BRB No. 92-0701

LAWRENCE W. KUBIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRO-FOOTBALL, INCORPORATED d/b/a WASHINGTON REDSKINS	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Samuel B. Groner, Administrative Law Judge, United States Department of Labor.

Gerald Herz (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for claimant.

William S. Hopkins and Williams S. Sands, Jr. (McChesney, Duncan and Dale, P.C.), Washington, D.C., for employer/carrier.

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

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

PER CURIAM:

Employer appeals the Decision and Order (89-DCW-53) of Administrative Law Judge Samuel B. Groner 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.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973) (the 1928 Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a professional football player for the Washington Redskins from 1981 until 1985, injured his back while performing mandatory weight lifting for the Redskins on October 14, 1981. Prior to being drafted by the Redskins, claimant played college football for Pennsylvania State University, where he sustained several injuries, including a September 1980 injury to his right knee, which kept him out of play his last season at Penn State and from playing, but not practicing, during his first year with the Redskins. After the 1981 season, claimant played regularly for the Redskins for the next three seasons, passing all pre-season physicals. Although there are numerous entries in the trainer's records of back problems, claimant missed no additional playing time due to his back condition.

In August 1985, claimant was traded to the Buffalo Bills; he played in two games for that team and was released, having suffered no additional injuries. Shortly thereafter, he was hired as a free agent by the Tampa Bay Buccaneers. He played three games for Tampa Bay, and then sustained an injury to his left knee. In the summer of 1986, after being released by Tampa Bay, claimant attended "mini-camp" with the Kansas City Chiefs. After experiencing a recurrence of back pain, however, he voluntarily left mini-camp, and decided to retire from football. After leaving football, claimant initially obtained work selling insurance and thereafter worked as a sales representative for a financial and legal printing company, a position he continued to hold as of the time of the hearing. Claimant filed a claim against employer for permanent partial disability compensation, alleging that the October 14, 1981, back injury he sustained with the Redskins caused an end to his football career in 1986, and resulted in a loss of wage-earning capacity in his post-football career.

The administrative law judge found that, as claimant suffered a disabling injury on October 14, 1981, from which he never fully recovered, employer was liable for claimant's benefits. Although the administrative law judge also found that claimant suffered other injuries in football, particularly to his knee and ankle, he found that there was no evidence that these injuries were ever more than temporarily disabling. The administrative law judge then calculated claimant's average weekly wage based on his 1985 base salary and the average of the incentives and bonuses he received over his five-year football career and awarded him permanent partial disability benefits at one rate for the projected remainder of his football career and at another rate for his post-football career. Finally, the administrative law judge denied employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge's finding that claimant's retirement from football and his subsequent disability were the result of his October 14, 1981, injury is not supported by substantial evidence. Employer also contends that the administrative law judge erred in calculating claimant's average weekly wage based on his 1985 earnings instead of his earnings immediately prior to the October 14, 1981, injury, and in awarding compensation which exceeded the maximum compensation rate allowable under Section 6(b) of the Act, 33 U.S.C. §906(b). Employer further contends that the administrative law judge erred in determining that claimant sustained a 10 percent loss of wage-earning capacity in his post-football career, and in denying Section 8(f) relief. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, also responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Causation

Employer initially avers that the administrative law judge erred in finding a causal link between claimant's 1981 injury and his retirement from professional football and subsequent disability, arguing that claimant's October 14, 1981, injury was either a temporary aggravation of a pre-existing problem or, alternatively, an injury from which claimant fully recovered by early 1982. In establishing that an injury is causally related to employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990). In the present case, claimant is entitled to invocation of the Section 20(a) presumption as it is undisputed that he sustained a harm, a disabling back condition, and that an incident occurred on October 14, 1981, while performing mandatory exercises for employer which could have caused the harm. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57, 59 (1994); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by the employment event. *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). In a case where employer alleges a subsequent intervening cause of claimant's condition, employer may also rebut the presumption by proving that the disabling condition was not the natural and unavoidable result of the work injury. *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). While employer is correct that Section 20(a) does not aid claimant in establishing the degree of disability, it is applicable in analyzing the cause of a disabling condition. Thus, employer here bears the burden of proving that claimant's back condition was not due to the October 1981 injury, and employer's argument to the contrary, that claimant bears the burden of proof in this regard, is rejected.

We affirm the administrative law judge's determination that claimant's back condition is the natural and unavoidable result of his October 14, 1981, injury while employed by employer, because it is rational and supported by substantial evidence. In reaching this conclusion, the administrative law judge did not specifically invoke the Section 20(a) presumption. Any error in this regard is harmless as, contrary to employer's contentions, his decision is supported by substantial evidence; the administrative law judge considered the relevant evidence and applied the appropriate legal

standard in determining whether claimant's disability was the natural and unavoidable result of the work injury or due to other causes. *See Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *White*, 29 BRBS at 9.

In relating claimant's disabling back condition to the October 14, 1981, injury, the administrative law judge noted that claimant's uncontradicted testimony that he never fully recovered from the effects of that injury was consistent with notations contained in the training records for each of the professional clubs for which he played. These records reflect claimant's continued complaints of low back pain and contain numerous references to treatment of his low back with ultrasound, whirlpool, massage, ice, and, on at least one occasion, traction. These records also indicate that claimant would occasionally work a limited practice due to his back, and there is at least one notation that he was given Empirim to help relieve the pain and relax his back. Ex. 2. Furthermore, Preston Lamar "Bubba" Tyer, the head athletic trainer for the Redskins, testified that claimant had recurrence of symptoms involving the same type of low back problem when he was with the Redskins while he was practicing, playing, or lifting weights and that he saw claimant regarding his back at least once after claimant left the Redskins. Ex. 13 at 11, 13.

Contrary to employer's arguments on appeal, the administrative law judge specifically considered and rejected employer's argument that claimant's disability was due to his prior and subsequent injuries in concluding that claimant never fully recovered from the October 14, 1981, injury. The administrative law judge found that while claimant had suffered other injuries, particularly to his knees and ankles, there was no evidence that these injuries were more than temporarily disabling, a finding which is consistent with the record. *See* discussion *infra* at 9. Although, as employer contends, the administrative law judge did not explicitly address claimant's prior back problems while at Penn State in assessing the cause of his disabling condition, his failure to do so is harmless; employer would not be relieved of liability in any event because under the "aggravation rule," where an employment-related injury aggravates, accelerates, or combines with an underlying condition, employer remains liable for the entire resultant condition.[1] *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Kooley v. Marine Industries, Northwest*, 22 BRBS 142 (1989). Moreover, employer's argument that the October 14, 1981, injury was merely a temporary aggravation of claimant's prior Penn State back injuries is rejected as it is lacking any evidentiary basis in the record. In addition, in relating claimant's disability to the October 14, 1981, injury, the administrative law judge also considered but rejected employer's argument that claimant's disability was due to the subsequent lumbar strain he sustained in 1986 when he was with Kansas City, based on his determination that the physicians rendering relevant opinions were non-committal regarding whether this was a new injury or a reoccurrence of the 1981 injury. *See* Decision and Order at 7; *see generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

While employer also argues that there is no medical evidence to support the administrative

[1]Furthermore, the Penn State records contain only three relatively minor notations regarding claimant's back.

law judge's finding that claimant's disability is causally related to his 1981 injury, the medical reports of Drs. Bruno, Gordon and Lavine actually relate claimant's back problems to this injury. *See* Cxs. 2, 4; Ex. 6. We note, however, that, in any event, claimant was not required to introduce affirmative medical evidence, as Section 20(a) shifted the burden of proof to employer to rebut the presumed causal connection by introducing evidence which would establish that claimant's disability was not the natural and unavoidable result of his 1981 work injury, a burden which employer failed to meet in this case. *See, e.g., Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 151-152 (1989).

Employer correctly contends that in assessing the cause of claimant's disability, the administrative law judge failed to discuss Dr. Gordon's deposition testimony. On deposition, Dr. Gordon testified that he had "wondered" if claimant may have sustained another, subsequent trauma between November 1988 and November 1989 because there was evidence of a small disk herniation at the L5-S1 level on the 1989 MRI which had not been present on a November 1988 CT scan. Ex. 9 at 21. The administrative law judge's failure to consider this evidence is harmless, however, because Dr. Gordon ultimately opined that the exact cause of claimant's back injury was not clear. *See* Ex. 6; Ex. 9 at 8. Such speculative and equivocal testimony is not sufficiently specific to rebut the presumption afforded to claimant pursuant to Section 20(a). *See generally Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

Employer's general attacks on the administrative law judge's assessment of claimant's credibility also fail. Although employer contends that claimant's testimony is not credible because he was not honest regarding the occurrence of the October 14, 1981, injury with the teams for which he subsequently played, and avers that the administrative law judge failed to adequately explain his decision to credit claimant's testimony, we disagree. The administrative law judge acted within his discretion in accepting claimant's explanation for his actions[2], and in crediting his testimony despite the inconsistencies alleged by employer. Decision and Order at 7. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). Inasmuch as claimant's testimony in conjunction with the aforementioned medical reports and training records provide substantial evidence to support the administrative law judge's finding that claimant's disability was the natural and unavoidable result of the October 14, 1981, work injury, this determination is affirmed. *See O'Keeffe*, 380 U.S. at 359.

Average Weekly Wage

Employer alternatively argues that the administrative law judge erred in calculating claimant's average weekly wage based on his 1985 earnings instead of his earnings immediately prior to the October 14, 1981, weight-lifting injury. In his Decision and Order, the administrative law judge found that although claimant's injury was due to events in October 1981, his injury did not become fully disabling to him as an athlete until 1985, when his earning power was greater than it had been in 1981. The administrative law judge further determined that inasmuch as the reasonable

[2]Claimant indicated that he was concerned that if he acknowledged prior back injuries, his chances of making a new team would be adversely affected.

outlook for claimant's post-1985 career was for a salary schedule based on his ability as an experienced defensive player rather than as a beginner in the league, the latter year is the reasonable one to use as a base for determining claimant's loss in wage-earning capacity. Accordingly, the administrative law judge determined that claimant's average weekly wage was $3,446.15, based on his 1985 base salary plus the average of some bonuses received over his five-year career.[3] In challenging the administrative law judge's average weekly wage decision, employer contends that claimant's average weekly wage should be calculated based on his earnings at the time of his October 1981 injury.[4] Claimant responds, urging that the administrative law judge's average weekly wage determination be affirmed.

The analysis which the administrative law judge employed in determining claimant's average weekly wage in the present case is consistent with that applied by the United States Court of Appeals for the Ninth Circuit in *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). In *Johnson*, claimant injured her hand in December 1979, but returned to work intermittently until May 1983, at which time she was forced to cease work due to continued pain and swelling. The administrative law judge found that she was entitled to permanent total disability compensation as of May 1983 based on her average weekly wage for the year prior to her December 1979 work accident, and the Board affirmed this finding. Relying on cases decided under other provisions of the Act, the court held that the date of disability rather than the date the accident occurs is the appropriate date of "injury" for purposes of the average weekly wage. Recognizing that Congress had adopted a rule based on the date of manifestation of disability for determining average weekly wage in occupational disease cases, the court decided that the same rule should apply to latent traumatic injuries. The court reasoned that while claimant Johnson suffered an accident in December 1979, she was not actually "injured" until 1983, when the continued strain on her hand rendered her permanently disabled.[5] The court further noted that while in most traumatic injuries the date of disability and the date of the injury will coincide, *Johnson*

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[3]He derived this figure by taking claimant's base contractual salary for 1985 of $165,000, adding the average of the bonuses and incentives he had received over his five-year career minus $190,000 in initial signing and post-season play-off bonuses ($261,000 - $190,000 = $71,000/5 years or $14,200), resulting in a total of $179,200, which he divided by 52 weeks.

[4]Although not explicitly stated, it is apparent from the administrative law judge's Decision and Order that his average weekly wage finding was made pursuant to Section 10(c), 33 U.S.C. §910(c), using wages from 1985. Employer also asserts that Section 10(c) applies, but urges use of wages from 1981, at which time claimant's base salary was $53,000 and his gross salary, including bonuses, $104,371.40.

[5]In determining that claimant's 1983 earnings should serve as the basis for the average weekly wage calculation, the court placed no emphasis on the potential aggravating effect of claimant's employment on the 1979 traumatic injury. Rather, the court focused solely on the fact that claimant's earning capacity had not been adversely affected until 1983, the same reasoning employed by the administrative law judge in this case.

differed in that the effect of the traumatic event was not evident until a few years later. *Johnson*, 911 F.2d at 250, 24 BRBS at 6-8 (CRT). The court also noted that the purpose of Section 10 would be thwarted by providing compensation based on a past wage rate for a disability occurring years later, and that such a holding would discourage workers from attempting to return to work.

We affirm the administrative law judge's decision to base claimant's average weekly wage on his 1985 earnings. The rationale used by the administrative law judge and in *Johnson* is logical when applied to appropriate facts, and it is consistent with developing trends in the case law. In deciding to apply in this case the reasoning of the Ninth Circuit in *Johnson* we note that court relied on the definition of the term "injury" adopted in *Stancil v. Massey*, 436 F.2d 274 (D. C. Cir. 1970), by the United States Court of Appeals for the District of Columbia Circuit, within whose appellate jurisdiction the present case arises. In *Stancil*, the court held that claimant does not sustain an "injury" for purposes of Section 13, 33 U.S.C. §913, until he knows or should have known that the accident he has suffered will likely impair his ability to earn his previous wage. *See also Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT)(D. C. Cir. 1987) (limitation period begins only when the employee knows or should know that (1) his injury is causally related to his employment and (2) his injury is impairing his capacity to earn wages). Under *Stancil*, a claimant is not injured until he knows the full character, nature and extent of the harm sustained. *Stancil*, 432 F.2d at 279. This case law, developed by the D.C. Circuit, supports the definition of "injury" enunciated in *Johnson* and applied in that case and here to average weekly wage.

As the court noted in *Johnson*, moreover, other circuits have adopted similar reasoning under other sections of the Act, defining "injury," whether of occupational or of traumatic origin, as occurring when its disabling effects become manifest. *See, e.g., Duluth, Missabe & Iron Range Ry. Co. v. Heskin*, 43 F.3d 1206 (8th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990) (rationale held applicable in context of Sections 12 and 13). In a case of latent injury, therefore, we hold that claimant's average weekly wage may be calculated at the time he is disabled rather than when his accident occurred based on earnings prior to this date of "injury."

The present case involves a latent disability occurring years after the initial injury. The administrative law judge's determination that claimant's back condition did not become fully disabling until 1985 is supported by the record; after the 1981 incident, claimant played over three seasons of football with the Redskins and a portion of a season for other teams before retiring. Thus, the administrative law judge's decision to employ claimant's 1985 base salary as the basis for determining his average weekly wage is rational, inasmuch as claimant's injury did not disable him or affect his earnings until years after the October 14, 1981, injury. The administrative law judge's analysis is also consistent with *Johnson*, as well as the reasoning of the D.C. Circuit in *Stancil* and its progeny. We therefore reject employer's argument regarding application of claimant's 1981 wages and affirm the administrative law judge's average weekly wage determination based on

claimant's 1985 earnings on the facts presented in this case.[6]

Wage-Earning Capacity

In his Decision and Order, the administrative law judge determined that claimant is permanently partially disabled due to his October 14, 1981, injury, that his anticipated football career had been cut short by 3.02 years, and that his actual post-injury sales earnings of $60,000 per year or $1,153.85 per week reasonably represented his post-athletic wage-earning capacity. Accordingly, he awarded claimant permanent partial disability compensation at a compensation rate of $1,520.20 per week commencing August 1, 1986, for the remaining 3.02 years of his projected football career.[7] The administrative law judge further determined that inasmuch as claimant's back pain caused him to miss 2 to 3 days of work per month, or approximately ten percent of his working time, in his post-athletic career, he was also entitled to permanent partial disability compensation in this period based on a ten percent reduction in his post-football earnings of $1,153.85.

Employer initially argues on appeal that although claimant's injury occurred in 1981 and he may not have suffered any loss of wages or incapacity until his retirement from football in July 1986, the administrative law judge erred in failing to limit the permanent partial disability award to the maximum compensation rate allowable under Section 6 of the Act, 33 U.S.C. §906 (1982) (amended 1984)[8] as of October 14, 1981, the date of the injury which caused the loss of wage-earning capacity. While we agree that the administrative law judge's award of permanent partial disability compensation based on a compensation rate of $1,153.85 exceeds the statutory maximum rate allowable under Section 6 of the Act, we disagree with employer that the applicable rate is that in effect at the time of claimant's October 14, 1981, injury. Section 6(b)(1) states that compensation for disability shall not exceed 200 percentum of the national average weekly wage. Pursuant to Section 6(b)(3), the national average weekly wage is determined by the Secretary as soon as practicable after June 30 of each year and is applicable from October 1 of that year until September 30, of the following year. Pursuant to Section 6(c) the determination made under Section 6(b)(3) is applicable both to employees or survivors currently receiving permanent total disability or death

[6]Employer notes that this result permits claimant to benefit from earnings received after the 1982 amendment of the D.C. Workers' Compensation Act, which removed Department of Labor jurisdiction over D.C. claims. Employer does not challenge the application of the 1928 Act, and has no basis for doing so as the injury occurred in 1981, prior to the effective date of the 1982 Act.

[7]This figure reflected 66 and 2/3 percent of the difference between claimant's $3,446.51 average weekly wage and his average weekly post-football earnings of $1,153.85 per week.

[8]Section 6(b)(1) was amended in 1984. The amended provision is inapplicable in cases such as this one, which arise under the District of Columbia Workmen's Compensation Act. *See Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125 (1988). Section 6(c) was renumbered in 1984, but was not changed in any respect material to this case.

benefits and to those "newly awarded compensation during such period." Inasmuch as claimant's award of permanent partial disability compensation commenced on August 1, 1986, we hold that pursuant to Section 6(c) claimant is limited to the statutory maximum rate available at that time, $594.24 (200 percent of $297.06). Accordingly, we modify the administrative law judge's award of permanent partial disability compensation to reflect that claimant is subject to this statutory maximum rate.

Employer also challenges the administrative law judge's determination that claimant sustained a 10 percent loss in his earnings in his post-athletic career.[9] Contrary to employer's assertions on appeal, the administrative law judge did analyze claimant's post-injury wage-earning capacity in the post-athletic period consistent with Section 8(h) of the Act, 33 U.S.C. §908(h), and specifically determined that his actual post-football earnings fairly and reasonably represented his post-football career wage-earning capacity. Employer's argument that the administrative law judge erred in concluding that claimant sustained a 10 percent loss in wage-earning capacity based on claimant's testimony that he would miss 2 to 3 days of work per month due to back pain is also without merit. Employer maintains that claimant's testimony does not provide substantial evidence to support the administrative law judge's finding in the absence of supporting medical evidence documenting physical restrictions which would preclude full time sales work and wage or economic evidence indicating that claimant's failure to work 2 to 3 times per month would result in a loss of earnings given that claimant was guaranteed a minimum salary of $60,000. Such credibility determinations, however, are clearly within the purview of the trier-of-fact. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991); *Whitmore v. AFIA Worldwide Insurance*, 837 F.2d 513, 20 BRBS 84 (CRT) (D.C. Cir. 1988). Inasmuch as claimant's testimony provides substantial evidence to support the administrative law judge's finding, and it was not unreasonable for the administrative law judge to infer from this testimony that the 10 percent of time claimant lost from work due to back pain equated to a 10 percent loss in his post-football career earnings, the administrative law judge's award of permanent partial disability compensation for this period is affirmed.[10] *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT)

[9]Under Section 8(c)(21) of the Act, an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post injury wage-earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. The burden of proof is on the party seeking to prove that claimant's actual post-injury wages are not representative of claimant's wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). In the present case neither party contests the administrative law judge's decision to fashion separate awards for the projected duration of claimant's career and for his post-football career. Such awards are consistent with those fashioned for other professional football players. *See generally 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); *Jaqua v. Pro-Football, Inc.*, 8 BRBS 825, 827 (1978).

[10]Employer also argues that the administrative law judge's award of permanent partial disability

(D.C. Cir. 1994).

Section 8(f)

Finally, we reject employer's argument that the administrative law judge erred in denying employer Section 8(f) relief based on certain cervical and back injuries claimant sustained while at Penn State. Section 8(f) shifts liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In order to be entitled to Section 8(f) relief where claimant is permanently partially disabled, employer must establish that the employee had a manifest pre-existing permanent partial disability, which combined with claimant's subsequent work injury to result in a materially and substantially greater disability than that which would have resulted from the subsequent work injury alone. *See* 33 U.S.C. §908(f); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990); *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146 (CRT) (D.C. Cir. 1985); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Employer attempted to establish Section 8(f) entitlement based on cervical and back injuries documented in the Penn State medical records. Specifically, employer relies upon notations of a cervical spine injury in August 1977, a cervical spine injury on January 1, 1979, and back pain on September 25, 1980. The administrative law judge denied Section 8(f) relief, finding that employer failed to establish that these injuries were manifest pre-existing permanent partial disabilities within the meaning of Section 8(f) or that these injuries contributed to the disability which resulted from claimant's October 14, 1981, injury.

Employer argues on appeal that the administrative law judge erred in denying Section 8(f) relief inasmuch as it established all elements of Section 8(f) entitlement. After review of the Decision and Order in light of the record evidence, however, we affirm the administrative law judge's denial of Section 8(f) relief. The Penn State records indicate that a radiological evaluation was performed after claimant's August 1977 cervical injury on August 10, 1977, which indicated that claimant's cervical spine was normal. These records further indicate that although claimant experienced cervical root syndrome on January 1, 1979, when he hit a runner with his head flexed, causing him to black out momentarily and experience numbness from his head to his fingers, he continued to play football thereafter with good strength and was described as clinically normal when examined by Dr. Strickler, two days later. Moreover, the Penn State records contain only three relatively minor notations regarding claimant's low back. On October 20, 1979, the training notes state that claimant sustained a low back injury on October 20, 1979, while "straining up under a

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for claimant's post-football career was improper because the award was based on a percentage of claimant's earnings, whereas the statute requires that an actual figure be given. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321 (1981). Although the administrative law judge found that claimant sustained a 10 percent loss in his wage-earning capacity, he specified that this loss equates to $115.39 per week.

blocker (4th period)." On the following date, an indication is made of "low back-bilateral paraspinal spasms." The only other notation of back problems occurred nearly one year later when, on September 25, 1980, claimant complained of "low back discomfort." Ex. 1. Because the Penn State records fail to establish that the injuries cited by employer resulted in a "serious lasting physical condition that would have motivated a cautious employer to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability," *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 512, 6 BRBS 399, 412 (D.C. Cir. 1977), the administrative law judge rationally determined that employer failed to establish the pre-existing permanent partial disability element of Section 8(f) entitlement. *See Berkstresser*, 921 F.2d at 310-311, 24 BRBS at 72-73 (CRT). Inasmuch as the administrative law judge's finding in this regard is rational and supported by substantial evidence, the denial of Section 8(f) relief is affirmed.

Accordingly, the Decision and Order Awarding Benefits is modified to reflect that claimant's award of permanent partial disability is subject to the statutory maximum rate applicable under Section 6 of the Act as of August 1, 1986, but is, in all other respects, affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge