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**Issue Date: 24 April 2012**

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*In the Matter of:*

STEPHEN FIELDER,  
*Claimant,*

Case No.: 2011 LHC 01719  
OWCP No.: 06-190452

v.  
SEA RAY BOATS, INC. /  
INSURANCE COMPANY of the STATE of PENN.,  
*Employer/Carrier,*  
and  
DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
*Party in Interest.*

.....  
Decision and Order

This matter arises pursuant to a Petition for relief filed by Sea Ray Boats, Inc., (Employer) under Section 8(f) of the Longshore Act. The Petition seeks to transfer to a government administered Special Fund liability for compensation owed to an injured worker. On July 25, 1988, while working as Employer's lamination manager, Stephen Fielder (Claimant) was attending a dealer open house when he severely injured his low back in a boating accident. He was diagnosed with a compound fracture of the spine at L1, and initially received conservative treatment. Ex. 2 at 16. In September, 1991, Claimant's physician, Dr. Hani El Kommos, performed an extensive posterior fusion during which he installed instrumentation along Claimant's spine from T10 through L3. Ex. 2 at 10-17, Ex. 4 at 19-20. Shortly after the surgery, Claimant returned to his job. He received no impairment rating at the time, sustained no loss of wage-earning capacity, and he was formally placed on no restrictions other than to limit his twisting movements and to use common sense when engaging in physical activity. Ex. 4 at 18.

On October 20, 2002, Claimant allegedly injured his low back when, while inspecting a boat, he slipped down a stairway and landed on his buttocks. This incident triggered sharp pain which radiated into Claimant's lower extremities and subsequently led to further surgery. In October, 2010, Dr. Michael Broom, Claimant's new surgeon, placed Claimant at maximum medical improvement for his injuries retroactive to July 15, 2010, and declared him permanently and totally disabled. Ex. 3 at 35-6.

In this proceeding, Employer seeks to transfer liability to the Special Fund on the ground that Claimant's current disability results from a combination of his 1988 and October 20, 2002 injuries. In a brief filed March 16, 2012, the Director, OWCP, as administrator of the Special Fund, argued the Sea Ray has failed to satisfy any of the criteria prerequisite to establishing Section 8(f) relief, and, therefore, its Petition should be denied.

### Discussion

In general, Section 8(f) of the Act limits the liability of the employer of an injured worker to 104 weeks of compensation. Section 8(f)(1). The relief it affords is available, however, only if the employer establishes that (1) the injured worker has a pre-existing permanent partial disability; (2) the pre-existing condition was manifest to the employer; (3) the disability following the second injury was not due solely to the second injury; and (4) the resulting disability was materially and substantially greater than that which would have resulted from the second injury alone. 33 U.S.C. 908(f)(1); Director v. Ingalls Shipbuilding, Inc., 125 F. 3d 303, 306 (5<sup>th</sup> Cir. 1997); Two "R" Drilling Co. v. Director, 894 F. 2d 748, 750 ( 5<sup>th</sup> Cir.1990). The Director contends that Employer has failed to establish any of the elements prerequisite to entitlement to Section (8)(f) relief, and accordingly, its Petition for relief should be denied. Each element of Sea Ray's Section 8(f) defense will be addressed below, seriatim.

### Pre-Existing Disability

The Director initially argues that the 1988 injury and subsequent spinal fusion surgery in 1991 did not "disable" Claimant. The Director observes that Claimant was not given a disability rating following the 1991 surgery, was not placed on any physical restrictions other than twisting, he went back to his usual job and was able to work long hours, and he suffered no loss of wage earning capacity. Indeed, he eventually received a promotion. The Director acknowledges that Claimant developed degenerative disc disease, but as the Director observes, it was not diagnosed until after his December, 2002 accident. Rejecting Employer's contention that Claimant's condition would have motivated a cautious employer not to hire him, the Director insists that he was not disabled. The Director thus reasons that Sea Ray has failed to demonstrate that "Claimant had a pre-existing, partial disability" as a result of the 1988 accident. Dir. Br. at 7-8. The applicable precedents, however, would suggest otherwise.

As the Director correctly emphasizes, because Claimant's usual job was very sedentary, he was able to go back to work without a loss of wage-earning capacity; however, the Supreme Court has determined that the word "disability" found in Section 8(f) is not a term of art and need not fall within the definition of "disability" within the meaning of Section 2(10) of the Act. Larson v. Suwannee Fruit and Steamship Co., 336 U.S. 198 (1949); *see, e.g.*, C & P Telephone Co. v. Director, 564 F.2d 503, (D.C. Cir. 1977); Atlantic & Gulf Stevedores v. Director, 542 F.2d 602, (3d Cir. 1976). Further, the courts, applying Larson, have rejected the notion that a "pre-existing partial disability" under Section 8(f) necessarily includes an economic disability. The court in C&P Telephone, for example, stated:

To summarize, the term “disability” in new Section 8(f) can be economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. “Disability” under new Section 8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability ... that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk. C&P Telephone, 564 F.2d at 513

To be sure, Larson interpreted Section 8(f) as it existed prior to the 1972 Amendments to the Longshore Act, but the courts have concluded that no relevant change was intended by the change in phrasing of “previous disability” in the original Section 8(f) to the term “existing permanent partial disability” in the amended Act. As a result, most appellate courts that have considered the issue have concurred in the C&P Telephone rationale that an actual economic loss of wage-earning capacity is not a prerequisite to invoking Section 8(f). *See*, Todd Pacific Shipyards Corp. v. Director, [Mayes], 913 F.2d 1426, (9th Cir. 1990); Director v. Campbell Industries, Inc., 678 F.2d 836, (9th Cir. 1982), *rev’g* Lostanau v. Campbell Industries, Inc., 13 BRBS 227 (1981), *cert. denied*, 459 U.S. 1104 (1983); Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, (5th Cir. 1977), *rev’g* 3 BRBS 426 (1976); Morehead Marine Services, Inc. v. Washnock, 135 F.3d 366, (6th Cir. 1998); Director v. Bath Iron Works Corp. [Johnson], 129 F.3d 45, (1st Cir. 1997); Director v. General Dynamics Corp. [Bergeron], 982 F.2d 790, (2d Cir. 1992); Lockheed Shipbuilding v. Director, 951 F.2d 1143, (9th Cir. 1991).

Administratively, the Benefits Review Board has also concluded that a claimant's pre-existing disability under Section 8(f) need not be economically disabling. *See, e.g.*, Bickham v. New Orleans Stevedoring Co., 18 BRBS 41 (1986); Burch v. Superior Oil Co., 15 BRBS 423 (1983); Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141 (1980); Johnson v. Brady-Hamilton Stevedore Co., 11 BRBS 427 (1979); Lawson v. Atlantic & Gulf Grain Stevedores Co., 6 BRBS 770 (1977); Benoit v. General Dynamics Corp., 6 BRBS 762 (1977); Bickham v. New Orleans Stevedoring Co., 18 BRBS 41 (1986). To the contrary, the Board has adopted the test established in C & P Telephone that a condition is a disability for purposes of Section 8(f) when it is such that a cautious employer would be motivated to avoid hiring or consider discharging an employee with the condition because of a greatly increased risk of compensation liability. *See, e.g.*, Devor v. Dept. of the Army, 41 BRBS 77 (2007); Smith v. Gulf Stevedoring Co., 22 BRBS 1 (1988); Cononetz v. Pacific Fisherman, Inc., 11 BRBS 154 (1979).

Thus, in Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989), the Board granted an employer Section 8(f) relief notwithstanding its specific finding that the claimant’s first injury resulted in no loss of wage-earning capacity. *See also*, Dugas v. Durwood Dunn, Inc., 21 BRBS 277 (1988) (pre-existing condition need not result in an economic disability to be a pre-existing permanent partial disability); Peterson v. Columbia Marine Lines, 21 BRBS 299 (1988); Dugan v. Todd Shipyards, Inc., 22 BRBS 42 (1989) (the mere fact claimant did not lose any time at work due to condition does not preclude a finding of pre-existing permanent partial disability); Devor v. Dep’t of the Army, 41 BRBS 77 (2007) (improper to conclude that claimant had no

disability merely because he was able to perform his usual work as a bartender). As a consequence, contrary to the argument in the Director's brief, Claimant's ability, in this instance, to return to his job following the first injury with no loss of wage-earning capacity is not a sufficient ground to deny the Employer relief under Section 8(f).

The Director, citing Director v. Belcher Erectors, 770 F.2d 1200 (D.C. Cir. 1985), argues further that the fact that Claimant suffered an injury in 1988, "does not establish a disability," and a latent condition is not indicative of "an existing permanent partial disability." Emyard & Sons Shipyard v. Smith, 862 F.2d 1220, 1223 (5<sup>th</sup> Cir 1989). The Director correctly contends that the mere existence of past injury does not itself establish disability; rather, "[t]here must exist, as a result of that injury, some serious, lasting physical problem," Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145-46, (9th Cir. 1991). Each case in which Section 8(f) relief was denied, however, involved circumstances clearly distinguishable from the circumstances involved here. For example, in Todd Shipyards Corp. v. Director, 793 F.2d 1012, (9th Cir. 1986) an injured claimant returned to his job and worked overtime; but unlike the situation here, the medical records showed no objective evidence of a permanent condition. In this instance, the objective evidence of a permanent condition is abundant. Claimant's medical record shows that, as a result of the 1988 injury, he underwent a spinal fusion involving instrumentation, including metal hooks and rods, installed in his spine from T10 to L3. The resulting fusion was clearly a permanent condition.

The Director next contends that the condition was not serious because Claimant returned to work with no formal restrictions and no impairment rating. Yet, the absence of a disability rating following the 1988 injury is not especially significant in the context of this proceeding. The record shows that although Claimant was covered by state workers' compensation at the time and was out of work for a period following the first accident and again during a period of recovery following the surgery, Claimant received no worker's compensation because his Employer apparently had provided for a continuation of his salary and Claimant received full pay. Ex.9 at 1, 2. As a result, the Carrier covered his medical expenses, but compensation was not in issue, and Dr. El Kommos apparently was not requested to provide a date of MMI or an impairment rating following the 1991 surgery.

The record shows, however, that regardless of the reason an impairment rating was not obtained when Claimant reached MMI, with occasional flare-ups, after the 1991 surgery, he nevertheless had a ratable impairment following the accident and the 1991 surgery. Indeed, Dr. Broom, after reviewing Claimant's medical records, testified that Claimant had a 12% permanent impairment from the 1988 accident and the subsequent surgical procedure that installed metal hardware instrumentation from T10 to L3 in Claimant's spine. Ex. 3 at 15-16. In addition, while the Director correctly notes that Dr. El Kommos imposed no formal restrictions following the 1988 accident and 1991 surgery, Claimant was advised to limit his twisting motions and to exercise common sense when engaging in physical activities such as twisting, rotating, and lifting, Ex. 2 at 20-21. Dr. Broom testified, based upon the medical records, that with the type of accident and fusion performed as a result of the 1988 accident, Claimant had permanent limitations that would include excessive bending and twisting and lifting 40-50 pounds. Ex. 3 at 16-17.

The Board has determined that Section 8(f) relief may be available under circumstances in which the pre-existing disability is asymptomatic or even unknown to the claimant. Currie v. Cooper Stevedoring Co. Inc., 23 BRBS 420 (1990) (an asymptomatic pre-existing condition is sufficient when it is a serious lasting condition that would have caused a cautious employer to consider terminating him); Dugan v. Todd Shipyards, Inc., 22 BRBS 42 (1989) (claimant's knowledge of conditions is not relevant). In this instance, Claimant's condition waxed and waned over the years following the 1991 surgery, but he was rarely asymptomatic or free from medical problems associated with his back condition, and he took pain medication to control his symptoms. Ex. 2 at 21, Ex. 4 at 17-18. Like the claimant in Lockheed Shipbuilding v. Director, 951 F.2d 1143, (9th Cir. 1991), Claimant here continued to experience occasional back problems for many years after returning to work. In contrast, in CNA Ins. Co. v. Legrow, 935 F.2d 430, 436, (1st Cir. 1991), Section 8(f) relief was denied under circumstances in which a claimant, following back injuries, resumed his regular physical labor without medical restrictions or medical treatment including medication. Unlike the situation in Legrow and Todd Shipyards Corp. v. Director, [Cortez], 793 F.2d 1012, (9th Cir. 1986), a case in which the first injury was not permanent and the claimant resumed his old job, including overtime, without restrictions or a decrease in pay and no objective medical evidence of permanent disability, the evidence here demonstrates both a permanent condition and a medical history which indicates that Claimant continued to take pain medication for years after the 1988 back injury. *See also*, Director v. Belcher Erectors, 770 F.2d 1220, 1222, (D.C. Cir. 1985).

To establish entitlement to Section 8(f) relief: "there must exist, as a result of the injury, some serious, lasting physical problem." Belcher Erectors, *supra*; *see also*, Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, (5th Cir. 1991). I conclude that the record evidence of a physical and medical foundation is sufficient to demonstrate that Claimant's first injury resulted in a lasting physical problem. *See*, Director v. Potomac Elec. Power Co. (Brannon), 607 F.2d 1378, (D.C. Cir. 1979); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991). The question remains, however, whether the condition was sufficiently serious to motivate a cautious employer to discharge the injured worker.

#### Cautious Employer

As previously noted, to invoke Section 8(f), a pre-existing condition need not be economically disabling so long as it is sufficiently serious to motivate a cautious employer not to hire a worker or to discharge an employee because of a greatly increased risk of compensation liability. C&P Telephone, *supra*. Addressing this issue, the Director believes: "No employer would reasonably be inclined not to hire Claimant;" nor would Claimant's condition motivate a cautious employer to discharge him due to his condition following the first injury. The Director emphasizes that, following the first injury, Claimant worked long hours, had little or no difficulty performing his sedentary job, had no disability rating, no formal medical restrictions; and, rather than discharge him, Employer promoted him.

A review of the case law invoking the "cautious employer" test, however, reveals that it applies to the pre-existing condition not to the worker's actual ability to perform his or her job duties. Nor does it require that the employer actually take adverse action based on the pre-existing condition. To the contrary, Section 8(f) is only available to employers that have hired or retained workers with serious pre-existing disabilities. The "cautious employer" test thus

subsumes the reality that the injured worker has gone back to Longshore work for the employer seeking Section 8(f) relief, and the employee, prior to the second injury, is able to perform duties he or she is assigned despite the pre-existing condition. *See, e.g., Lockheed Shipbuilding v. Director*, 951 F.2d 1143, (9th Cir. 1991); *Kooley, supra*; *Peterson, supra*; *Columbia Marine Lines, supra*; *Dugan, supra*; *Devor, supra*. The “cautious employer test,” thus assesses whether a reasonable employer would view the condition as sufficiently serious to motivate it to consider taking adverse action to avoid a significant liability risk. For the reasons which follow, I conclude that Claimant’s condition clearly satisfies the cautious employer test as formulated by the court in *C&P Telephone*.

Claimant’s condition was clearly a lasting, well-documented physical problem, and as pre-existing conditions go, it would rank as quite serious. Indeed, the Board has held that even an asymptomatic condition may be sufficient to trigger Section (8)(f). *See, Director v. General Dynamics Corp.* [Bergeron], 982 F.2d 790, (2d Cir. 1992); *see also, Currie, supra*. In this instance, Claimant’s medical records reveal not only that, in 1991, he had metal instrumentation, in the form of hooks and rods, installed to fuse his spine from T10 to L3, but, over the years following the fusion, he experienced symptoms that waxed and waned.

Claimant’s condition was, therefore, not asymptomatic; but beyond that, Dr. Broom explained that the pre-existing condition rendered Claimant a greatly increased liability risk for an employer. He testified that the first injury and subsequent fusion put stress on the discs and joints below the fusion, making them more vulnerable not only to premature degeneration, but to injury. Ex 3 at 18. *See, Currie, supra*, (pre-existing condition which pre-disposed a claimant to injury). Consequently, Claimant’s medical records documenting the spinal fusion and the metal hardware surgically installed provide objective indicia of a very serious, lasting pre-existing condition. *Currie, supra*; *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, (6th Cir. 1998). Consistent with the “cautious employer test” as applied by the Board in accordance with *C&P Telephone* and its progeny, I find that the pre-existing condition of Claimant’s spine would motivate a reasonable employer to refuse to hire him or consider discharging him due to an increased risk of an employment-related accident and compensation liability. I, therefore, conclude that Employer has established the existence of a “pre-existing permanent partial disability” under Section 8(f) of the Act.

#### Manifestation of Pre-Existing Condition

In addition to demonstrating the existence of a pre-existing disability, an employer seeking to trigger a Section 8(f) defense must demonstrate that the pre-existing disability was manifest to the employer before the second accident occurred. *See, Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1, 5 n.2 (1987); *C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112 (**11th Cir.** 1994); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323 (**2d Cir.** 1993); *Director v. Luccitelli*, 964 F.2d 1303 (**2d Cir.** 1992), *rev’g Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991); *E.P. Paup Co. v. Director*, 999 F.2d 1341 (**9th Cir.** 1993); *Director v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74 (**1st Cir.** 1992); *Bunge Corp. v. Director, OWCP [Miller]*, 951 F.2d 1109 (**9th Cir.** 1991); *Director v. Berkstresser*, 921 F.2d 306 (**D.C. Cir.** 1990); *Two R Drilling Co. v. Director*, 894 F.2d 748 (**5th Cir.** 1990); *Pennsylvania Tidewater Dock Co. v. Director [Lewis]*, 202 F.3d 656, (**3d Cir.** 2000). Further refining the manifestation requirement, the Board in *Esposito v. Bay Container Repair Co.*, 30 BRBS

67(1996), explained that: "It is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if, prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito* at 68; see also, *Wiggins v. Newport Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1224 (5th Cir. 1989); *Director v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452 (3d Cir. 1978); *Director v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983).

The Director agrees that the Employer had actual knowledge of Claimant's condition following the 1988 injury and surgery. Employer had access to his medical and worker's compensation records; and Patricia Shoemaker, Employer's Human Resource Manager, stated in her January 20, 2011 affidavit that Employer was well aware of the 1988 injury, the spinal fusion, and Claimant's on-going low back problems after the July 25, 1988 accident. Under these circumstances, I conclude that *Employer has clearly satisfied the "manifestation" requirement.*

### Second Injury

To prevail on a Section 8(f) petition, an employer must also establish that a claimant's disability is neither solely due to the new injury, *Two "R" Drilling Co. v. Director*, 894 F.2d 748 (5th Cir. 1990), nor the natural progression of the pre-existing injury. See, *Jacksonville Shipyards v. Director*, 851 F. 2d 1314, (11th Cir. 1988). Challenging this element of Employer's Petition, the Director disputes the contention that Claimant suffered a new injury on October 20, 2002. Dir. Br. at 10.

### New Injury or Natural Progression

Citing the 6-week delay between the date of the alleged second accident on October 20, 2002, and the date Claimant first sought medical treatment for his alleged injuries on December 5, 2002, and the fact that Dr. El Kommos's office notes make no mention of an October 20, 2002 accident or injury, the Director challenges the Employer's assertion that Claimant actually suffered a new injury on October 20, 2002. The Director observes that Dr. El Kommos's notes indicate that Claimant, in December, 2002, was experiencing an on-going problem that was getting worse and resulted from his long work hours and extensive degenerative disc disease. The Director further observes that following the alleged second injury, Claimant continued to work full time, did not have surgery until 2004, and thereafter, he continued to experience pain and numbness due to his degenerative condition. As a result, the Director argues that: "Even if Claimant's fall in 2002 was the trigger that led to another medical evaluation, the accident itself had little impact on his work schedule, and the subsequent evaluation showed only that Claimant suffered from a condition that was 'ongoing for several years.'" Dir. Br. at 10-11. The record, however, suggests otherwise.

Claimant testified at his deposition that he was inspecting a large yacht with two co-workers on October 20, 2002. Ex. 2 at 25. Because the vessel had hardwood floors, the inspectors wore only their socks to avoid scuffing the finish. Claimant testified that he slipped at the top of a stairway and fell approximately eight feet into the vessel's lower cockpit, landing on

his buttocks. Ex. 2 at 24. He experienced sharp pain and reported the incident to his boss, Dennis Wilson. Ex. 2 at 24-25.

Claimant explained that he did not immediately seek medical attention but rather self-medicated with pain pills without much success. Ex. at 25. When the medication failed to alleviate his pain after several days, he became concerned that the fall may have loosened or moved some of the hardware in his spine. He subsequently requested and received permission from the Carrier to see Dr. El Kommos. Ex. 2 at 25, 27. Claimant stated that he delayed seeking medical attention because he had pain medication available and he initially hoped the pain would resolve itself. Ex. 2 at 26.

The record provides no explanation for the failure of Dr. El Kommos's records to mention the October 20, 2002 accident; however, in corroboration of Claimant's testimony that an accident occurred, Ms. Shoemaker attested to the fact that Claimant fell down the stairs on October 20, 2002, and injured his low back. Emp. Pet., Ex. I. In addition, an Accident Investigation Report dated February 5, 2003, reveals an October 20, 2002 date of accident, Ex. 8 at 4, and Employer's Department of Labor Form LS 202, filed on February 6, 2002, reported the October 20, 2002 accident. Ex. 8 at 9. Further, Dr. Broom's medical records show that he was treating, and was authorized by Specialty Risk Services to treat, Claimant for his October 20, 2002 injuries. Ex. 3 at 6. Although Dr. El Kommos reported in December, 2002, that Claimant had a longstanding degenerative condition, Dr. Broom explained that while a portion of Claimant's problems did indeed relate to the degenerative disease, the October 20, 2002 accident aggravated the pre-existing degenerative changes. He opined further that a dislodged hook at L3 was consistent with the type of accident that occurred on October 20, 2002. Ex. 3 at 8-9. Dr. Broom's assessment that Claimant suffered a new injury on October 20, 2002, is also consistent with the action of the insurance carriers in this instance.

The record shows that different carriers were at risk for the 1988 and 2002 accidents, respectively. Employer's state workers' compensation carrier for the first injury is CIGNA. Emp. Pet. Ex I. The Carrier for the second, Longshore, injury is AIG, and its servicing agent is Specialty Risk Services. *See*, LS 202, Ex. 9; Emp. Pet., Ex. I; Ex. 9 at 22. Neither Carrier has suggested any fraud or deception in the report of the October 20, 2002 accident, and neither Carrier has argued that Claimant's current condition is the natural progression of the 1988 injury and resulting surgery.

This seems notable because AIG likely would have insisted that CIGNA undertake the responsibility for Claimant's treatment with Dr. Broom if it deemed Claimant's condition the natural progression of the 1988 injuries as the Director suggests; *see, e.g., Gladney v. American Civil Constructors*, BRB No. 11-0586 (03/29/2012) (dispute between carriers), and AIG likely would have argued that CIGNA, not Specialty Risk Services, should authorize Dr. Broom to treat Claimant's injury. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Mijangos, supra*; *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418, 421 (1983), *rev'd on other grounds sub nom. Director v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984); *Scott v. Rowe Mach. Works*, 9 BRBS 198, 200-01 (1978); *Spencer v. Bethlehem Steel Corp.*, 7 BRBS 675, 677 (1978); *Duty v. Jet America, Inc.*, 4 BRBS 523, 531 (1976). Yet, AIG has not alleged in this proceeding either that the October 20,

2002 accident did not occur or that Claimant's current condition is the natural progression of his 1988 injuries. Thus a carrier responsible for Claimant's medical bills regardless of the outcome of the Section 8(f) Petition seems satisfied that his current condition is the result of a new injury, an aggravation of the 1988 injury, or both, and is not simply the natural progression of a previous injury for which a different carrier would be responsible.

In summary, for all of the foregoing reasons, I conclude that the weight of contemporaneous credible evidence, both direct and circumstantial, indicates that Claimant, as he testified, fell at work on October 20, 2002, and injured his low back. Moreover, according to Dr. Broom's unchallenged assessment, while a portion of Claimant's degenerative changes pre-existed the 2002 accident, the October, 2002 fall caused aggravations of his degenerative changes, including facet degeneration at L4/L5 below the fusion, moderate stenosis, disc degeneration and bulging at L5/S1, Ex 3 at 10, and it dislodged hooks at L3, Ex. 3 at 8-9, all of which, Dr. Broom opined, is consistent with the type of accident that occurred on October 20, 2002. Ex.3 at 9, 10. For these reasons, I, therefore, conclude that, while Claimant did exhibit degenerative changes that were the natural progression of his first injury, his fall on October 20, 2002, aggravated his pre-existing condition and resulted in a second injury. *See*, Foundation Constructors v. Director, 950 F.2d 621, 624 (9th Cir. 1991); Kelaita v. Director, 799 F.2d 1308, 1311 (9th Cir. 1986); Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986) (*en banc*), *aff'g* 751 F.2d 1460 (5th Cir. 1985), *aff'g* 15 BRBS 386 (1983); Newport News Shipbuilding & Dry Dock Co. v. Fishel, 694 F.2d 327 (4th Cir. 1982); Independent Stevedore Co. v. O'Leary, 357 F.2d 812, 815 (9th Cir. 1966) Adam v. Nicholson Terminal & Dry Dock Co., 14 BRBS 735 (1981); Abbott v. Dillingham Marine & Mfg. Co., 14 BRBS 453 (1981), *aff'd sub nom. Willamette Iron & Steel Co. v. OWCP*, 698 F.2d 1235 (9th Cir. 1982) (table); Mulligan v. Haughton Elevator, 12 BRBS 99 (1980); Crawford v. Equitable Shipyards, Inc., 11 BRBS 646, 649-650 (1979), *aff'd per curiam sub nom.*, Employers Nat'l Ins. Co. v. Equitable Shipyards, 640 F.2d 383 (5th Cir. 1981).

#### Contribution of First Injury to Current Condition

Nevertheless, the Director asserts that Section 8(f) relief is available only under circumstances in which a worker's current disability is the result of a combination of a second injury and a pre-existing permanent partial disability. The current disability cannot be due solely to the second injury, and the resulting disability must be materially and substantially greater than the second injury alone would have produced. *See*, Director v. Newport News Shipbuilding & Dry Dock Co. [Harcum I], 8 F.3d 175, (4th Cir. 1993), *aff'd on other grounds*, 115 S.Ct. 1278 (1995); Director v. Ingalls Shipbuilding, Inc. [Ladner], 125 F.2d at 303 (5<sup>th</sup> Cir. 1997). Employer, in this proceeding, has satisfied both criteria.

A preponderance of the record evidence indicates that Claimant's current condition is not solely related to the October 20, 2002 injuries. While Dr. El Kommos's records fail to mention the October 20, 2002 accident, Dr. Broom, in a letter dated January 17, 2011, observed that Claimant was: "diagnosed with stenosis and degeneration below the fusion, which I feel was aggravated to some extent by the October 20, 2002 injury, although the previous injury and resultant fusion clearly had a major affect on his developing this degeneration and stenosis." Dr. Broom opined that more of Claimant's ultimate disability and impairment is due to the initial injury, and, noting again the multi-level fusion, he concluded: 'It is clear based on this

information that Mr. Fielder's current disability is not solely due to the more recent injury of October 20, 2002." Ex 3 at 63. I, therefore, find, based on Dr. Broom's expert analysis, that Claimant's current condition is not due solely to the October 20, 2002 injury.

### Materially and Substantially Greater Disability

The Director next contends that Employer has failed to demonstrate that Claimant's current disability is due to the combination of the first and second injury and is materially and substantially greater than the second injury alone would produce. The Director argues that Claimant suffered no disability from the first injury; and since there was no pre-existing disability, there can be no combination with a second injury. Dir. Br. at 10. In the alternative, the Director contends that any disability Claimant may now experience is due to the natural progression of the pre-existing disability. Dir. Br. at 10-11. For these reasons, the Director asserts that Employer has failed to establish the "contribution" element of the Section 8(f) defense.

### Harcum I

Addressing the "contribution" issue, the Director relies upon the Court's decision in Director v. Newport News Shipbuilding & Dry Dock Co. [Harcum I], 8 F.3d 175, (4th Cir. 1993), *aff'd on other grounds*, 115 S. Ct. 1278 (1995). Dir. Br. at 10-11. In Harcum I, the court held that the "contribution" element of Section 8(f) requires the employer to show, by medical evidence or otherwise, that the ultimate disability materially and substantially exceeds the disability resulting from the second injury alone. To meet this burden, an employer must quantify the level of impairment that would ensue from the second injury alone so that an adjudicative body has a basis on which to determine whether the ultimate disability is materially and substantially greater. A mere increase in whole body impairment is insufficient. Harcum I; *see also*, Quan v. Marine Power & Equipment Co., 30 BRBS 124, 126 (1996); Director v. Ingalls Shipbuilding, Inc. [Ladner], 125 F.3d 303, (5th Cir. 1997). Ceres Marine Terminal v. Director, [Allred], 118 F.3d 387, (5th Cir. 1997); Director v. Bath Iron Works Corp. [Johnson], 129 F.3d 45, (1st Cir. 1997); Newport News Shipbuilding & Dry Dock Co. v. Director, [Harcum II], 131 F.3d 1079, (4th Cir. 1997).

The progeny of Harcum I have further refined the "contribution" element of Section 8(f). In assessing the effect of the second injury on a claimant's disability, it is not permissible merely to subtract the impairment rating for the first injury from the rating following the second injury. Director v. Newport News Shipbuilding & Dry Dock Co. [Carmines], 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); Newport News Shipbuilding & Dry Dock Co. v. Winn, 326 F.3d 427, (4th Cir. 2003); Newport News Shipbuilding & Dry Dock Co. v. Pounders, 326 F.3d 455, (4th Cir. 2003); Smith v. Gulf Stevedoring Co., 22 BRBS 1 (1988). The "contribution" element may, however, be satisfied based on the affidavit of a doctor, who states that, but for the prior related injuries, a claimant's current disability due to pain, for example, would not be as great and/or would not have continued for as prolonged a period of time. *Compare*, Thompson v. Northwest Enviro Services, Inc., 26 BRBS 53 (1992), *with* Abbott v. Louisiana Ins. Guaranty Ass'n, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), and Two "R" Drilling Co., 894 F.2d 748, (5th Cir. 1990). In addition, in Farrell v. Norfolk Shipbuilding & Dry Dock Corp., 32 BRBS 282 (1998), the Board noted that vocational evidence may be considered.

In this instance, Dr. Broom testified at his deposition that Claimant's second injury aggravated his pre-existing degenerative condition and dislodged instrumentation used to fuse his spine at L3 following the 1988 injury. Dr. Broom noted further that the severity of the second injury: "may not have been to a degree to even require additional surgery," Ex. 3 at 63; and, if the second injury did contribute to the need for further surgery, the surgical procedure he performed probably would not have been as extensive had it not been for the first injury and prior surgery. Ex. 3 at 18.<sup>1</sup> In Dr. Broom's opinion, Claimant's present disability is materially and substantially greater due to the earlier 1988 industrial accident and the resulting surgery in December, 1991, than would have resulted from the accident of October 20, 2002, alone. Dr. Broom explained that Claimant's pre-existing injury and surgery pre-disposed him to the greater disability caused by the second injury because they created stresses at the joints and discs below the fusion that made them more susceptible to the damage caused by the second injury. Ex. 3 at 18. In this respect, I find Dr. Broom's opinion well-documented, well-reasoned, and highly credible.

### Quantifying the Disabilities

As previously noted, Dr. El Kommos did not provide an impairment rating following the first injury. Dr. Broom, however, was able to formulate a whole body impairment rating of 12% for the first injury based upon the multi-level fusion performed in 1991. He then evaluated the impairment caused by the second accident, alone, at a 12% whole body impairment rating based upon the additional fusion of a portion of Claimant's low lumbar spine that was not involved in the first fusion. Dr. Broom then rated Claimant's current whole body impairment at 24% based on: "the whole spinal condition including the prior fusion, thoracic and lumbar and more recent low lumbar fusion...." Ex. 3 at 15. It is clear that, in reaching his conclusion, Dr. Broom evaluated the impairments attributable to the first and second injuries separately and independently, and he expressly quantified the level of impairment which Mr. Fielder suffered from the second injury alone.

Consistent with Harcum I, Dr. Broom did not employ the impermissible and discredited "subtraction" method of assessing Claimant's disability. As required by Harcum I, he quantified the level of disability which Claimant suffered from the second injury alone, rating it at 12% permanent partial impairment of the body as a whole. He then permissibly reasoned that Claimant's current whole body impairment rating of 24% is, as a result of the combination of his first and second injuries, materially and substantially greater than he would have suffered as a result of the second injury alone. Ex. 3 at 19, 63. Here again, I find Dr. Broom's opinion well-documented, well-reasoned, and highly credible. Employer has, therefore, satisfied the Harcum I test, and for all of the foregoing reasons, its Petition for Section 8(f) relief will be granted.

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<sup>1</sup> The degree of a physician's certainty in assessing the consequences of the second injury alone may depend upon whether the second injury involves the same body part as the pre-existing injury. For example, the assessment of the level of disability caused by a low back injury to a claimant who has a pre-existing permanent partial disability due to an arm injury involves a considerably different analysis from the claimant who has a pre-existing permanent partial back disability and subsequently sustains a second back injury. Meeting the Harcum I test in the latter situation may present a formidable challenge. In the first example, the physician can evaluate the conditions as they actually exist and assess the impairments as they affect segregated and independent body parts, alone and in combination. In the latter example, in contrast, the physician must first evaluate a hypothetical situation that assumes the second injury occurred in a context devoid of the Claimant's actual injury history, and then quantify how badly a claimant's back likely would have been impaired by the second injury had it not been weakened or damaged by the pre-existing condition.

## Total Disability

The record shows that Claimant was able to work at his sedentary job for several years following the second accident; however, his condition continued to deteriorate. He underwent surgery in January, 2004, to remove some of the hardware from the first fusion, and again on April 1, 2009, he underwent a procedure to fuse the lower limits of the prior fusion to his sacrum. Ex. 3 at 63. Claimant continued to work, but was allowed to leave when his condition required it, Ex. 2 at 35, and he received accommodations and help from his co-workers. A golf cart was provided to help him move about and co-workers assisted him on the stairways. Ex. 2 at 34. By July of 2010, he was unable to manage the pain, Ex. 2 at 39, and his medications made him too sleepy to drive or attend meetings. Ex. 2 at 39. The record shows he was no longer able to perform the duties required by his sedentary job, Ex. 2 at 38-3, and he stopped working on July 30, 2010. As a salaried employee, he was, however, eligible to go on a paid leave of absence for six months, and he received full pay through January 28, 2011. Emp. Pet., Ex I.

## Medical Evidence

Dr. Broom, on July 14, 2009, reported that Claimant was unable to work four hours per day. Ex. 3 at 49. His office notes show that Claimant's pain was treated with medication and injections, but his back and bilateral leg pains were severe. On March 22, 2010, Dr. Broom noted that Claimant was "still struggling" with the pain, and he administered two injections. Ex. 3 at 40-42. By May 19, 2010, "excruciating" pain was awakening Claimant several times a night, and Dr. Broom recommended a trial of NUCYNTA at night and ULTRAM during the day. Ex. 3 at 38. On July 15, 2010, Dr. Broom reported that Claimant was "barely making it at work, with half days" and he considered Claimant permanently disabled at that time. Ex. 3 at 36. As previously discussed, following the first injury, Claimant was permanently, partially disabled, and continued to work. By October, 2010, Dr. Broom placed Claimant at maximum medical improvement for his injuries retroactive to July 15, 2010, and declared him permanently and totally disabled as a result of the combination of his first and second injuries. Ex. 3 at 19, 35-6, 63. On July 11, 2011, Dr. Broom again noted that Claimant was permanently and totally disabled. Ex. 3 at 34; *see also*, Ex. 3 at 33, 31, 14.

## Vocational Evidence

Ellen Fernandez is a vocational consultant retained by Employer to provide a vocational assessment of Claimant's employability. Ex. 5. She met with Claimant, reviewed his medical and employment records, medications, and considered his age, education, and managerial experience. Ex. 5 at 1-2. She noted his above average aptitude and general learning and problem-solving ability and also noted his physical limitations which precluded heavy lifting, his problems bending, stooping, and crouching, and his standing and sitting tolerances of 10-15 minutes. Ex. 5 at 3. Ms. Fernandez conducted a transferrable skills analysis to find vocational alternatives for Claimant and was unable to identify any sedentary or light duty jobs within his restrictions and abilities. Ex. 5 at 4. She noted that, by July 15, 2010, the pain levels he experienced prevented him from performing the sedentary requirements of his job as Employer's general manager even on a part-time basis with accommodations, and noted further that Dr. Broom considered Claimant permanently and totally disabled. Ex. 5 at 4. Thus considering

Claimant's age, education, work history, skills, and physical restrictions, Ms. Fernandez concluded that Claimant lacks vocational potential and is unemployable. Ex. 5 at. 4.

### Conclusions

Based upon the unchallenged assessments of Dr. Broom and Ms. Fernandez, and Claimant's credible testimony, I find and conclude that Claimant is currently permanently disabled and is unable to return to work at his usual and customary job. I further find that the Director and Employer have failed to establish the availability of suitable alternate employment. *See, e.g., Palombo v. Director*, 937 F.2d 70, (2<sup>nd</sup> Cir. 1991). Accordingly, I find and conclude that Claimant is permanently and totally disabled by a combination of his first and second injuries. I further find that Claimant's average weekly wage is \$1,513.81. Ex. 7.<sup>2</sup> The record shows that he started a leave of absence on July 30, 2010, and received full continuation of his salary through January 28, 2011. *See*, Emp. Pet., Ex. I, Para. 17. I, therefore, conclude that Claimant's benefits should commence on January 29, 2011. Accordingly;

### ORDER

IT IS ORDERED that the Employer's Application for Limitation of Liability under Section 8(f) be, and it hereby is granted, and;

IT IS FURTHER ORDERED that Employer shall pay compensation for Claimant's permanent total disability for a period of 104 weeks, commencing as of January 29, 2011, based upon an average weekly wage of \$1,513.81, after which Claimant's compensation shall be paid by the Special Fund.

**A**

Stuart A. Levin  
Administrative Law Judge

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<sup>2</sup> A discrepancy is noted between the average weekly wage (AWW) shown on Ex. 7 and Ex. 10. Exhibit Ex. 7 shows an AWW of \$1513.81 while Ex. 10 shows an AWW of \$1,562.83. Neither the Carrier nor the Director mention the discrepancy or dispute or challenge either AWW, and neither document reveals the data or methodology used to calculate the AWW which it reports. I have, however, placed greater evidentiary weight on the AWW calculated and shown on Ex. 7, Employer's LS 206, because Ex. 7 was prepared by a Claim Consultant in anticipation of the possible need to pay benefits. As a result, it was probably prepared with greater attention to the details of the data because the AWW is the focus of the LS 206 report. In contrast, Ex. 10 is Employer's LS 202, Employer's First Report of Injury, and it was prepared by Employer's H R Assistant when Claimant was still working and payment of compensation was not then in issue. Consequently, it may have been viewed as less important to focus on the AWW data for purposes of completing the LS202. I am, of course, mindful that the need actually to pay compensation may provide an incentive to underreport the AWW. Yet there is no allegation by any party, including Claimant, that the AWW in Ex. 7 is underreported, and therefore assuming both documents were prepared in good faith, for the reason noted, I have accorded greater weight to the AWW reflected in Ex. 7.