UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 23 July 2012

CASE NOS.: 2012-LHC-00028, 2012-LHC-00029, 2012-LHC-00030
OWCP NOS.: 01-166174, 01-163883, 01-166825

In the Matter of:

RONALD A. MARSTERS,
Claimant,

v.

BATH IRON WORKS CORPORATION,
Employer/Self-Insured.

Before: Timothy J. McGrath, Administrative Law Judge

Appearances:

Jan Marie Toker, Esq., McTeague Higbee, Topsham, Maine, for the Claimant

Stephen Hessert, Esq., Norman, Hanson & DeTroy, LLC, Portland, Maine, for the Employer

DECISION AND ORDER AWARDING BENEFITS AND SPECIAL FUND RELIEF

I. STATEMENT OF THE CASE

This proceeding arises from a claim for workers' compensation and medical benefits filed by Ronald Marsters ("Claimant") against Bath Iron Works Corporation ("BIW" or "Employer") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of the Administrative Law Judges for a formal hearing, which was held on March 5, 2012, in Portland, Maine.

At the hearing, appearances were made by attorneys for the Claimant and the Employer. The District Director was not present, nor represented by counsel at the hearing. The hearing transcript is referred herein as ("TR"). The parties represented that they had resolved all the issues between them except for the outstanding issue of BIW's request for relief from liability pursuant to Section 8(f) of the Act. TR at 5. The parties offered signed stipulations which were

admitted as Joint Exhibit ("JX") 1. TR at 5. The Employer's Exhibits ("EX") 1 – 42, Claimant's Exhibits ("CX") 1-15, and ALJ Exhibits ("ALJX") 1– 5 were admitted without objection. TR at 5-9. The record remained open post-trial to allow the parties to depose Claimant's treating physician on April 10, 2012. That deposition transcript was admitted into evidence without objection as EX-43. Pursuant to a Briefing Order issued March 9, 2012, the Claimant and Employer filed their briefs ("Cl. Br." and "Er. Br") and the record is now closed.

The Claimant seeks an award of permanent total disability benefits from April 18, 2008 though the present and continuing. The Employer seeks to invoke Section 8(f) relief, and that request is joined in by the Claimant. Upon review of the parties' stipulations and the evidence of record, I conclude the Claimant is entitled to an award of permanent and total disability compensation beginning on April 18, 2008 to the present and continuing. I further conclude the Employer is entitled to relief from liability pursuant to Section 8(f) of the Act. My findings of fact and conclusions of law are set forth below.

II. PARTIES STIPULATIONS AND ISSUE PRESENTED

The parties entered into the following stipulations: (1) the claim falls under the jurisdiction of the Act; (2) the injuries occurred on April 19, 2005, March 27, 2006 and January 12, 2007[1] at Bath Iron Works; (3) the injury arose out of and in the course of the Claimant's employment with BIW; (4) an employment relationship existed between the Claimant and BIW at all relevant times; (5) the notice, claim, and controversion were all timely; (6) the informal conference occurred on August 30, 2011; (7) the average weekly wage at the time was: $757.52 for the April 19, 2005 injury; $738.26 for the March 27, 2006 injury and $799.72 for the January 12, 2007 injury; (8) the Claimant has been paid temporary total disability at the rate of $505.01 for the April 19, 2005 injury; $492.18 for the March 27, 2006 injury; and $533.15 for the January 12, 2007 injury; (9) the date of maximum medical improvement was April 18, 2008; (10) Claimant's disability became permanent and total as of April 18, 2008. JX-1.

The parties agree that compensation benefits should be paid based on the average weekly wage of $799.72 that corresponds with the last date of injury of January 12, 2007.

The only issue to be adjudicated is whether or not the Employer is entitled to Section 8(f) relief.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Testimony of Ronald Marsters

Claimant was the only witness who testified at the hearing. He is 57 years old and lives in Gardner, Maine. He graduated from high school in Dixfield, Maine and he began working at BIW as a tinsmith on January 2, 1989. He has spent his entire career working at the BIW shipyard in that capacity. TR at 13-14. The main duties of a tinsmith are to install overhead ventilation lines for air conditioning in ships. The ventilation lines consisted of heavy galvanized steel and aluminum.

[1] Those three injuries will be hereinafter be referred to in this Decision as the "subsequent injuries."

Claimant testified he sustained a gradual work injury to his back up through April 19, 2005. He remembers having intermittent pain so he sought treatment from his personal physician who then referred him to see Dr. Susan Hage at Medical Rehabilitation Associates. His initial visit with Dr. Hage was on May 25, 2005. An MRI was scheduled and that is when the cause of his problems became evident. [2] He testified that the April 2005 injury to his back was a gradual injury caused by many years of heavy lifting and very physical work. Claimant testified his work included climbing up ladders, working on saw horses, heavy lifting, twisting, being in awkward positions and brutal physical labor. TR at 15. He testified that he has had treatment, including cortisone shots in order to function. After the injury he returned to work at BIW where he was subject to limitations because of his back problem. He was limited in his ability to sit and stand for no more than 20 minutes at a time, and could only kneel, bend and climb as he could tolerate. He testified that BIW was aware of the back problems because his supervisors tried to accommodate him and BIW was paying for the medical treatment and his lost time from work. TR 16.

On March 27, 2006 Claimant sustained a traumatic injury to his left shoulder. That injury occurred when he was working overhead installing a vent line and the stepladder he was standing on kicked out, causing him to fall backwards. Claimant put his left arm up to break his backwards fall, his arm got caught in the bulkhead and he severely damaged his shoulder. He testified he "ripped three of the four ligaments—one right off the bone and two just tore apart." TR at 17. He was diagnosed with a rotator cuff injury and underwent surgical repair on April 27, 2006. TR at 18; EX 33 at 425, 426; EX 36 at 441.

Claimant testified he has no strength or endurance because of the rotator cuff injury. He said he cannot lift over 10 or 15 pounds because he can feel the shoulder pulling. He said he cannot hold his arm over the height of his shoulder for any more than a minute or two at a time. TR at 18. He returned to work at BIW in September 2006 but continued to have limitations on the use of his shoulder. He could no longer do overhead work because of the injury, and that is a big problem for someone who works as a tinsmith. TR 19.

Claimant testified about the third injury he suffered. He sustained a gradual injury to his right shoulder with a date of January 12, 2007 due to a lot of overhead work and repetitive stress, strain and taxation of the shoulder. He had surgery on the right shoulder and attempted to go back to work at BIW. He was placed on extreme light duty in order to keep employed, but that was not a long term solution. By the spring of 2008, both he and BIW recognized that he was no longer able to work due to his back and left and right shoulder conditions. TR 20.

He said that any of the three separate injuries would have affected his ability to do his job, but in combination, he was unable to perform his usual work as a tinsmith. He said "I don't believe I can do anything." TR at 21. Claimant testified he is currently receiving Social Security disability payments. He also described his inability to drive a car except for very short trips

[2] MRI of the lumbar spine in March 2005 showed bulging at T11-T12, a small L1-2 herniation, bulging L2-4 without neural compromise, a small right sided herniation at L4-L-5 with annular tear affecting the sac and L5 nerve roots, and a small to moderate L5-S-1 herniation with predominant neural foraminal narrowing and facet arthropathy again involving the L5 nerve roots. X-rays of the lumbosacral spine at L4-L-5 showed degenerative changes.

around town to run errands because of severe back pain and sciatica that causes shooting pains in his legs and toes. He testified the pain and spasms cause him to be anxious while driving because he is afraid he could get into an accident and harm someone. TR at 22.

B. Medical Testimony: Susan Hage, D.O.

A post hearing deposition of Dr. Hage took place on April 10, 2012, and the transcript has been offered and admitted as EX-43. Dr. Hage is licensed to practice medicine in Maine and is a specialist in physiatry. She explained that physiatry is a combination of physical medicine and rehabilitation that focuses on a patient's quality of life and functioning when they suffer from disabilities or pain. Treatment is done from a nonoperative approach. She is a member of Medical Rehabilitation Associates, a practice group in Augusta, Maine. EX 43 at 3.

Dr. Hage initially saw Claimant on May 25, 2005 after he was referred to her because of his April 19, 2005 injury. She has continued to treat him since then. She testified that radiographic studies showed that Claimant had degenerative disk disease, as well as herniated disks narrowing in on his nerves. She noted that Claimant had been having back pain for two to three years prior to that first visit. Dr. Hage testified that the degenerative disk disease the Claimant had prior to his injury of April 19, 2005, was preexisting and permanent in nature. She said that his work activities at BIW were superimposed on his preexisting problem and led to the worsening of his back symptoms. EX 43 at 6.

Dr. Hage testified that although Claimant has not had surgery on his back, he has been treated in a conservative, i.e. non-surgical, manner. In addition to medication, he has received a number of cortisone injections which are designed to quiet the swelling and inflammation on the irritated nerve linings and to produce symptomatic relief for up to several months at a time. She testified the injections have been very helpful to Claimant. EX 43 at 8, 9.

Although Dr. Hage did not treat Claimant for the shoulder injuries, she was familiar with the surgical procedures he had undergone and his limitations. She testified that it was the combination of his back and shoulder problems that produced Claimant's total disability. She testified Claimant would still have some work capacity if he only had one of the three injuries, but in combination, he could not return to functional employment. Dr. Hage also testified that in August 2005 Claimant was diagnosed with severe left carpal tunnel syndrome and that would significantly impact his upper extremity function and disability. She indicated it would impact his use of any vibratory tools or his use of tools on a repetitive basis. EX 43 at 9-10, 12-13.

C. Compensation Benefits

Based on the parties' stipulations and findings of fact, the Claimant is entitled to compensation benefits for permanent total disability pursuant to 33 U.S.C. §908(b) commencing on April 18, 2008.

D. Entitlement to Special Fund Relief

Special Fund Relief under Section 8(f) of the Act is available where an employee with an existing permanent partial disability suffers a subsequent injury which, combines with the earlier partial disability, results in permanent total disability. 33 U.S.C. § 908. An employer's liability for payment of benefits under the Act is limited to no greater than a period of 104 weeks with the remaining compensation paid by a Special Fund established pursuant to 33 U.S.C. § 944. 33 U.S.C. § 908(f)(2)(A); *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file an application with the District Director of OWCP pursuant to Section 8(f)(3), which, as amended, provides in pertinent part, "[a]ny request…for apportionment of liability to the special fund…for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability of payment of any benefits in connection with such claim." 33 U.S.C. § 908(f)(3).

The record shows that the Employer submitted a petition for Special Fund relief on August 30, 2011, when the claim was pending before the District Director. The District Director reviewed the application and determined it did not meet the standards to successfully obtain liability relief. In a letter dated September 22, 2011, the Director denied the application stating among other reasons,[3] "There is no medical evidence submitted to establish how the pre-existing condition(s) 4/19/05 back injury [sic] contributed to the subsequent shoulder injuries to render the claimant's current total disability." Since the Section 8(f) application was timely filed, I will proceed to the merits of the Employer's application.

In addition to timely filing a sufficiently documented application, an employer in a permanent and total disability case must meet three requirements to avail itself of Section 8(f) relief: (1) the employee must have a pre-existing permanent partial disability; (2) the pre-existing disability must have been manifest to the Employer; (3) the employee's permanent total disability must not be solely due to the subsequent injury. *Dir., OWCP v. General Dynamics Corp.* [*Lockhart*], 980 F.2d 74 (1st Cir. 1992). In other words, BIW gains entitlement to Section 8(f) relief by showing that but for the pre-existing disability, "…the [C]laimant would not have been rendered totally disabled by the [subsequent injuries]." *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 436 (1st Cir. 1991) (*Legrow*).

As to the first element, the evidence establishes that Claimant had a preexisting permanent partial disability. Dr. Hage testified that the Claimant's degenerative disk disease was present prior to his injury of April 19, 2005, and was therefore preexisting and was permanent in nature. EX 43 at 9.

Next, I must consider whether the Claimant's pre-existing disability was manifest to BIW prior to the subsequent injuries. Regarding this second element, "…a pre-existing disability will

[3]The Director also said the application fails to show that the pre-existing permanent disability would have motivated a cautious employer to terminate the employee.

meet the manifest requirement of Section 8(f) if prior to the subsequent injury, the employer had actual knowledge of the condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito v. Bay Container Repair Co.*, BRBS 67, 68 (1996). In this case, I find that BIW had actual knowledge of the Claimant's pre-existing back problems. BIW employee records show that Claimant's degenerative condition was manifest to BIW as it was recorded in the BIW health department's records. Claimant visited the BIW health department in April 2005 where it was noted he had "two bulging disks" in his back for approximately two years. EX 25, Bates 99. Other instances of the Employer's knowledge of Claimant's back problems can be found throughout the BIW health records in Employer's Exhibit 25. EX 25 at Bates 55, 86, 99, 101. Therefore, I find that the Claimant's pre-existing disabilities were manifest to BIW establishing the second element necessary for obtaining Section 8(f) liability relief.

The third element requires BIW establish that the Claimant's current permanent and total disability is not solely attributable to the subsequent injuries. BIW "must show by medical evidence, or otherwise, that the claimant's subsequent injury *alone* would not have caused the claimant's total permanent disability." *Luccitelli*, 964 F.2d 1303, 1306 (2d Cir. 1992) (italics in original); *see Legrow*, 935 F.2d at 436 ("the [C]laimant would not have been rendered totally disabled by the subsequent injury."). Further, the "[e]mployer has the burden of establishing that the [subsequent] injury would not have rendered the employee permanently totally disabled absent the pre-existing disability." *Two R Drilling Co., Inc. v. Dir., Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 849 F.2d 748 (5th Cir. 1990).

BIW relies on the deposition and written reports of Dr. Susan Hage to establish that the Claimant's permanent total disability is a result of the combined effects of his degenerative disk disease and back problems, and his right and left shoulder injuries. Dr. Hage testified that if Claimant had only one of the three injuries, he would not be totally disabled and he would have some residual work capacity. However, the combination of the pre-existing degenerative disk disease and his back problems with the March 2006 and January 2007 shoulder injuries renders the Claimant unable to engage in any type of meaningful employment. EX 43 at 11, 12.

There is no contrary evidence offered. Therefore, I find that the Employer has established that the Claimant's permanent total disability was not due solely to the subsequent injuries, but rather resulted from their combined effects with his chronic back pain and degenerative disk disease. Accordingly, a review of the applicable standard and the facts of this case establish that the Employer is entitled to relief from the Special Fund pursuant to Section 8(f) of the Act. 33 U.S.C. §908(f).

E. Attorney's Fees

Having successfully established his right to continued compensation, the Claimant is entitled to an award of attorney fees under Section 28 of the Act. *See Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). My Order will grant the Claimant's counsel 30 days from the date this order is issued in which to file an attorney's fee petition. The Employer will have 30 days from the entry of the Claimant's attorney fee petition to file any objection.

ORDER

Based upon the Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order:

1. The Employer, Bath Iron Works Corporation, shall pay the Claimant compensation benefits for permanent and total disability pursuant to 33 U.S.C §908(a), at a rate of 66 2/3 percent of his average weekly wage of $799.72 per week beginning on April 18, 2008, and for a period of 104 weeks, plus annual adjustment pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f);

2. Effective with the expiration of the 104 week period of permanent total disability benefits paid by the Employer which began on April 18, 2008, the Special Fund shall assume liability for payments for the Claimant's continuing permanent total disability compensation benefits, pursuant to 33 U.S.C.§ 908(f), from the Special Fund established under 33 U.S.C.§ 944 until further order, and the Employer is entitled to a reimbursement for any overpayment it has made;

3. Bath Iron Works shall pay Claimant interest on any past due benefits at the Treasury Bill rate applicable under 28 U.S.C. § 1961 computed from the date each payment was originally due until paid;

4. Pursuant to 33 U.S.C. § 907, Bath Iron Works Corporation shall provide the Claimant with such reasonable, appropriate, and necessary medical care and treatment as the Claimant's work-related back and right and left shoulder injuries may require.

5. If the Claimant seeks an award of attorney's fees and costs pursuant to 33 U.S.C. § 928, an application conforming to the requirements of 20 C.F.R. § 702.132(a) (2008) shall be filed within **30 days** of the date on which this order is filed in the office of the District Director. Should the Employer object to any fees or costs requested in the application, the parties' attorneys shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed with the court in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Employer objections shall be filed no later than **30 days** following service of the fee application. **The objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Claimant's attorney prior to the filing of the objections; and**

6. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts