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Issue Date: 23 March 2010

CASE NO.: 2009-LDA-273

OWCP NO.: 02-148559

IN THE MATTER OF:

RONALD NORRIS

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA  
c/o AIG Worldsource

Carrier

APPEARANCES:

DELOS E. FLYNT, ESQ.

For the Employer/Carrier

JOSH BERSTEIN, ESQ.

For the Office of the Solicitor

Before: LEE J. ROMERO, JR.  
Administrative Law Judge

## DECISION AND ORDER DENYING 8(f) RELIEF

This is a claim for 8(f) relief under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Employer/Carrier.

On January 4, 2010, the undersigned issued an Order Awarding Benefits and Bifurcating Section 8(f) Application/Issue. Claimant was found to be temporarily totally disabled, permanently totally disabled and permanently partially disabled for various time periods.

Post-hearing briefs were received from Employer/Carrier and the Office of the Solicitor. Based upon the evidence introduced, I make the following Findings of Fact, Conclusions of Law and Order.

### I. SECTION 8(f) APPLICATION

Section 8(f) of the Act provides in pertinent part:

(f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers [an] injury . . . [and] is totally and permanently disabled, and the disability is found not to be due solely to that injury . . . the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

(2) (A) After cessation of the [foregoing] payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . 33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9<sup>th</sup> Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) that the current disability is not due solely to the employment injury. Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5<sup>th</sup> Cir. 1990); 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9<sup>th</sup> Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988). In permanent partial disability cases, such as here, an additional requirement must be shown, i.e., that Claimant's **disability is materially and substantially greater than that which would have resulted from the new injury alone.** 33 U.S.C. § 908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4<sup>th</sup> Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, supra, at 516-517 (5<sup>th</sup> Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4<sup>th</sup> Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9<sup>th</sup> Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious

employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

#### 1. Pre-existing permanent partial disability

I find that the record medical evidence does not establish that Claimant suffered a pre-existing neck injury. Claimant testified that his neck and back were treated for muscle strain after his 1993 automobile accident, but the record is devoid of any medical evidence relating to such treatment. (Tr. 67). In fact, Claimant testified that he had no neck problems and was working without limitations when he began working for Employer. (Tr. 28). Claimant's wife additionally testified to his not having any neck problems. (Tr. 103). Moreover, although he disclosed the 1993 accident and subsequent 2003 ankle injury during his pre-deployment physical, Claimant had no neck problems and was released to work for Employer without any limitations. (EX-10, pp. 1-14).

The record is further devoid of any evidence to determine whether Claimant's alleged pre-existing neck injury resulted in a permanent disability. At best, Drs. Letchuman, Nanda and Drazner indicated that Claimant suffered from degenerative disc disease. (EX-32, p. 4; EX-31, p. 3; EX-17, pp. 1-4). Dr. Drazner also noted that Claimant may suffer from short pedicles, causing his degenerative disc disease. (EX-30, p. 8). However, any degenerative condition from which Claimant may have suffered was not discovered by Employer/Carrier until **after** the May 5, 2006 work-related accident. There is nothing in the record that would substantiate Employer/Carrier's claim of a pre-existing neck injury, resulting in permanent disability sufficient to warrant relief under Section 8(f) of the Act. Thus, based on the lack of evidence, I find and conclude that Claimant did not suffer from a pre-existing permanent neck injury.

#### 2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie, 23 BRBS at 426. Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, *supra*; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc).

As mentioned above, a review of the medical records submitted that pre-date Claimant's May 5, 2006 injury do not reveal that Claimant was diagnosed with any neck problems. I therefore find that the medical records did not disclose Claimant suffered from a pre-existing permanent partial neck injury. I further find that such records were available at the time of his injury. Thus, I find and conclude that any alleged pre-existing neck injury was not manifest to Employer at the time of Claimant's May 5, 2006 injury.

3. The pre-existing disability's contribution to a greater degree of permanent disability.

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, *supra*. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or disability. Id. If a claimant's permanent disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., *supra*; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

Based on the medical evidence of record and Claimant's testimony, I find and conclude that Claimant's May 5, 2006 work-related neck injury is due solely to his employment in Iraq while working for Employer.

## II. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier's petition for Section 8(f) relief is hereby **DENIED**.

**ORDERED** this 23<sup>rd</sup> day of March, 2010, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge