BRB Nos. 89-0282
and 89-0282A

THOMAS J. WHITE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
PETERSON BOATBUILDING	)	
COMPANY	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH	)	
AMERICA	)	DATE ISSUED:
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeals of the Decision and Order of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Terri L. Herring-Puz (Welch & Condon), Tacoma, Washington, for claimant.

James E. Hutchins (Faulkner, Banfield, Doogan & Holmes), Anchorage, Alaska, for employer/carrier.

Marianne Demetral Smith and Mark Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (88-LHC-1232) of Administrative Law Judge Edward C. Burch rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board heard oral argument in this case on August 2, 1994, in Seattle, Washington.[1]

On October 17, 1978, claimant sustained a low-back injury while working for employer as a mechanic. Subsequent to this injury, claimant had two surgeries on his back. Claimant alleged that while he was hospitalized for the second back surgery, he was dropped by two nurses, and that as a result he suffers from incontinence, bowel and bladder problems, and impotency. Claimant sued the hospital for malpractice, and in July 1984, the malpractice case was settled for $135,000, of which claimant received $77,988.11.

Employer voluntarily paid claimant temporary total disability compensation from October 18, 1978 to December 29, 1978, and again from June 25, 1979 to May 11, 1983. Employer then made temporary partial disability payments until March 13, 1985. At that time, employer suspended its payments because it discovered that claimant had settled his malpractice action without its prior approval. Claimant sought temporary and permanent total disability compensation under the Act. 33 U.S.C. §908(a),(b).

The administrative law judge rejected employer's contention that claimant's right to compensation under the Act is barred pursuant to Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1)(1988), based on claimant's entering into a third-party settlement of the malpractice action without obtaining its prior written approval. The administrative law judge found that inasmuch as the third-party settlement was based on the bowel and bladder injuries alone, and was totally independent of the benefits being claimed under the Act for disability due to claimant's low back injury, Section 33(g) did not apply. On the same rationale, the administrative law judge found that employer was not entitled to an offset under Section 33(f), 33 U.S.C. §933(f). The administrative

[1]Claimant's attorney was unable to attend oral argument, but was given an opportunity to file a brief within 30 days after receiving a copy of the oral argument transcript. We accept claimant's brief, filed October 19, 1994, and employer's response, filed December 1, 1994.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

law judge also rejected employer's argument that claimant sustained a new injury to his lower back in May 1979, which was an intervening cause sufficient to relieve it of liability. The administrative law judge then found that, although it was undisputed that claimant could not return to his previous employment due to his back problems, employer established the availability of suitable alternate employment. Accordingly, he awarded claimant permanent partial disability compensation under the Act commencing April 2, 1984, based on the difference between claimant's stipulated average weekly wage of $192.56 and his post-injury wage-earning capacity in the suitable alternate telephone positions identified by employer's vocational expert. Finally, the administrative law judge rejected employer's contention that it was entitled to relief under Section 8(f) of the Act. 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred in determining that claimant's right to compensation under the Act is not barred under Section 33(g) and that employer is not entitled to a credit for the net amount of the third-party settlement against its future liability pursuant to Section 33(f). Employer also avers that the administrative law judge erred in finding that claimant did not sustain an injury in May 1979 which was an intervening cause of his disability and in denying its request for relief under Section 8(f). Claimant responds, urging that the findings disputed by employer be affirmed.

On cross-appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant that the administrative law judge's findings regarding Section 33(f) and (g) should be affirmed and his finding that suitable alternate employment had been established vacated inasmuch as the administrative law judge failed to consider evidence relating to claimant's alleged psychological disability and the effect, if any, it may have on claimant's employability.

Section 33

Employer argues on appeal that the administrative law judge erred in concluding that claimant's right to compensation under the Act is not barred under Section 33(g). Employer asserts that it is liable under the Act for any injuries claimant received during the course of treatment covered under the Act, and claimant entered into a settlement of the third-party malpractice action for these injuries without obtaining its prior written consent. Employer maintains that because it dutifully paid claimant's compensation benefits and medical care during the time when the alleged negligence occurred during claimant's hospitalization and thereafter,[2] the finding that the claim is not barred on the facts presented is contrary to law.

Section 33 of the Act addresses situations where an employee sustains a disability compensable under the Act, for which a third party may be liable in damages. In such a case, the claimant need not elect whether to seek compensation or pursue a third-party suit to recover damages. 33 U.S.C. §933(a). Section 33 permits an employee to file suit against a third party while

[2]We note that there is no evidence in the record which supports employer's assertion in this regard.

also pursuing compensation under the Act and contains provisions designed to prevent injured employees from receiving double recoveries where they are entitled to both benefits under the Act and civil damages from a successful suit. *See* 33 U.S.C. §933(e), (f), (g); *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994). Section 33(g)(1), as amended in 1984, states:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1)(1988). The purpose of this provision is to protect the employer against the employee's entering an inordinately low settlement, which would deprive the employer of a proper offset under Section 33(f). *Cretan*, 1 F.3d at 846, 27 BRBS at 96 (CRT). *See also Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992). Section 33(f) acts as a safeguard against double recovery by allowing employer to offset against its liability the net amount of any recovery that the person entitled to compensation receives from third parties for the same disability claimed under the Act.[3] *Cretan*, 1 F.3d at 846, 27 BRBS at 95-96 (CRT); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991).

In the present case, claimant sustained injuries resulting in bladder and bowel problems while undergoing surgery for his work-related back injury, and he filed a third party action asserting that medical malpractice caused his post-surgical condition. Under the Act, the Board has held that the aggravation of a primary work-related injury by medical or surgical treatment is compensable. *See Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986); *see generally Mattera v. Pacific King, Inc.*, 20 BRBS 43 (1987). Thus, an employer may be held liable for disability

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[3]Section 33(f) provides

> If the person entitled to compensation institutes proceedings . . . the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. . . .

33 U.S.C. §933(f)(1988).

resulting from medical malpractice occurring during the treatment of a work-related injury. *See Wheeler v. Interocean Stevedoring Co.*, 21 BRBS 33 (1988). Fault on the part of a physician, even if it might amount to an actionable tort, does not break the chain of causation. Similarly, injuries due to the negligence of persons other than physicians connected with the process of treatment or convalescence are also within the compensable range of consequences. 1 A. Larson, *Workmen's Compensation Law*, §13.21(a)-(c) (1993).

Employer herein relies on the fact that under this case law, the results of any malpractice could be found compensable, as it resulted from treatment for the back injury. As it is undisputed that claimant settled his malpractice action without obtaining employer's prior written approval, employer asserts that Section 33(g) bars the claim. *See Cowart*, 112 S.Ct. at 2589, 26 BRBS at 49 (CRT). The administrative law judge, however, found that the disability for which claimant was compensated related solely to claimant's primary back injury, while the third-party settlement was for the incontinence and bladder problems resulting from the malpractice; therefore, he concluded that the settlement was not for the same disability and Section 33 does not apply. Further, the administrative law judge did not award medical benefits for claimant's bowel and bladder problems. As the administrative law judge's award thus purports to compensate only claimant's primary back injury, this case presents the novel question of whether Section 33(g) applies where claimant seeks benefits for disability due to the primary injury alone, and his third-party recovery is solely based on subsequent malpractice.

Section 33 applies where claimant seeks compensation for the same disability or death for which a third party is also liable in tort. 33 U.S.C. §933(a). It follows that the Section 33(g) bar applies where claimant settles a suit for the same disability for which he claims compensation and that employer is entitled to a Section 33(f) credit only where the compensation and third-party recovery are for the same disability. Neither the Board nor the federal courts have directly addressed the effect which an employer's potential liability for the results of malpractice has on the application of Section 33.

Initially, we turn to the state courts for guidance and examine how third-party malpractice settlements are dealt with under state workers' compensation statutes with provisions similar to Section 33(g). The state courts are generally in agreement that a compromise of an injured employee's third-party medical malpractice action to recover damages for aggravation injuries allegedly sustained as a result of malpractice in claimant's post-accident medical care will generally foreclose recovery of workers' compensation benefits *only to the extent* that such benefits are attributable to the malpractice. *See Matter of Roach v. Hastings Plastics Corp.*, 442 N.E.2d 1186, 1187 (N.Y. 1982) (emphasis added). As a corollary, it has been recognized that the conduct of a claimant with respect to a third-party malpractice action to recover injuries is referable only to that portion of the compensation award which can be attributed to the malpractice; the injuries caused by the malpractice thus mark the limit the injured employee could recover in his tort action and the limit which the workers' compensation insurer could recover under statutory subrogation. *See Duneu v. Native Textiles*, 512 N.Y.S.2d 923 (N.Y. App. Div. 1987). *See also Forest v. Safeway Stores, Inc.*, 830 P.2d 778 (Alaska 1992); *Firestein v. Kingsbrook Jewish Medical Center*, 528 N.Y.S.2d 85

(N.Y. App. Div. 1988); *Noker v. International Paper Co.*, 457 N.Y.S.2d 909 (N.Y. App. Div. 1982).[4] Thus, a statutory bar such as Section 33(g) would bar recovery only for the results of the malpractice; it would not affect employer's liability for the original primary injury. Applied to this case, employer would remain liable for claimant's back injury, but any claim for compensation for his problems due to malpractice would be subject to Section 33.

This approach is consistent with that taken by the administrative law judge in this case, and is both well-reasoned and persuasive.[5] It recognizes that an employee's failure to obtain prior approval of a third-party malpractice settlement does not affect employer's liability for disability caused by the initial work injury, consistent with the fact that compensation attributable to malpractice represents the extent of employer's potential prejudice in the event that the employee settles a claim without employer's prior approval.[6] Thus, if the compensation being claimed under the Act is for a different condition than the damages which are the subject of the malpractice action, as the administrative law judge found in the present case, the recoveries are not for the same disability, employer suffers no prejudice, and Section 33 does not apply.

Although not involving a malpractice action, a comparable result was reached in *Harms v. Stevedoring Services of America*, 25 BRBS 375, 378-379 (1992) (Smith, J., dissenting on other grounds), *rev'd in part on other grounds mem.*, Nos. 92-70450, 92-70515 (9th Cir. Feb. 10, 1994). In *Harms*, claimant entered into a third-party settlement for a crush injury and claimed benefits thereafter for a hearing loss. The Board held that Section 33(g) did not apply to bar claimant from receiving compensation under the Act for a hearing loss claim. In so concluding, the Board noted

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[4]Because the Longshore Act was patterned after the New York Workmen's Compensation Law, New York case law, in particular, may be instructive. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

[5]This approach also recognizes the practical difficulties which attend application of ordinary third-party rules to malpractice cases. There is a fundamental difference between these aggravation cases and third-party cases in which the wrongdoer caused the original injury which lies in the fact that the malpractice action involves liability for only part of the injury while most other third-party actions involve liability of the third party for the entire injury. 2A A. Larson, *Workmen's Compensation Law*, §72.65(a) (1993).

[6]We note that this analysis is also consistent with case law under the Act relating to intervening causation outside of the malpractice area which recognizes that where claimant sustains a work-related injury employer is liable for claimant's entire resultant disability unless the subsequent progression of claimant's condition is due to an intervening cause, in which case employer is relieved of the liability attributable to the intervening cause. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *see also Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Marsala v. Triple A South*, 14 BRBS 39 (1981). Unless the intervening cause is the cause of all disability thereafter, employer remains liable for the effects of the initial work-related injury.

that pursuant to Section 33(a), Section 33(g) applies only where compensation is sought for the same disability for which damages are sought in a civil action against a third party. *See also Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994) (McGranery, J., dissenting on other grounds); *O'Berry v. Jacksonville Shipyards, Inc.*, 22 BRBS 430 (1989), *modifying on recon.* 21 BRBS 355 (1988). Thus, where compensation is sought only for disability due to the primary injury, and not for subsequent aggravations resulting from medical treatment, and the third-party settlement relates solely to the latter, Section 33 does not apply.

The next issue is whether the administrative law judge's finding that the disability being compensated relates solely to claimant's back condition and not to the results of medical malpractice is supported by substantial evidence. After review of the record, we affirm the administrative law judge's finding that the third party malpractice claim was wholly independent of the benefits being claimed under the Act, as it is rational and supported by the record. *O'Keeffe*, 380 U.S. at 359. On January 14, 1985, claimant's counsel in the civil action, Mr. Bufalini, wrote a letter to employer's counsel in which he stated that the malpractice settlement pertained solely to claimant's bowel, bladder and related problems and that no claim was being made for aggravation of claimant's pre-existing back condition. CX 10 at 202. Moreover, the administrative law judge rationally found that claimant's bowel, bladder and related problems did not effect his employability, as the medical and vocational evidence of record reflects that no additional restrictions were imposed based on these problems. *See* CX 9; EX 19 at 60-64. In addition, in attempting to identify suitable alternate employment, employer's vocational expert, Carolyn Prosser, considered only those restrictions relating to claimant's back. Moreover, although claimant's initial pre-hearing statement indicated that he was seeking compensation under the Act for impotence and incontinence, he later amended his pre-hearing statement to exclude these malpractice injuries. As there is ample evidence in the record to support the administrative law judge's finding that the settlement of the malpractice action was wholly independent of the benefits being claimed under the Act, his determination that claimant's right to compensation under the Act for his back injury is not barred under Section 33(g) is affirmed.[7] Inasmuch as the money claimant received from the malpractice settlement was not for the occupational injury for which compensation was claimed under the Act, the administrative law judge's finding that employer is not entitled to a credit pursuant to Section 33(f) is also affirmed. *See generally Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991).

Intervening Cause

Employer next argues that the administrative law judge erred in failing to conclude that claimant sustained an accidental injury on May 29, 1979, which was a supervening cause of his

[7]Employer asserts that it, in fact, paid medical benefits for treatment of the conditions resulting from the alleged malpractice and argues that, as it is liable for such treatment, Section 33(g) applies. The administrative law judge did not award medical benefits for claimant's incontinence, impotence or related problems. Nothing in this decision prevents employer from raising the Section 33(g) bar or asserting entitlement to a Section 33(f) credit should claimant subsequently claim disability or medical benefits for these conditions.

disability. We reject this contention, as the administrative law judge's finding is supported by substantial evidence. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, claimant must prove that he suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated, or accelerated the condition. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In the present case, although the administrative law judge did not evaluate the causation question in light of the Section 20(a) presumption, it is undisputed that claimant suffered a harm, *i.e.*, a back injury, and that a work accident occurred, and thus the Section 20(a) presumption is invoked. *See generally Merrill v. Todd Pacific Shipyards, Inc*., 25 BRBS 140 (1991).

Once claimant establishes a *prima facie* case, the burden shifts to employer to rebut the presumption. Employer may meet its rebuttal burden by producing substantial evidence that claimant's disabling condition was caused by a subsequent event which was not the natural or unavoidable result of the initial work injury. *See Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, No. 92-70045 (9th Cir. Oct. 6, 1993). Where the subsequent injury is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for disability attributable to the intervening cause. *Wright*, 25 BRBS at 164; *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989).

Employer argues on appeal that claimant sustained a new injury to his lower back in May 1979 when he was struck by scaffolding while performing part-time work for Wall Finishers, Incorporated, and that this injury was a supervening cause of his disability thereafter. We affirm the administrative law judge's finding to the contrary, as it is rational and supported by the record. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994). Employer asserts that claimant was released to return to work by Dr. Erickson, his treating physician, after his October 1978 injury in December 1978 and was asymptomatic until sustaining the new injury, which led him to return to his doctor. In his report dated July 31, 1979, however, Dr. Erickson described claimant's injury as a recurrence of low back pain related to claimant's October 17, 1978, work injury. EX 15 at 134. In addition, later medical reports suggest that the May 1979 accident resulted only in a minor injury to claimant's shoulder. *See, e.g.*, CX 7 at 146. The administrative law judge's conclusion that the May 1979 injury was "to the shoulder area with *continuing complaints* of low back pain, not originating low back pain," *see* Decision and Order at 7 (emphasis in original), is consistent with Dr. Erickson's July 31, 1979, report. Inasmuch as Dr. Erickson specifically related claimant's back problems in May 1979 to the initial October 17, 1978, work injury, the administrative law judge's finding that the May 1979 accident was not an intervening cause sufficient to relieve employer of liability is affirmed as it is supported by substantial evidence.

Section 8(f)

Finally, employer challenges the administrative law judge's finding that it failed to establish

entitlement to relief pursuant to Section 8(f) of the Act based on claimant's pre-existing psychological disorder and a prior back injury he sustained in 1970. Section 8(f) of the Act, 33 U.S.C. §908(f), shifts liability to pay compensation for permanent disability compensation after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, if the employer establishes: (1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that the employee's current disability is not due solely to the most recent injury. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993); *Todd Pacific Shipyards Corp v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25 (CRT) (9th Cir. 1990). Where an employee is permanently partially disabled, the employer must also show that the current permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

In denying employer Section 8(f) relief, the administrative law judge initially rejected employer's assertion that claimant suffered from a pre-existing psychological disorder. In so concluding, he noted that the only neurological records presented showed claimant functioning in the borderline intellectual range with some emotional difficulties. The administrative law judge determined that these records were not evidence of a psychological disorder, but merely of a lower intelligence level. The administrative law judge further determined that, in any event, this condition was not a pre-existing permanent partial disability for purposes of Section 8(f), as it would not motivate a cautious employer to discharge claimant. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977)

We agree with the employer that the administrative law judge's finding that employer is not entitled to Section 8(f) relief based on claimant's pre-existing psychological problems cannot be affirmed, as his finding that employer failed to establish that claimant suffered from any psychological disorder other than a low intelligence level is not consistent with the record. Drs. Severtson, Hamm and Newman offered relevant opinions which the administrative law judge did not discuss. *See* Tr. at 9; CX 4; EX 8 at 53; EX 24 at 166. In addition, the administrative law judge's finding that claimant's low intellectual level was insufficient to establish a pre-existing permanent partial disability under Section 8(f) is not consistent with current case law. Subsequent to the administrative law judge's issuance of his Decision and Order in this case, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, held that limited intelligence can constitute a pre-existing permanent partial disability for purposes of Section 8(f). *Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25 (CRT) (9th Cir. 1990). *See also State Compensation Insurance Fund v. Director, OWCP*, 818 F.2d 1424, 21 BRBS 11 (CRT) (9th Cir. 1987). As the administrative law judge did not fully consider the evidence of record and in view of this new precedent, the administrative law judge's finding that employer did not establish that claimant suffered from a pre-existing permanent partial disability based on a psychological condition is vacated. The case is remanded for the administrative law judge to consider the evidence regarding claimant's psychological condition and render findings consistent with the case precedent.

The administrative law judge's finding that claimant's pre-existing 1970 back injury[8] did not constitute a pre-existing permanent partial disability must also be reconsidered on remand. Although the administrative law judge found that the 1970 back injury did occur, he nonetheless concluded that this injury was not a pre-existing permanent partial disability for Section 8(f) purposes because it was temporary in nature, affecting claimant only until 1975, at which time he returned to pre-injury status. The administrative law judge determined that this injury also would not motivate an employer to discharge claimant because of a greatly increased risk of an employment-related accident.

The record reflects that claimant fell approximately seven feet in the 1970 accident. As a result, he was admitted to the Portland Pain Clinic for 3 1/2 weeks in December 1974. EX 37 at 176. In a follow-up visit to the pain clinic on March 21, 1975, Dr. Russakov noted that claimant was minimally to mildly disabled and that while he may not be able to return to arduous work, he could return to moderate to heavy work. EX 24 at 216; EX 37 at 230. Other reports referring to visits to Emanuel Hospital and to Dr. Seres in 1975 and 1976 indicate that claimant was still complaining of lower back pain, although his x-ray revealed a normal spine. *See* EX 24 at 215, 220, 229, 255; EX 37 at 242. In a letter to the Washington State Department of Labor and Industries dated December 27, 1976, Dr. Gritzka stated that claimant had continuous and chronic back pain since the 1970 injury, and requested enrollment in vocational rehabilitation. EX 37 at 270. This evidence suggests that the effects of the 1970 injury persisted beyond 1975, and may have been more significant than the administrative law judge found. As the administrative law judge failed to consider this evidence in finding that the 1970 injury did not constitute a pre-existing permanent partial disability under Section 8(f), we vacate this finding.

On remand the administrative law judge should reconsider employer's entitlement to Section 8(f) relief in light of all of the relevant evidence of record. If he finds that employer established the pre-existing permanent partial disability requirement of Section 8(f) based on either claimant's pre-existing psychological problems or his 1970 back injury, he should then consider whether that pre-existing condition was a contributing factor to claimant's current level of disability.[9] *E. P. Paup Co.*, 999 F.2d at 1352, 27 BRBS at 52 (CRT). If employer is entitled to Section 8(f) relief, it is liable for 104 weeks of permanent disability benefits commencing April 2, 1984.[10]

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[8]The 1970 injury is sometimes referred to as the 1973 injury in the record.

[9]As there are numerous medical reports of record predating the 1978 injury relating to claimant's psychological problems, his limited intellect, and the 1970 back injury, these conditions were clearly manifest prior to the last work injury. *See, e.g.*, EX 24 at 166, 215, 216, 220, 229, 255; EX 37 at 230, 270. *See also Director, OWCP v. Campbell Industries,* 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

[10]Employer contends that as Dr. Heath released claimant to lighter employment as of July 9, 1982, this date should be recognized as the date of maximum medical improvement. Thus, under Section 8(f), employer contends that its liability should terminate 104 weeks from that date. An employee is

Suitable Alternate Employment

Claimant asserts on cross-appeal that the administrative law judge erred in finding him permanently partially disabled rather than permanently totally disabled. We agree that this finding cannot be affirmed. In determining that employer established the availability of suitable alternate employment, the administrative law judge did not consider the effect of claimant's low intelligence level and psychological problems on his ability to perform alternate jobs.

In the present case, as it is undisputed that claimant is incapable of performing his usual employment as a mechanic, he established a *prima facie* case of total disability. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Accordingly, the burden shifted to employer to demonstrate the availability of suitable alternate employment within the geographic area where claimant resides which claimant is capable of performing given his age, education, physical restrictions, and work experience, and which he could secure if he diligently tried. *Edwards*, 999 F.2d at 1375, 27 BRBS at 82 (CRT); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988). The Act requires that employer establish realistic job opportunities for claimant; for the job opportunities to be considered realistic, employer must establish the precise nature, terms, and availability of the alternate positions identified. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329, 12 BRBS 660, 662 (9th Cir. 1980); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

The administrative law judge found that employer met its burden of demonstrating suitable alternate employment opportunities based on the telephone answering service operator and telephone representative jobs identified as suitable by Ms. Prosser, employer's vocational expert.[11] Although the administrative law judge did not thoroughly discuss the physical requirements of these jobs, it is apparent from the record that they are sedentary, that they involved no heavy lifting, and that claimant could alternate sitting and standing. Furthermore, inasmuch as Ms. Prosser testified

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considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined by medical evidence. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). As the administrative law judge rationally found that claimant reached maximum medical improvement on April 2, 1984, based on a report from the Orthopaedic Panel, EX 8 at 50, if the administrative law judge finds that employer is entitled to Section 8(f) relief on remand, its liability will terminate 104 weeks from that date. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

[11]There were telephone operator positions available with Northeast Unique Answering Service, Puget Sound Answering Service, and Carland Alarm and Communications. EX 25 at 261. Similarly specific telephone sales representative positions were available at Carol Allen Photography, Amerton and Associates, and American Handicapped. EX 25 at 263.

that in identifying these jobs as suitable, she considered the physical capacities evaluation of claimant's treating physician, Dr. Heath, and the administrative law judge credited her testimony, the administrative law judge rationally found that these jobs were suitable for claimant from a physical standpoint.

We agree with claimant, however, that the administrative law judge erred in not considering the effect of claimant's low intelligence and psychological problems on his employability. As claimant asserts, in concluding that suitable alternate employment was established, the administrative law judge failed to consider the testimony of Dr. Severtson, a licensed psychologist, that claimant has a longstanding learning disability which would preclude him from being able to learn new material and which in effect rendered him not vocationally retrainable. *See* Tr. at 8-10.[12] He also did not consider Dr. Severtson's testimony that claimant suffered from the complicating emotional problems of anxiety and depression which hindered his ability to learn new tasks as well as his ability to deal with the public. In addition, the administrative law judge did not address the evidence regarding claimant's pre-existing psychological problems.

We note that employer's vocational expert, Ms. Prosser, did testify that she worked with Dr. Severtson and considered his opinion in identifying the telephone positions as suitable. However, it appears from the record that Ms. Prosser was under a misconception as to Dr. Severtson's opinion regarding claimant's capabilities. While Ms. Prosser assumed that Dr. Severtson believed that claimant would best benefit from hands on, concrete, routine on-the-job training, *see* EX 27 at 342, in actuality, Dr. Severtson stated that claimant was not capable of learning any new vocational task through on-the-job training. Tr. at 8-9, 15. Although Ms. Prosser also stated that the telephone positions identified did not require a specific education or experience level, EX 25, that claimant appeared to be articulate and to have a pleasant telephone voice, and that she believed that claimant would fit the criteria for these jobs, tr. at 187, 199, inasmuch as she also indicated that these jobs required on-the-job training, claimant's ability to perform them appears questionable. Tr. at 196; EX 27 at 342. As the administrative law judge failed to consider the effect of claimant's low intelligence and psychological problems on his employability in making his suitable alternate employment determination and the record suggests that Ms. Prosser's opinion that the telephone jobs were suitable was premised on an erroneous assumption regarding claimant's mental capacity, we vacate the administrative law judge's finding and remand for him to reconsider whether suitable alternate employment has been established taking into account both claimant's physical and mental limitations.[13]

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[12]Dr. Severtson also noted that the only thing claimant had was his physical skills and strength which he lost in the accident, and that "[r]etraining then became a matter of building up his intellectual strengths and, frankly, we couldn't find any and we tried very hard." Tr. at 10.

[13]On remand, the administrative law judge should consider all of the jobs identified by Ms. Prosser. In addition to the telephone jobs relied upon by the administrative law judge, Ms. Prosser also identified jobs as an optical technician apprentice, gas station attendant, and auto parts position which she considered suitable for claimant.

Finally, as claimant asserts, in denying the claim for permanent total disability compensation, the administrative law judge irrationally discredited the opinion of claimant's vocational expert, Mr. Peterson. Mr. Peterson found claimant totally disabled and non-competitive in the active labor market. The administrative law judge found that this opinion was not credible in light of claimant's treating physician's opinion that claimant can work. While claimant's treating physician, Dr. Heath, did opine that claimant was capable of performing light duty work, his opinion only took into account claimant's physical limitations. After reviewing claimant's medical records and the psychological and vocational testing, however, Mr. Peterson concluded that the combination of claimant's physical functioning capability and very low mental capacity and emotional problems render him totally disabled. Tr. at 27. Although credibility determinations are generally within the purview of the administrative law judge, the administrative law judge's rejection of Mr. Peterson's opinion based solely on Dr. Heath's opinion is patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, in re-evaluating the suitable alternate employment issue on remand, the administrative law judge should reconsider Mr. Peterson's opinion in light of the evidence as a whole.

Accordingly, the administrative law judge's determinations that employer established the availability of suitable alternate employment and his denial of Section 8(f) relief are vacated, and the case is remanded for further consideration of these issues consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER,
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge