BRB No. 92-0472

TERRY BLOODSWORTH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SCAFFOLDING RENTAL & ERECTION COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Jerry L. Hutcherson, Pascagoula, Mississippi, for claimant.

Phillip W. Jarrell (Dukes, Dukes, Keating & Faneca, P.A), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-580) of Administrative Law Judge Ben H. Walley rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act).[1] We must affirm the

[1]Initially, employer appealed and claimant cross-appealed the administrative law judge's Decision

findings of fact and the conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This claim arises from an injury to his left knee sustained by claimant while working for employer on December 3, 1986. Prior to this injury, claimant suffered injuries to both knees in 1976 and 1977 while employed by Frigitemp Marine which resulted in a 5 percent permanent impairment of each knee. Following his 1986 injury, claimant's right knee also worsened. After providing conservative treatment and performing several surgical procedures, Dr. Enger, an orthopedic surgeon, determined that claimant's knees reached maximum medical improvement on September 15, 1988, with a resulting 20 percent permanent physical impairment to each leg and limited him to light sedentary work.

Subsequently, the condition in both of claimant's knees deteriorated, and claimant ultimately underwent knee replacement surgeries in May and August 1990, which were performed by Dr. Longnecker, another orthopedic surgeon. On January 1, 1991, Dr. Longnecker opined that claimant had reached maximum medical improvement and assessed claimant as having a 50 percent permanent physical impairment of each leg.

Employer voluntarily paid claimant temporary total disability benefits from December 29, 1986 through September 15, 1988, and 62 weeks of scheduled permanent partial disability benefits thereafter for the injury to claimant's left knee. Claimant sought additional temporary total disability, permanent partial disability, and permanent total disability benefits under the Act.

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and Order. Both appeals were dismissed, and the case was remanded for consideration of a settlement. On March 6, 1996, employer's appeal was reinstated on the Board's docket, as the proposed settlement had not been approved, and this date commenced the one-year period for review provided by Pub. L. Nos. 104-134 and 104-208. On January 8, 1997, after a diligent effort to obtain the record in this case failed, the Board remanded the case to the District Director for reconstruction of the record, indicating once this was achieved, employer's case would be reinstated on the Board's docket. Inasmuch as the Board received the record from the District Director on February 4, 1997, we hereby reinstate employer's appeal, BRB No. 92-472.

In his Decision and Order, the administrative law judge awarded claimant permanent partial disability benefits for a 20 percent permanent physical impairment of each leg from September 15, 1988, to January 1, 1991.[2] Moreover, based on Dr. Longnecker's opinion that as of the time claimant reached maximum medical improvement from his knee replacement surgeries he was limited to performing sedentary work, and employer's failure to introduce evidence of suitable alternate employment available during this period, the administrative law judge awarded claimant permanent total disability compensation commencing January 1, 1991. In addition, the administrative law judge awarded claimant medical benefits and found that employer was entitled to a credit for the compensation it paid previously and to relief under Section 8(f) of the Act, 33 U.S. C. §908(f), commencing 104 weeks from January 1, 1991.[3]

On appeal, employer contends that the administrative law judge erred in holding it liable for permanent partial disability benefits and future medical expenses for claimant's right leg. Employer further asserts that the administrative law judge erred in awarding claimant permanent partial disability compensation as of September 15, 1988, in addition to permanent total disability compensation, rather than finding claimant permanently totally disabled as of September 15, 1988. Employer argues that its liability under Section 8(f) is limited to one period of 104 weeks of compensation commencing on the date of maximum medical improvement, September 15, 1988. Finally, employer avers that it is entitled to reimbursement from the Special Fund or alternatively from the claimant for any overpayment pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j).[4] Neither claimant nor Director responded to employer's appeal.

Initially, we reject employer's argument that the administrative law judge erred in holding it liable for disability and medical benefits for claimant's right leg. Employer asserts the disability in this leg is attributable to claimant's prior 1977 injury. In establishing that an injury arises out of his employment, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). An employment injury need not be the sole cause of a

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[2]The administrative law judge found claimant was temporarily totally disabled during his periods of recovery from both knee replacement surgeries, but limited claimant to his scheduled permanent partial disability benefits on the theory that claimant voluntarily rendered himself temporarily totally disabled by electing to undergo the knee replacement surgeries against the advice of his treating physician, Dr. Enger. These findings are not at issue on appeal.

[3]Section 8(f) shifts the liability to pay compensation for permanent partial disability, permanent total disability, and death benefits after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. To obtain the benefit of Section 8(f) relief, employer must show (1) that the employee had a pre-existing permanent partial disability, (2) that this disability was manifest to the employer prior to the subsequent injury, and (3) that the subsequent injury alone would not have caused claimant's permanent disability or death. *Director, OWCP v. General Dynamics Corp. (Bergeron)*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

[4]Section 14(j) of the Act, 33 U.S.C. §914(j), provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

disability; rather, if the employment aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.

In the instant case, the administrative law judge did not apply the Section 20(a) presumption in analyzing the cause of claimant's problems with his right knee. Any error in this regard is harmless, as the record contains the uncontradicted testimony of Drs. Enger and Longnecker which establishes that claimant's right knee condition was either aggravated directly in the 1986 accident or is the natural and unavoidable result of an altered gait disturbance resulting from claimant's work-related injury to his left knee. CX-59 at 8, 17; CX-60 at 16. Inasmuch as employer, in contrast, has failed to set forth specific and comprehensive evidence in support of its allegation that claimant's right knee condition is not related to his December 3, 1986 work injury, we affirm the administrative law judge's finding that claimant's right leg condition is a compensable consequence of his December 3, 1986 work injury. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS at 140 (1991); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988).

Employer's argument that the administrative law judge erred in failing to find claimant permanently totally disabled as of September 15, 1988, is also rejected because it is lacking any evidentiary basis in the record. The administrative law judge's finding that as of September 15, 1988, claimant was only partially disabled is rational, in accordance with applicable law, and is supported by substantial evidence. *O'Keeffe*, 380 U.S. at 359. Dr. Enger, whom the administrative law judge credited in assessing the extent of claimant's permanent partial disability, opined that as of September 15, 1988, claimant was capable of sedentary work within certain restrictions. Employer's vocational expert, Mr. Tingle, conducted several labor market surveys and identified specific and general job opportunities within those restrictions available to claimant as of October 1988 which he felt were consistent with claimant's age, education, and work experience. CX-18; *see also* CXS-14, 23, 25; Tr. at 74-81. Thus, while claimant established a *prima facie* case of total disability as of September 15, 1988, by demonstrating he was no longer able to perform his usual work, *see New Orleans [Gulfwide] Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), he was only partially disabled and thus limited to an award under the schedule because employer established the availability of suitable alternate employment. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212, 224 (1994)(Smith, J., dissenting on other grounds); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Accordingly, employer's argument that the administrative law judge erred in failing to limit its liability to one period of 104 weeks of permanent total disability compensation commencing September 15, 1988, is rejected, and we affirm the administrative law judge's finding that claimant is entitled to permanent partial and permanent total

disability benefits.

Nonetheless, we agree with employer that on the facts presented in this case its liability should have been limited under Section 8(f) to one period of 104 weeks commencing on the date claimant's disability became permanent. In cases 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. *See, e.g., Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985). In awarding Section 8(f) relief, the administrative law judge determined that claimant's "disabilities are the result of his several injuries and surgeries necessitated thereby and that the recurrences were successive injuries increasing in rating to become total." Decision and Order at 16. As claimant's permanent total disability resulted from the deterioration of the same knee injuries which rendered him partially disabled as of September 15, 1988, both awards arise from the same operative facts. Thus, if the elements for Section 8(f) relief are met as to the permanent total disability,[5] they are also met as to the permanent partial disability. Accordingly, based on the uncontested award of Section 8(f) relief, we modify the Decision and Order to reflect that employer's liability is limited to one period of 104 weeks of permanent disability benefits commencing September 15, 1988. The Special Fund is liable for all additional disability compensation owed thereafter. *See generally Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). Employer is entitled to reimbursement from the Special Fund for its overpayment of benefits.

[5]The Director has not appealed the administrative law judge's findings regarding Section 8(f).

Accordingly, the administrative law judge's decision is modified to provide that employer is liable for 104 weeks of permanent disability benefits commencing September 15, 1988, and the Special Fund is liable for benefits thereafter. The Special Fund shall reimburse employer for benefits paid in excess of this amount. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge