

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4819
Summary Calendar

MARATHON LETOURNEAU COMPANY and
HARTFORD FIRE INSURANCE COMPANY,

Petitioners,

versus

JESSIE E. BREWER, and
DIRECTOR, OFFICE OF WORKERS
COMPENSATION OF THE UNITED STATES
DEPARTMENT OF LABOR,

Respondents.

Petition for Review of an Order of the
Benefits Review Board
(BRB #89-2937)

(November 30, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Marathon LeTourneau Company and Hartford Fire Insurance Company challenge the Benefits Review Board's reversal of an administrative law judge's award of contribution relief under Section 8(f) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 908(f). We **AFFIRM**.

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In 1977, Jessie E. Brewer, a Marathon employee, suffered a job-related back injury. He underwent disc surgery on the right side, at the L5-S1 level, and later was released to return to work, with a 20% permanent partial disability rating. In 1984, while still employed by Marathon, Brewer suffered another job-related back injury. A neurosurgeon performed a left hemilaminectomy at both the L4-L5 and L3-L4 levels. The neurosurgeon assigned Brewer a 20% permanent partial disability rating which, added to the previous 20% disability rating, resulted in a 40% impairment, and total disability.

Marathon agreed to pay Brewer benefits for permanent total disability resulting from the 1984 injury, but sought contribution from the second injury fund pursuant to Section 8(f), on the ground that Brewer had a manifest pre-existing permanent partial disability as a result of the 1977 injury that contributed to his permanent total disability.² The ALJ found that Marathon had

² Section 8(f) provides, in pertinent part:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in

established its entitlement to Section 8(f) relief. The BRB reversed, holding that the evidence was insufficient, as a matter of law, to support a finding of contribution, because that evidence established that Brewer's permanent total disability was caused solely by the 1984 injury.

II.

Section 8(f) of the LHWCA "provides that where an employee has a preexisting permanent partial disability, and then is injured and disabled totally and permanently at least in part because of his prior disability, the employer's liability may be limited to 104 weeks of coverage". ***Cajun Tubing Testors, Inc. v. Hargrave***, 951 F.2d 72, 74 (5th Cir. 1992) (citing 33 U.S.C. § 908(f)). "The remainder of the employee's benefits are to be paid out of a

the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only....

(2)(A) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title, except that the special fund shall not assume responsibility with respect to such benefits (and such payments shall not be subject to cessation) in the case of any employer who fails to comply with section 932(a) of this title.

33 U.S.C. § 908(f).

special fund". *Id.*³ To establish its entitlement to such relief, the employer must prove that the employee had "(1) an 'existing permanent partial disability' before the employment injury; (2) that the permanent partial disability was 'manifest' to the employer; and (3) that the current disability is not due solely to the employment injury". *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990). In short, relief is not authorized if the evidence establishes that the claimant's permanent total disability was caused solely by the subsequent work injury. *Id.*

The BRB must uphold an ALJ's findings of fact if such findings are supported by substantial evidence. 33 U.S.C. § 921(b)(3); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 87 (5th Cir. 1990). "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion". *Owens v. Heckler*, 770 F.2d 1276, 1279 (5th Cir. 1985). "Our review of BRB decisions is limited to considering errors of law, and making certain that the BRB adhered to its statutory standard of review of factual determinations, that is, whether the ALJ's findings of fact are supported by substantial evidence and consistent with the law". *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 90 (5th Cir. 1990).

³ The purpose of Section 8(f) "is to encourage the employment of handicapped workers, by protecting an employer who hires a handicapped worker from paying total disability and compensation for an injury that would have been a partial disability but for preexisting conditions". *Cajun Tubing Testors*, 951 F.2d at 74.

The ALJ's finding that Brewer's 1977 injury contributed to his permanent total disability was based on the deposition testimony of Dr. Stringer, who performed surgery on Brewer after the 1984 injury. Dr. Stringer's deposition was the only medical testimony presented to the ALJ. Although Dr. Stringer testified that Brewer's back was more susceptible to injury in 1984 as a result of the 1977 injury and resulting surgery, he also testified that the 1984 injury would have resulted in total permanent disability regardless of that pre-existing injury. Dr. Stringer did *not* testify that the 1977 injury *actually* contributed to the total permanent disability caused by the 1984 injury, but only that the earlier injury made Brewer more prone to experience back problems in the future.⁴ No other evidence was adduced with respect to the contribution issue. The ALJ found that "Dr. Stringer has concluded that [Brewer's] present permanent total disability is 'due solely to' the injury of July 5, 1984".

In concluding that the evidence was insufficient to establish that the 1977 injury contributed to the total permanent disability,

⁴ [I]t would be impossible for me to say that ... it was both of these injuries that have made him 100 percent disabled. I was not involved in his care up until the time I first saw him. And there was nothing in my work-up, or in my evaluation, that indicated he was still having any problems from the bottom disk -- the L5-S1 disk that Dr. Neill operated on.

And so I would have to continue to make the statement ... that he certainly could have 100 percent disability from the job that he was doing at the time of his injury, solely as a result of his second injury.

the BRB adhered to its statutory standard of review of the ALJ's factual findings. Because the ALJ's finding is not supported by substantial evidence, the BRB did not err in reversing the award of Section 8(f) relief.

III.

The decision and order of the BRB is

AFFIRMED.