U.S. Department of Labor

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Issue date: 07Aug2001

CASE NOS.: 2000-LHC-231
2000-LHC-1170/1171

OWCP NOS.: 14-126650
14-116045/14-123192

In the Matter of:

RUSSELL P. EVERITT
Claimant

v.

STEVEDORING SERVICES COMPANY
MARINE TERMINALS
Employer/Self-Insured

and

HOMEPORT INSURANCE COMPANY
MAJESTIC INSURANCE COMPANY
Carrier

and

Director, Office of Workers' Compensation Programs
U.S. Department of Labor
Party-in-Interest

APPEARANCES:

Mary Alice Theiler, Esq.
For the Claimant

Richard Slagle, Esq.
For SSA/Homeport

Raymond H. Warns, Jr., Esq.
For Marine/Majestic

Matthew L. Vadnal, Esq.
Jay Williamson, Esq.
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION ON MOTIONS FOR RECONSIDERATION

Claimant and the Employers have timely moved for reconsideration of the Decision and Order issued by this Administrative Law Judge and filed with the District Director on April 5, 2001, in the above matter.

This Administrative Law Judge, having again considered the matter, concludes that there is valid basis for modification of the Decision and Order. The Motion for Reconsideration is **GRANTED**.

This Administrative Law Judge, by **Decision and Order Awarding Benefits** dated April 4, 2001 and filed with the District Director on April 5, 2001, concluded that Claimant had been injured in the course of his maritime employment on March 25, 1994, August 5, 1996 and October 14, 1997, that he had sustained temporary total and temporary partial disability for various periods of time, that orders should be entered awarding Claimant, **inter alia**, benefits for such periods of disability and that SSA/Homeport Insurance (Employer I or SSA) and Marine Terminals Corporation and Majestic Insurance Company (Employer II or MTC) were liable for certain of the benefits awarded Claimant because of his successive injuries with the two maritime Employers and their Carriers joined herein.

Claimant, by motion dated April 13, 2001 and timely filed by facsimile transmission on the same date (CX 58), has moved for reconsideration of the decision on several grounds that shall be further explicated below. On the same day SSA also moved for reconsideration on several grounds (EX 29) and MTC has also moved for reconsideration on several grounds by motions dated April 17, 2001 (RX 27) and April 23, 2001. (RX 28) Moreover, SSA and MTC were granted an interim extension of time file a response to fee petitions to be filed by Claimant's counsel. (RX 29) SSA has filed a response to Claimant's motion for reconsideration (EX 30) and MTC has filed a response to the motions for reconsideration filed by Claimant and SSA (RX 28). Counsel for MTC has included a copy of the very recent decision issued by the Ninth Circuit Court of Appeals in **International Transportation Services (Buchanan) v. Kaiser Permanente Hospital, Inc.; Director, OWCP**, 2001 WL 201498 (9th Cir. 2/26/01). (RX 28A) SSA then filed an amended motion for reconsideration (EX 31) and brief in support thereof. (EX 32) Claimant thereupon filed a response to SSA's amended motion. (CX 59) SSA then filed a response to MTC's opposition to reconsideration (EX 33) and Claimant, after advising this Court of Claimant's new mailing address (CX 60), then filed a response to MTC's objections to the motions for reconsideration filed by Claimant and SSA (CX 61), and SSA thereupon filed on May 1, 2001 a reply to Claimant's opposition to the amended reconsideration

filed by SSA. No other pleadings were filed and the record was then closed on May 1, 2001.

The issues raised by the parties post-decision are now ripe for resolution. The Findings of Fact and Conclusions of Law as stated in the April 4, 2001 decision issued herein are incorporated herein by reference and will be reiterated solely for purposes of clarity and to deal with the issues raised by the parties in their respective pleadings.

As the very significant decision issued by the U.S. Court of Appeals for the Ninth Circuit on February 26, 2001 in **Buchanan, supra**, is non-published (RX 28A) (and I trust that I shall not be in violation of Ninth Circuit Rule 36-3), I shall insert the entire memorandum opinion at this point for ease of reference by the parties and by reviewing authorities.

"International Transportation Services (ITS) petitions for review of the Benefits Review Board's affirmance of the administrative law judge's decision finding ITS liable to Kaiser Permanente for medical services provided to Ronald Buchanan pursuant to the Longshore and Harbor Workers' Compensation Act. ITS also challenges the award of attorney's fees to Kaiser. We have jurisdiction under 33 U.S.C. § 921 and deny the petition to review.

