collins v. Todd Shipyard Corp.*, 9 BRBS 1015 (1979).

Obesity by itself does not constitute a pre-existing disability. A pre-existing disability must be a medically cognizable ailment rather than an unhealthy habit or lifestyle. *Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989); *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985); *Brogden v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 259 (1984). However, physically disabling symptoms of obesity may suffice. *Wilson*, 23 BRBS 24.

An x-ray showing pleural thickening establishes a pre-existing permanent partial disability, as it evidences a serious lung condition. *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40 (1983); *Musgrove v. William E. Campbell Co.*, 14 BRBS 762 (1982).

Alcoholism may constitute a pre-existing disability pursuant to Section 8(f). *Parent v. Duluth, Missabe & Iron Range Ry. Co.*, 7 BRBS 41 (1977). In *Parent,* employer submitted evidence that claimant's alcoholism resulted in a psychological disability which combined with his work injury. Thus, while alcoholism may meet this requirement, where there is no evidence that it caused a serious lasting physical condition, that requirement is not met. *See Settles v. Lane Constr. Corp.*, 15 BRBS 148 (1982) (records indicated only that claimant was a heavy drinker).

Smoking does not qualify as a pre-existing disability until it results in medically cognizable symptoms that physically impair the employee. *Gen. Dynamics Corp. v. Sacchetti*, 681 F.2d 37, 14 BRBS 862 (1st Cir. 1982), *aff'g* 14 BRBS 29 (1981). In *Sacchetti*, the court reasoned that applying Section 8(f) to "socially pervasive risks" would redefine "disability," broadening the rule beyond its intended scope.

Digests

Illiteracy is not a pre-existing permanent disability for purposes of Section 8(f); unless there is a medically cognizable physical or mental ailment underlying a disability such as this, it is a mere social or economic factor insufficient to trigger relief. *Watts v. Marcel S. Garrigues Co.*, 19 BRBS 40 (1986), *aff'd sub nom. State Compensation Ins. Fund v. Director, OWCP*, 818 F.2d 1424, 20 BRBS 11(CRT) (9th Cir. 1987).

Affirming this decision, the Ninth Circuit held that mental impairment qualifies as a permanent partial disability under Section 8(f) if it is shown that the impairment was not simply due to lack of education. An employee's illiteracy which is not the result of mental retardation or a learning disability does not constitute a pre-existing permanent partial disability for purposes of Section 8(f). *State Compensation Ins. Fund v. Director, OWCP*, 818 F.2d 1424, 20 BRBS 11(CRT) (9th Cir. 1987).
Where the evidence credited by the administrative law judge established that psychological testing showed that claimant suffered from "borderline retardation," the Ninth Circuit reversed the Board and held that this mental limitation was sufficient to establish a pre-existing permanent partial disability. The court held that the definition of disability as an

economic concept set forth in Section 2(10) does not apply to Section 8(f). *Todd Pac. Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25(CRT) (9th Cir. 1990).

The Board vacated the administrative law judge's denial of Section 8(f) relief and remanded for reconsideration of whether claimant's low intellectual level constituted a pre-existing permanent partial disability where he did not discuss relevant medical opinions regarding claimant's psychological problems which suggested these problems were more serious than he found and the Ninth Circuit's decision in *Mayes*, 913 F.2d 1426, 24 BRBS 25(CRT), was issued subsequent to his decision. *White v. Peterson Boatbuilding Co*., 29 BRBS 1 (1995).

Obesity, by itself, cannot constitute a pre-existing disability. A pre-existing disability must be a medically cognizable physical ailment rather than an unhealthy habit or lifestyle. Physically disabling symptoms attributable to obesity may thus be sufficient to establish a pre-existing permanent partial disability. The Board remanded for the administrative law judge to consider the evidence in light of these propositions. *Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989).

The Ninth Circuit affirmed the Board's holding that substantial evidence supported a determination that claimant's first injury was not permanent where he resumed his old job including overtime without restrictions or a decrease in pay and there was no objective medical evidence of permanent disability. *Todd Shipyards Corp. v. Director, OWCP [Cortez]*, 793 F.2d 1012, 19 BRBS 1 (CRT) (9th Cir. 1986).

The First Circuit affirmed a finding that claimant's hypertension was a pre-existing permanent partial disability. Claimant had the condition "for years," had a job offer postponed because of elevated blood pressure, and had significantly elevated blood pressure at the time of hire with employer. *Director, OWCP v. Gen. Dynamics Corp. [Fantucchio]*, 787 F.2d 723, 18 BRBS 88(CRT) (1st Cir. 1986).

Where claimant had a history of three injuries to his left arm yet suffered no significant medical problems or work restrictions, the mere existence of these prior injuries did not establish a pre-existing disability for Section 8(f) purposes because the pre-existing condition must produce some serious, lasting physical problem. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

The Board reversed an administrative law judge's denial of Section 8(f) relief, reasoning that claimant's long-standing lung condition consisting of chronic obstructive lung disease, bronchitis and pneumonia constituted a pre-existing permanent partial disability. *Armand v. Am. Marine Corp.*, 21 BRBS 305 (1988).

The Board held, contrary to the administrative law judge's conclusion, that Section 8(f) does not require a finding of maximum medical improvement before a pre-existing permanent partial disability can be found. The pre-existing condition must produce some serious lasting physical problem, but it need not have reached maximum medical improvement. *Lockhart v. Gen. Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992).

The Board reversed the administrative law judge's holding that age-related disabilities are not within the scope of Section 8(f). There is no indication that Congress intended to preclude an existing disability due to age or other causes from forming a basis for Section 8(f) relief, based solely on the cause of the disability. The disability need only be a serious, lasting physical condition. The Board also rejected the administrative law judge's reasoning that employees with age-related disabilities are already protected by the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* The case was remanded for the administrative law judge to determine if degenerative disc disease is a pre-existing permanent partial disability. *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988).

In remanding for reconsideration of the issue of employer's entitlement to Section 8(f) relief, the Board noted that an asymptomatic condition which is aggravated by treatment for the work injury might be a pre-existing permanent partial disability. The pre-existing condition need not result in an economic disability to be a pre-existing permanent partial disability. *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988).

The Board noted that symptoms of fatigue alone do not constitute the type of pre-existing condition which would likely motivate a cautious employer to discharge an employee so as to establish a pre-existing permanent partial disability for Section 8(f) purposes and thus the administrative law judge's failure to discuss evidence on this issue is harmless error. The Board stated that the administrative law judge erred in relying on the fact that claimant had not lost time from work to conclude that claimant's skin rash was not a pre-existing permanent partial disability, inasmuch as a condition need not be economically disabling to constitute a permanent partial disability under Section 8(f). Concluding this finding was harmless error, the Board affirmed the administrative law judge's denial of Section 8(f) relief based on a determination that administrative law judge correctly concluded that claimant's rash had not resulted in any serious lasting physical problem. *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988).

The Board held that an administrative law judge erroneously concluded that a physician's diagnosis of a protruding disc was insufficient to establish a permanent partial disability simply because he had not given claimant a physical impairment rating. The Act does not require that claimant receive a physical impairment rating to establish a permanent partial disability for Section 8(f) purposes so long as claimant's pre-existing condition has resulted in a serious lasting physical problem. The administrative law judge also erred in relying

on the fact that claimant had been released to return to work following his prior injury to conclude that this injury had not resulted in "permanent partial disability" within the meaning of Section 8(f) as a condition need not be economically disabling to establish a permanent partial disability under Section 8(f). Moreover, a doctor stated protruded disc made claimant susceptible to further injury. *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988).

The Board reversed the administrative law judge's finding that claimant's diabetes and hypertension did not constitute pre-existing permanent partial disabilities because they were "merely" risk factors for developing heart disease and did not constitute serious, lasting problems, and because claimant was unaware of the conditions. The Board held that the mere fact claimant did not lose any time at work due to these conditions does not preclude a finding of pre-existing permanent partial disability, since these conditions need not be economically disabling. The Board further noted that the record contained medical evidence that claimant's hypertension and diabetes put him at risk for heart disease, and the evidence demonstrated that these conditions were longstanding and well documented. Since claimant's knowledge of the conditions is not relevant, and they met the "cautious employer" test, the Board reversed the administrative law judge's decision. *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989).

The Board majority rejected a dissenting view that laws protecting handicapped workers have rendered the *C&P Tel.* test meaningless. Section 8(f) may encompass persons who are "disabled" but who do not meet the standards of "disability" set forth in other statutory schemes. The Board's function is to interpret the specific statutory scheme of the Act, not to gauge the necessity of the scheme in light of other laws addressing employment discrimination, as Congress has not given any indication that federal laws protecting the handicapped in any way override or modify Section 8(f). Accordingly, the Board stated it would continue to apply the *C & P Tel.* standard in determining whether the pre-existing permanent partial disability element is met in a given case. The Board remanded the case for reconsideration as the administrative law judge's findings were inadequate and did not address relevant evidence. *Preziosi v. Controlled Indus., Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting).

A condition alleged to be a pre-existing disability for Section 8(f) purposes must precede the injury on which the compensation claim is based. Where the insurer did not argue that the employee had such a condition, the Board held that the administrative law judge properly denied Section 8(f) relief. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100, (1990), *aff'd on recon.* 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

Where a pre-employment audiogram revealed a hearing loss too minimal to be quantified under the AMA *Guides*, the Board held it insufficient to establish a pre-existing permanent partial disability under Section 8(f). The Board, however, remanded for the administrative

law judge to determine whether other audiograms in the record could establish a pre-existing permanent partial disability. *Fucci v. Gen. Dynamics Corp.*, 23 BRBS 161 (1990)(Brown J., dissenting).

The Board affirmed an administrative law judge's finding that claimant's history of gastrointestinal problems was insufficient to constitute a pre-existing permanent partial disability. Although claimant had several GI series tests and complained of pain over the course of 16 years, there was no evidence of any impairment; after each occasion of abdominal pain, claimant returned to work with no significant problems, and there was no pre-injury diagnosis indicating that claimant suffered from a permanent condition. *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990).

The Board held that an asymptomatic pre-existing condition which pre-disposed a claimant to injury and which would cause a doctor to impose restrictions was a pre-existing permanent partial disability under Section 8(f) because it was a serious lasting condition that would have caused a cautious employer to consider terminating him. *Currie v. Cooper Stevedoring Co. Inc.*, 23 BRBS 420 (1990).

In a hearing loss case, the Board noted that a prior work-related injury may constitute a pre-existing permanent partial disability for purposes of Section 8(f) relief. *Emery v. Bath Iron Works Corp.*, 24 BRBS 238 (1991), *vacated mem. sub nom. Director, OWCP v. Bath Iron Works Corp.*, 953 F.2d 633 (1st Cir. 1991).

The First Circuit agreed with the Board's reversal of Section 8(f) relief. The fact that claimant previously sustained back injuries does not, standing alone, establish that he had a pre-existing permanent partial disability. In this case, claimant resumed regular physical labor after recovering from each of his previous back injuries. Furthermore, employer must show that, but for the pre-existing injury, claimant would not have been rendered totally disabled by the work-related injury. Employer not only failed to show that claimant had a pre-existing injury, it did not show that the pre-existing injury, combined with the final work-related injury, would, or did, create a greater degree of disability. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991).

Citing the "cautious employer" test, the Ninth Circuit reversed the Board's denial of Section 8(f) relief and agreed with the administrative law judge that claimant had a preexisting permanent partial disability where there was substantial evidence that claimant failed to completely recover from his back injuries and continued to have back problems for seven years after returning to work. The decision distinguished *Legrow*, 935 F.2d 430, 24 BRBS 202(CRT). *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991).

The Board affirmed the administrative law judge's finding that 12 days was a sufficiently long time for a pre-existing permanent partial disability to emerge, and that claimant's

intracranial bleeding preceding the stroke constituted a pre-existing disability for purposes of Section 8(f). No specific amount of time must pass between the pre-existing condition and the work injury. The Board therefore rejected Director's argument that claimant's bleeding and stroke constituted all one condition to which Section 8(f) relief would not be applicable. *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

The Board affirmed the finding that employer established a pre-existing permanent partial disability. One of claimant's treating physicians opined that claimant was susceptible to prolonged disability due to his back condition. This opinion constituted substantial evidence from which the administrative law judge could rationally find that claimant had a serious and lasting permanent partial disability. *Thompson v. Nw. Enviro Services, Inc.*, 26 BRBS 53 (1992).

The Second Circuit deferred to the Director's reliance on *C & P Tel. Co.*, 564 F.2d 503, 6 BRBS 399(CRT), which defined the term "disability" as used in Section 8(f) as meaning either economic disability, or a condition described in the schedule in Section 8(c), or a physical disability that would motivate a cautious employer to discriminate against a handicapped employee for fear of increased compensation liability. The court, however, declined to defer to the Director's specific application of this standard and remanded the case for the administrative law judge to determine whether claimant's pre-existing asymptomatic back condition constituted a serious physical condition such that a cautious employer would have been motivated to discharge or decline to hire the claimant because of an increased risk compensation liability. The court noted that the administrative law judge is not bound by the Director's view that an asymptomatic condition cannot satisfy this test. *Director, OWCP v. Gen. Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992).

A doctor's opinion that claimant had a serious asbestos-related lung disease which was evidenced on x-rays for years prior to his retirement constituted substantial evidence that claimant had a pre-existing permanent condition which would have motivated a "cautious employer" to discriminate against him because of a greatly increased risk of compensation liability. Medical records need not indicate the precise nature or severity of a pre-existing condition in order to satisfy this requirement of Section 8(f), so long as there is sufficient information to establish the existence of a serious lasting physical problem prior to the subsequent injury. *Shrout v. Gen. Dynamics Corp.*, 27 BRBS 160 (1993) (Brown, J., dissenting).

Because the existing medical records failed to establish that the injuries cited by employer resulted in a "serious lasting physical condition" *etc.*, the administrative law judge rationally determined that employer failed to establish the pre-existing permanent partial disability element of Section 8(f) entitlement. The records revealed only minor injuries with no lingering effects. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

The Board affirmed the administrative law judge's conclusion that employer failed to establish that claimant suffered from a manifest pre-existing permanent partial disability. The evidence showed that claimant's pleural thickening prior to his December 1986 work-related injury was minimal, caused by fat, and, after claimant lost 30 to 40 pounds, disappeared. With regard to claimant's chronic bronchitis, the administrative law judge found that claimant never missed work because of it, and determined that there was no evidence prior to December 1986 which included either a diagnosis of a chronic condition or a permanent, serious lasting pulmonary condition. *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997).

The Board affirmed the administrative law judge's determination that claimant had a pre-existing permanent partial disability as the additional medical evidence employer submitted on reconsideration cured the deficiencies the administrative law judge found in the original medical report. Thus, substantial evidence supported the finding that claimant's pre-existing back problems were "serious and lasting." *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

In *dicta*, the First Circuit stated that claimant's existing obstructive pulmonary disease due to smoking and obesity constituted a pre-existing permanent partial disability within the meaning of Section 8(f) under the "cautious employer" test. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997).

In determining whether claimant had a pre-existing permanent partial disability for purposes of Section 8(f), the Sixth Circuit adopted the cautious employer test, over the Director's objection, under which a claimant has a permanent partial disability when the claimant had "such a serious physical disability in fact that a cautious employer . . . would [be] motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." The case was remanded for the administrative law judge to apply this test. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998).

The Board affirmed the administrative law judge's denial of Section 8(f) relief as he rationally determined that employer did not establish a manifest pre-existing disability. Specifically, although the records submitted by employer in support of its application for Section 8(f) relief indicated that claimant had some pre-existing emotional problems, the administrative law judge rationally found that they do not establish the existence of a serious, lasting emotional problem pre-dating the work injury. *Callnan v. Morale, Welfare & Recreation, Dep't of the Navy*, 32 BRBS 246 (1998).

The Board affirmed the administrative law judge's denial of Section 8(f) relief as employer failed to establish a pre-existing permanent partial disability due to either claimant's obesity or his back condition. Obesity alone is insufficient to establish a pre-existing

disability, and the administrative law judge rationally credited evidence that claimant's prior back injuries were only temporarily disabling. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

The Fourth Circuit affirmed the administrative law judge's finding that employer did not establish a pre-existing permanent partial disability. The administrative law judge rationally rejected the medical opinions of Drs. Reid as lacking supporting data or medical analysis, and claimant returned to work for several years with no permanent work restrictions after the prior injuries. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT)(4th Cir. 2003).

As the administrative law judge did not address whether claimant's pre-existing osteoarthritis of the knees resulted in a serious and lasting condition, the Board remanded the case for the administrative law judge to address whether claimant's pre-existing knee conditions constituted a pre-existing permanent partial disability. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

Claimant injured his right shoulder at work and had previously injured the same shoulder, undergone two surgeries and had permanent work restrictions. The Board reversed the administrative law judge's finding that claimant did not have a pre-existing permanent partial disability. The Board held that, as "disability" under Section 8(f) is not limited to an economic disability, it was improper for the administrative law judge to conclude that claimant had no disability merely because he was able to perform his usual work as a bartender. Rather, the fact that claimant had two prior shoulder surgeries, his condition had been deemed "chronic" as early as 1998, and he had been given permanent lifting restrictions in 1999, established that claimant had a lasting condition prior to his work injury in 2000. Therefore, the Board vacated the denial of Section 8(f) relief, and remanded the case for consideration of the remaining Section 8(f) elements. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

The Second Circuit held that an employer is eligible for Section 8(f) relief where the employee's pre-existing disability and second injury both arise from the same course of employment with the same employer. *Elec. Boat Corp. v. DeMartino*, 495 F.3d 14, 41 BRBS 45(CRT) (2d Cir. 2007). In *Cutietta v. Nat'l Steel & Shipbuilding Co.,* 49 BRBS 37 (2015), the Board remanded the case to the administrative law judge to address employer's contentions that claimant had prior manifest, disabling work injuries that were aggravated by subsequent work injuries such that employer was entitled to Section 8(f) relief.

Manifest

The requirement that a claimant's pre-existing disability be manifest to the employer is not a statutory requirement of Section 8(f), but was added by the courts in early cases. *See Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Duluth, Missabe & Iron Range Ry. v. U. S. Dep't of Labor*, 553 F.2d 1144, 5 BRBS 756 (8th Cir. 1977); *Equitable Equip. Co. v. Hardy*, 558 F.2d 1192 (5th Cir.1977); *Atl. & Gulf Stevedores v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); *Dillingham Corp. v. Massey*, 505 F.2d 1126 (9th Cir. 1974); *Am. Mut. Ins. Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). *Accord Bath Iron Works Corp. v. Director, OWCP [Reno]*, 136 F.3d 34, 32 BRBS 19(CRT) (1st Cir. 1998); *C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1233, 22 BRBS 11(CRT) (5th Cir. 1989). *Cf. Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991) (manifest requirement does not apply in post-retirement occupational disease cases); *Am. Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15(CRT) (6th Cir. 1989) (court found enforcement of the statute as written, without an employer knowledge requirement, best accomplishes the purpose of Section 8(f), but in order to prevent fraud, employer must show that pre-existing injury or condition has been documented or otherwise shown to exist prior to the second injury).

The reasoning behind this requirement flows from the anti-discriminatory purpose of Section 8(f), as a latent defect, unknown to the employer, cannot cause discrimination against an employee. *Eymard & Sons Shipyard*, 862 F.2d at 1223, 22 BRBS at 13(CRT). Actual knowledge of a prior permanent disability will satisfy the manifest requirement; however, actual knowledge is not necessary as case precedent establishes that constructive knowledge will suffice. A pre-existing disability will meet the manifest requirement if, prior to the permanently disabling subsequent injury, either employer had actual knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable. *Bunge Corp. v. Director, OWCP [Miller]*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991); *Director, OWCP v. Universal Terminal & Stevedoring Corp. [DeNichilo]*, 575 F.2d 452, 8 BRBS 498 (3d Cir. 1978); *Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984); *Rowe v. W. Pac. Dredging*, 12 BRBS 427 (1980); *Delinski v. Pragnot Air Flex Corp.*, 9 BRBS 206 (1978); *Mapp v. U. S. Airforce Ctr. Welfare Fund*, 12 BRBS 418 (1980). *See Kent v. Commissioned Officers' Mess*, 13 BRBS 1118 (1981) (physician's testimony that his records would show condition is sufficient). *Cf. Sheek v. Gen. Dynamics Corp.*, 18 BRBS 1 (1985), *modified on other grounds on recon.,* 18 BRBS 151 (1986) (denial of Section 8(f) relief affirmed where employer assumed on the basis of one physician's letter to another noting a history of muscle spasms dating back 10-15 years that hospital records

existed documenting a pre-existing back problem).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest, so long as there is sufficient information that might motivate a cautious employer to consider terminating the employee because of the risk of compensation liability. *Todd*, 16 BRBS at 167-68; *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40 (1983). In *Topping,* an x-ray showing pleural thickening was held sufficient. *Accord Musgrove v. William E. Campbell Co*., 14 BRBS 762 (1982). *See Williams v. The Washington Post Co.*, 13 BRBS 366 (1981) (full ramifications of a disease need not be known). In *Langley v. Newport News Shipbuilding & Dry Dock Co.,* 13 BRBS 580 (1981), *rev'd sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982), the Board stated that there is no requirement of a conclusive diagnosis of a claimant's pre-existing condition in order for "a serious physical disability" to be manifest and relied on a "liberal construction" of Section 8(f) in reversing an administrative law judge's finding that claimant's nephrotic syndrome was not manifest prior to his work-related asbestosis. The Board held that a physician's statement that in hindsight, edema was a symptom of claimant's nephrotic syndrome, and the edema pre-existed claimant's asbestosis was sufficient to make a serious condition manifest. Reversing this decision, the court stated that the Board erred in using "liberal construction" to re-weigh the evidence, as the employer has the burden of persuading the fact finder that the requirements of Section 8(f) were met.

In *Rowe,* 12 BRBS at 431-32, the Board found the manifest requirement satisfied as the record was clear that claimant had prior back injuries and an index report of an earlier automobile accident indicated that claimant suffered neck and back injuries in that accident. The Board cited *Rowe* in *Berkstresser v. Washington Metro. Area Transit Auth.,* 16 BRBS 231 (1984), *decision after remand* 22 BRBS 280 (1989), *rev'd,* 921 F.2d 306, 24 BRBS 69(CRT) (D. C. Cir. 1990), holding that medical records from a prior back injury noting a degenerative disc condition were sufficient to make it manifest and vacating the administrative law judge's conclusion that the records did not disclose a back condition of sufficient severity to motivate the employer to discharge the employee due to an increased risk of liability. The Board stated that while the severity of claimant's pre-existing medical condition is relevant to whether it is a permanent partial disability, the medical records of the pre-existing condition do not necessarily have to indicate its severity in order for it to be manifest. On remand, the administrative law judge again found the records insufficient to meet the manifest requirement as they did not establish claimant had any back disability at that time, and the Board reversed, holding that records of minor degenerative changes sufficed. On appeal, the D. C. Circuit initially held that the Board and administrative law judge stated the correct standard in requiring objective evidence of a serious physical condition that would motivate a "cautious employer" to discharge the employee due to the increased risk of liability. The court, however, reversed the Board's application of this standard, holding that the administrative law judge's findings established that claimant's minimal spinal degeneration was not medically significant and was "normal" for someone

of claimant's age. The fact that claimant had *some* condition is not sufficient to raise the risk of employment discrimination and trigger Section 8(f) relief.

In *Vlasic v. Am. President Lines*, 20 BRBS 188 (1987), the Board subsequently overruled *Rowe,* finding it inconsistent with *Campbell Indus.,* 678 F.2d 836, 14 BRBS 974, insofar as *Rowe* found a manifest pre-existing permanent partial disability without evidence that the prior conditions were serious physical conditions. In *Campbell Indus.*, the Ninth Circuit reversed a Board decision similar to *Rowe* which held that Section 8(f) requirements were satisfied by claimant's three prior injuries. The court found that in each case, claimant returned to work within a few days, without work restrictions or additional medical care. Although claimant had underlying scoliosis and degenerative disc disease, these conditions were not discovered until after claimant's last injury. In *Vlasic,* PMA records indicated prior back injuries, but claimant returned to work with no time lost. The Board stated that the facts in all three cases were similar and therefore followed *Campbell Indus.* and overruled *Rowe*, holding the manifest requirement was not met.

Thus, while the precise severity of a condition need not be stated on records prior to the work injury, there must be sufficient information to establish that a serious, lasting physical condition existed. In order words, where a diagnosis is not expressly stated in the pre-existing medical records, the records must contain sufficient unambiguous, objective, and obvious indications of a disability in order for it to be considered "manifest." *See Transbay Container Terminal v. U.S. Dep't of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998); *Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

There is no requirement that the pre-existing condition be manifest at the time of hiring; rather, the pre-existing condition need only be manifest prior to the compensable (subsequent) injury. *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 16 BRBS 137(CRT) (9th Cir. 1983) (en banc), *on remand following en banc decision*, 718 F.2d 886, 16 BRBS 85(CRT) (9th Cir. 1983); *Rieche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984); *but see Balderson v. Maurice P. Foley Co., Inc.*, 4 BRBS 401 (1976*), aff'd*, 569 F.2d 132, 7 BRBS 69 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978) (affirming a finding that the manifest element was not met because the employer did not know of the severity of the claimant's pre-existing asthma at the time it hired him).

The Ninth Circuit stated that this rule is in accord with the principle that Section 8(f) is intended to encourage employers to retain workers who become handicapped during their tenure on the job. *Cargill,* 718 F.2d at 888, 16 BRBS at 139(CRT). *See C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). *Accord Director, OWCP v. Newport News Shipbuilding & Dry Dock Co*., 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Director, OWCP v. Sun Shipbuilding & Dry Dock Co*., 600 F.2d 440, 10 BRBS 621 (3d Cir. 1979); *Alston v. United Brands Corp.*, 5 BRBS 600 (1977). *See Fortier v. Gen.Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983) (aff'g

denial of Section 8(f) where conditions arose after claimant ceased employment with employer).

The Board has rejected the argument that a medical condition is manifest if the proper medical test would have disclosed a pre-existing condition at the relevant time. *Harris v. Lambert's Point Docks, Inc.*, 15 BRBS 33 (1982), *aff'd*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983); *Rieche*, 16 BRBS 272. In *Harris*, the Board rejected employer's argument that Section 8(f) relief was appropriate because an x-ray predating permanent total disability would have disclosed plasmacytoma, if such an x-ray had been taken. The Board reasoned that the relevant information must be actually available to employer before the onset of permanent total disability. *Harris*, 15 BRBS at 36.1. Affirming the finding that the condition was not manifest as no extant medical record revealed it, the Fourth Circuit specifically declined to hold that a pre-existing disease is manifest where it might have been discovered by a proper diagnosis.

Similarly, in *Hitt v. Newport News Shipbuilding & Dry Dock Co*., 16 BRBS 353 (1984), the Board held that a medical opinion after a subsequent injury in 1979 stating that a pre-1979 x-ray revealed asbestosis did not make the disease manifest before 1979; the relevant diagnosis must be actually available to employer before the onset of total disability.

A majority of the Board followed *Hitt* in *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99 (1985) (Ramsey, dissenting in relevant part), *aff'd on recon.*, 17 BRBS 160 (1985) (Ramsey, dissenting in relevant part). In *Villasenor*, the Board reaffirmed the rule that an employer must have constructive notice of a pre-existing condition for it to be manifest, and held that the mere existence of x-rays, without any relevant diagnoses or interpretations concerning the pre-existing condition, is not sufficient to meet the manifest requirement. *See also Malone v. Howard Fuel Co.*, 16 BRBS 364 (1984) (following *Harris*, the Board rejected employer's argument that claimant's pre-existing condition was manifest when it might have been discovered by proper diagnosis, but was not); *Falcone v. Gen. Dynamics Corp.*, 16 BRBS 202 (1984) (attending physician's notation that claimant had a pre-existing liver condition may be sufficient to establish a manifest pre-existing disability; the administrative law judge's failure to consider this evidence is error); *Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984) (Board affirms administrative law judge's finding that claimant's pre-existing lung cancer was not manifest. Infirmary records that claimant suffered cold-like chest difficulties are not sufficient to motivate a cautious employer to discharge the employee due to increased risk of compensation liability).

The remaining courts of appeals to address the issue have joined the Fourth Circuit and the Board in holding that a disease that might have been discovered had proper testing been performed is not manifest. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11(CRT) (5th Cir. 1989); *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1st Cir. 1987).

Digests

Post-Retirement Occupational Disease Cases

The Board declined to eliminate the manifest requirement in occupational disease cases where the employee's occupational disease was diagnosed after his employment with employer ends, and concluded that, in order to effectuate the purposes of Section 8(f) regarding the prevention of discrimination against disabled workers, the pre-existing disability must be manifest to employer either at the time of hire or during the period of employment with employer. *Harris v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 114 (1989), *rev'd*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

In reversing the Board's decision in *Harris*, the Fourth Circuit held that the manifest requirement is not applicable in post-retirement occupational disease cases. To establish entitlement to Section 8(f) relief in such cases, an employer need only show that claimant had a pre-existing permanent disability which combined with the occupational disease to result in the compensable disability. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

Relying on its decision in *Harris*, 23 BRBS 114, the Board held that where claimant's work-related disease became manifest subsequent to retirement, claimant's pre-existing disability must have been manifest prior to retirement to serve as a basis for Section 8(f) relief. As there was no creditable evidence of the extent of claimant's hearing loss prior to 1984, and claimant left covered employment in 1971, the Board affirmed administrative law judge's finding that employer did not meet its burden of establishing that claimant had a pre-existing disability which was manifest to employer prior to his leaving covered employment. *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991).

In a case arising in the Fourth Circuit involving occupational disease claims for disability and death benefits of a retired worker, the Board followed *Harris*, 934 F.2d 548, 24 BRBS 190(CRT), and held that in order to establish entitlement to Section 8(f) relief employer need only show that an employee's pre-existing permanent partial disability pre-dated the manifestation of the occupational disease, and that the pre-existing disability contributed to the employee's permanent disability or death. The Board remanded the case for reconsideration. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

In a post-retirement occupational disease case which arose in the Third Circuit, the Board addressed the Fourth Circuit's decision in *Harris*, 934 F.2d 548, 24 BRBS 190(CRT),but held that the manifest requirement remains applicable in cases arising outside the Fourth Circuit. The Board vacated the administrative law judge's decision which relied on *Harris*. In so doing, however, the Board declined to narrow the scope of the manifest element by requiring the pre-existing disability to be manifest before either the last date of employment

or the last date of exposure to injurious stimuli. Therefore, to this extent, it overruled its prior decision in *Dubar*, 25 BRBS 5 (1991). The Board held that, for an employer to be entitled to Section 8(f) relief, the pre-existing permanent partial disability must be manifest prior to the work-related second injury. Such a rule makes the dual goals of Section 8(f), *i.e.,* preventing discrimination and protecting employers, attainable. Consequently, the Board remanded the case for the administrative law judge to consider whether employer satisfied the manifest element. *Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996), *vacated sub nom. Director, OWCP v. Sun Ship, Inc.*, 150 F.3d 288, 32 BRBS 132(CRT) (3d Cir. 1998).

On appeal, the Third Circuit initially found it had jurisdiction as the Board's decision did not issue within a statutory deadline and thus should have been summarily affirmed. The court declined to follow the Fourth Circuit's decision in *Harris*, 934 F.2d 548, 24 BRBS 190(CRT), concluding that the better reasoned approach is that of the First Circuit in *Reno*, 136 F.3d 34, 32 BRBS 19(CRT), *infra.* The court thus held that employer was not entitled to Section 8(f) relief, as claimant's pre-existing asbestosis was not diagnosed until after he left employment. *Director, OWCP v. Sun Ship, Inc.*, 150 F.3d 288, 32 BRBS 132(CRT) (3d Cir. 1998).

The First Circuit rejected the decision of the Fourth Circuit in *Harris*, 934 F.2d 548, 24 BRBS 190(CRT), that the manifest element does not apply in post-retirement occupational disease cases. The court stated that through the manifest element is the anti-discrimination purpose of Section 8(f) effectuated. The court held that the pre-existing disability must be manifest to the employer during the term of employment in order for employer to be entitled to Section 8(f) relief. *Bath Iron Works Corp. v. Director, OWCP [Reno]*, 136 F.3d 34, 32 BRBS 19(CRT) (1st Cir. 1998).

The Board rejected the Director's argument that in order to be eligible for Section 8(f) relief, claimants' pre-existing permanent partial disabilities must have been manifest to employer prior to the date they were last exposed to asbestos at employer's facility; the Director asserted that the date of exposure established the "date of injury" for the work-related occupational disease which was the "second injury. The Board discussed legal precedent and stated that "exposure" does not equate to "injury" in occupational disease cases as that would not support the "core purpose" of prohibiting discrimination against employees with pre-existing disabilities. The Board held that, consistent with the First Circuit's decisions, where employees become aware of work-related occupational diseases after they have retired from employment, their pre-existing permanent partial disabilities must have been manifest to their employers prior to the date they left that employment in order for employer to be eligible for Section 8(f) relief. *W.D. [Dresser] v. Bath Iron Works Corp.*, 41 BRBS 119 (2007).

In General

The First Circuit affirmed the finding that claimant's hypertension was a manifest pre-existing permanent partial disability where claimant's medical records indicated he had the condition "for years" and had significantly elevated blood pressure at his pre-employment physical. *Director, OWCP v. Gen. Dynamics Corp. [Fantucchio]*, 787 F.2d 723, 18 BRBS 88(CRT) (1st Cir. 1986).

Where claimant had an initial back injury and a second injury a few days after his return to work a month later, the Board held that the administrative law judge erred in finding that a condition must reach maximum medical improvement in order to be a manifest pre-existing permanent partial disability. The manifest requirement may be satisfied either by employer's actual knowledge of the pre-existing condition or by medical records in existence prior to the subsequent injury from which claimant's condition could be objectively determined. The medical records need not indicate the severity or the precise nature of a pre-existing condition for it to be manifest, so long as there is sufficient information regarding a serious lasting problem which could motivate a cautious employer to consider terminating the employee. *Lockhart v. Gen. Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992).

The First Circuit affirmed the Board's decision, holding that the manifest standard is met if there is "sufficient information regarding the existence of a serious lasting problem which would motivate a cautious employer to consider terminating the employee because of the risk of compensation liability." This standard would not be met if the injury appeared to be merely temporary, and while absolute certainty of permanency need not be established, contrary to the Director's contention, the pre-existing injury must be of "substantial duration and consequence." *Director, OWCP v. Gen. Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992).

A pre-existing disability is manifest if it is objectively determinable from medical records. Where employer introduced no medical records from claimant's surgery, the Board held that a scar on claimant's back, without any relevant pre-existing diagnoses, was insufficient to satisfy the manifest requirement. *Anderson v. C.G. Willis, Inc.*, 19 BRBS 169 (1986), *aff'd sub nom. C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994).

The Eleventh Circuit affirmed the Board, holding that a scar on claimant's back, standing alone, did not satisfy the manifest element. Employer did not introduce any medical reports pre-dating the work injury, and the manifest element is not met merely because a pre-existing condition would have been discoverable. *C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994).

The Board held that a pre-existing disability could be "constructively manifest" where contemporaneous records indicated that claimant had been hospitalized in 1926 for kidney problems, the hospital had destroyed its records after 25 years, and claimant's work-related exposure to asbestos had occurred between 1942 and 1945. Although employer could not produce the hospital records, the Board held that circumstantial evidence regarding the records could satisfy the manifest requirement with regard to kidney disease and remanded the case for further consideration. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

Following remand, the Board found it unnecessary to address the parties' contentions regarding whether the administrative law judge properly found that decedent's kidney problems were constructively manifest, inasmuch as the Fourth Circuit, in whose jurisdiction this case arose, eliminated the manifest requirement in post-retirement occupational disease cases in *Harris,* 934 F.2d 548, 24 BRBS 190(CRT). *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995).

The Board affirmed the administrative law judge's finding that claimant's pre-existing back condition was "constructively manifest" in a case in which the medical records of a retired physician who previously had treated claimant no longer existed. The Board held that the physician's independent recollection that he treated claimant's severe back injury from 1969 to 1971, as supported by the physician's financial records, supported the administrative law judge's inferences that the physician's medical records were available when employer hired claimant in 1969 and for some time thereafter, and that those records would have provided sufficient information regarding a serious lasting physical problem to satisfy the manifest requirement. *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

The Board held that PMA records referring to a no-time-lost back injury were insufficient to establish that claimant's pre-existing degenerative disc disease was a manifest, pre-existing, permanent partial disability because they did not establish a serious physical condition existed prior to the work injury. The Board overruled *Rowe*, 12 BRBS 427, to the extent that it was inconsistent. *Vlasic v. Am. President Lines*, 20 BRBS 188 (1987).

The Board agreed with employer that a pulmonary function study performed prior to claimant's last injurious exposure with employer was sufficient to establish a manifest pre-existing permanent partial disability, *i.e.*, a lung impairment, under Section 8(f). Because this pulmonary function study in conjunction with testimony of the physician could support an award of Section 8(f) relief, Board remanded for reconsideration. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

The Board vacated the administrative law judge's determination that claimant's degenerative disc disease was not manifest to employer because of the absence of pre-existing evidence of degeneration at the L3-4 site of claimant's disc rupture. The Board

found that pre-existing evidence of disc degeneration both above and below the L3-4 disc, and a prior diagnosis of cervical arthritis, created an issue of fact necessitating remand as to whether claimant's degenerative disc disease was manifest. Although addressed in a post-injury deposition, the doctor's diagnosis of cervical arthritis in 1963 was determined from his office records extant at that time, and therefore was objectively determinable before the work injury. The case was remanded for further consideration. *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988).

The Board held that where employer's president testified he was aware of claimant's history of pulmonary problems and a pre-existing x-ray diagnosed asbestosis, claimant's lung condition was objectively determinable and therefore "manifest." The Board therefore reversed the administrative law judge's decision. *Armand v. Am. Marine Corp.*, 21 BRBS 305 (1988).

The First Circuit refused to extend the manifest requirement of Section 8(f) to encompass disabilities that are "discoverable" by means of further medical testing. *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1st Cir. 1987).

Medical records indicating only an undiagnosed spot on claimant's lungs are insufficient to satisfy the manifest requirement. The Fifth Circuit affirmed the administrative law judge's and Board's findings that claimant's silicosis was not manifest absent a clear diagnosis or indication in medical reports. The court held that a disease that might have been discovered had proper testing been performed is not manifest. *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11(CRT) (5th Cir. 1989).

The Sixth Circuit rejected the "manifest" element of Section 8(f) as interpreted by other circuit courts of appeal. The court stated that enforcement of the statute as written--free from an employer knowledge requirement--best accomplishes the stated purpose of Congress in 1972. However, in order to prevent fraud, in determining the existence of the "pre-existing permanent partial disability" element of Section 8(f), inquiry will be made as to whether employer establishes that the pre-existing condition manifested itself to *someone* prior to that second injury, *e.g.*, employer must show that pre-existing injury or condition has been documented or otherwise shown to exist prior to the second injury. *Am. Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15(CRT) (6th Cir. 1989).

X-ray evidence indicating that decedent had an undiagnosed abnormality in the right lung field several years prior to the diagnosis of his lung cancer did not meet the manifest requirement because it did not constitute sufficient, unambiguous and obvious information regarding the existence of a serious, lasting physical problem. *Armstrong v. Gen. Dynamics Corp.*, 22 BRBS 276 (1989).

Noting that medical records of the pre-existing condition need not indicate its severity or precise nature for it to be manifest, the Board held that x-ray evidence of minor

degenerative changes of the lumbosacral spine was sufficient to render claimant's pre-existing degenerative back disease constructively manifest to employer. *Berkstresser v. Washington Metro. Area Transit Auth.*, 22 BRBS 280 (1989), *rev'd sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990).

The D.C. Circuit reversed the Board's holding that the manifest element was met. Although the manifest condition need not be serious enough to actually impair the employee at the time of hiring or retention and may even be asymptomatic, the fact that claimant had a pre-injury diagnosis of a minimal spinal degeneration that was no worse than normal and was present in most people of his age is not sufficient to raise the risk of employment discrimination and trigger Section 8(f). *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990).

The Ninth Circuit affirmed a decision that employer was not entitled to Section 8(f) relief. Claimant's heart murmur and bursitis were manifest prior conditions, but the evidence was insufficient to meet the contribution element with regard to these conditions. While evidence that claimant's present disability was due more to his pre-exiting osteoarthritis than to his subsequent back injury could establish contribution, the osteoarthritis was not manifest to employer prior to the back injury. *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989).

Claimant's first two hernias satisfy the manifest element as a matter of law as they occurred at work; thus, employer had actual knowledge of their existence. *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

The Board affirmed the administrative law judge's finding that pre-existing records indicating claimant received Valium for over 2 years before the work injury for hand tremors and a doctor's notation that claimant exhibited anxiety shortly before receiving the first prescription failed to establish that claimant's pre-existing depression was manifest to employer. After the initial recording of anxiety there were no further notations of anxiety or any other psychological illness. *Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev'd in part on other grounds*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991).

The Board held that a kidney x-ray report, which included a secondary diagnosis of moderate degenerative changes in the left hip, constituted substantial evidence to support the administrative law judge's finding that the pre-existing degenerative condition was manifest. The Board also rejected the Director's argument that the x-ray evidence did not meet the manifest requirement because it did not indicate the seriousness of the condition. *Currie v. Cooper Stevedoring Co. Inc.*, 23 BRBS 420 (1990).

The Board reversed the administrative law judge's finding that claimant's illiteracy rendered his mental retardation and learning disability, which were not diagnosed until subsequent to the work injury, manifest to employer. *Lacey v. Raley's Emergency Road*

Serv., 23 BRBS 432 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991).

A *post-hoc* diagnosis of a pre-existing condition, even if based on pre-existing medical records, is insufficient to satisfy the manifest requirement. Moreover, claimant's cervical problem was not objectively determinable from existing records; they showed only that claimant sought treatment for episodes of neck and shoulder pain and did not contain a diagnosis. The Board thus affirmed the administrative law judge's denial of Section 8(f) relief. *Caudill v. Sea Tac Alaska Shipbuilding,* 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

The Ninth Circuit affirmed the Board's holding that claimant's psychological disorder was not manifest to employer prior to his work-related injury in 1981, based on a 1979 orthopaedic report which contained no diagnosis of any psychological disorder, or any inference that claimant's problems were of a psychological nature. The court ruled that a medical record describing pain without an identification of a psychological or neurological cause does not by itself constitute sufficient unambiguous, objective, and obvious indication of a psychological disability sufficient to render claimant's psychological condition manifest. *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991).

The Second Circuit held that claimant's pre-existing back condition was not manifest prior to claimant's work-related injury, and the fact that claimant's back condition could have been discovered through use of x-rays did not render the condition manifest to employer. The court declined to abandon the manifest requirement of Section 8(f). *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993).

The Board noted that to the extent that the administrative law judge required employer to have actual knowledge of reports discussing a pre-existing condition, he erred, as constructive knowledge has long been a sufficient basis for satisfaction of the manifest element. *Lucas v. Louisiana Ins. Guaranty Assoc.*, 28 BRBS 1 (1994).

The Board affirmed the administrative law judge's conclusion that employer failed to establish that claimant suffered from a manifest pre-existing permanent partial disability. The diagnoses of chronic bronchitis and asbestosis in the medical reports given in 1987, 1988 and 1990 respectively, each post-date claimant's December 1986 injury and, thus, are insufficient to render these conditions manifest under Section 8(f). *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997).

The Fifth Circuit remanded for the administrative law judge to determine whether claimant's degenerative cervical spine disease was manifest to employer prior to the work injury. The court stated that although it had not expressly adopted an objective standard (constructive knowledge) for determining whether the manifest requirement was satisfied,

other courts have done so and it had previously recognized that there may be instances where, although a diagnosis is not expressly stated in the medical records, the records contain sufficient unambiguous, objective, and obvious indication of a disability so that the disability should be considered manifest even though actually unknown to the employer. *Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

The court affirmed the administrative law judge's finding that the deceased employee's pre-existing severe cardiovascular atherosclerosis was not manifest to employer prior to the employee's death and therefore employer was not entitled to Section 8(f) relief. Mere presence of certain risk factors, namely, four recorded incidents of high blood pressure over a period of six years, 20 year smoking history of two packs per day, a family history of diabetes, and that the employee was an obese male, is not legally sufficient to establish the manifest requirement. Without a documented diagnosis, there must be sufficient unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available records so that the disability should be considered manifest even though actually unknown by the employer. As such was lacking here, the administrative law judge's finding that the deceased employee's condition was not manifest to employer is supported by substantial evidence. *Transbay Container Terminal v. U.S. Dep't of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998).

The administrative law judge's finding that claimant's pre-existing back condition was manifest prior to claimant's June 1986 work injury is affirmed, as employer's clinic records reflect that claimant sustained 5 back injuries in 7 years and, in addition, document numerous occasions since October 1981 when claimant's back problems required the use of prescription medication and imposition of work restrictions. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

The Board affirmed the administrative law judge's denial of Section 8(f) relief as he rationally determined that employer did not establish a manifest pre-existing disability. Specifically, although the records submitted by employer in support of its application for Section 8(f) relief indicated that claimant had some pre-existing emotional problems, the administrative law judge rationally found that they do not establish the existence of a serious, lasting emotional problem pre-dating the work injury. *Callnan v. Morale, Welfare & Recreation, Dep't of the Navy*, 32 BRBS 246 (1998).

The Fifth Circuit held that a physician's report to a former employer sent one year prior to the subject injury discussing claimant's injuries and degenerative disease and reporting worsening pain and discomfort was sufficient to establish the manifest element. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

The Ninth Circuit held that the administrative law judge, after examination of depositions and other evidence, reasonably inferred from circumstantial evidence that medical records

documenting claimant's prior broken back must have been in existence when employer hired the claimant, and thus, affirmed the administrative law judge's finding that employer established the manifest element for Section 8(f) relief. *Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998).

The Third Circuit held that the administrative law judge correctly found that substantial evidence supported the conclusion that claimant's pre-existing back condition was manifest to employer. Prior to his work injury, claimant had been diagnosed as having a bulging disc and the start of a "neuropathic process" in his back which caused him great pain. As these results were in claimant's medical files, the court held that they were available to employer and, therefore, were manifest prior to the work injury in 1993. *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000).

The Board affirmed the administrative law judge's denial of Section 8(f) relief. Employer did not meet the manifest element because claimant's degenerative back condition was neither actually nor constructively manifest to employer. Claimant first sought treatment for his work-related back pain on January 17, 2004, and was given restricted work duty. There are no medical records pre-dating January 27, 2004, that discuss any degenerative conditions in claimant's back, and it is insufficient to contend that a medical condition would have been show to exist had the proper medical tests been performed. *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007).

In these consolidated cases where it was questionable whether the medical records established that the claimants had pre-existing permanent partial disabilities prior to the date the claimants left their employment, the Board held that in *W.D.* the pre-employment pulmonary function test demonstrating a lung capacity of 74% of predicted along with a notation stating that Claimant D was wheezing and had "smoked all he can" was sufficient evidence for purposes of the cautious employer test. However, the uninterpreted pulmonary function test ("PFT decreased") combined with a "normal" x-ray in *D.A.* did not constitute obvious and unambiguous evidence of a serious lasting condition. Therefore, the Board affirmed the award of Section 8(f) relief in one case and reversed it in the other. *W.D. [Dresser] v. Bath Iron Works Corp.*, 41 BRBS 119 (2007).

The Third Circuit rejected employer's speculative argument that medical records of the pre-existing arthritic condition must exist, despite its having failed to produce them. As employer failed to establish that it had actual or constructive knowledge of claimant's pre-existing arthritic condition, the court held that employer is not entitled to Section 8(f) relief. *C & C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008).

Contribution and Aggravation

Section 8(f) will not apply to relieve employer of liability unless claimant's ultimate disability or death is "found not to be due solely to" the work injury for which benefits are sought. Thus, in order for Section 8(f) relief to be awarded, the existing permanent partial disability must contribute to claimant's permanent total disability or death, and in the case of permanent partial disability, the ultimate disability must also be "materially and substantially" greater than that due to the subsequent injury alone.

In a claim for death benefits, contribution may be found if as a result of a pre-existing condition, the employee's death occurred sooner than it would have otherwise. *Atl. & Gulf Stevedores v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976). *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993) ("to hasten death is to cause it").

If claimant's permanent total disability is a result of his work injury alone, Section 8(f) does not apply. *Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988); *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40 (1983); *Picoriello v. Caddell Dry Dock Co.*, 12 BRBS 84 (1980); *Ledlow v. Ingalls Shipbuilding Division, Litton Sys., Inc.*, 8 BRBS 275 (1978). It also does not apply where a prior condition is aggravated by a non work-related condition; in such a case, employer has not established a "second injury." *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987).

Employment-related aggravation of a pre-existing disability will suffice as contribution to the total disability for purposes of Section 8(f). The employment-related aggravation is the "second injury," and both the appellate courts and the Board have consistently rejected the Director's arguments that Section 8(f) cannot apply where a claimant's pre-existing condition is aggravated by employment conditions. *Director, OWCP v. Gen. Dynamics Corp*., 705 F.2d 562, 15 BRBS 130(CRT) (1st Cir. 1983), *aff'g Graziano v. Gen. Dynamics Corp.*, 14 BRBS 950 (1982); *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980), *aff'g Ashley v. Todd Shipyards Corp.*, 10 BRBS 42 (1978); *Director, OWCP v. Sun Shipbuilding & Dry Dock Co.*, 600 F.2d 440, 10 BRBS 621 (3d Cir. 1979), *aff'g Frame v. Sun Shipbuilding & Dry Dock Co*., 8 BRBS 885 (1978); *Director, OWCP v. Potomac Elec. Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (2d Cir. 1979), *aff'g Brannon v. Potomac Elec. Power Co.*, 6 BRBS 527 (1977); *C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). This rule applies even if the pre-existing disability is also work-related. *Sun Shipbuilding,* 600 F.2d 440, 10 BRBS 621. Thus, where claimant has a pre-existing permanent partial disability, and his employment aggravates that condition resulting in a greater degree of disability, employer may be entitled to Section 8(f) relief.

The Board has rejected the Director's attempts to weaken this rule through the argument

that not permitting Special Fund liability in aggravation cases will provide employer with an incentive to provide a safer workplace, although it has stated that, if it were to be shown that an employer intentionally placed an employee in a dangerous position for the purpose of invoking Section 8(f), the employer would not be entitled to the limitation of liability provided by Section 8(f). The Board reasoned that it would be inconsistent with the remedial purposes of the Act to reward such conscious malfeasance. *Frame*, 8 BRBS 855; *Johnson v. Bender Ship Repair, Inc.*, 8 BRBS 635. The Board stated it would require evidence that employer had this intention when it retained claimant, *Frame*, and has summarily rejected the argument that specific intent to reinjure should not be required. *See Graziano*, 14 BRBS 950. On appeal, the First Circuit also rejected Director's argument in this regard. *Graziano*, 705 F.2d 562, 15 BRBS 130(CRT)

However, Section 8(f) does not apply where there is no actual aggravation; thus, it does not apply if claimant's disability results from the natural progression, or is a direct and natural consequence, of the prior condition. *Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988); *Director, OWCP v. Cooper Assoc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1975), *rev'g Cooper v. Cooper Assoc.*, 7 BRBS 855 (1978) (claimant's depression over business decline, which led to his suicide, was one continuous injury). *Cf. Brannon*, 607 F.2d 1378, 10 BRBS 1048 (Section 8(f) applies where work-related trauma caused mental disease which was aggravated by exposure to dangerous equipment, and led to claimant's suicide).

Thus, the Board affirmed an administrative law judge's denial of Section 8(f) where the administrative law judge found exposure was too minimal to actually contribute to disability notwithstanding that employer accepted liability under the responsible employer rule of *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). *Stokes v. Jacksonville Shipyards, Inc.*, 18 BR8S 237 (1986), *aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988). Section 8(f) relief is not granted solely on the basis that employer is the responsible employer based on the last exposure rule. *Id. See Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT); *Ashley*, 10 BRBS 42, 48-49 (discussing interrelationship of section 8(f), aggravation rule and last employer rule). In affirming the Board's decision in *Stokes,* the Eleventh Circuit stated that the *Cardillo* rule is a rule for allocation of responsibility among insurers for a particular injury and is not relevant to Section 8(f). The employer failed to show an actual aggravation, and thus there was no second injury for application of Section 8(f).

Employer bears the burden of proving that the ultimate disability was in part caused by the pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982), *rev'g Langley v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 580 (1981). *Accord CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 15 BRBS 30(CRT) (7th Cir. 1983) (en banc); *Director, OWCP v. Campbell Indus.*, 678 F.2d 836, 14

BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). *Cf. Maryland Shipbuilding & Dry Dock Co. v. Director, OWCP [Miller]*, 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980) (a "liberal construction" of Section 8(f) accords with the purpose of protecting handicapped workers from loss of employment); *John T. Clark & Son v. Benefits Review Board*, 622 F.2d 93, 95-96 n.5, 12 BRBS 229, 232-233 n.5 (4th Cir. 1980) (Section 8(f) is to be liberally construed in favor of employer). In *Langley*, 13 BRBS 580, the Board relied on this liberal construction in reversing an administrative law judge's denial of Section 8(f) relief. Reversing the Board, the court stated that the Board erred in using "liberal construction" to re-weigh the evidence, as the employer has the burden of persuading the fact finder that the disability was in part caused by the pre-existing condition. As the evidence was inconclusive, the court concluded that the administrative law judge properly found that contribution had not been proven. *Langley*, 1676 F.2d 110, 14 BRBS 716.

A strong practical consideration supports the allocation of the burden of persuasion to the employer. Often the Director does not participate at the original hearing before the administrative law judge, and "only the Director has any real interest in protecting the fund against unjustified payments. It is to the financial advantage of the employer for payments to be taken in part from the fund, and the employee involved is interested only in being paid, not in the source from which his payments come." *Langley*, 676 F.2d at 114, 14 BRBS at 724. The only practical way to protect against unjustified payments is to place the burden on the employer to show that the total disability arose in part from the pre-existing condition. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107(CRT) (4th Cir. 1984), *rev'g Barcliff v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418 (1983) (vacating Board affirmance of administrative law judge's award of Section 8(f) relief where Board found administrative law judge "implicitly" found contribution). In *Topping*, 15 BRBS 40, the Board affirmed an administrative law judge's finding that employer was not eligible for Section 8(f) relief based on employer's failure to show that claimant's overall disability was in part caused by a pre-existing condition. *Accord Jensen v. Maryland Shipbuilding & Dry Dock Co.*, 15 3RBS 400 (1983). Similarly, in *Settles v. Lane Constr. Corp.*, 15 BRBS 148 (1982), the Board reversed an administrative law judge's finding that employer was entitled to Section 8(f) relief where employer failed to show that claimant's pre-existing alcoholism combined with claimant's subsequent injury to produce his present disability.

Thus, employer does not meet this burden merely by submitting evidence which is uncontradicted, as the administrative law judge "may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140, 32 BRBS 48, 52(CRT) (4th Cir. 1998). *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003).

It is not sufficient for employer to prove only that claimant's existing permanent partial

disability combined with the work injury to result in a greater degree of disability; employer must specifically prove that the work injury *alone* did not cause claimant's ultimate disability. *Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000); *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Director, OWCP v. Gen. Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992), *rev'g Luccitelli v. Gen. Dynamics Corp.*, 25 BRBS 30 (1991); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). In a case where the compensable disability is permanent partial disability, employer must also prove that this disability was "materially and substantially greater," which requires quantification of the degree of disability due to the subsequent injury alone. *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT); *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995).

In cases involving *de minimis* permanent partial disability awards, the Board has held that Section 8(f) relief cannot be available, as it is impossible to determine whether claimant's disability is materially and substantially greater than it would have been from his last injury alone. *Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3(CRT) (9th Cir. 1986). In *Porras*, the Board held that employer was not entitled to Section 8(f) relief where claimant received a *de minimis* award of $3.00 per week for a one percent loss in wage-earning capacity. Affirming this decision, the Ninth Circuit found it supported by the policies underlying Section 8(f), which "was enacted to encourage employers to hire handicapped workers by requiring employers to pay only their fair share of benefits for work-related injuries that aggravated preexisting conditions." Allowing Section 8(f) to apply here would result in employer's liability for two years of a nominal amount, shifting liability for any increased disability arising later to the Special Fund. The court also stated that if the award were subsequently modified to an increased amount, employer would have the opportunity to meet the requirements of Section 8(f) on that award.

In *Burch v. Superior Oil Co*., 15 BRBS 423 (1983), the Board reversed a denial of Section 8(f) relief, holding that where claimant had prior injuries to the lumbar area of the back, and his current diagnosis is degenerative disc disease, common sense dictates that the previous condition must have contributed. The "common sense" test, however, has been rejected by the courts. *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990). *Compare Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997) (opinions sufficient to establish pre-existing conditions pushed the employee "over the hump" from partial to total

disability). Thus, employer's evidence must contain a sufficient foundation and reasoning for the administrative law judge to find that it constitutes substantial evidence that the work injury alone did not cause claimant's disability in order for employer to meet its burden.

However, medical opinions are not the only evidence by which contribution can be established. Employer must establish, through medical or other relevant evidence, that claimant's disability or death was not solely due to the work injury. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997) (vocational evidence); *Sproull v. Director, OWCP*, 86 F.3d 895, 900, 30 BRBS 49, 52(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997) (claimant's testimony sufficient); *Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (employer must establish work injury alone did not cause total disability through medical or other evidence); *Paul v. Gen. Dynamics Corp.*, 13 BRBS 1073 (1981) (finding of contribution based on claimant's testimony affirmed). *See also Patrick v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 274 (1983) (denial reversed; testimony that deceased claimant's pre-existing condition would have a "negative effect" on claimant's work-related condition is sufficient to support a finding that the prior condition combined with the subsequent to result in claimant's death). *Cf. Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd on other grounds*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001) (casts doubt on *Patrick* as using "combination" standard rather than "solely due to").

Digests

In General; Second Injury

The Board reversed the administrative law judge's award of Section 8(f) relief where the only relevant medical opinion stated that the doctor had no way of knowing whether a prior accident contributed to claimant's disability. The evidence was thus insufficient to meet employer's burden of establishing that claimant's disability was caused in part by his prior accident. *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986).

Where an employee's increased disability is due to a non-work-related condition, employer has failed to establish that a second, work-related injury contributed to the employee's permanent total disability, and employer is accordingly not entitled to Section 8(f) relief. The court, in a footnote, rejected the argument that under the "last-employer" rule set forth in *Cardillo,* in an occupational-disease case, a "second injury" is presumed to have occurred with each subsequent exposure to noxious elements. *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987).

Section 8(f) is not applicable when claimant's disability results from the progression of, or is the direct result and natural consequence of, the pre-existing disability. The Board remanded for the administrative law judge to consider whether the pre-existing condition was aggravated by the work injury, which will satisfy the contribution element. *Vlasic v.*

Am. President Lines, 20 BRBS 188 (1987).

The contribution element is met in this case as uncontradicted evidence establishes that claimant's on-the-job exposure to asbestos increased the severity of claimant's asbestosis. *Armand v. Am. Marine Corp.*, 21 BRBS 305 (1988).

The Board held that employer could not satisfy the contribution element, which in the permanent partial disability case required that the pre-existing disability, in combination with his subsequent work injuries, contribute to a materially and substantially greater degree of disability, by showing that claimant suffered an increased "economic disability," where the administrative law judge found that the claimant's physical condition did not change between his first and later injuries. A change in job status with no change in physical impairment is not sufficient to show an increased disability as a result of the combination of the work injury and pre-existing condition. *Readel v. Foss Launch & Tug*, 20 BRBS 229 (1988).

In remanding for consideration of the contribution element, the Board instructed the administrative law judge to consider whether a doctor's inability to complete back operations claimant needed due to his pre-existing hepatitis, which was aggravated by the medication treating his back pain and precluded his going under anesthesia, satisfied this element. Aggravation of a pre-existing condition can satisfy the "contribution" element of Section 8(f). *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988).

The Board remanded for the administrative law judge to consider whether a doctor's testimony that a person with resolution of a prolapsed disc is more likely to have recurrence of an injury to a disc at that level, that claimant may have reherniated his disc in the later accident, and that claimant's prior history of disc disease was a factor in the decision to perform fusion surgery following claimant's later injury, was sufficient to satisfy the contribution requirement of Section 8(f). *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988).

In remanding for consideration of the contribution element, the Board reversed the administrative law judge's finding that claimant did not have a second injury, which was based on the facts that the second back injury occurred in temporal proximity to the first back injury and the two were related. The Board held that a work-related aggravation of a pre-existing condition will suffice and that the evidence relied upon by the administrative law judge established on aggravation. The Board remanded for findings as to whether employer met its burden of proving that claimant's total disability was due in part to the pre-existing condition. *Lockhart v. Gen. Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992).

The Board rejected the Director's argument that claimant's intracranial bleeding and stroke constituted one condition to which Section 8(f) relief would not be applicable. The Board thus affirmed the administrative law judge's finding that two injuries occurred notwithstanding that only 12 days elapsed between the time claimant first reported to Kaiser Permanente complaining of neck pain, shoulder pain, and headaches and the day he suffered his stroke. The Board rejected the Director's contention that the D.C. Circuit's decision in *Cooper*, 607 F.2d 1385, 10 BRBS 1058, is analogous, because in the instant case the conditions of claimant's employment, as opposed to merely going to work, aggravated claimant's condition to the point of a stroke. *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

In a hearing loss case, the Board rejected the contention that exposure sufficient to trigger the "last injurious exposure" rule of *Cardillo* automatically constitutes a second injury for Section 8(f) purposes. Employer must carry its burden of showing that a second injury occurred before it may be entitled to Section 8(f) relief. *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).

While a work-related aggravation of a prior condition may establish contribution for Section 8(f) purposes, where the administrative law judge stated that claimant's continued exposure to asbestos at the workplace resulted in further impairment, but failed to analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion, the Board remanded for reconsideration of this issue in accordance with the APA, 5 U.S.C. §557(c)(3)(A). *Shrout v. Gen. Dynamics Corp.*, 27 BRBS 160 (1993)(Brown, J., dissenting).

The Board held that the award of Section 8(f) relief based on a pre-existing Nov. 1984 audiogram was not consistent with the administrative law judge's finding that claimant was not exposed to injurious noise after Oct. 1984. In the absence of evidence that claimant's condition was aggravated by continued noise exposure after this audiogram, it could not be the basis for Section 8(f) relief. As the record contained a 1978 audiogram, the Board modified the award of Section 8(f) relief to reflect the Special Fund's liability for the loss shown on this report. *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993).

In remanding for consideration of the contribution element, the Board stated that a work-related aggravation of a pre-existing condition will suffice as contribution to the total disability, whereas Section 8(f) is not applicable where the claimant's disability is the result of a natural progression of the pre-existing disability. The Board remanded for the administrative law judge to determine whether claimant sustained a second work-related injury or aggravation or whether her present condition is the result of a natural progression of her original work-related injury, as he mischaracterized the medical evidence. If, on remand, the administrative law judge found a second work-related injury or aggravation, he must determine whether employer showed that claimant's ultimate permanent total

disability was not due solely to the subsequent injury. *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002).

The Second Circuit affirmed the denial of Section 8(f) relief, as employer failed to establish that the employee suffered a second injury. The administrative law judge rationally found the evidence insufficient to establish that the employee was exposed to additional asbestos and that any such exposure aggravated his pre-existing asbestosis. *Elec. Boat Corp. v. DeMartino*, 495 F.3d 14, 41 BRBS 45(CRT) (2d Cir. 2007).

The administrative law judge did not address employer's contention, raised in its Application for Section 8(f) Relief, its post-hearing brief, and on appeal, that it is entitled to Section 8(f) relief based on claimant's having sustained prior permanently disabling back injuries while in its employ. The Board stated that a work-related condition may constitute a manifest, pre-existing, permanent partial disability for purposes of Section 8(f), that an employer is eligible for Section 8(f) relief where the employee's pre-existing disability and second injury both arise from the course of employment with the same employer, and that the record contained evidence that claimant had a series of low back pain complaints and/or that he sustained back injuries during his work for employer. The Board remanded the case for the administrative law judge to address this theory of employer's entitlement to Section 8(f) relief, noting that, under its theory, employer must establish that claimant sustained a "second" injury, i.e., an aggravation, as opposed to the natural progression of a prior injury. *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015).

The administrative law judge erroneously addressed whether claimant's 2003 audiogram demonstrated a materially and substantially greater disability than that demonstrated on the 2002 audiogram before determining whether claimant's hearing loss increased between the two audiograms, resulting in a "second injury." Section 8(f)(1) requires that the ultimate disability be greater as a result of the pre-existing disability than that which would result solely from the second injury. As substantial evidence supported the administrative law judge's finding that the difference between the 2002 and 2003 audiograms was within the parameters of test/retest variability, the Board affirmed his finding that these audiograms measure the same hearing loss and thus cannot establish a second injury. The Board remanded for reconsideration of earlier audiograms. *G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011).

Section 8(c)(23)

The Board held that where a claim was made pursuant to Section 8(c)(23) for lung cancer, employer could not rely on pre-existing hearing loss, lower back difficulties, anemia and arthritis to obtain Section 8(f) relief. These pre-existing disabilities have no role in establishing claimant's entitlement to an award for lung cancer under Section 8(c)(23), which is based solely on the degree of respiratory impairment, and thus there could be no contribution to the employee's lung disability. The Board similarly held with regard to Section 8(f) and a Section 9 death benefits claim, that evidence of these pre-existing conditions could not establish Section 8(f) relief, since there was no evidence that these impairments contributed to the employee's death. The evidence established that decedent's death was due to respiratory failure from lung cancer and pre-existing chronic obstructive pulmonary disease. Accordingly, only decedent's chronic obstructive pulmonary disease can satisfy the contribution element for Section 8(f) relief. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

In a case where claimant was compensated under Section 8(c)(23) for asbestosis, the First Circuit recognized that only a pre-existing non-asbestosis related pulmonary disability could form the basis for Section 8(f) relief. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997).

Under *Adams*, 22 BRBS 78, pre-existing hearing loss and a prior finger injury cannot contribute to claimant's award under Section 8(c)(23) for asbestosis and cannot be the basis for Section 8(f) relief. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

The Board permitted the Director to raise the contribution issue for the first time on appeal due the fact that *Adams*, 22 BRBS 78, constituted intervening case law. The Board held that decedent's kidney disease could not contribute to decedent's 100 percent respiratory impairment compensated under Section 8(c)(23). The Board remanded for consideration of whether decedent's coronary artery disease "materially and substantially" contributed to the compensable disability. The Board also remanded for consideration of whether the kidney disease and/or coronary artery disease contributed to decedent's death. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995).

The Board reversed the administrative law judge's determination that employer was entitled to Section 8(f) relief. Claimant's leg amputations could not support a finding of contribution in this Section 8(c)(23) case as they were not pre-existing disabilities which contributed to claimant's compensable lung impairment due to asbestosis. *Beckner v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 181 (2000).

Solely Due to--Permanent Total Disability

The Board held that the contribution element was established as a matter of law, based on medical evidence that the risk factors of hypertension and diabetes contributed to or caused claimant's arteriosclerotic heart disease, which contributed to claimant's permanent total disability. The Board noted that the evidence in this case was substantially similar to that in *Atl. & Gulf Stevedores*, 542 F.2d 602, 4 BRBS 79, where the contribution element was satisfied by evidence that pre-existing disease increased the risk of heart disease and that heart disease contributed to claimant's heart attack. *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989).

The Ninth Circuit affirmed the Board's holding that claimant's pre-existing heart condition and right shoulder bursitis were unrelated to the work-related back injury, and that the evidence failed to show that they combined with it to result in a greater degree of permanent disability. The court held that even if it credited testimony from a vocational counselor that claimant's pre-existing conditions, combined with the back injury, resulted in a greater disability, this was insufficient to establish that the back injury by itself did not result in his permanent total disability. *FMC Corp. v. Director, OWCP,* 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989).

The First Circuit agreed with the Board's reversal of Section 8(f) relief where claimant resumed regular physical labor after recovering from each of his previous back injuries and employer did not show that but for the pre-existing injury, claimant would not have been rendered totally disabled by the work-related injury alone. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991).

The Fifth Circuit held that employer was not entitled to Section 8(f) relief since it did not introduce any medical evidence that claimant's pre-existing disability due to two developmental diseases of the spine contributed to his current permanent total disability of the back. The court rejected application of a "common sense test," which presumes that when a claimant who had a history of back problems prior to his employment suffers a work-related injury to his back, the current disability is not due solely to the employment injury. *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990).

The Board reversed the award of Section 8(f) relief, as there was no evidence that claimant's pre-existing hand condition contributed in any way to his permanent total disability due to his work-related back injury. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in pert. part and modified on other grounds sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). The Ninth Circuit affirmed the Board's denial of Section 8(f) relief, noting that the medical reports relied upon by employer were insufficient to establish that claimant's injury alone did not cause his permanent total disability. Because there was no evidence pertaining to the contribution

element other than stipulations to which the Director did not agree, the court affirmed the Board's denial of Section 8(f) relief. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Board rejected the Director's contention that the contribution element is satisfied only upon a showing that claimant's disability following the employment-related injury would be of a lesser degree "but for" the pre-existing condition, and especially that employer must show that claimant's economic disability is greater due to the pre-existing condition than it would be because of the work injury alone. The Board held that the contribution element may be satisfied based on medical or other evidence which establishes that claimant's disability is due to a combination of the pre-existing condition and the subsequent work injury. *Luccitelli v. Gen. 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).

The Second Circuit reversed *Luccitelli,* holding that the Board's analysis was contrary to the plain language of Section 8(f) which provides that in order for an employer to limit its liability, claimant's permanent total disability must not be due solely to the subsequent injury. The court noted that under the Board's analysis, the question of whether the total disability is due solely to the subsequent injury is never reached and employer would be entitled to Section 8(f) relief even though the subsequent injury alone would have rendered claimant totally disabled. The court held that in order for an employer to establish Section 8(f) contribution, it must show by medical or other evidence that a claimant's subsequent injury alone would not have caused the claimant's permanent total disability. *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992).

The Second Circuit held that in order to satisfy the contribution requirement of Section 8(f), employer must establish that the subsequent injury alone would not have caused claimant's total permanent disability under its holding in *Luccitelli*. This requirement 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. *Director, OWCP v. Gen. Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992).

The Board held that a doctor's opinion that if claimant were able to undergo ameliorative back surgery, which was precluded by his pre-existing cardiac condition, his condition would improve such that he would no longer be permanently totally disabled was a reasoned medical opinion sufficient to support a finding of Section 8(f) contribution. The administrative law judge erred in requiring employer to prove that claimant would have undergone ameliorative back surgery if it were not medically contraindicated by claimant's pre-existing cardiac condition in order to establish Section 8(f) contribution. The relevant inquiry is not whether claimant would have undergone the surgery but for the fact that it was contraindicated by his pre-existing cardiac condition, but rather whether the fact that the surgery was contraindicated resulted in claimant's being permanently totally disabled rather than retaining some residual wage-earning capacity. Moreover, the administrative

law judge erred in requiring vocational evidence to prove that claimant would be only permanently partially disabled if he underwent surgery. *Pino v. Int'l Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

The Second Circuit affirmed the administrative law judge's denial of Section 8(f) relief because employer failed to establish that claimant's work-related injury alone would not have caused his permanent total disability. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993).

The Board remanded the case for reconsideration of the evidence consistent the holding in *Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT), that employer must establish that claimant's work injury alone did not cause his permanent total disability. *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

To satisfy the contribution element, employer must show that a claimant's subsequent injury alone would not have caused the permanent total disability. This standard is not met merely by demonstrating that the pre-existing injury compounded the employment related injury; rather employer must show that "but for" the pre-existing injury, claimant would be employable. The D.C. Circuit held that the Board exceeded its scope of review in vacating the denial of Section 8(f) relief inasmuch as the administrative law judge's finding that claimant's work-related injury rendered him totally disabled is supported by substantial evidence. The administrative law judge had a sound evidentiary basis for finding that employer failed to prove that claimant's pre-existing alcoholism robbed him of the necessary motivation to overcome the severity of the work injury through vocational rehabilitation. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994).

The Board rejected employer's argument that there was a "conflict" among the circuits regarding the nature, quality and scope of the evidence necessary to establish contribution in a case where the claimant is permanently totally disabled. It held that the proper standard, as set forth in the Act, is whether the present disability is "not due solely to" the work injury, whereas the "but for" language cited by some of the circuits (claimant's disability would be less "but for" the pre-existing disability) is simply descriptive of evidence sufficient to satisfy the statutory mandate. Thus, the Board concluded that these variations have the same result: a claimant's total disability must have been caused by both the work injury and the pre-existing condition. The Board affirmed the administrative law judge's conclusion that the term "disability" in Section 8(f) may be composed of both "physical" and "economic" elements, as evidence of claimant's total disability may be either medical or "other." Therefore, the Board rejected the Director's argument that the administrative law judge applied an improper legal standard for obtaining Section 8(f) relief. Consequently, the Board affirmed the Section 8(f) award, holding that the opinions of two doctors constituted substantial evidence establishing that claimant's total disability in this case was caused by his three prior back injuries in conjunction with his more recent

work-related back injury. *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

The Fifth Circuit held that the Board erred in reversing the administrative law judge's finding that the contribution element was satisfied. The court held that the evidence was sufficient for the administrative law judge to have inferred that claimant's pre-existing permanent partial disabilities combined with his employment injury to increase what would otherwise have been a partial disability into a total disability. The existence of multiple injuries that combine to increase a claimant's disability will satisfy the contribution requirement when the pre-existing injuries are necessary to push the claimant "over the hump" from partial to total disability. *Ceres Marine Terminal v. Director, OWCP [Allred],* 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

With regard to the contribution element in a case involving permanent total disability, the Third Circuit held the employer must show that the work injury alone would not have disabled the employee. That is, an employer must demonstrate that the employee would have been able to continue working after the work injury if he had not already been suffering from a pre-existing permanent partial disability. In this case, the court held that there was sufficient evidence to demonstrate a pre-existing permanent partial disability and that after the work injury the pain was not significantly greater, and that these findings support the reasonable inference that the work injury was not severe enough to cause total disability on its own. Therefore, the court reversed the Board's decision and reinstated the administrative law judge's award of Section 8(f) relief. *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3^{d} Cir. 2000).

Employer bears the burden of proving that the work-related injury would not have rendered the employee permanently and totally disabled absent the pre-existing disability. In this case, employer produced no evidence to suggest that the claimant suffered any long-term effects from a previous injury, nor any evidence that would tend to show that the claimant's current disability was more disabling because of the earlier injury. *Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

The Board vacated the denial of Section 8(f) relief and remanded where the administrative law judge found a physician's opinion to be conclusory, but a review of the report revealed that the doctor documented the reports on which he relied in rendering his opinion, and the administrative law judge did not address the physicians' opinions in the context of the other evidence relevant to the contribution issue, specifically claimant's pre-injury medical restrictions. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

The Board affirmed the administrative law judge's denial of Section 8(f) relief as result of an alleged relationship between claimant's pre-existing back condition and her work injury where employer presented no evidence that the pre-existing back condition contributed to claimant's present permanent total disability. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

The Board vacated the administrative law judge's award of Section 8(f) relief as he did not adequately address the contribution element. While the evidence established that claimant's pre-existing diabetic condition likely played some role in disabling him, this evidence did not establish that claimant is not totally disabled by the work injury (traumatic head injury leading to significant ongoing psychological conditions) alone. The Board thus remanded the case for the administrative law judge to first determine whether claimant's work injuries alone are not the cause of his total disability; if they are not, the relevant inquiry then is whether the pre-existing diabetes contributed to claimant's total disability. *Roush v. Bath Iron Works*, 49 BRBS 5 (2015).

Permanent Partial Disability—Materially and Substantially Greater

Relying on *Porras,* 17 BRBS 222, the Board vacated the administrative law judge's award of Section 8(f) relief, holding that Section 8(f) relief is not proper where claimant is awarded a *de minimis* award. The Board instructed the administrative law judge that if on remand he concluded that claimant sustained more than a nominal loss in wage-earning capacity, he should reconsider employer's entitlement to Section 8(f) relief. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

Where claimant's award for permanent partial disability after the first 2.4 years was a *de minimis* award, the Director did not contest employer's entitlement to Section 8(f) relief for the first period of permanent partial disability, but asserted it was inapplicable to the *de minimis* portion. The Board rejected this contention, holding employer liable for only one period of 104 weeks for all permanent disabilities arising out of the same injury consistent with *Huneycutt*, 17 BRBS 142, and its progeny, *infra*. The Board noted that the policy considerations behind the holding that employer cannot receive Section 8(f) relief in a *de minimis* case is absent here, as employer is liable for the greater disability. *Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), *aff'd on recon.*, 25 BRBS 114 (1991), *rev'd mem. on other grounds*, No. 91-1601 (D.C. Cir. Dec. 18, 1992).

Applying the underlying concerns addressed in *Porras*, 17 BRBS 222, the Board affirmed the administrative law judge's determination that employer could not seek Section 8(f) relief where the degree of claimant's disability was so small in fact ($3.78 per week) that employer would be legally unable to establish that claimant's disability was not due solely to the work injury, and was "materially and substantially greater" than that caused by the last injury alone. Additionally, the Board noted that the underlying policy of Section 8(f) would not be served in this case if employer were granted Section 8(f) relief, since it would enable employer to avoid liability for any substantial disability which may subsequently arise as a result of the instant work-related injury. *Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *vacated in pert. part*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001).

In vacating this decision, the Fourth Circuit held that despite the fact that claimant's award was small, it was not nominal as it reflected claimant's actual, current loss in wage-earning capacity. The court vacated the Board's holding that employer was precluded from seeking Section 8(f) relief on such a small award, as it held that it was legally and factually possible for employer to establish that claimant's current disability was materially and substantially greater due to his pre-existing disabilities, despite the small size of the monetary award. The court stated that the Director's policy concerns that the Special Fund might become liable for a greater loss in wage-earning capacity in the future if Section 8(f) relief was awarded now was unfounded as there was no finding in this case that claimant's disability would likely increase in the future. The case was remanded for the merits of Section 8(f). *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT)

(4th Cir. 2001).

The Board reversed the administrative law judge's award of Section 8(f) relief as there was no evidence, medical or otherwise, that claimant's pre-existing hand injury contributed to his permanent partial disability. *Sproull v. Stevedoring Services of Am.*, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd and modified on recon. on other grounds en banc*, 28 BRBS 271 (1994), *rev'd in pert. part sub nom. Sproull v. Director, OWCP*, 85 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

Reversing the Board's denial of Section 8(f) relief, the Ninth Circuit held that nothing in the Act requires employers to submit medical opinions to establish the contribution requirement. Employer was entitled to establish the contribution requirement under Section 8(f) by medical or *other* evidence. Thus, the court held that the Board erred in reversing the administrative law judge's finding that claimant's prior left hand injury contributed to his current disability due to his left shoulder injury, based on claimant's testimony as to the effects of the injuries on his ability to work. *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

The Board affirmed a finding that the contribution element was satisfied based on the affidavit of a doctor, who stated that, but for the prior related injuries, claimant's current disability due to pain would not be as great and/or would not have continued for as prolonged a period of time. Although the administrative law judge did not specifically address whether claimant's prior injuries "materially and substantially" contributed to a greater degree of disability than that resulting from the work injury alone, Dr. Crowley's opinion supports his finding that employer established the contribution element necessary for Section 8(f) relief on claimant's permanent partial disability award. *Thompson v. Nw. Enviro Services, Inc.*, 26 BRBS 53 (1992).

The Board affirmed the administrative law judge's finding that where claimant had a pre-existing knee condition which was manifest to employer, but there was no record evidence to establish that the knee condition contributed in any way to claimant's current degree of permanent disability, employer did not meet the Section 8(f) contribution requirement; Dr. Gary's opinion that the combination of claimant's knee and back injuries resulted in materially and substantially greater whole body disability is insufficient to establish this prong, as this kind of "common sense" test was rejected in *Two "R" Drilling*, 894 F.2d 748, 23 BRBS 34(CRT). *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

The Fourth Circuit held that to satisfy the contribution element of Section 8(f) in a case where claimant is permanently partially disabled, employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeded the disability as it would have resulted from the work-related injury

alone. The court held that a showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone so that an adjudicative body has a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater. The court rejected the Director's contention that a greater loss in wage-earning capacity must be shown and employer's contention that a mere increase in whole body impairment is sufficient. The court therefore reversed the administrative law judge's grant of Section 8(f) relief, and remanded for further findings. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I],* 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995).

The Fourth Circuit rejected a "but-for" test urged by the Director and reaffirmed its holding in *Harcum I* that to satisfy the contribution element where the employee is permanently partially disabled, employer must show by medical *or other evidence* that the ultimate permanent partial disability is materially and substantially greater than a disability from the work-related injury alone. The court reiterated that this showing requires quantification of the level of impairment that would ensue from the work-related injury alone. Rejecting the Director's contention that the quantification criterion may be satisfied only with medical evidence, the court held that a vocational rehabilitation specialist's report discussing wage rates available to claimant with and without the pre-existing disability satisfied the quantification criterion, and, thus, established the contribution element of Section 8(f). *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997).

The Fifth Circuit reversed an administrative law judge's finding that employer established the contribution element of Section 8(f). Although the evidence that claimant's permanent partial disability was increased as a result of a prior toe injury was sufficient to meet the requirement that claimant's disability be "not due solely" to the subsequent injury, it was not sufficient to establish that the disability was "materially and substantially greater" as a result of the prior injury. Satisfying this prong of the statutory test requires employer to present evidence of the type and extent of the disability that claimant would suffer if not previously disabled when injured subsequently. *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997).

The Fifth Circuit affirmed the denial of Section 8(f) relief as employer did not establish that claimant's ultimate disability was materially and substantially greater due to the pre-existing injury. The evidence is only that claimant's disability is related to both injuries. Moreover, that claimant had a pre-existing disability of 10 percent and a subsequent disability of 15 percent is insufficient as it does not establish that the resulting disability is not due to the second injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997).

The First Circuit adopted *Harcum* and held that in a permanent partial disability case under Section 8(c)(23, in order to satisfy the contribution element of Section 8(f), an employer is required to show the degree of disability attributable to the work-related injury, so that this amount may be compared to the total percentage of the partial disability for which compensation under the Act is sought, in order to establish that the current permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. The First Circuit concluded that the record did not contain evidence of the percentage of claimant's disability attributable to the work-related asbestosis so that it cannot be determined whether the pre-existing disability rendered claimant's compensable disability "materially and substantially greater." The award of Section 8(f) relief was therefore reversed. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997).

In order to establish the contribution element for purposes of Section 8(f) relief where the employee is permanently partially disabled, employer must show that claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the last injury alone did not cause claimant's permanent partial disability. It is insufficient for employer to show that the pre-existing disability rendered the subsequent disability greater. In *Sproull*, 86 F.3d at 900, 30 BRBS at 52(CRT), the Ninth Circuit held that an employer is entitled to establish the contribution element of Section 8(f) by medical or *other* evidence. In this case, the "other" evidence relied upon by employer and the administrative law judge was economic in nature. However, while the vocational evidence supported a conclusion that claimant's palsy and depressive reaction limited his opportunity for suitable alternate employment, the administrative law judge did not determine whether claimant's permanent partial disability was *materially and substantially* greater due to his prior conditions than it would due to his work-related shoulder injury. The Board thus remanded for reconsideration of the contribution element. *Quan v. Marine Power & Equip. Co.*, 30 BRBS 124, 127 (1996).

After remand, the Board rejected employer's contention that its first decision was in error and that the administrative law judge's decision on remand was inconsistent with the Ninth Circuit's decision in *Sproull*, 86 F.3d 895, 30 BRBS 49(CRT). The Ninth Circuit has not provided specific guidance as to the degree of quantification necessary to meet the "materially and substantially greater" standard under Section 8(f) where claimant is permanently partially disabled following the subsequent injury. Nevertheless, the Board affirmed the administrative law judge's conclusion that the evidence did not establish that claimant's pre-existing disability "materially and substantially" affected his post-injury wage-earning capacity, as he found, based upon the "other" evidence relied upon by employer which was economic in nature, that claimant had virtually the same wage-earning capacity with only the work-related shoulder injury that he would have had with only the pre-existing conditions. *Quan v. Marine Power & Equip.*, 31 BRBS 178 (1997), *aff'd sub nom. Marine Power & Equip. v. Dep't of Labor*, 203 F.3d 664, 33 BRBS 204(CRT) (9th

Cir. 2000).

The Ninth Circuit affirmed the denial of Section 8(f) relief on the basis that employer did not establish that claimant's disability was materially and substantially greater in this permanent partial disability case since the administrative law judge found that claimant's pre-existing palsy did not affect his wage-earning capacity following his work injury based on wage rate comparisons. The court rejected employer's argument that it established the contribution element by establishing that claimant's pre-existing palsy combined with his work injury foreclosed claimant from some types of employment that he otherwise could perform had he suffered only the work injury since claimant had no highly specialized skill, and since employer did not show that there was a limited number of unskilled positions for which claimant was qualified or that any limit on employment opportunities caused by claimant's pre-existing palsy would measurably affect the number of jobs available to him such that he would spend more time unemployed as a result. *Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000).

The Fourth Circuit held that under *Harcum I*, it is not proper simply to calculate the ultimate disability and subtract the disability resulting from the pre-existing injury in order to determine whether the ultimate disability was materially and substantially greater. In reversing the administrative law judge's award of Section 8(f) relief, the court held that the evidence showed that claimant did not suffer from serious hypertensive cardiovascular disease, and moreover, the reports of employer's in-house physician failed to quantify the disability claimant would have suffered from his asbestosis alone absent the alleged hypertensive cardiovascular disease. With regard to claimant's alleged pre-existing lung scarring, the court held that the reports of employer's physician did not establish quantification pursuant to *Harcum I*, as they did not determine what claimant's disability would have been from his asbestosis alone, independent of the lung scarring. This type of evidence is necessary before it can be determined if claimant's ultimate disability is materially and substantially greater as a result of a pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998).

The Board affirmed the administrative law judge's finding that employer was not entitled to Section 8(f) relief on the basis of claimant's pre-existing back condition, as employer put forth insufficient evidence to show contribution under *Harcum I*. Citing the Fourth Circuit's decision in *Harcum II*, however, the Board held that the vocational evidence put forth by employer, a transferable skills analysis to discern what types of jobs or percentage of jobs were available to claimant first, with regard to his March 11, 1990, injury, and then upon consideration of claimant's pre-existing mental impairment, if credited, showed the "level of impairment that would ensue from the work-related injury alone," and thereby provided the administrative law judge with a basis to determine if claimant's ultimate permanent partial disability was materially and substantially greater than his disability due to the work-related injury alone. The case was remanded for consideration of employer's

vocational evidence pursuant to the requisite standard. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.,* 32 BRBS 118, *vacated on other grounds on recon.,* 32 BRBS 282 (1998).

The Ninth Circuit held that although the administrative law judge did not use the exact words of the statute in determining that claimant's pre-existing condition resulted in disability that was materially and substantially greater than that which would have resulted from the subsequent injury alone, his analysis permissibly followed previous judicial framework for making such a finding and was supported by substantial evidence. Consequently, the Ninth Circuit affirmed the administrative law judge's finding that employer established this element for Section 8(f) relief. *Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998).

The Board affirmed the administrative law judge's denial of Section 8(f) relief on a Section 8(c)(21) claim, as employer failed to show that any of claimant's manifest pre-existing disabilities contributed to claimant's current back disability. Rather, the administrative law judge found, and that finding went unchallenged, that claimant's current back condition is due to the work injury and to claimant's non-manifest pre-existing degenerative disc disease. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

The Board reversed the administrative law judge's determination that employer was entitled to Section 8(f) relief, as employer did not establish that the ultimate permanent partial disability materially and substantially exceeded the disability resulting from the injury alone. The parties agreed that claimant had a 25 percent respiratory impairment, and the administrative law judge credited a medical opinion that claimant's asbestosis alone caused this impairment. The administrative law judge's comparison of claimant's whole body impairment to his compensable impairment was in error. *Beckner v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 181 (2000).

The Fourth Circuit applied *Carmines,* 138 F.3d 134, 32 BRBS 48(CRT), and held that the opinion of one doctor is insufficient to establish the contribution element, as he subtracted the extent of disability resulting from the pre-existing disability from the extent of the current disability, which is legally insufficient. The opinion of another doctor is insufficient under *Harcum*, 8 F.3d 175, 27 BRBS 116(CRT), as he did not attempt to quantify the level of impairment that would ensue from the work-related injury alone. The administrative law judge rationally rejected the opinion of the third physician, pursuant to *Carmines*, as the doctor did not treat claimant, his test results were not submitted into evidence and his opinion was discrepant with that of another physician. *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003).

The Fourth Circuit affirmed the denial of Section 8(f) relief based on employer's failure to establish contribution under *Carmines,* 138 F.3d 134, 32 BRBS 49(CRT). Although employer submitted medical evidence of the type deemed relevant to the quantification inquiry, the administrative law judge rationally found that the evidence was not creditable

as the opinion was generalized and lacked a supporting explanation, since the doctor did not refer to evidence supporting his conclusion or explain how he arrived at it. The remaining medical evidence failed to quantify the type and extent of disability which claimant would have suffered from the second injury alone, which is necessary so that a comparison may be made between the degrees of disability arising from each injury and the ultimate resulting disability. *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003).

In *dicta,* the Fourth Circuit affirmed the administrative law judge's finding that employer did not establish the contribution element. The court stated that the administrative law judge incorrectly concluded that employer offered no evidence sufficient to quantify the disability due to the work injury absent pre-existing conditions, as employer submitted a physician's opinion stating that if claimant "had had a normal back, [his September 12, 1995 injury] would have resolved with no permanent disability," which was sufficient to do so. However, this opinion was properly rejected as "pure conjecture," citing *Ward. Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT) (4th Cir. 2003).

The Fourth Circuit affirmed the Board's decision on reconsideration reversing an award of Section 8(f) relief. It held that, pursuant to *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), employer did not satisfy the contribution element, as it did not provide quantitative evidence, other than the discredited "subtraction" method, of the disability ensuing from the work injury alone so that it could be determined whether claimant's disability was materially and substantially greater as a result of the pre-existing disability. *Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003).

The Board affirmed the administrative law judge's finding that the contribution element was not met, as well as his consequent denial of Section 8(f) relief, as employer did not put forth sufficient evidence regarding quantification to prove that claimant's current impairment was materially and substantially greater than the disability resulting from the work-related condition alone. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd sub nom*. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x. 249 (4th Cir. 2007).

The Board affirmed the administrative law judge's finding that employer did not establish that claimant's disability was not due solely to the subsequent injury and that the disability was materially and substantially greater due to the contribution of the pre-existing condition. The administrative law judge found that the work injuries alone were serious enough to disable claimant and that the record was devoid of evidence showing the relationship between claimant's pre-existing disabilities and his current disability. Thus, the denial of Section 8(f) relief was affirmed. *Neff v. Foss Mar. Co.*, 41 BRBS 46 (2007).

The Board affirmed the administrative law judge's denial of Section 8(f) relief because employer did not establish that claimant's pre-existing congenital and degenerative spinal conditions contributed to claimant's disability. The administrative law judge rationally found the medical evidence supports the conclusion that claimant's disability is due solely to his work injury. *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015).

Death

The Board affirmed a finding that death was work-related based on the maxim that "to hasten death is to cause it" where the immediate cause of death was a cerebellar hemorrhage and work-related asbestosis was a contributing factor. The case was remanded for reconsideration of Section 8(f) relief. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993)

The Fourth Circuit affirmed the finding that employer was not entitled to Section 8(f) relief, as decedent's death was due solely to mesothelioma and was not contributed to or hastened by his pre-existing conditions. The administrative law judge applied the proper "hastening" standard, and his conclusion is supported by substantial evidence. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998).

When benefits are awarded to both a deceased employee prior to his death under Section 8(a) and to his widow under Section 9, employer's entitlement to relief under Section 8(f) must be evaluated independently for each claim. It is sufficient in the death claim that the evidence establishes that the pre-existing condition hastened death, *i.e.,* decedent would not have died when he did but for the pre-existing condition. In this case, the Board held that the evidence was legally insufficient to establish contribution on the death claim, as employer put forth insufficient evidence that mesothelioma alone did not cause the death. The Board's decision casts doubt on the validity of *Patrick*, 15 BRBS 274 (1983), as using an incorrect contribution standard (*i.e.,* combination). *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd on other grounds*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001).

In a case involving claims for disability under Section 8(c)(23) and death benefits, the Board held that as the Section 8(c)(23) was for lung cancer, employer could not rely on pre-existing disabilities which were unrelated to claimant's entitlement to an award for lung cancer under Section 8(c)(23) based on his respiratory impairment. The Board similarly held with regard to Section 8(f) and a Section 9 death benefits claim, that evidence of these pre-existing conditions could not establish Section 8(f) relief, since there was no evidence that these impairments contributed to the employee's death. The evidence established that decedent's death was due to respiratory failure from lung cancer and pre-existing chronic obstructive pulmonary disease. Accordingly, only decedent's chronic obstructive pulmonary disease can satisfy the contribution element for Section 8(f) relief. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

The Board permitted the Director to raise the contribution issue for the first time on appeal due the fact that *Adams*, 22 BRBS 78, constituted intervening case law. The Board initially held that decedent's kidney disease could not contribute to decedent's Section 8(c)(23) award for a 100 percent respiratory impairment but remanded for consideration of contribution based on decedent's coronary artery disease. The Board also remanded for

consideration of whether the kidney disease and/or coronary artery disease contributed to decedent's death. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995).

Procedural Issues Concerning Section 8(f)

Standing

The Board has held that a claimant has no interest in the source of his compensation and therefore has no standing to appeal the applicability of Section 8(f). *Dove v. Sw. Marine of San Francisco*, 18 BRBS 139 (1986); *Price v. Greyhound Bus Lines, Inc.*, 14 BRBS 439, 440 n.1 (1981), *appeal dismissed*, No. 81-1934 (4th Cir. Jan. 4, 1982), *cert. denied*, 459 U.S. 831 (1982); *Creasy v. J. W. Bateson Co.*, 14 BRBS 434, 437 (1981); *Jackson v. Willamette Iron & Steel Co.*, 13 BRBS 908, 909 (1981); *Sims v. Singleton Elec. Co*., 9 BRBS 1068, 1071-72 (1978); *Nobles v. Children's Hosp*., 8 BRBS 13, 16 (1978); *Schuster v. Roger Smith Hotel*, 7 BRBS 255, 258 (1977).

Similarly, claimant's attorney is not entitled to a fee for defending against the application of Section 8(f). *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984); *Sims*, 9 BRBS at 1072; *Shuster,* 7 BRBS at 258. Embodied in these cases is the general principle that a claimant should not be concerned with the source of his compensation once it has been awarded.

The appellate courts have recognized this reasoning and have also stated that the Director is the proper party to appeal an award of Section 8(f) relief as only he has a real interest in protecting the financial integrity of the Special Fund. *See, e.g., Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir 1984); *Director, OWCP v. Cargill, Inc.*, 718 F.2d 886, 15 BRBS 30(CRT) (9th Cir. 1983); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377, 9 BRBS 404 (5th Cir. 1978). *See also Hitt v. Newport News Shipbuilding & Dry Dock Co*., 16 BRBS 353 (1984). The Director therefore has standing before the Board and courts to appeal Section 8(f). *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995) (Director has standing before the courts of appeals only where his administrative responsibilities under the Act, including those involving the Special Fund, are at issue). For cases discussing the Director's standing in general, *see* Section 21.

The Director has standing to appeal regardless of his participation below. *Hitt*, 16 BRBS 353. *See Langley*, 676 F.2d at 114 n.4, 14 BRBS at 724 n.4; *Cf. Outland v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 552 (1981) (Director may not appeal absent participation below where he raises new issues requiring additional fact-finding). Moreover, the Director has a right to appeal as protector of the Fund in order to protect it against undue distribution, however slight. *Powell v. Brady-Hamilton Stevedore Co*., 17 BRBS 1 (1984) (Order).

The 1984 Amendments added a provision specifically stating that employer remains a party to the claim even after its liability terminates under Section 8(f) and retains all its rights under the Act. 33 U.S.C. §908(f)(2)(B). *See* H.R. Rep. 98-1027, 98th Cong., 2d Sess. 32. Similar language is contained in Section 22 including an employer who has received relief under Section 8(f) as a party for purposes of applying for modification of an award.

Digests

In a footnote, the Board declined to consider a claimant's contentions pertaining to an administrative law judge's Section 8(f) determination, reasoning that claimants possess no cognizable interest in dispositions of requests for Section 8(f) relief. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

In a footnote, the Board stated that the Director has standing to appeal the administrative law judge's Section 8(f) findings regardless of whether he participated before the administrative law judge. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in pert. part and modified on other grounds sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Fourth Circuit held that the Director has standing to appeal a Section 8(f) award, as well as a decision affecting his administrative responsibilities under the Act. However, as his challenge to the onset date of disability benefits did not fit into either of those categories, he did not have standing to appeal that issue. The court discussed the difference in the Board regulation, permitting appeals by any party in interest, as opposed to Section 21(c) which allows appeals by "any person adversely affected or aggrieved." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). In affirming this decision, the Supreme Court identified four areas of responsibility for the Director in administering the Act, including duties related to the administration of the Special Fund.

In this D.C. Act case, where amended Section 22 and Section 8(f)(2)(B) are not applicable, the administrative law judge dismissed employer from the modification proceeding in which claimant requested additional compensation from the Special Fund. Contrary to the administrative law judge's finding, the Board held that employer's financial interest in the modification proceeding was not too remote in order to establish standing under Section 702 of the APA. With respect to carriers and employers covered under the D.C. Act, any increase in payments to claimant from the Special Fund will result in an increase in employer's assessment to the Special Fund, pursuant to Section 44(c) of the Act. As employer had a cognizable interest in the modification proceeding, the Board vacated administrative law judge's decisions, and remanded the case for a new hearing. *Terrell v. Washington Metro. Area Transit Auth.,* 34 BRBS 1 (2000).

Timeliness of Employer's Claim for Relief

The 1984 Amendments added a provision to Section 8(f) specifying that it must be raised before the district director in the initial consideration of the claim unless employer could not have reasonably anticipated Fund liability at that time. Section 8(f)(3) provides:

> (3) Any request, filed after the date of enactment of the Longshore and Harbor Workers' Compensation Amendments of 1984, for apportionment of liability to the special fund established under section 44 of this Act for the payment of compensation benefits, and a statement of the grounds therefore (sic), shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3). By regulation, the title "deputy commissioner" has been changed to "district director." 20 C.F.R. §701.301(a)(7).

This provision requires that all applications for relief pursuant to Section 8(f) be made to the district director as soon as the permanency of claimant's condition is known or is in dispute in a disability case, and as soon after death as possible in a death benefits case. 20 C.F.R. §702.321(b).

Where claimant has not reached maximum medical improvement and permanency is not in issue by the date of referral to the Office of Administrative Law Judges, an application need not be submitted to the district director to preserve employer's right to later seek Section 8(f) relief. In all other cases, employer's failure to submit an application to the district director shall operate as an absolute bar to Section 8(f) relief. However, this affirmative defense must be raised and pleaded by the Director. 20 C.F.R. §702.321(b)(3).

The Eleventh Circuit has held that only claims filed after the September 28, 1984, effective date of the 1984 Amendments are subject to this rule. *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 778 n.5, 17 BRBS 154, 157 n.5(CRT) (11th Cir. 1985).

Section 8(f)(3) also requires that the request for Section 8(f) relief be accompanied by a statement of the grounds for such relief. The Department of Labor's regulations implementing Section 8(f)(3) outline the documentation necessary to complete an application for relief under this provision. 20 C.F.R. §702.321.

In cases prior to the enactment of Section 8(f)(3), the Board also restricted employer's ability to raise Section 8(f) after the initial hearing. The Board required that employer raise

Section 8(f) as an issue at the first hearing on a claim, *see Wilson v. Old Dominion Stevedoring Co.*, 10 BRBS 943 (1979); *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979), and that the administrative law judge consider Section 8(f) when it had been properly raised as an issue. *See Bacon v. Gen. Dynamics Corp.*, 14 BRBS 408 (1981). In *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984), the parties attempted to bifurcate the issues and litigate only coverage; however, the administrative law judge did not permit this procedure and required that disability and other issues be addressed. With regard to Section 8(f), the administrative law judge declined to address it on the basis that it must be pursued first before the deputy commissioner. The Board held that this belief was in error, as Section 8(f) need only be raised at the first hearing on the claim. The Board remanded the Section 8(f) issue to allow employer to present evidence and for the administrative law judge to make necessary findings, stating that although ordinarily employer's failure to present evidence would be considered a waiver, remand was appropriate due to the confused record and unique procedural circumstances.

The "use it or lose it" nature of Section 8(f) under the pre-Amendment Act was affirmed by the courts on appeal. *See, e.g., Brady-Hamilton Stevedoring Co. v. Director, OWCP*, 779 F.2d 512, 18 BRBS 43(CRT) (9th Cir. 1985), *aff'g Adams v. Brady-Hamilton Stevedoring Co.*, 16 BRBS 351 (1984); *Verderane*, 772 F.2d 775, 17 BRBS 154(CRT), *aff'g* 14 BRBS 220 (1981); *Gen. Dynamics Corp. v. Director, OWCP,* 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), *aff'g Woodberry v. Gen. Dynamics Corp.*, 14 BRBS 431 (1981); *Am. Bridge Div., U.S. Steel Corp. v. Director, OWCP*, 679 F.2d 81, 14 BRBS 923 (5th Cir. 1982) *aff'g Carroll v. Am. Bridge Div., U.S. Steel Corp*., 13 BRBS 759 (1981); *Avallone v. Todd Shipyards Corp.*, 13 BRBS 348 (1981), *petition for review denied*, 672 F.2d 901 (2d Cir. 1981).

Section 22 modification cannot be used except in rare circumstances to avoid the rule that Section 8(f) is waived unless raised at the first hearing. *Dykes v. Jacksonville Shipyards*, 13 BRSS 75 (1981). *See also Avallone*, 13 BRBS 348; *Carroll*, 13 BRBS 759. Generally, employer cannot raise Section 8(f) as an issue in a Section 22 modification proceeding if the issue was not raised and litigated in the original hearing. *See Cactus Int'l, Inc. v. Price*, 15 BRBS 360 (1983), *aff'd*, No. 83-4325 (5th Cir. May 4, 1984); *Burke v. San Leandro Boat Works*, 18 BRBS 44 (1986); *Adams v. Brady-Hamilton Stevedoring Co.*, 16 BRBS 350 (1984), *aff'd sub nom. Brady-Hamilton Stevedore Co. v. Director, OWCP*, 779 F.2d 512, 18 BRBS 43(CRT) (9th Cir. 1985).

However, the Board has recognized that in some special circumstances, in the interest of justice, the general rule does not apply, and Section 8(f) can be raised for the first time in a Section 22 modification hearing. *See Dixon v. Edward Minte Co*., 16 BRBS 314 (1984), *aff'd sub nom. Director, OWCP v. Edward Minte Co., Inc*, 803 F.2d 731, 19 BRBS 27(CRT) (D.C. Cir. 1986) (Section 8(f) could be raised on modification where administrative law judge advised at initial hearing prior to 1972 that the request would be futile as the Special Fund was inadequately funded); *Mason v. Bender Welding & Machine*

Co., 16 BRBS 307 (1984) (special circumstances existed where employer was not alerted to possibility Section 8(f) applied until it took post-hearing depositions). The Board has also remanded for reconsideration where the parties were obviously under a misapprehension as to whether they could raise Section 8(f) at a separate hearing, *Davenport*, 16 BRBS 196; *Egger*, 9 BRBS 897, and when the parties mistakenly believed that Section 8(f) could not be raised where the claim was only for permanent partial disability and this mistaken belief was not corrected by the administrative law judge. *Tibbetts v. Bath Iron Works Corp*., 10 BRBS 245 (1979).

It is apparent, therefore, that the applicability of Section 8(f) cannot be raised for the first time on appeal. *Verderane v. Jacksonville Shipyards*, 14 BRBS 220 (1981), *aff'd*, 772 F.2d 775, 17 BRBS 154(CRT) (11th Cir. 1985); *Anderson v. Am. President Lines, Inc.*, 11 BRBS 757 (1980); *Moore v. Paycor, Inc.*, 11 BRBS 483 (1979); *Reed v. Sun Shipbuilding & Dry Dock Co.*, 4 BRBS 130 (1976).

Conversely, it is error for the administrative law judge to consider Section 8(f) where the claimant has been found to only be temporarily disabled. *See Nathenas v. Shrimpboat, Inc.*, 13 BRBS 34 (1981); *Laput v. Blakeslee, Arpaia, Chapman, Inc.*, 11 BRBS 363 (1979); *Jameson v. Marine Terminals, Inc.*, 10 BRBS 194 (1979). Moreover, when the administrative law judge raised Section 8(f) *sua sponte* without notice or response from the Director, the Board vacated his decision and remanded. *Hummel v. Greyhound Lines, Inc.*, 12 BRBS 736 (1981).

Digests

Pre-1984 Amendment; Modification

The D.C. Circuit affirmed the Board's decision which held employer could raise Section 8(f) relief in response to claimant's petition for modification seeking a greater degree of disability. The Section 8(f) waiver rule is a procedural rule imposed by the courts and the Board; the party asserting that Section 8(f) was waived because it could have been raised earlier has the burden of raising the issue and proving it. In this case, the Director failed to establish that employer could have successfully pursued a Section 8(f) claim earlier in the proceedings, and it is questionable whether such could be shown given the pre-1972 law. Moreover, the policy basis for the waiver rule is absent where the legal test and relevant facts have changed in the time since the initial claim. *Director, OWCP v. Edward Minte Co., Inc*, 803 F.2d 731, 19 BRBS 27(CRT) (D.C. Cir. 1986), *aff'g Dixon v. Edward Minte Co., Inc.*, 16 BRBS 314 (1984).

The Board held that the issue of Section 8(f) applicability, although not initially raised before the administrative law judge since only temporary disability benefits were sought, was properly raised on remand, since the extent of claimant's disability was then at issue and since the D.C. Circuit stated that the administrative law judge should consider the

applicability of Section 8(f) on remand. The administrative law judge thus abused his discretion in denying employer's motion to reopen the record for submission of evidence bearing on permanency, given the "special circumstances" existing in this case, and given that employer's motion could be construed as a Section 22 petition for modification based on a change in claimant's medical condition. *Champion v. S & M Traylor Bros.*, 19 BRBS 36 (1986).

The Board held that the administrative law judge erred in finding that employer waived its right to Section 8(f) relief both by failing to raise the issue at the original hearing and by failing to raise it in response to the administrative law judge's show cause order on modification. The party opposing the request for Section 8(f) relief on grounds of waiver must raise the waiver issue and come forward with facts supporting the waiver claim, which no party did here. Moreover, Section 8(f) need not be raised and litigated until the first hearing wherein permanent disability is at issue. *Moore v. Washington Metro. Area Transit Auth.*, 23 BRBS 49 (1989).

The First Circuit held that, although a claim for relief under Section 8(f) must be made at or before the first hearing or the issue is considered waived, the administrative law judge acted within his discretion in raising the issue on his own initiative under 20 C.F.R. §702.336. Nonetheless, he failed to give the Director the chance to address the issue, and the case was therefore remanded to give the parties the opportunity to fully and fairly litigate the issue. *Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988).

The Board held that Section 8(f)(3) did not apply but affirmed the denial of Section 8(f) relief as the administrative law judge did not abuse his discretion in finding that employer's failure to notify the Director that Section 8(f) would be at issue precluded its consideration. *Scott v. S.E.L. Maduro, Inc.*, 22 BRBS 259 (1989).

The Board held that the "law of the case" doctrine did not preclude an administrative law judge from reopening the previously-decided issue of Section 8(f) relief where the case was before him pursuant to a request for modification, even where Section 8(f) had not been specifically raised as an issue in the modification request, if the administrative law judge found that a "mistake in fact" was contained in the previous Section 8(f) determination. Board nonetheless remanded, since the administrative law judge in this case did not afford the parties an adequate opportunity to present evidence and arguments relevant to Section 8(f) once he notified them that he would address this issue in his decision on modification. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

The Board reversed the administrative law judge's finding that employer was entitled to Section 8(f) relief. A request for Section 8(f) relief must be raised and litigated at the first hearing wherein permanent disability is at issue. Employer received notice of the deputy

commissioner's intent to modify claimant's temporary partial disability benefits to permanent partial status in 1969, and should have raised Section 8(f) at that time. Moreover, where claimant's request for modification was denied, employer's defense of Section 8(f) also failed. The Board rejected Director's contention that Section 8(f) can only be raised at modification proceedings if there has been a mistake in a determination of fact or change in condition with regard to an earlier Section 8(f) determination. *Allison v. Washington Society for the Blind*, 20 BRBS 158 (1988), *rev'd*, 919 F.2d 763 (D.C. Cir. 1991).

The D.C. Circuit reversed the Board's holding that employer waived its right to Section 8(f) relief by failing to assert it in 1969, when the deputy commissioner modified claimant's award of compensation for temporary partial to permanent partial disability. Noting that under the pre-1972 version of Section 8(f), only a change in claimant's status to permanent total disability would have allowed Section 8(f) relief, the court ruled that employer did not waive its rights by failing to assert its entitlement in 1969 since the only question presented to the deputy commissioner in 1969 was whether claimant had permanent partial disability. The court upheld the Board's rejection of the Director's contention that Section 8(f) can only be raised in Section 22 modification proceedings if there has been a mistake of fact with regard to a previous 8(f) determination. *Washington Society for the Blind v. Allison*, 919 F.2d 763 (D.C. Cir. 1991).

The Board reversed the administrative law judge's denial of employer's Section 22 motion for modification and protective cross-appeal to preserve its right to seek Section 8(f) relief in the future. Employer fully satisfied the filing requirements through its timely and repeated requests for Section 8(f) relief from the outset of this case, including while the case was before the deputy commissioner. The administrative law judge erred in finding that employer could not raise the issue because it did not raise it in response to claimant's motion for reconsideration and did not appeal the issue to the Board. There is no requirement that employer raise the issue in response to a motion for reconsideration, and there were no adverse findings for employer to appeal to the Board. Lastly, the administrative law judge erred in raising the waiver of Section 8(f) *sua sponte*, as the party raising the waiver issue bears the burden of coming forward with facts to support the contention, and the Director failed to do so here. *Reynolds v. Cooper Stevedoring Co., Inc.*, 25 BRBS 174 (1991).

In a case where the Director did not properly raise Section 8(f)(3), the Board held that it was within the administrative law judge's adjudicatory powers to nonetheless decline to consider Section 8(f) where it was raised for the first time post-hearing, as it was a "new" issue. The Board thus affirmed the administrative law judge's denial of Section 8(f) relief. *Emery v. Bath Iron Works Corp.*, 24 BRBS 238 (1991), *vacated mem. sub nom. Director, OWCP v. Bath Iron Works Corp*, 953 F.2d 633 (1st Cir. 1991).

Inasmuch as the Director conceded that employer is entitled to a hearing on modification

regarding its request for Section 8(f) relief, the Board remanded the case for further proceedings and did not need to address LIGA's specific arguments regarding the administrative law judge's finding that it could have litigated the Section 8(f) issue earlier. *Lucas v. Louisiana Ins. Guaranty Assoc.*, 28 BRBS 1 (1994).

The Fourth Circuit agreed that Section 8(f)(3) was inapplicable as permanency was not at issue before the district director and because the Director did not raise the affirmative defense. Nevertheless, the court affirmed the finding that employer's claim for Section 8(f) relief was untimely as it was first raised in a motion for reconsideration after the administrative law judge awarded permanent total disability benefits. Employer was obligated to raise the issue at the earliest time it was aware of a claim for permanent disability benefits, which was when claimant raised the issue before the administrative law judge. *Universal Mar. Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In this case, where employer withdrew its claim for Section 8(f) relief from consideration following the initial hearing in 1995, and neither alleged nor demonstrated any reason for not having litigated Section 8(f) at that time, the Board reversed the administrative law judge and held that employer was not entitled to Section 8(f) relief, because its 1996 application filed on modification was not timely under *Egger*, 9 BRBS 897. As *Egger* was decided in 1979, employer was on notice at the 1995 hearing that bifurcation of the liability and Section 8(f) issues was improper, and while the administrative law judge did not specifically inform the parties that postponing Section 8(f) consideration at the initial hearing would result in a waiver, the Board agreed with the Director that he had no duty to do so given that *Egger* had been in existence for 15 years as of the time of the hearing. *Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998).

The Board held that the administrative law judge acted within his discretion in refusing to address employer's request for Section 8(f) relief. While employer timely raised the issue before the district director, it did not raise Section 8(f) as an issue before the administrative law judge until it filed a motion for reconsideration. Because the administrative law judge may refuse to entertain a post-hearing request to address an issue which should have been anticipated before the hearing, the Board affirmed the administrative law judge's decision. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

Although Section 8(f)(3) was not applicable as it was not raised by the Director, the administrative law judge did not err in finding employer's request for Section 8(f) relief untimely. Pre-1984 Amendment law regarding the timely raising of Section 8(f) relief still applies. Employer did not raise its entitlement to Section 8(f) relief for the first time until it moved for modification, and the administrative law judge rationally determined that employer did not raise any special circumstances that would permit it to raise the issue at that time. *Ceres Marines Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

The Board rejected employer's argument that the Director could not argue for the first time on appeal that employer waived its right to claim Section 8(f) relief. The Director was permitted to raise the waiver issue for the first on appeal as the Director's argument raised a legal issue and as the liability of the Special Fund was at issue. *Anderson v. Yusen Terminals, Inc.*, 50 BRBS 23 (2016).

In this case, employer formally withdrew the Section 8(f) issue from consideration during the 2012 proceedings before an administrative law judge in which the administrative law judge entered an award of permanent disability benefits based on the private parties' stipulations. Employer again raised its entitlement to Section 8(f) relief several years later in conjunction with a Section 8(j) claim. In subsequent formal proceedings in 2015, a second administrative law judge considered the issue of employer's entitlement to Section 8(f) relief, but found that employer did not meet the requirements for entitlement to such relief. The Board agreed with the Director that, pursuant to precedent established in *Serio*, 32 BRBS 106, and *Egger*, 9 BRBS 897, the administrative law judge should not have considered employer's Section 8(f) request because employer waived its right to claim such relief when it withdrew the Section 8(f) issue from consideration in the initial proceeding in which claimant was found to be permanently disabled. *Anderson v. Yusen Terminals, Inc.,* 50 BRBS 23 (2016).

Section 8(f)(3)

Only claims for Section 8(f) relief filed after the effective date of the 1984 Amendments are subject to the requirement of Section 8(f)(3) that the claim for Section 8(f) relief be filed as soon as the permanency of claimant's condition is known or is in dispute, or as soon after death as possible in a death benefits case, and the failure to do so is an affirmative defense which the Director must raise. As the case was referred to OALJ after the effective date of the 1984 Amendments, and the Director did not raise this issue, the administrative law judge erred in denying Section 8(f) relief on this basis. Nevertheless, the Board affirmed the denial of Section 8(f) relief as the administrative law judge did not abuse his discretion in finding that employer's failure to notify the Director that Section 8(f) would be at issue precluded consideration of the issue. *Scott v. S.E.L. Maduro, Inc.*, 22 BRBS 259 (1989).

Although employer did not fully comply with the requirements of 20 C.F.R. §702.321(a) in its application for Section 8(f) relief, the Director's failure to affirmatively raise and argue this issue below precluded Director from using Section 8(f)(3) as a defense to employer's claim under 20 C.F.R. §702.321(b)(3). *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

The Fourth Circuit agreed that Section 8(f)(3) was inapplicable as permanency was not at issue before the district director and because the Director did not raise the affirmative defense. Nevertheless, the court affirmed the finding that employer's claim for Section 8(f) relief was untimely as it was first raised in a motion for reconsideration after the administrative law judge awarded permanent total disability benefits. Employer was obligated to raise the issue at the earliest time it was aware of a claim for permanent disability benefits, which was when claimant raised the issue before the administrative law judge. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The Board affirmed the administrative law judge's finding that employer's failure to raise Section 8(f) at the deputy commissioner level was excused, since employer could not reasonably have anticipated the liability of the Special Fund before the case was referred to OALJ, as claimant previously had denied any prior injuries. The Board further held that the eight month delay between employer's filing of its LS-18 raising Section 8(f) and the submission of its supporting documentation did not bar employer's claim pursuant to Section 8(f)(3). The Board reasoned that if the failure to present a timely application is excused because the liability of the Special Fund could not be anticipated, so too is the failure to present a fully documented application in a timely manner, as long as the Director, the administrator of the Fund, is given proper notice. Under the facts of the instant case, the Board held that the Director's entitlement to adequate notice and its due process rights were not abridged. *Currie v. Cooper Stevedoring Co. Inc.*, 23 BRBS 420 (1990).

In reviewing the administrative law judge's determination that employer's claim for relief under Section 8(f) was barred under Section 8(f)(3) and 20 C.F.R. §702.321, the Board held that these provisions limit the inquiry of the administrative law judge to one of whether the issue of permanency was in fact before the deputy commissioner, rather than allowing him to also consider whether the issue of permanency should have been raised, as neither the Act nor the regulations can be interpreted to require an employer to monitor a claimant's condition in order to initiate consideration of the issue of permanency and thus preserve its right to seek Section 8(f) relief. Thus, although the administrative law judge found that claimant's condition reached maximum medical improvement prior to the date of the informal conference, the Board held that since the relevant evidence did not establish that the issue of permanency was actually before the deputy commissioner, the administrative law judge erred in finding employer's Section 8(f) request barred under Section 8(f)(3). *Brazeau v. Tacoma Boatbuilding Co.*, 24 BRBS 128 (1990).

The Board affirmed the administrative law judge's order granting the Director's motion to dismiss employer's request for Section 8(f) relief pursuant to Section 8(f)(3). Employer was given 60 days in which to submit a fully documented application, but did not file it within this time frame, and there was no creditable evidence that employer was given an additional extension. *Hargrave v. Cajun Tubing Testors, Inc.*, 24 BRBS 248 (1991), *aff'd*, 951 F.2d 72, 25 BRBS 109(CRT) (5th Cir. 1992).

The Fifth Circuit affirmed the Board's determination that the deputy commissioner was entitled to assert the absolute defense to Section 8(f) liability because employer's application for Section 8(f) relief was not timely filed pursuant to 20 C.F.R. §702.321(b) based on employer's failure to provide adequate documentation within the 60-day period granted after its initial filing of the application, or to file for an extension of time to do so. *Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109(CRT) (5th Cir. 1992).

The Ninth Circuit affirmed the finding that employer's untimely application to the administrative law judge for Section 8(f) relief served as an absolute bar to the Special Fund's liability under Section 8(f)(3) since the permanency of claimant's disability was at issue prior to the time that the deputy commissioner referred the case to the administrative law judge for a formal hearing. In this case, claimant's claim form stated that he was seeking permanent benefits and a doctor's report stated that claimant had a permanent partial disability. Employer, therefore, should have raised its entitlement to Section 8(f) relief before the deputy commissioner. The court rejected the contention that the deputy commissioner did not "consider" the claim because he did not hold an informal conference or issue correspondence. Absent evidence that the deputy commissioner transferred the case to OALJ without evaluating the claim, it is assumed the "considered" it before the transfer. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991).

The Board affirmed the administrative law judge's finding that employer's post-hearing

request for Section 8(f) relief was barred by Section 8(f)(3). Employer was put on notice that the liability of the Special Fund could be at issue while the case was before the deputy commissioner when it became aware that the case involved a claim for death benefits, and, additionally, when a disability claim based on asbestosis was filed at the same time. The Board also held that employer had sufficient information in its possession at the time of the informal conference indicating decedent had pre-existing medical conditions which could have contributed to his death. Moreover, the Board rejected employer's argument that it lacked sufficient information to file a fully documented Section 8(f) application while the case was before the deputy commissioner as Section 702.132(b) distinguishes between requesting Section 8(f) relief, and filing a documented application for such relief. *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991).

Affirming the Board's decision, the First Circuit noted that employer had sufficient medical evidence in its possession at the time of the informal conference indicating that decedent's pre-existing lung impairment contributed to his death, thereby enabling employer to reasonably anticipate the liability of the Special Fund. The court further noted that if employer believed that it possessed insufficient evidence to meet the requirements for a fully documented application as described in 20 C.F.R. §702.321, it should have simply requested additional time in which to develop the required evidence. *Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991).

The Board affirmed the administrative law judge's finding that employer's claim for Section 8(f) relief was barred. Employer had evidence at the deputy commissioner level that claimant's hearing loss might be permanent and that Section 8(f) might be applicable. Thus the request for Section 8(f) relief -- initially presented post-hearing -- would have been barred under Section 8(f)(3) had the Section 8(f)(3) defense been properly raised by the Director. In this case, the Director did not properly raise Section 8(f)(3), but the Board held that it was within the administrative law judge's adjudicatory powers to nonetheless decline to consider Section 8(f), as it was a "new" issue, and affirmed the administrative law judge's ultimate denial of Section 8(f) relief. *Emery v. Bath Iron Works Corp.*, 24 BRBS 238 (1991), *vacated mem. sub nom. Director, OWCP v. Bath Iron Works Corp*, 953 F.2d 633 (1st Cir. 1991).

The Board reversed the administrative law judge's finding that the Section 8(f)(3) bar applied. Although permanency was at issue, employer did not possess sufficient medical evidence at the time of the informal conference on which it could have requested Section 8(f) relief based on the theory of pre-existing intracranial bleeding, and therefore could not have reasonably anticipated the liability of the Special Fund. The Board noted that medical records covering the 12 day period of claimant's initial injuries merely indicated that claimant complained of neck, shoulder and severe head pain, and that no "correct" diagnosis indicating that claimant's intracranial bleeding (as opposed to his hypertension) leading to a stroke was aggravated by his continuing to work was made until nearly two

years after this period. *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

In a case in which the Director has properly raised the Section 8(f)(3) absolute defense, the administrative law judge, before proceeding to the merits of the employer's Section 8(f) request, must give *de novo* consideration to whether the employer submitted a sufficiently documented Section 8(f) application to the district director in compliance with Section 8(f)(3) and 20 C.F.R. §702.321. If the administrative law judge finds the Section 8(f)(3) bar does not apply, he then may consider the merits of the Section 8(f) request; if the administrative law judge finds that the bar does apply, he must deny Section 8(f) relief. As the Section 8(f) bar is an affirmative defense, it is the Director's burden to come forward with the necessary evidence to support the claim that the employer failed to comply with Section 8(f)(3), including the allegedly deficient Section 8(f) application. The case was remanded for further consideration of whether employer's application met the regulatory requirements, including reopening the record for admission of the application submitted to the district director. *Tennant v. Gen. Dynamics Corp.*, 26 BRBS 103 (1992).

The Board followed *Tennant*, 26 BRBS 103, in a case in which the Director appealed an administrative law judge's Decision and Order awarding employer Section 8(f) relief, contending that the Section 8(f) claim should have been found barred by the employer's failure to submit a fully documented application to the deputy commissioner pursuant to 20 C.F.R. §702.321. The Board noted that inasmuch as employer's Section 8(f) application was not included in the record before the administrative law judge, the administrative law judge had an inadequate basis for concluding that the Director was improperly attempting to invoke the Section 8(f)(3) absolute defense on the ground that the application was not sufficiently convincing rather than because it failed to adequately state the grounds for the request as required by the Act. Thus, the Board vacated the award of Section 8(f) relief and remanded the case for the administrative law judge to reconsider whether employer's application was sufficient after reopening the record for submission of the application and other relevant evidence. *Fullerton v. Gen. Dynamics Corp.*, 26 BRBS 133 (1992).

The Board rejected employer's assertion that Section 8(f)(3) was not applicable, since employer first requested Section 8(f) relief in April 1986, subsequent to the effective date of the 1984 Amendments, September 28, 1984. The Board affirmed the administrative law judge's application of the absolute bar under Section 8(f)(3), and his consequent denial of Section 8(f) relief, since there was no evidence in the record that the district director ever received employer's Section 8(f) application, notwithstanding employer's assertion that the application was mailed. *Lassiter v. Nacirema Operation Co*., 27 BRBS 168 (1993).

The regulation at 20 C.F.R. §702.321(c) provides that when a case raising Section 8(f)(3) is transmitted to OALJ, the district director shall attach a copy of the application and his denial of it. Thus, although the district director's correspondence was not admitted into evidence, the administrative law judge may consider the correspondence in determining whether the request for relief is barred. In this case, the administrative law judge's finding

that the claim was barred by Section 8(f)(3) was reversed. Claims were filed for injuries occurring in 1986 and 1988. Section 8(f) relief for the 1988 claim was requested before the district director, and the district director's correspondence addressed only this injury. The Director did not raise the Section 8(f)(3) defense with regard to the 1986 injury before the district director or administrative law judge and cannot raise it for the first time on appeal. Since the 1986 injury is the only injury resulting in permanent disability, the Board remanded for consideration of the merits of employer's request for Section 8(f) relief. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on recon.*, 29 BRBS 103 (1995).

On reconsideration, the Board clarified its decision to state that the Director may raise the Section 8(f)(3) defense before the administrative law judge on remand, as well as contest the merits of employer's claim for Section 8(f) relief. The Director did not have the opportunity to raise the defense earlier as she was not informed of the request for Section 8(f) relief until after the administrative law judge issued his decision. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 29 BRBS 103 (1995), *modifying on recon.* 28 BRBS 73 (1994).

The Board held that the administrative law judge erred in raising the Section 8(f)(3) bar based on the district director's statement, in her letter referring the case for a hearing, that employer did not file a Section 8(f) application. The Board held that as the plain language of 20 C.F.R. §702.321(b)(3) requires that the "Director" raise and plead the absolute defense, and elsewhere requires action by the district director, the reference to the Director cannot also refer to the district director. Moreover, a referral letter is ministerial in nature, and is insufficient to "plead" the Section 8(f)(3) bar. As the Director was on notice in this case that Section 8(f) was at issue and did not raise and plead the bar at the hearing, the Board remanded the case for consideration of the merits of Section 8(f). *Abbey v. Navy Exch.*, 30 BRBS 139 (1996).

The Board held that the administrative law judge erroneously determined that the Section 8(f)(3) bar did not apply when the district director informed employer that a Section 8(f) application was due by a certain date and employer missed the deadline. The letter from the district director implied that the case was under consideration, and as the claim was under consideration prior to the submission of the Section 8(f) application, the administrative law judge's finding that the bar did not apply is incorrect. The Board further noted that, contrary to the administrative law judge's determination, the district director had the authority to set a date for the submission of a Section 8(f) application. 20 C.F.R. §702.321(b)(2). The case was remanded for the administrative law judge to determine whether employer's failure to timely submit a petition for Section 8(f) relief should be excused. In this regard, the permanency of claimant's condition is not the sole relevant criterion in determining whether employer should have anticipated the Special Fund's liability; the administrative law judge should address when employer reasonably knew the case might meet the legal requirements for obtaining Section 8(f) relief, when evidence relevant to these requirements was available, and any other facts that would have impact.

In addition, any deadline set for submission of the application must have been reasonable. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

The Fourth Circuit accepted the Director's interpretation of Section 8(f)(3) and 20 C.F.R. §702.321(b)(1), (3) and held that when an employer files a Section 8(f) application before the district director on one ground (in this case a hearing loss), and then asserts before the administrative law judge an entirely new ground (a back injury), employer must demonstrate that, with respect to the new ground, it could not have reasonably anticipated the liability of the Fund before the district director considered the claim. As the administrative law judge did not make this required finding, the court remanded this case to the administrative law judge to make such a determination. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998).

Citing *Container Stevedoring Co.*, 935 F.2d 1544, 24 BRBS 213(CRT), the Board held that an employer is obligated to request Section 8(f) relief if it has the requisite knowledge of the permanency of claimant's condition prior to the time the district director "considers" the claim. The Board affirmed the administrative law judge's determination that employer's application for Section 8(f) relief was timely since it was filed prior to the time that the permanency of claimant's condition became an issue before the district director. The Board held the administrative law judge's use of the date of the informal conference, December 6, 1995, as the pivotal date for filing the Section 8(f) application was rational and in accordance with law, as it was at this point in time that the district director first undertook the consideration of claimant's claim. The fact that the claim had been initially filed in 1990 did not alter this result, since claimant had taken no action or raised permanency until May 1995. However, the Board held that, contrary to the administrative law judge's determination, employer's application for Section 8(f) relief was not fully documented as it did not specify "the reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent partial disability," 20 C.F.R. §702.321(a)(1)(ii). The Board held that this error was harmless as the administrative law judge rationally concluded that employer's request for an extension of time to supplement its application was improperly denied by the district director. The Board therefore affirmed the finding that employer could submit additional evidence in support of its request for Section 8(f) relief at the formal hearing. *Rice v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 102 (1998).

The Board held that contrary to the administrative law judge's determination, employer's application for Section 8(f) relief satisfied Section 8(f)(3), as it contained the grounds for employer's assertion of entitlement to Section 8(f) relief and the information required by Section 702.321(a)(1). Thus, employer's application was complete, fully documented and sufficient to preclude application of the Section 8(f)(3) bar. The test for whether employer has submitted a sufficient application under Section 702.321(a)(1) is not whether it has affirmatively proven its entitlement to Section 8(f) relief but whether it has provided the

required documentation of the basis for its claim to such relief. *Callnan v. Morale, Welfare & Recreation, Dep't of the Navy*, 32 BRBS 246 (1998).

In light of the Fourth Circuit's decision in *Elliot*, 134 F.3d 1241, 31 BRBS 215(CRT), the Board, on reconsideration, modified its decision to place the burden on employer, rather than Director, to show for purposes of Section 8(f)(3), that it could not have reasonably anticipated the liability of the Special Fund as to claimant's pre-existing mental condition while the claim was pending before the district director. The case was remanded to the administrative law judge to address the evidence relevant to this issue. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998), *modifying on recon.* 32 BRBS 118 (1998).

The Fifth Circuit held that employer is not required to present an application for Special Fund relief before referral of the claim to OALJ if the existence of the relevant medical evidence is unknown until after the transfer and therefore it could not have reasonably anticipated the Fund's liability earlier. Nor is employer obliged to engage in discovery in order to develop its Section 8(f) case while the matter is pending before the district director, as employer need only request Section 8(f) relief when it knows it has a claim. "Reasonable anticipation" is a factual determination to be addressed by the administrative law judge. The court thus rejected the Director's argument which would "impose on employers a requirement to explain to the district director circumstances which, to the employers' knowledge, do not then yet exist" and affirmed the finding Section 8(f)(3) did not bar the Section 8(f) award. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

The Board reversed the administrative law judge's finding that Section 8(f)(3) did not bar the claim for Section 8(f) relief. The district director scheduled an informal conference on employer's motion for modification, and employer was obligated to raise Section 8(f) at that time as the permanency of claimant's disability was at issue. The statute does not provide an exception, applicable in modification cases, to the rule that a claim for Section 8(f) relief must be raised before the district director; by its specific terms Section 8(f)(3) applies to all claims for Sections 8(f) relief. The fact that, at employer's request, the informal conference was not held does not mean that the district director did not "consider" the claim as required, *see Container Stevedoring,* 935 F.2d 1544, 24 BRBS 213(CRT). *Firth v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 75 (1999), *aff'd*, 363 F.3d 311, 38 BRBS 1(CRT) (4th Cir. 2004).

On appeal, employer conceded it did not comply with Section 8(f)(3), but contended that the purpose of that section was met when it raised the issue of its entitlement to Section 8(f) relief before the administrative law judge. The Fourth Circuit held that the requirements of Section 8(f)(3) are unambiguous, and they declined to depart from the statute; employer cannot obtain Section 8(f) relief if it does not comply with mandatory procedural requirements of Section 8(f)(3). The court further rejected employer's

contention that the absolute bar was not applicable because the district director did not set a deadline for filing an application. Employer must first request Section 8(f) relief before the district director sets an application deadline. The court also rejected employer's contention that the district director did not "consider" the case; employer requested that an informal conference not be held. Thus, it cannot later rely on the absence of the conference in the manner suggested. *Newport News Shipbuilding & Dry Dock Co. v. Firth*, 363 F.3d 311, 38 BRBS 1(CRT) (4th Cir. 2004).

The Fourth Circuit held that an employer cannot unqualifiedly amend a Section 8(f) claim to raise a new condition as a basis for Section 8(f) relief after the district director originally considered it, as this would prevent the Director from adequately defending the Special Fund. The court thus vacated the conclusion that the Section 8(f)(3) bar did not apply and remanded the case to the administrative law judge to determine whether employer could have reasonably anticipated the late-asserted ground for Section 8(f) relief at the time the application was filed with the district director. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* [*Dillard*], 230 F.3d 126, 34 BRBS 100(CRT) (4th Cir. 2000).

Where the district director set a specific date as the deadline for receiving employer's application for Section 8(f) relief, the Board rejected employer's assertion that the deadline was arbitrary. Not only did the record contain the testimony of the current and former district directors, which the administrative law judge rationally found to be consistent, but the administrative law judge found that the district director considered the necessary factors from the regulation, 20 C.F.R. §702.321, and the OWCP Procedural Manual, Chapter 6-201. As the administrative law judge found that employer was aware permanency would be at issue by claimant's request for an informal conference, the Board affirmed his determination that the district director's deadline of 30 days after the informal conference was a reasonable deadline for filing the Section 8(f) application. Employer mailed its application on the date the district director set as the deadline for receiving the application in her office. The Board rejected employer's argument that the "mailbox rule" applied to render the application timely. The Board held that there is no provision in either the regulations or the OWCP Manual regarding the filing of documents by mail, and employer's reliance on the rules for the Board and the OALJ was misplaced. Moreover, the Board held that, regardless of how the former district director would have processed employer's application, the memorandum in effect here explicitly stated that the application would be timely only if it was received in the district director's office "on or before December 13, 2002." As employer's application was not received in the district director's office on or before that date, it was untimely filed, and the untimeliness was not excused. Thus, the denial of Section 8(f) relief was affirmed. *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005).

The Board rejected the Director's argument that the administrative law judge erred in failing to address the Section 8(f)(3) defense. Employer did not raise its entitlement to Section 8(f) relief before the district director. However, the administrative law judge found

that the Director did not raise and plead the Section 8(f)(3) defense and stated he would not consider it in his decision. The Board held that because the district director is the Director's authorized representative for receiving applications for Section 8(f) relief and because the evidence established that employer sent copies of its pre-hearing statements raising its entitlement to Section 8(f) relief to the district director as early as eight months before the hearing, the Director was given sufficient notice that Section 8(f) was at issue. The Director's failure to raise and plead the Section 8(f)(3) defense before the administrative law judge prevented him from raising it before the Board. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

The Effect of Settlements and Stipulations

The 1984 Amendments added Section 8(i)(4) to the Act, which precludes Special Fund liability after a Section 8(i) settlement between employer and claimant. This provision applies to settlements approved after enactment of the amendments; the Board held that it did not apply to cases pending on appeal before the Board on the date of enactment, but instead applied only to settlements approved post-enactment. *Brady v. J. Young & Co.*, 18 BRBS 167, 170 (1985) (decision on reconsideration). *See also* Section 8(i) of the desk book.

In cases not affected by this provision, the Board has held that stipulations and agreements between employer and claimant as to the benefits due which impact the liability of the Special Fund are not binding on the Fund absent the participation of the Director. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985); *Younger v. Washington Metro. Area Transit Auth.*, 16 BRBS 360 (1984); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984); *Bentley v. Sealand Terminals, Inc.*, 14 BRBS 469 (1981); *Cabe v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 1144 (1981); *Collins v. Northrop Corp.*, 12 BRBS 949 (1980). In *Brady,* claimant and employer entered into a Section 8(i) settlement prior to enactment of Section 8(i)(4), which therefore did not apply. The Board held that "in cases not affected by the 1984 Amendments, an employer may enter into a binding settlement with claimant resolving all issues regarding employer's liability to claimant, while retaining the ability to pursue Section 8(f) relief before an administrative law judge. Such a settlement resolves only the controversy between employer and claimant; the controversy between employer and the Director, as guardian of the special fund, is a totally separate matter in which claimant has no interest." *Brady*, 17 BRBS 53. However, such a settlement cannot bind the Special Fund to the payment of compensation absent the agreement of the Director. Such issues as nature and extent of disability, average weekly wage, and the work-relatedness of disability, have a direct bearing on the Fund's liability, and agreements between employer and claimant regarding these issues is not determinative as to the Fund's liability, if any. The Board reasoned that under the Act, the Fund's liability is derivative as the Fund is responsible only for a portion of the benefits for which employer is actually liable to claimant. Thus, if the Director does not participate in stipulations or agreements, the administrative law judge must make findings regarding claimant's actual entitlement before addressing the applicability of Section 8(f). *Brady*, 17 BRBS 46; *Misho v. Dillingham Marine & Mfg.*, 17 BRBS 188 (1985).

Stipulations between employer and claimant regarding facts which affect Section 8(f) may be accepted by the administrative law judge if the stipulations are supported by substantial evidence in the record. *Phelps,* 16 BRBS 325. The Board has held, however, that the administrative law judge may not reject stipulations without giving the parties prior notice that the stipulations will not be automatically accepted. *Beltran v. California Shipbuilding & Dry Dock*, 17 BRBS 225 (1985); *Phelps*, 16 BRBS 325; *Erickson v. Crowley Mar. Corp.*,

14 BRBS 218 (1981). The parties must be allowed the opportunity to present evidence in support of the rejected stipulations. *Id*.

The holding in *Brady* does not affect the binding nature of settlements between employer and claimant; the findings which an administrative law judge must make to determine Section 8(f) applicability will not affect claimant's rights against employer under the terms of a settlement. *Brady*, 17 BRBS at 54-55. If the administrative law judge rejects stipulations between employer and claimant for purposes of Section 8(f), the administrative law judge may also decline to bind employer to its stipulations. *Misho*, 17 BRBS 188. The administrative law judge may also, however, choose to bind employer to the stipulations in such a situation. *Beltran*, 17 BRBS 225.

Digests

The Board reversed the administrative law judge's award of Section 8(f) relief where the only evidence on contribution in the record was the parties' stipulation of facts, which was not binding on the Special Fund absent the participation of the Director. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in pert. part and modified on other grounds sub nom. E. P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

Affirming the Board's decision denying Section 8(f) relief, the Ninth Circuit stated that a stipulation between employer and claimant relevant to the contribution element did not constitute substantial evidence sufficient to support an award of Section 8(f) relief where the Director did not participate. The court further noted that the medical reports relied upon by employer were insufficient to establish that claimant's injury alone did not cause claimant's permanent total disability. Because there was no evidence of record pertaining to the contribution element other than the stipulations, the court affirmed the Board's denial of Section 8(f) relief. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Board affirmed the administrative law judge's approval of a settlement agreement between employer and claimant which provided that the Special Fund was liable for claimant's pre-existing hearing loss, even though the Director did not directly participate in the settlement. In the instant case, the district director had previously approved employer's Section 8(f) application, stating that based on a pre-existing 11.3 percent monaural hearing loss, the Special Fund was liable for 5.9 weeks of compensation; thus, the settlement did not bind the Special Fund to anything to which the Director had not previously agreed. The Board held that since employer's entitlement to Section 8(f) relief was established prior to the settlement, the Director constructively participated in the settlement process. *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993).

The Board distinguished the facts of two consolidated hearing loss cases, where the district director either deferred adjudication of employer's request for Section 8(f) relief, or approved employer's request but did not indicate the extent of the Fund's liability, from *Dickinson*, 28 BRBS 84, and held that the Director did not constructively participate in either settlement. Because the Director did not participate, either constructively or explicitly, and the administrative law judge used an incorrect average weekly wage, the administrative law judge erred in approving settlements which affect the liability of the Fund. The settlements were vacated, and the cases were remanded for decisions on the merits. *Byrd v. Alabama Dry Dock & Shipbuilding Corp.,* 27 BRBS 253 (1993).

Where claimant and employer entered into a settlement agreement and one of the provisions sought to reserve employer's right to seek relief from the Special Fund, the Board held that Section 8(i)(4) automatically barred employer's right to seek Section 8(f) relief, as the provision was void as a matter of law. Because the parties entered into the agreement without the participation of the Director and without first obtaining a determination of whether the employer would be entitled to Section 8(f) relief, the Board held that employer was not entitled to relief from the Special Fund. *Strike v. S. J. Groves & Sons*, 31 BRBS 183 (1997), *aff'd sub nom. S. J. Groves & Sons v. Director, OWCP*, 166 F.3d 1206 (3d Cir. 1998)(table).

Rejecting employer's argument that the Board's holding in *Strike,* 31 BRBS 183, that the language of Section 8(i)(4) protects the Special Fund from liability after an employer enters into a Section 8(i) settlement with a claimant, applies only where Section 8(f) is requested after the settlement is approved, the Board affirmed the administrative law judge's determination that employer's claim for Section 8(f) relief was prohibited by Section 8(i)(4). The Board held that a settlement is entered into when it is executed by the parties, not when it is administratively approved. Moreover, the simultaneous submission of the settlement agreement and the stipulations and exhibits in support of employer's claim for Section 8(f) relief foreclosed the administrative law judge's consideration of the request for Section 8(f) relief, since the speedy resolution mechanism of Section 8(i)(1) prevents any delay in litigating issues necessary for a Section 8(f) determination. Consequently, once the settlement is approved, claimant's entitlement is fixed and employer's liability is discharged; Section 8(i)(4) prevents the transfer of liability under the settlement to the Special Fund, and as employer's liability is discharged, the Fund's derivative liability is also discharged. *Cochran v. Matson Terminals, Inc.*, 33 BRBS 187 (1999).

The Ninth Circuit rejected the Director's contention that the administrative law judge and Board should not have awarded Section 8(f) relief based on a stipulation in which the Director did not concur, since the stipulations that the employee could not return to his usual employment and setting the employee's residual wage-earning capacity and employer's liability for attorney's fees did not purport to establish the Special Fund's liability. The Director participated in the hearing, but did not object to the matters on which the parties stipulated; thus, his right to object was waived. The Ninth Circuit further

observed that the administrative law judge heard evidence and independently arrived at the finding, not based on the stipulation, that the employer was entitled to Section 8(f) relief because of the employee's previous broken back. *Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998).

Noting that the facts of the instant case are similar to those presented in *Coos Head*, 194 F.3d 1032, 33 BRBS 131(CRT), and are distinguishable from those presented in *Strike*, 31 BRBS 183, and *Cochran*, 33 BRBS 187, the Board affirmed the administrative law judge's finding that employer is entitled to Section 8(f) relief and that its entitlement is not precluded by Section 8(i)(4). The Board noted that like *Coos Head*, the private parties' settlement agreement did not seek to subject the Special Fund to liability and that while it did affect the liability of the Special Fund in that it set out the extent of permanent disability and the level of claimant's loss of wage-earning capacity, the Director had already conceded those issues as well as employer's entitlement to Section 8(f) relief "upon agreement of the parties as to the extent of permanent disability and/or the level of claimant's loss in wage-earning capacity." Additionally, the Board observed that the Director's concession regarding Section 8(f) relief for liability based on the agreement of the parties as to claimant's loss in wage-earning capacity was the distinguishing feature from *Strike* and *Cochran*. *Nelson v. Stevedoring Services of Am.*, 34 BRBS 91 (2000), *aff'd on recon*., 35 BRBS 55 (2001).

In a decision on reconsideration, the Board clarified its earlier decision, holding that the administrative law judge's decision reflected approval of a Section 8(i) settlement agreement which is not subject to modification. The Board however also held employer's claim for Section 8(f) relief was not barred by Section 8(i)(4). The Board relied on the fact that the Director explicitly, in writing, conceded employer's entitlement to Section 8(f) relief for any permanent partial disability in his pre-hearing statement, whether after a hearing or upon agreement of the parties. The Director thus gave his specific approval to the parties' resolving this claim by agreement and nothing in the Director's document restricted this approval to agreements based on stipulations as opposed to ones contained in an approved Section 8(i) settlement. The Director provided this approval *prior* to the time that the parties entered into their agreement and sought and received approval by the administrative law judge. Moreover, the Board noted that the purpose of Section 8(i)(4) was satisfied as the Director was provided with, and in fact participated in the case, prior to the time the settlement was entered into. *Nelson v. Stevedoring Services of Am.*, 35 BRBS 55 (2001), *aff'g on recon.* 34 BRBS 91 (2000).

The Board affirmed the administrative law judge's conclusion that Section 8(i)(4) barred the employer's claim for Section 8(f) relief. The Director has no obligation to respond to a request for Section 8(f) relief prior to approval of a settlement. Thus, the employer cannot assert reliance on the Director's silence as constructive acceptance of its application for Section 8(f) relief. The Board noted that, assuming arguendo, the settlement was executory until it was approved, such is of no legal significance given the administrative law judge's

subsequent approval of the parties' settlement. *Johnson v. BAE Sys. Se. Shipyard*, 49 BRBS 67 (2015).

As the Director stipulated that the Special Fund was liable for permanent total disability benefits commencing on a certain date, the Board modified the administrative law judge's award of benefits to reflect employer's entitlement to Section 8(f) relief. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

The Board vacated the administrative law judge's finding, based on the parties' stipulation, as to the date the Special Fund shall assume liability for claimant's permanent partial disability benefits relating to his cervical injury because the administrative law judge's decision lacked specific findings or stipulations regarding the dates claimant reached maximum medical improvement and as to claimant's post-injury wage-earning capacity. In particular, the Board observed that the record: (1) contains conflicting evidence regarding the date on which claimant reached permanency with regard to his injury; and (2) it does not contain any evidence of suitable alternate employment or explanation as to why the extent of claimant's disability changed from total to partial as of September 30, 2006. Nonetheless, the Board affirmed the administrative law judge's determination that claimant is entitled to an award of disability benefits relating to that injury, as well as her finding that employer has established the requisite elements for entitlement to Section 8(f) relief. *Bomback v. Marine Terminals Corp.,* 44 BRBS 95 (2010).

The Director can challenge stipulations that affect Section 8(f). The Board vacated the administrative law judge's order based on stipulations which evinced an incorrect application of law regarding: the proper maximum rate, an improper waiver of claimant's entitlement to interest, the failure to account for benefits for all injuries and time periods of disability, and the failure to properly consider the law for concurrent awards. The parties cannot merely "agree" via stipulation that claimant has been fully compensated. The Board remanded the case for the administrative law judge to make findings of fact or accept proper stipulations and issue an award. Employer must pay benefits for all temporary disability and 104 weeks of permanent disability before the Special Fund can be held liable under Section 8(f). *Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010).

Employer's Liability—One Period or Two?

The Board has held that in cases where permanent partial disability is followed by permanent total disability due to the same injury, and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. *Huneycutt v. Newport News Shipbuilding & Dry Dock Co*., 17 BRBS 142 (1985). *See Cabe v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 1144 (1981). In *Huneycutt*, the Board held that to the extent the holding in *Davenport v. Apex Decorating, Inc.*, 13 BRBS 1029 (1981), which had assumed that separate periods would apply, is inconsistent, it is overruled. The Board in *Davenport* remanded the case for reconsideration, and on appeal of the decision on remand, the Board vacated its prior holding, and held that employer was liable for only one period of disability for permanent partial and total disability, consistent with *Huneycutt*. *Davenport v. Apex Decorating Co.*, 18 BRBS 154 (1986).

The Board has similarly held that in cases where total permanent disability is followed by work-related death, and the elements of Section 8(f) are met with respect to both Sections 8 and 9 benefits, employer is only liable for one period of 104 weeks. *Sawyer v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 270 (1982); *Graziano v. Gen. Dynamics Corp.*, 14 BRBS 950 (1982), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.,* 705 F.2d 562, 15 BRBS 130(CRT) (1st Cir. 1983).

Employer must establish that Section 8(f) applies to each successive type of benefits sought. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Fineman v. Newport News Shipbuilding & Dry Dock Co.,* 27 BRBS 104 (1993). Thus, where claimant's pre-existing permanent partial disability is work-related and is the basis for establishing employer's entitlement to Section 8(f) relief for a later period of total disability compensable under the Act, Section 8(f) does not apply to employer's liability for payment of compensation for the permanent partial disability. *Hastings v. Earth-Satellite Corp.,* 8 BRBS 519 (1978), *aff'd,* 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Hart v. Berg Shipyards, Inc.*, 8 BRBS 146 (1978). In *Hastings,* the Board held that employer was liable for the full continuing permanent partial disability award and for 104 weeks of concurrent permanent total disability, with the Special Fund liable only for the total disability benefits thereafter.

Where claimant sustains two separate unrelated injuries to which Section 8(f) applies, employer is liable for two periods of benefits. *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002); *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990).

Digests

The Board's decision in *Honeycutt*, 17 BRBS 142, in which it held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to

both periods of disability, employer is liable for only one period of 104 weeks, is not applicable where claimant's permanent total disability award is for a totally new injury which is unrelated to his permanent partial disability. *Cooper v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 284 (1986).

The Board affirmed an administrative law judge's determination that under *Graziano*, 14 BRBS 950, employer's liability is limited by Section 8(f) to one period of 104 weeks where decedent's death was found to be unrelated to his employment but death benefits were awarded based on decedent's permanent total disability at time of death under pre-1984 Section 9 (this provision was repealed by the 1984 Amendments). To hold otherwise would nullify Section 8(f) for that class of cases. The Board rejected Director's argument that Section 8(f) was intended to limit employer's liability to no more than 104 weeks on each type of claim (death and disability). *Bingham v. Gen. Dynamics Corp.*, 20 BRBS 198 (1988).

In a case involving an award of death benefits where claimant was permanently totally disabled and died from unrelated causes, the Board held that the administrative law judge erred in denying Section 8(f) relief for the payment of death benefits where Section 8(f) relief had been awarded with regard to the payment of disability compensation. The Director agreed that under *Graziano,* 14 BRBS 950, employer was liable for only one period of 104 weeks from the date of permanent total disability and modified the award accordingly. *Hickman v. Universal Mar. Serv. Corp.*, 22 BRBS 212 (1989).

It is consistent with the Act to assess employer for only one 104 week period of liability, pursuant to Section 8(f), for all disabilities arising out of the same injury. This rationale is equally applicable to awards for permanent partial disability and death benefits arising from the same injury; it is immaterial that the death benefits were paid before the permanent partial disability benefits. This rationale had previously been applied to awards for permanent partial followed by permanent total, and to awards for permanent total followed by death benefits. *Henry v. George Hyman Constr. Co.*, 21 BRBS 329 (1988).

Where employer claimed Section 8(f) relief and the case involved two separate claims, in this case a Section 8(c)(23) claim and Section 9 death benefits claim, employer's entitlement to Section 8(f) relief must be separately evaluated in regard to each claim. If Section 8(f) applies to both claims, employer is only liable for one period of 104 weeks. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

The Fourth Circuit affirmed the Board's agreement with the Director's interpretation of Section 8(f) which allowed for a new 104 week liability period to be assessed against employer, under certain circumstances, for successive work-related injuries. In the instant case, claimant suffered a permanent partial disability to his back and employer was awarded Section 8(f) relief. Subsequently, claimant developed carpal tunnel syndrome which combined with his prior back injury to produce total disability. As the subsequent

injury was new and distinct from the earlier injury, employer was held liable for a second 104 week period of liability under Section 8(f). *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990).

Where claimant's award for permanent partial disability after the first 2.4 years was a *de minimis* award, the Director did not contest employer's entitlement to Section 8(f) relief for the first period of permanent partial disability, but asserted it was inapplicable to the *de minimis* portion. The Board rejected this contention, holding employer liable for only one period of 104 weeks for all permanent disabilities arising out of the same injury consistent with *Huneycutt*, 17 BRBS 142, and its progeny. The Board noted that the policy considerations behind the holding that employer cannot receive Section 8(f) relief in a *de minimis* case is absent here, as employer is liable for the greater disability. *Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), *aff'd on recon.*, 25 BRBS 114 (1991), *rev'd mem. on other grounds*, No. 91-1601 (D.C. Cir. Dec. 18, 1992).

Where claimant sustained injuries to both knees, employer was liable for two separate 104-week periods under Section 8(f), as these were two distinct injuries, resulting in distinct compensable disabilities, notwithstanding that the injuries arose from the same working conditions. The language of Section 8(c)(2) lends support to this interpretation, as it provides compensation for "leg lost" in the singular, and Section 8(c)(22) provides for award of compensation for *each* member injured, with several specific exceptions not applicable here. Thus, the Board's decisions in *Huneycutt,* 17 BRBS 142, and its progeny were not applicable in this case, which is similar to *Howard*, 904 F.2d 206, 23 BRBS 131(CRT), and *Cooper*, 18 BRBS 284*,* holding employer liable for two periods of 104 weeks for disabilities due to unrelated injuries. The Board rejected employer's argument that being held liable for two 104-week periods under Section 8(f) provides a disincentive to hire and retain handicapped employees, thereby undermining the policy considerations behind Section 8(f), based on the Fourth Circuit's rejection of this argument in *Howard*. *Berg v. Matson Terminals, Inc.*, 34 BRBS 140 (2000), *aff'd*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002).

The Ninth Circuit affirmed the Board's decision that the Special Fund's liability under Section 8(f) commenced after a period of 104 weeks for each of claimant's knee injuries, because claimant suffered discrete injuries to both knees, albeit in the same incident. The court reasoned that employer was liable for two 104-week periods instead of one because claimant's working conditions, even if arising from the same accident, caused two injuries that are separately compensable under the Act. *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002).

Because claimant sought death benefits and compensation for decedent's permanent partial disability, employer must raise and show entitlement to Section 8(f) relief for each claim separately. Where both types of benefits have been awarded and where 8(f) applies to each, an employer is liable for only one 104-week period of payments if the disability and

death arose from the same injury. If the employee sustained successive injuries, employer may be liable for one 104-week period on both the disability and death claims. Because the administrative law judge in this case did not separately analyze employer's entitlement to Section 8(f) with regard to each claim, and because he did not discuss which conditions constituted a pre-existing permanent partial disability, the Board remanded the case for further consideration. *Fineman v. Newport News Shipbuilding & Dry Dock Co.,* 27 BRBS 104 (1993). *See also Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995); *Perry v. Bath Iron Works Corp.,* 29 BRBS 57 (1995).

Because Section 8(f)(1) delineates an employer's potentially differing periods of liability for scheduled and unscheduled partial awards, and because that difference affects the Special Fund's secondary liability, the Board agreed with the Director and held that where a claimant is awarded benefits under the schedule as well as under Section 8(c)(21), an employer must seek and prove entitlement to Section 8(f) relief on each award separately. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

Liens and Credits

The Board held that where claimant is receiving benefits from the Special Fund under Section 8(f) and enters into a third-party settlement, *see* 33 U.S.C. §933, the Fund is entitled to a lien on the proceeds of the settlement. *Carter v. Director, OWCP*, 15 BRBS 481 (1983), *rev'd sub nom. Carter v. Director, OWCP,* 751 F.2d 1398, 17 BRBS 18(CRT) (D.C. Cir. 1985). The Board held that a right of subrogation and lien in favor of the Fund was consistent with the statutory purpose of avoiding double recovery despite the lack of a specific statutory reference to the Special Fund in Section 33. The D.C. Circuit reversed this decision on the basis that any equitable right of subrogation for the Fund would allow it to recover only monies related to the injury for which it was liable, and in this case, it could not be said how much of the recovery under Section 8(f) was due to the first or second injury. This issue has been addressed by the 1984 Amendments to Section 33, 33 U.S.C. §933(g)(3), which explicitly provides the Fund a lien on the proceeds of any settlement or judgment against a third person described in Section 33(a).

In cases where the "credit doctrine" applies to allow a credit for prior payments for a scheduled injury against a successive injury to a scheduled body part, *see, e.g., Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc), and Section 8(f) is applicable, employer is fully liable for all benefits due to the second injury. Thus, the Special Fund may receive the benefit of some or all of the prior payments credited against the subsequent liability.

Digests

Pursuant to the credit doctrine, where a claimant is compensated by employer for a scheduled injury, and a second injury results in an increased scheduled disability, employer is entitled to a credit for the dollar amount of the prior payment against its liability for 104 weeks pursuant to Section 8(f). In its Decision on Reconsideration, the Board reaffirmed application of both the credit doctrine and Section 8(f) relief in the same case. Employer was liable for payment of 104 weeks of compensation with a credit for compensation previously paid relative to the pre-existing disability. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd in part and rev'd in part sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

The Fifth Circuit reversed the Board, holding that when a second scheduled injury increases a claimant's pre-existing permanent partial disability and where this second injury alone results in over 104 weeks of compensation, then whenever a credit for previous compensation paid as a result of the initial injury is available to offset the present amount due claimant, that credit shall first reduce the total award before there is any allocation of liability under Section 8(f). This reduction in the total award due as a result of the second injury will effectively apply the credit to the Special Fund's liability first, with any credit

remaining to be applied employer's liability. The court affirmed the Board, further holding that the amount of the credit to be allowed against the total award shall be the actual dollar amount of payment that was previously made to claimant as a result of the initial injury. *Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

The Board held that employer is entitled to a credit for its voluntary payments of benefits and to reimbursement from the Special Fund for its voluntary payments which were in excess of its liability due to the operation of Section 8(f). *Krotsis v. Gen. Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990).

The Second Circuit affirmed the Board's holding that the Special Fund had to reimburse employer for its voluntary advance payment of compensation which was overly generous due to the operation of Section 8(f). Employer, not the Special Fund, received the credit under Section 14(j) for the advance payment in this case. The court distinguished *Brown*, 868 F.2d 759, 22 BRBS 47(CRT), on the grounds that in *Brown*, unlike this case, there were no pre-employment disabilities, and Bethlehem's payments were entirely for work-related injuries. Under those circumstances, granting employer a credit would result in an underpayment of employer's liability. Here, claimant had a pre-employment hearing loss, which employer compensated in addition to compensating claimant for his entire hearing loss due to his employment. Thus, employer gets a credit for its overpayment and the Fund must reimburse that portion of its liability paid by employer. *Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990).

The Board held that employer was entitled to reimbursement from the Special Fund for overpayments of compensation due to the operation of Section 8(f). In this case, allowing employer a credit did not absolve employer of its liability for the full extent of claimant's hearing loss attributable to his employment with employer, as the Fund's liability was fixed at the extent of claimant's pre-employment hearing loss under amended Section 8(f), regardless of claimant's overall hearing impairment rating. *Balzer v. Gen. Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon. en banc*, 23 BRBS 241 (1990) (Brown, J., dissenting).

The Second Circuit followed *Brown*, 868 F.2d 759, 22 BRBS 47(CRT), on the facts of this case and held that where an employee who has previously received compensation for a hearing loss which was entirely work-related brings a second injury claim alleging that his hearing loss has worsened, the Special Fund, and not the employer, is to receive the benefit of the credit. In so concluding, the court distinguished *Krotsis*, wherein the claimant had a pre-existing non-work related hearing loss and employer was entitled to the credit, noting that as claimants Blanchette and Wilcox did not exhibit any pre-employment hearing loss, awarding the credit to the Special Fund rather than to the employer would not unfairly result in the employer's being held liable for a disability which was not work-related. The

court further determined that allowing the Special Fund a credit under such circumstances was consistent with the express language of Section 8(f)(1) of the Act which indicates that the employer is to compensate the disabled employee for the entire second injury and with Congressional intent to control the unrestrained growth of the Special Fund's obligations by ensuring that employer pays the full stake specified in Section 8(f). *Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993).

In a hearing loss case in which the claimant filed three separate claims, the Board remanded for consideration of whether the second employer was entitled to Section 8(f) relief. If, on remand, the administrative law judge found that the second employer was entitled to Section 8(f) relief, the Board held that the credit for the previous hearing loss settlement would properly be applied to reduce the liability of the Special Fund pursuant to *Blanchette*, 998 F.2d 109, 27 BRBS 58(CRT), and *Brown*, 868 F.2d 759, 22 BRBS 47(CRT). With regard to the administrative law judge's finding that the third employer is entitled to relief pursuant to Section 8(f), the Special Fund would be liable for the additional compensation attributable to the pre-existing impairments based on the higher average weekly wage in effect at the time of the third injury. *Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003).

The Board agreed with the administrative law judge's conclusion that employer was not entitled to Section 8(f) relief from its liability for claimant's award of benefits under Section 8(c)(2), although it so held on grounds others than those espoused by the administrative law judge. Specifically, because of the rule providing that the Special Fund is to obtain the benefit of the credit in those cases involving the credit doctrine and Section 8(f), *Brown*, 868 F.2d 759, 22 BRBS 47(CRT), thereby requiring an employer to pay for at least the full extent of the second injury, the Board held that even if the elements of Section 8(f) had been established, employer could not benefit from Section 8(f) in this case. The Act requires an employer to pay the greater of 104 weeks of benefits or the number of weeks attributable to the second injury. Whether this amount is the number of weeks due under the schedule or to an adjustment made by the administrative law judge due to a concurrent award situation, the employer must still pay all of the benefits attributable to the second injury. Thus, in this instance, employer is liable for scheduled benefits for the full number of weeks exceeding those needed to account for claimant's pre-existing disability, for which claimant previously received benefits and for which the Special Fund takes the credit. As the administrative law judge took the previous settlement amount into account in making his calculations and prior to making adjustments for the concurrent awards, employer is liable for the full amount awarded. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

Miscellaneous

Where claimant properly withdrew his Longshore claim to exclusively pursue a claim under the state workers' compensation statute, the Board held that employer was entitled to a hearing on its request for Section 8(f) relief regardless of whether claimant had withdrawn his claim for benefits under the Act. The Board noted, however, that a finding that employer was entitled to Section 8(f) relief would not affect employer's obligations under the state statute. The Board deferred to the Director's position that, notwithstanding that any liability of the Special Fund would be completely offset pursuant to Section 3(e) by the state benefits paid by employer, a finding of Special Fund liability would benefit employer with respect to the calculation of employer's assessment under Section 44. *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., concurring and dissenting).

Where the Board modified the administrative law judge's date of permanency to an earlier date, the Special Fund should have assumed liability sooner. Employer is entitled to reimbursement of overpaid compensation from the Special Fund in a lump sum with interest. To the extent claimant received Section 10(f) adjustments from employer during periods of temporary total disability, he was overpaid. As Section 8(f) applies, Special Fund may withhold an increment of claimant's periodic payments, and repay employer for its Section 10(f) overpayments in periodic installments. *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *vacated in part on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990)(en banc).

The Board held that in light of its determination that employer was solely liable for the payment of claimant's benefits, employer must reimburse the state for the money the state paid to claimant on employer's behalf. In addition, because the Board reversed the administrative law judge's award of Section 8(f) relief, the Board determined that employer must also reimburse the state for the payments made by the state on behalf of the Special Fund. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Ninth Circuit modified the Board's decision to hold that employer must pay claimant an amount equal to the state payments and claimant must then repay the state. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Board remanded the case to the administrative law judge for the entry of an award (or denial) of benefits based on the agreement of the parties or after a hearing on the merits. The administrative law judge was procedurally barred from considering employer's entitlement to Section 8(f) relief where an award of benefit had not yet been entered. Without an award, there is no way to know whether there will be an award of permanent benefits of more than 104 weeks, if the Director agreed to any stipulations of the private

parties, or if employer was seeking Section 8(f) relief after it agreed to a Section 8(i) settlement, in violation of Section 8(i)(4). *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999).

Although the Board remanded the case for the administrative law judge to resolve the compensation claim, it held that employer's appeal of the denial of Section 8(f) relief was not premature in this case because the denial was based on the application of Section 8(f)(3). As the issue of the timeliness of the application is not contingent upon the extent of claimant's permanent disability, the Board agreed to address employer's arguments on appeal. *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005).

In this case where claimant had previously been awarded temporary total disability benefits based on claimant's and employer's stipulations, the administrative law judge granted claimant's motion for modification on the basis that a mistake in a determination of fact had been made in the 2002 decision regarding the nature of claimant's disability. Having found that claimant, in fact, had reached maximum medical improvement on September 14, 2000, the administrative law judge awarded permanent total disability benefits as of that date. On modification, the administrative law judge granted employer's request for Section 8(f) relief, and found that employer's liability for permanent total disability benefits is limited to the period of 104 weeks commencing September 14, 2000. On appeal, the Director challenged the commencement date for the award of Section 8(f) relief, contending that the administrative law judge erred by modifying the award of benefits retroactively to September 2000. The Board rejected the Director's contention that the administrative law judge granted modification based on a change in condition and, that, thus the award of permanent total disability benefits could not predate the decision being modified. Accordingly, the Board affirmed the commencement date for the Section 8(f) award found by the administrative law judge. *Buttermore v. Elec. Boat Corp.,* 46 BRBS 41 (2012).