BRB No. 07-0829

L.G	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NORTHRUP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 04/22/2008
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (2006-LHC-00741) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they

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

Claimant has a history of knee injuries. Claimant underwent arthroscopic surgery on her left knee in 1986 after she fell during the course of her employment for employer as a welder. Claimant injured her right knee at work in 1991. She underwent arthroscopic surgery, and employer paid her compensation under the Act for a 10 percent knee impairment. EXs 20 at 1, 7; 21 at 6. On December 16, 1999, claimant fell on her knees during the course of her employment for employer. Tr. at 37. Dr. Black performed a right knee arthroscopy in May 2000 and a left knee arthroscopy in November 2000. Dr. Black opined that claimant had a 12 percent permanent partial right knee impairment, and a 10 percent left knee impairment, and he released claimant to return to work with restrictions. EX 22 at 5-7, 15-16. Dr. Black referred claimant to Dr. Johanson after she continued experiencing bilateral knee pain. Dr. Johanson performed a total right knee replacement in September 2002, and a total left knee replacement in December 2002. He opined that claimant had a 37 percent permanent partial impairment of each leg. EX 27 at 12-13. Dr. Johanson performed a revision of the left knee replacement in May 2004. He opined that claimant's knee condition was at maximum medical improvement on March 3, 2005, and that claimant is unable to return to work as a welder. *Id*. at 15-16.

In his decision, the administrative law judge determined claimant's average weekly wage of $617.94, pursuant to Section 10(a). 33 U.S.C. §910(a). The administrative law judge found that claimant is entitled to compensation for temporary total disability, 33 U.S.C. §908(b), from August 31, 2002, through March 3, 2005, and for permanent total disability thereafter, 33 U.S.C. §908(a). Employer was found liable for penalties for unpaid compensation from May 26, 2000, to July 31, 2000. 33 U.S.C. §914. The administrative law judge found that employer is entitled to Section 8(f) relief. 33 U.S.C. §908(f).

On appeal, the Director does not challenge the finding that employer is entitled to Section 8(f) relief. However, the Director argues that the administrative law judge erred in failing to allocate liability for compensation payments between employer and the Special Fund for the appropriate number of weeks. Specifically, the Director contends that employer is liable for compensation payments for claimant's current 37 percent impairment to each knee, or a total of 213 weeks of benefits under the Act. *See* 33 U.S.C. §908(c)(2). Employer responds that claimant's bilateral knee impairment arose from a single work injury and that it therefore is liable for only one period of 104 weeks of compensation benefits.

Section 8(f) shifts the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest preexisting permanent partial disability and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990). In the case of a scheduled injury resulting in permanent total disability where Section 8(f) is applicable, employer is liable for compensation for the greater of the number of weeks in the schedule attributable to the subsequent injury or 104 weeks.[1] 33 U.S.C. §908(f)(1); *Higgins v. Hampshire Garden Apartments*, 19 BRBS 77 (1986) (Brown, J., dissenting), *aff'd on recon. en banc*, 19 BRBS 192 (1987).

In *Berg v. Matson Terminals*, 34 BRBS 140 (2000), *aff'd*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002), the Board addressed the issue presented in this case. In *Berg*, the employer requested Section 8(f) relief based on pre-existing knee injuries, but contended that it should pay only 104 weeks of compensation because the second injury to both knees arose from a single work incident. The Board held, based on the language of the Act and existing case law, that employer must pay two separate periods of compensation where the claimant sustained permanently disabling injuries to both knees, even though the injuries arose from the same work accident. The United States Court of Appeals for the Ninth Circuit affirmed this decision. Accordingly, for the reasons stated in *Berg*, employer in this case is liable for separate periods of compensation for each knee injury. The amount of compensation payable by employer for each injury is the greater of the number of weeks in the schedule attributable to each subsequent knee injury or 104 weeks for each injury.[2]

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[1] Section 8(f)(1) states in pertinent part:

[I]f following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, …

33 U.S.C. §908(f)(1).

[2] We reject employer's argument that *Barscz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007), supports its contention that its liability under Section 8(f) is limited to a single period of 104 weeks. In *Barscz*, benefits were awarded for permanent total disability and death due to asbestosis. Employer was liable for only one

The Director argues that employer is liable for a 37 percent impairment of each knee, which would result in liability for 106.5 weeks of compensation for each knee injury. Employer responds that, since its liability is limited to the extent of claimant's disability for the second injury and it previously paid claimant compensation under the schedule for a 10 percent right knee impairment, it is liable for a 27 percent left knee impairment and a 37 percent right knee impairment for a total of 184.32 weeks of compensation. Inasmuch as the percentage of impairment attributable to claimant's final injury to each knee is a factual determination, we remand this case for the administrative law judge to determine this issue. *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). However, we reject employer's contention that its combined liability for claimant's knee injuries totals 184.32 weeks of compensation. As stated above, employer is liable for compensation for the greater of the number of weeks in the schedule attributable to each subsequent injury or for 104 weeks for each injury. *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990); *Berg*, 34 BRBS at 143-144, *Cooper v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 284 (1986). Thus, employer in this case is either liable for the number of weeks in the schedule attributable to each subsequent knee injury, which the Director argues is 106.5 weeks, or it is liable for two periods of 104 weeks.[3] Employer's prior payment to claimant for a 10 percent right knee impairment is not a basis by which employer can reduce its combined compensation liability for claimant's subsequent knee injuries under Section 8(f) to less than 208 weeks. *See also Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989)[4]; *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

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period of 104 weeks as the disability and death benefits were due to the worsening of the same disease. *See Director, OWCP v. General Dynamics Corp. [Graziano]*, 705 F.2d 562, 15 BRBS 130(CRT) (1st Cir. 1983); *Berg*, 34 BRBS at 143. In this case, claimant sustained a distinct impairment to each knee resulting in separate compensable disabilities, and employer is therefore liable under Section 8(f) for each disability.

[3] A one percent knee impairment corresponds to 2.8 weeks of compensation under Section 8(c)(2). In this case, a finding that claimant had a pre-existing impairment to each knee of one percent or more would render employer liable for 104 weeks of compensation for each knee since this figure would be greater than the number of weeks attributable to the subsequent knee injury.

[4] In *Brown*, the Fifth Circuit held that, in cases involving the application of both the credit doctrine and Section 8(f), the Special Fund is to obtain the benefit of the credit for previous benefits paid, and that this "Fund-first" rule is consistent with the language of Section 8(f)(1), 33 U.S.C. §908(f)(1), in that it ensures that, "at the very least, the

Accordingly, the administrative law judge's Decision and Order is remanded for the administrative law judge to determine the extent of employer's liability under Section 8(f) for each of claimant's subsequent knee injuries. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

employer will compensate the employee for the entire second injury." *Brown*, 868 F.2d at 762, 22 BRBS at 50(CRT); *see also Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993).