"It is undisputed that Buchanan suffered an injury compensable under the Act. Rather, the disputed issue is which employer should be held liable for the costs associated with Buchanan's disability, which included his surgery at Kaiser: (1) Metropolitan, where Buchanan began experiencing pain in his low back, buttocks and left leg as he moved container locking cones on December 31, 1993; or (2) ITS, where Buchanan worked on January 2, 1994, and began to experience increasingly severe pain.

"Under the "last employer" or "aggravation" rule set forth in **Foundation Constructors, Inc. v. Director, OWCP, (Vanover)**, 950 F.2d 621, 624 (9th Cir. 1991), the last employer to expose a covered employee to injury is responsible for all the compensation due as a result of the employee's disability. If an injury at a second employer aggravates, accelerates or combines with an employee's prior injury, the second employer is responsible for the entire disability. **Id. citing Kelaita v. Director, OWCP**, 799 F.2d 1308, 1311 (9th Cir. 1986).

"We review the ALJ's decision to determine whether his factual findings are supported by "substantial evidence" and to correct any errors of law. **Brady-Hamilton Stevedoring co. v. Director, OWCP**, 58 F.3d 419, 421 (9th Cir. 1995). Substantial evidence means such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion. **Lockheed Shipbuilding v. Director, Office of Workers Compensation Programs**, 951 F.2d 1143, 1144 (9th Cir. 1991). The ALJ is entitled to determine the credibility of the witnesses, to weigh the evidence, draw his own inferences and is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Ass'n, Inc.**, 390 U.S. 459, 467 (1968).

"The ALJ's finding that Buchanan's work at ITS aggravated the injury he sustained at Metropolitan is supported by substantial evidence. Specifically, the medical evidence provided by Drs. Miller and Capen supports the finding of aggravation. Further, the medical evidence is corroborated by Buchanan's own testimony that his work at ITS was more strenuous than his work at Metropolitan, and that his pain subsided with rest after his work at Metropolitan, but not after his work at ITS. The ALJ was not bound to credit Dr. London's testimony that Buchanan's disability resulted solely from his work at Metropolitan, because Dr. London did not account for the documented progression of Buchanan's pain.

"Accordingly, ITS is liable for the medical costs associated with Buchanan's injury under the well-settled "last employer" rule. Further Kaiser is entitled to attorneys' fees under **Hunt v. Director, OWCP**, 999 F.2d 419 (9th Cir. 1993)

"Therefore, ITS's petition for review is denied."

As can be seen, the Ninth Circuit has forcefully reiterated its long-standing so-called "last employer" or aggravation rule that it initially articulated in **Kelaita**, **supra**, and then again in **Foundation Constructors, Inc. v. Director, OWCP (Vanover), supra**. **Buchanan, supra**, is also significant because, as I understand on the basis of the parties' opening arguments in the case before me, Metropolitan was able to use the "last employer rule," also known as the two-injury rule when applied to traumatic, orthopedic injuries, as an affirmative defense to avoid liability for Buchanan's disability benefits and medical expenses.

As I have not yet issued a final decision herein, I must take into account the Court's decision in **Buchanan, supra**, in light of the respective positions of the parties by their pleadings. To put the issues in proper perspective, I note that the Claimant seeks reconsideration of the decision to correct a mathematical error in the calculation of the PPD benefits awarded against MTC and to provide that those benefits continue to run concurrently following the subsequent SSA/Homeport injury on October 14, 1997. Claimant further submits an itemization of the Temporary Partial Disability benefits to which he is entitled as a result of the August 5, 1996 injury, and requests

that the Decision and Order be amended to include those itemized benefits. (**See**, Decision and Order, p. 44)

TEMPORARY PARTIAL DISABILITY

The Decision and Order found that Claimant was temporarily partially disabled (TPD) from September 20, 1996 through March 17, 1997 as a result of his August 5, 1996 injury at Marine Terminals. The Court noted that a week-by-week calculation of Claimant's PMA wages compared to his average weekly wage of $1,955.01 would show the amount of TPD benefits, if any, to which Claimant would be entitled. (D&O page 44).

Attached to Claimant's Motion is a chart that compares Claimant's actual PMA earnings (found at CX 49:307-311) to his average weekly wage of $1,955.01. That chart includes the inflation adjustment required by **Richardson v. General Dynamics Corp.**, 23 BRBS 327 (1990), using the annual compensation adjustment promulgated by the Secretary of Labor under Section 6(b)(3) of the Act. The cost of living adjustment that went into effect on October 1, 1996 was 2.38%. The attached chart shows that Claimant's total earnings loss from September 20, 1996 through March 17, 1997, compared on a week-by-week basis, is $10,487.73, entitling him to TPD benefits of $7,783.18 plus interest.

CALCULATION OF PPD BENEFITS

In calculating PPD benefits that should be awarded to the Claimant after he reached maximum medical improvement from his August 5, 1996 MTC/Majestic Insurance injury, the time period of March 18, 1997 to October 13, 1997 was utilized. This time period was also utilized in calculating Claimant's average weekly wage for the next injury on October 14, 1997. As SSA/Homeport correctly notes in its Motion for Reconsideration, page 5, fn 4, the period from March 18, 1997 to October 13, 1997 covers 30 weeks. The Decision and Order appropriately divided Claimant's wages during these weeks by 30, and calculated his average weekly wage for the October 14, 1997 injury as $1,259.16. (Decision and Order p. 48). SSA/Homeport states it has no objection to this figure. (EX 31 at 5, fn 5)

However, in calculating Claimant's permanent partial disability for the MTC/Majestic Insurance August 5, 1996 injury, the Decision and Order incorrectly utilized the divisor of 27 weeks for this same time period. (D&O p. 44) If the earnings of $39,855.34 were divided by 30 instead of 27, then Mr. Everitt's loss of wage earning capacity from the MTC/Majestic Insurance August 5, 1996 injury would be calculated as $695.85

($1955.01 minus $1259.16), for a PPD compensation rate of $463.90, according to the Claimant.

CONCURRENT AWARDS OF PERMANENT PARTIAL DISABILITY

Claimant has received SSA/Homeport's Brief in Support of Motion for Reconsideration, and agrees that his entitlement to the permanent partial disability award related to his August 5, 1996 MTC/Majestic Insurance injury should continue after his October 14, 1997 SSA/Homeport injury, running concurrently with the latter TPD award. Claimant's TPD compensation from SSA/Homeport for the October 14, 1997 injury is at the maximum applicable rate of $835.74. During such times as he is receiving the maximum compensation rate from SSA/Homeport, he would not be entitled to receive the additional PPD compensation from MTC/Majestic. However, during those weeks when he was attempting to work and not receiving any workers' compensation benefits, he would not be precluded from receiving the PPD benefits. For example, SSA Exhibit 7, page 95, shows that Mr. Everitt was paid TPD benefits by SSA/Homeport from 10/27/97 to 8/16/98, TPD benefits at "various" rates from 9/5/98 to 3/12/99, TPD benefits from 4/7/00 to 4/16/00 and 5/22/00 to 6/10/00. TPD benefits were reinstated on August 29, 2000 and continue (SSA Exhibit 7, page 96). For those weeks when Mr. Everitt was not paid TPD benefits, he would be entitled to receive the MTC/Majestic PPD benefits,[1] according to the Claimant.

Furthermore, as noted by SSA/Homeport, Claimant will hopefully return to work at some time in the future, and would again be eligible to receive such PPD benefits from MTC/Majestic Insurance to the extent that those benefits, in combination with any TPD or PPD benefits from SSA/Homeport, did not exceed the maximum compensation rate. To facilitate the expeditious reinstatement of those PPD benefits once Claimant returns to work, the Decision and Order should be amended at this juncture to clarify that the award of PPD benefits continues to run

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[1]For a determination of the exact amount of the TPD benefits for which Mr. Everitt qualified between 10/14/97 and the present, Claimant suggests that the calculation be left to the OWCP District Dierctor in Seattle, based on confirmation by SSA/Homeport of the amount of TPD benefits paid at "various" rates as set forth in its LS-208, SSA Exhibit 7. Interest should also be assessed with those benefits awarded by reason of the October 14, 1997 injury, and would be paid during any weeks in which the Claimant's other disability benefits do not exceed the maximum compensation rate in effect on October 14, 1997. I agree that the parties should work with the District Director with reference to these TPD benefits.

concurrently.

This Administrative Law Judge has already determined that (1) Claimant reached maximum medical improvement following the March 25, 1994 injury on April 28, 1995 and returned to work in his regular job without wage loss, D&O at 39; (2) Claimant reached maximum medical improvement following his August 5, 1996 injury on March 17, 1997 and was permanently partially disabled thereafter, D&O at 45; and (3) Claimant has not reached maximum medical improvement following his October 14, 1997 injury, and has a temporary total disability as a result of that injury, D&O at 41. Stevedoring Services of America ("SSA") does not challenge these findings. Rather SSA brings this Motion for Reconsideration to clarify the responsible employer issue and to correct some mathematical calculations in the Decision and Order.

As noted above, MTC has also filed a Motion for reconsideration because the positions taken by the Claimant and SSA would significantly increase its obligations herein as both Claimant and SSA request that this Court order MTC to pay Claimant an ongoing and concurrent award of permanent partial disability during the same time period that Claimant is temporarily totally disabled due to a subsequent injury to the same body part. MTC submits that this Court correctly concluded that MTC has no continuing requirement to pay Claimant disability compensation following his October 14, 1997 injury, that this Court correctly found responsibility for Claimant's continuing disability compensation and medical care and treatment following the October 14, 1997 injury while working for SSA and that this Court's decision should not be modified, except to clarify certain clerical errors, as it is consistent with the Ninth Circuit Court's decisions in **Kelaita, Vanover** and **Buchanan**.

While MTC suggests that SSA cannot be granted the relief that it seeks herein because it did not raise the issue at the formal hearing, I cannot accept that thesis (1) as Claimant has filed claims for three injuries, (2) as those injuries were consolidated for a joint hearing herein and (3) as I must consider and award Claimant all of the benefits to which he is legally entitled under the Act, subject to appellate review.

Although there has been a flurry of legal briefing following the Decision and Order Awarding Benefits in this case, the issues submitted for reconsideration are few. Briefly, those issues are: (1) Whether a permanent partial disability award is extinguished as a result of subsequent injury; (2) Whether certain mathematical errors in the Decision and Order should be corrected; and (3) Whether the Claimant should be awarded "temporary total disability from October 14, 1997 through the

present and continuing." **See** Decision and Order page 55, paragraph 3. The Claimant's opposition to SSA's amended motion for reconsideration pertains to the last of these three issues. The Claimant acknowledges that he was released to work, and had been working in his usual occupation for over a year during the time he was awarded total disability compensation, but contends that he may have been underpaid temporary partial disability during that time. The Claimant is not claiming entitlement to temporary total disability during the same time he was working. Claimant however, does contend that an award of temporary total disability should be made continuing into the indefinite future because the TTD payments are being made voluntarily now, and the Claimant would like protection against "unilateral action" in the future.

PAST TEMPORARY PARTIAL DISABILITY BENEFITS

For the reasons stated below, SSA disagrees with Claimant's contentions. At the outset, it should be noted that the Claimant misstates SSA's position with respect to past benefits. According to the Claimant, "SSA/Homeport asks for an across-the-board finding that Claimant was not entitled to any disability during those periods." (CX 59 at 3) SSA is not asking for any finding at all because this issue was never raised for hearing. The Claimant's Opposition to SSA's Amended Motion for Reconsideration (CX 59) is the first time we have seen any contention that the Claimant was underpaid compensation following the October 14, 1997 injury. That is precisely why "the record contains inadequate information in order to determine the adequacy of the TPD payments." (**Id.** at 2) If the ALJ chooses to address this issue, he should give the parties notice of the issue as provided by 20 CFR § 702.336. SSA would then be happy to supplement the record and document the date and amount of each of its temporary partial disability payments to the Claimant, according to SSA.

As noted, Claimant seeks an award of temporary partial disability benefits for those weeks he has been able to work following his return to work after his October 14, 1997 injury **but during which weeks he was earning less than his average weekly age for such injury**. Initially I note that that issue was properly raised at the hearing by Claimant (1) because he has filed three claims for his three maritime injuries, (2) because the three claims were consolidated for hearing and (3) because he seeks all of the benefits to which he is legally entitled. This issue will be further discussed below.

The Claimant also requests that he be awarded compensation for temporary total disability on into the indefinite future. He seeks this award because "the voluntary nature of these

payments [currently being made by SSA] raises the possibility that the payments could stop at any time." (CX 59 at 2) This, of course, is true of all voluntary payments of compensation. Nevertheless, this is the scheme that Congress has chosen to adopt. If, as Claimant suggests, the fact that payments are being made voluntarily is justification for an award of temporary total disability into the indefinite future, then all cases where the Employer/Carriers are making voluntary payments of temporary total disability compensation would justify a hearing and an award of indefinite total disability compensation, especially as Claimant is entitled to protection under the Act to avoid unilateral action, by any of the parties herein.

According to SSA, the problem with future temporary total disability compensation awards is that we do not know what the Claimant's condition will be like in the indefinite future and therefore such awards are not supported by substantial evidence. In this regard, there is a vast difference between a permanent disability award and a temporary disability award. With respect to a permanent disability award, the Claimant has reached his or her maximum medical cure, and accordingly, his or her disability is not expected to change in the future. The reason we classify a disability as temporary is that the Claimant is recovering from an injury or surgery and we expect a change in his or her condition. We just do not know when that change will come or how big a change it will be. It is one thing to make the Employer go through a formal hearing to change a permanent disability award and quite another to require a modification proceeding to change a temporary disability award. An order directing the Employer to pay temporary total disability into the indefinite future would require the Employer to pay that compensation even if the Claimant is released to and returns to work full time. The Employer's remedy would be a request for modification pursuant to Section 22 and the Claimant would get to keep the resulting overpayment unless future compensation benefits were due. **Stevedoring Services of America, Inc. v. Eggert**, 953 F.2d 552, 25 BRBS 92 (CRT)(9th Cir.), **cert. denied**, 505 U.S. 1230, 112 S.Ct. 3056, 120 L.Ed. 2d 922 (1992). Where, as here, the Employer has not controverted disability benefits, has paid and is continuing to pay compensation voluntarily, when due and without an award, a sanction which deprives the Employer of its statutory rights is not reasonable, according to SSA.

SSA recognizes that at least one Court has held that the ALJ has discretion to make a continuing award of temporary benefits. **Admiralty Coatings Corp. v. Emery**, 228 F.3d 513, 34 BRBS 91 (CRT) (4th Cir. 2000). Please notice, however, the difference in circumstances in that case. In **Admiralty Coatings**, the Employer "initially controverted its liability for this injury [and] belatedly paid Emery temporary total disability benefits."

Admiralty Coatings, supra, 34 BRBS at 92 (CRT). Then, after initially controverting the claim, the Employer again terminated benefits after six weeks and was not paying benefits at the time of the hearing. **Id.** The Employer did not resume payment of benefits until ordered to do so. The circumstances of that case are distinctly different from this one where the Employer paid benefits promptly, on time and without controversion through the date of the hearing. While the ALJ might want to force an Employer like **Admiralty Coatings** to proceed through a modification proceeding in order to change a temporary disability award, there is no reason to do so in this case. SSA has done nothing that would justify depriving it of its rights under the statute, according to SSA's thesis.

SSA has promptly paid all compensation that is due in this case. The issue of additional compensation payable for the October 14, 1997 injury was not even raised at the hearing in this case. If it is to be considered now, the ALJ should provide the parties with appropriate notice and an opportunity to respond. In such a case, the evidence will show that the Claimant has received all compensation due to him through the date of the hearing and to the present. Because SSA has timely and adequately compensated the Claimant, because SSA did not controvert the Claimant's entitlement to TPD or place that entitlement in issue, and because Claimant's condition is temporary in nature and unknown for the future, the ALJ should not penalize SSA by making an award of continuing temporary total disability into the indefinite future.

As these claims arise within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, I am bound by the well-reasoned decisions of that Court in **Kelaita, supra**, **Vanover, supra** and **Buchanan, supra**. Claimant and SSA also cite **Hastings v. Earth Satellite Corporation**, 628 F.2d 85, 14 BRBS 345 (D.C. Circ. 1980), **cert. denied**, 449 U.S. 905 (1980), **Brady-Hamilton Stevedoring Company v. Director, OWCP**, 58 F.3d 419, 29 BRBS 101 (9th Cir. 1995) and **Hansen v. Container Stevedoring Company**, 31 BRBS 155 (1997), as support for the proposition that a continuing concurrent disability award is appropriate herein. I agree with Claimant that those cases are applicable herein and I adopt as my own the reasons expressed by counsel as to why those cases are pertinent herein.

Thus, in view of the foregoing, I again find and conclude that Claimant's award of PPD benefits for his 1996 injury while working for MTC shall be payable between March 18, 1997 and October 13, 1997, the day before his third injury and his second while working for SSA. This Administrative Law Judge, in so concluding, relies upon the following rule of law as articulated by the Ninth Circuit Court in **Foundation Constructors, Inc. v. Director, OWCP (Vanover)**, 950 F.2d 621, 623-624, 25 BRBS 71, 75

(9th Cir. 1991), wherein that Court held as follows with reference to the so-called "last responsible employer rule" as it applies to successive traumatic injuries (the "two-injury rule"):

> **If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with the Claimant's prior injury, thus resulting in Claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.**

Foundation, supra at 75 (CRT), **quoting Kelaita v. Director, OWCP**, 799 F.2d 1308, 1311 (9th Cir. 1986). **See also General Ship Service v. Director, OWCP**, 938 F.2d 960, 962 (9th Cir. 1991).

MTC would have our journey end here and that I impose all liability herein post-October 14, 1987 upon SSA. However, I must also consider those cases cited by Claimant and SSA in support of awards for concurrent disabilities as long as the total paid weekly to the Claimant does not exceed the statutory weekly limitation payable to an injured employee for the pertinent period of time.

Resolution of this issue also involves a determination of the last responsible employer and this question also requires a determination as to whether an employer's obligation to pay permanent partial disability ceases if the claimant has a subsequent injury resulting in total disability. This question was addressed by the United States Court of Appeals for the District of Columbia in **Hastings v. Earth Satellite Corp.**, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980). In **Hastings**, the claimant sustained two occupational diseases (stroke and phlebitis), each diminishing his wage-earning capacity. After the stroke, the claimant was able to return to his regular occupation, but worked fewer hours per week. The ALJ therefore properly awarded him compensation for permanent partial disability. Later the claimant developed phlebitis from prolonged sitting and became permanently totally disabled. The ALJ then terminated the award for permanent partial disability and commenced an award for permanent total disability. The total disability award was based upon the claimant's average weekly wage at the time of the onset of the phlebitis. Hastings and the Director appealed, and the Benefits Review Board reversed stating:

> Nothing in the Act indicates that payment on an award

> for permanent partial disability should terminate when a later injury occurs rendering the claimant permanently totally disabled. The claimant's average weekly wages at the time of the second injury, upon which the award of permanent total disability is based under Section 10 of the Act, 33 U.S.C. § 910, presumably already reflects a reduced earning capacity resulting from the previous injury. **The award for the permanent partial disability should not have terminated even though the claimant was later permanently totally disabled.**

Hastings, supra, at 90, 14 BRBS at 349 (emphasis added). The Court of Appeals affirmed the Benefits Review Board, explaining the rationale for the ruling as follows:

> We think, also, that the Board's scheme of concurrent awards for both permanent-partial disability (for the stroke) and permanent-total disability (for the cumulative effects of both stroke and emboli) was appropriate... Because compensation for his original loss of earning capacity was already addressed in the permanent-partial award, logic and fairness require that the permanent-partial disability award continue concurrently with the permanent-total award.
>
> A hypothetical makes this clear. Consider a worker earning $10,000 per year. An accident permanently reduces his earning capacity to $6,000. He is awarded compensation based on the $4,000 diminution in his earning capacity. A second accident disables him totally. The second compensation award is based on the $6,000 in earning capacity remaining after the first accident. Terminating the first award at the onset of the second would deprive the worker of compensation for the permanent loss of $4,000 in earning capacity. Paying the two awards concurrently, however, compensates him fully.

Hastings, supra at 91, 14 BRBS at 350. Thus the Court held that it was improper to terminate the permanent partial disability award as the result of subsequent totally disabling injury.

The rationale of **Hastings** applies in this case. If Claimant's permanent partial disability award resulting from the August 5, 1996 injury is terminated effective the date he became totally disabled from the October 14, 1997 injury, he will have an uncompensated wage loss. Although Claimant is currently receiving disability compensation at the maximum compensation rate, if he recovers to the extent he is able to return to work three or four days per week, and without a concurrent award, he

will no longer be entitled to compensation for wage loss as a result of the October 14, 1997 injury. However, he will still have a wage loss from the August 5, 1996 injury reflected in the difference between the two average weekly wages, **i.e.** $1,259.16 for the August 5, 1996 injury and $1,254.66 for the October 14, 1997 injury. D&O at 47-48.

The Benefits Review Board has consistently adhered to the concept of concurrent awards for multiple injuries. **See e.g. Hansen v. Container Stevedoring Co.**, 31 BRBS 155, 159 (1997) ("Where a claimant sustains an injury which results in an award of permanent partial disability and subsequently suffers a second injury which results in a permanent total disability, he may receive concurrent awards for the two disabilities"). The concurrent award concept has also been adopted by the United States Court of Appeals for the Ninth Circuit. **Brady-Hamilton Stevedore Co. v. Director, OWCP**, 58 F.3d 419 (9th Cir 1995). **Brady-Hamilton** clarifies **Hastings** in two respects. First, the Court in **Brady-Hamilton** made it clear that "a concurrent award of permanent total disability may be based on an aggravation of the same condition that was previously awarded permanent partial disability." **Brady-Hamilton, supra** at 421. In other words, the last injurious exposure rule (or the so-called two injury rule) does not prevent concurrent awards. In **Brady-Hamilton**, the claimant had sustained successive low back injuries and the Court held that concurrent awards were proper. Second, the Court in **Brady-Hamilton** recognized that "it is inconsistent to allow a permanent partial disability from an initial injury and then allow a permanent total disability from a second injury so that the aggregate exceeds the statutory limit." **Id.**; 33 U.S.C. §908(a). Compensation for the second injury must be adjusted so that "the combined disability award does not exceed the statutory limit mandated by Congress." **Brady-Hamilton** at 422.

Based on these authorities, SSA respectfully submits that the permanent partial disability award following the August 5, 1996 injury should not be terminated on the date of the Claimant's subsequent totally disabling injury. Rather, it should run concurrently with, and in addition to, his total disability award. Compensation payable for total disability should be adjusted so that the combined compensation payable for the two injuries does not exceed the statutory maximum.

In view of the foregoing, and especially as the Ninth Circuit Court has reiterated its opinion in **Buchanan, supra**, I now find and conclude that Claimant's permanent partial disability award for his August 5, 1996 injury does not end on October 14, 1997, that such award continues thereafter and that he is entitled to a continued award of permanent partial disability on and after October 14, 1997 as long as the total

weekly benefits received by the Claimant do not exceed the statutory weekly maximum as determined by the Director, OWCP, as the designed representative of the Secretary of Labor.

As with any complex case involving, as the case at bar, three separate and discrete injuries, three average weekly wages, concurrent awards, successive disabilities and large columns of numbers and numerous drafts of that decision on a word processing system I still do not completely understand, certain mathematical/clerical errors invariably occur, and I shall now proceed to correct those at this point.

With reference to Claimant's average weekly wage for his October 14, 1997 injury, I initially utilized a divisor of 27 weeks for his wages between March 18, 1997 and October 13, 1997 and then I realized that a divisor of 30 was appropriate. I made the appropriate change on page 48 of my decision but failed to do so on page 44. As the parties are in agreement on 30 as the correct divisor, I shall now amend my April 4, 2001 decision, at page 44, to reflect total wages of $39,855.34 between March 18, 1997 and October 13, 1997, thereby producing an average weekly wage of $1,259.16 and I so find and conclude.

Accordingly, as Claimant's average weekly wage for his August 5, 1996 injury was $1,955.01, his loss of wage-earning capacity is $695.85 ($1,955.01 - $1,259.16 =), thereby producing a weekly compensation rate for such wage-earning loss of $417.67, pursuant to Section 8(c)(21) and (h) of the Act. Such award shall continue and run concurrently with Claimant's award of temporary total disability for his October 14, 1997 injury as long as these concurrent awards do not exceed the statutory maximum of $835.74 per week.

I also find and conclude that Claimant is entitled to an award of continued temporary total disability benefits as long as he is not working, that he will still be entitled to a continuing award of temporary partial disability benefits, based upon any difference between the average weekly wage of $1,259.16 and his wages upon his return to work, as properly adjusted for the post-injury inflation between October 14, 1997 and his return to work. The parties should confer among themselves and hopefully agree that any loss of wage-earning capacity is due to Claimant's physical condition and not solely to economic conditions. Any disputes should be brought to the attention of the District Director and, if not resolved, then to the Office of Administrative Law Judges pursuant to a timely filed Section 22 proceeding.

I agree with counsel for SSA that there should be a limitation on an indefinite award of temporary total benefits but I also agree with the Claimant that he should have the

protection of an **ORDER** with reference to these future benefits, especially (1) as benefits to this point are being paid voluntarily by SSA and (2) as it is apparent that Claimant should be able to return to work once he has reached maximum medical improvement. My award on this issue is a reasonable compromise between the parties' respective positions on the propriety of a continuing award of temporary total disability benefits **in futuro** as all agree that he is not entitled to receive TTD while he is gainfully employed.

Accordingly, in view of the foregoing, I now find and conclude that Claimant is entitled to an award of temporary partial disability as a result of his August 5, 1996 injury, that such TPD shall continue as a concurrent award on and after his October 17, 1997 injury, that he is entitled to an award of TPD on and after October 17, 1997, that such TPD shall continue until his return to work, at which time he will be entitled to an award of TPD, based upon the difference between his average weekly wage of $1,259.16 and his adjusted wages upon such return to work, that his concurrent awards shall not exceed the weekly statutory maximum of $835.74, that the parties shall use their best efforts to agree upon such wage-loss upon his return to work and that any disputes should be brought to the attention of the District Director initially and then to the Office of Administrative Law Judges for formal proceedings.

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and Employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.,** 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific**

Shipyards, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d

1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability 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. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

The issue of Section 8(f) relief was not resolved in the **Decision and Order Awarding Benefits** because the obligation of Employer II at that time did not exceed 104 weeks of permanent benefits. However, as found above, such obligation now exceeds 104 weeks of permanent benefits and, subject to appellate review, I shall now resolve this issue in the context of three separate and discrete injuries and awards of concurrent benefits to the Claimant.

On the basis of the totality of the record, I find and conclude that Employer II satisfied these requirements. The record reflects (1) that Claimant has worked as a longshore worker on the waterfront for many years, (2) that such maritime employment involves heavy manual labor, (3) that Claimant has sustained a number of injuries to various body parts in the course of such employment, (4) that he has sustained separate and discrete back injuries in the course of such employment on March 25, 1994, on August 5, 1996 and on October 14, 1997, (5) that Claimant has been out of work for various periods of time as a result of those injuries, has been paid compensation benefits for certain periods of time, (6) that the injuries have resulted in physical impairment that has been discussed at length above, (7) that the August 5, 1996 injury has resulted in substantial economic disability as is reflected in his average weekly wage as of August 5, 1996 of $1,955.01 and as October 14, 1997 of $1,259.16 and (8) that Claimant’s permanent partial disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, Claimant’s injuries of March 25, 1994 and August 5, 1996) and his October 14, 1997 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent

disability. **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on October 14, 1997, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **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 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

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). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board 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. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the

same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Ship-building v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking.

Sacchetti v. General Dynamics Corp., 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

In the case at bar, Employer II is entitled to the limiting provisions of Section 8(f) on the basis of the Board's decision in **Hastings v. Earth Satellite Corp.**, 8 BRBS 519 (1978), **aff'd in pertinent part**, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980). The factual scenario in **Hastings** is virtually similar herein as both cases deal with successive injuries and concurrent awards.

AMENDED ORDER

Based upon the foregoing Additional Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The modifications herein are noted in boldface type for ease of reference. The specific dollar computations of the compensation award shall be administratively performed and verified by the District Director.

It is therefore **ORDERED** that:

1. Marine Terminals and Majestic Insurance Company (Employer II) shall pay to the Claimant compensation for his temporary total disability from August 5, 1996 through September 19, 1996, based upon an average weekly wage of $1,955.01, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Employer II shall pay to Claimant compensation for his permanent partial disability, between March 18, 1997 and October 13, 1997, based upon the difference between his average weekly wage at the time of the injury, $1,955.01, and his wage-earning capacity after the injury, **$1,259.16**, as determined in the pertinent section herein, as provided by Section 8(c)(21 and 8(h) of the Act. **Claimant alleges that the chart establishes that the wage loss for the time period is $10,487.73, entitling**

him to PPD benefits of $7,783.18 plus interest at the appropriate rate. This award shall continue as a concurrent award with the award in provision #3 as long as the total amount of the concurrent awards does not exceed the maximum statutory amount of $835.74 per week.

3. SSA/Homeport Insurance Company (Employer I) shall pay to the Claimant compensation for his temporary total disability from October 14, 1997 through the present and continuing, **except during those weeks he has been able to return to work**, based upon the average weekly wage of **$1,328.51**, such compensation to be computed in accordance with Section 8(b) of the Act. **This award shall continue until Claimant returns to work, at which time he may be entitled to an award of temporary partial disability benefits based upon the difference between his average weekly wage and his post-injury adjusted wage-earning capacity. The parties shall use their best efforts to agree upon any such wage loss and any dispute shall be brought to the attention of the District Director and then to the Office of Administrative Law Judges.**

4. Interest shall be paid by Employer I and Employer II on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. Employer I shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his work-related injuries joined herein.

6. Employer I shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, **i.e.**, his lumbar and psychiatric problems, between March 25, 1994 and August 4, 1996 and on and after October 14, 1997, subject to the provisions of Section 7 of the Act.

7. Employer II shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, **i.e.**, his lumbar and psychological problems, between August 5, 1996 and October 13, 1996.

8. **The obligation of Employer II herein is limited to the payment of 104 weeks of permanent benefits and after this obligation has been satisfied, continuing benefits shall be paid by the Special Fund established in Section 44 of the Act.**

9. Claimant's attorney shall file, within thirty (30) days of receipt of this **Decision On Motions for Reconsideration** a

fully supported and fully itemized fee petition, apportioned to the best of her ability, as discussed above, sending a copy thereof to counsel for Employer I and Employer II, who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference held before the District Director.

A
DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl