

WILLIAM EARL BOREN )  
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 Claimant )  
 )  
 v. )  
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 JAMES MARINE, INCORPORATED )  
 )  
 and )  
 )  
 SEABRIGHT INSURANCE COMPANY ) DATE ISSUED: 10/04/2006  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Petitioner ) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Granting Employer Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Robert Nienhuis and Neal W. Settergren, St. Louis, Missouri, for employer/carrier.

Matthew W. Boyle (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits and Order Granting Employer Motion for Reconsideration (2004-LHC-1453) of Administrative Law Judge Rudolf L. Jansen 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a back injury while working for employer on January 15, 2003, prompting his filing a claim for benefits under the Act on June 10, 2003. On January 8, 2004, the district director informed employer that an informal conference was not warranted as the medical records sufficiently established claimant's entitlement to benefits, including permanent total disability benefits from October 29, 2003. Employer rejected the district director's recommendation, and on April 9, 2004, the case was transferred to the Office of Administrative Law Judges (OALJ). At no time while the claim was before the district director did employer request relief under Section 8(f) of the Act, 33 U.S.C. §908(f), a fact duly noted by the district director in transferring the case.

At his deposition on May 10, 2004, claimant informed employer, allegedly for the first time, that he had been receiving treatment from Drs. Meals and Burrow for low back pain prior to the January 15, 2003, work injury. Thereafter, claimant forwarded the treatment records of those physicians to employer. Employer subsequently filed its application for Section 8(f) relief with both the district director and administrative law judge asserting, based on the records of Drs. Meals and Burrow, that claimant's underlying disc degeneration and spondylosis represented pre-existing permanent partial disabilities. The Director then raised the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3), arguing that employer's request for Section 8(f) relief should be barred because it was not raised with the district director prior to the time the case was transferred to the OALJ.

Accepting the stipulations reached by employer and claimant, the administrative law judge awarded claimant temporary total disability benefits from January 15, 2003, through October 28, 2003, and ongoing permanent total disability benefits from October 29, 2003.<sup>1</sup> The administrative law judge next determined that employer's application for Section 8(f) relief was not barred by Section 8(f)(3), as the evidence established that employer could not have reasonably anticipated the liability of the Special Fund until

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<sup>1</sup> On reconsideration, the administrative law judge modified his decision to correct an inconsistency in claimant's compensation rate.

after the case was referred to the OALJ. The administrative law judge further found that employer established its entitlement to Section 8(f) relief on the merits.

On appeal, the Director contends that the administrative law judge erred in finding that the absolute defense of Section 8(f)(3) does not bar employer's claim for Section 8(f) relief. In the alternative, the Director argues that the administrative law judge erred in awarding employer Section 8(f) relief, as the administrative law judge did not make a finding that claimant's permanent total disability is not due solely to the subsequent work-related injury. Employer responds, urging affirmance.

The Director initially asserts that the administrative law judge applied an improper standard in determining that employer could not have reasonably anticipated the Special Fund's liability prior to May 10, 2004. The Director further contends that the record contains sufficient evidence to establish that employer could have reasonably anticipated the Special Fund's liability before the case was transferred to the OALJ.

Section 8(f)(3) requires an employer to present a request for Section 8(f) relief to the district director prior to his consideration of the claim; failure to do so bars the payment of benefits by the Special Fund, unless the employer demonstrates it could not have reasonably anticipated that the Special Fund's liability would be at issue while the case was pending before the district director.<sup>2</sup> The implementing regulation, 20 C.F.R. §702.321, states that the Section 8(f)(3) bar is an affirmative defense that must be raised and pleaded by the Director. As the Director timely raised this defense before the administrative law judge, and it is undisputed that employer did not file a Section 8(f) application while the case was pending before the district director, it is employer's burden to establish that it could not have reasonably anticipated the liability of the Special Fund prior to the referral of the case to OALJ. 20 C.F.R. §702.321(b)(3); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283, *modifying in part. part on recon.* 32 BRBS 118 (1998). "Reasonable anticipation" is a factual determination to be

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<sup>2</sup> Section 8(f)(3) of the Act states:

Any request, filed after September 28 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore (sic), shall be presented to the [district director] prior to the consideration of the claim by the [district director]. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3).

addressed by the administrative law judge. *See Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5<sup>th</sup> Cir. 1999). In resolving this issue, the administrative law judge should address when employer reasonably knew the case might meet the legal requirements for obtaining Section 8(f) relief, when evidence relevant to these requirements was available, and any other facts that would affect employer's ability to raise the Section 8(f) issue before the district director. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

The administrative law judge stated that employer was not aware that claimant had any pre-existing back condition that might entitle it to Section 8(f) relief until it received "definitive evidence" of claimant's back condition at claimant's deposition. Decision and Order at 25. Despite this terminology, the administrative law judge's overall consideration of the record and ultimate conclusion on the "reasonable anticipation" issue reflect, contrary to the Director's assertions, the consideration of the evidence according to the appropriate standard. *Vina*, 168 F.3d 190, 33 BRBS 65(CRT); *Wiggins*, 31 BRBS 142. In this regard, the administrative law judge specifically acknowledged the "reasonable anticipation" standard, Decision and Order at 24; he repeatedly referred to it in his evaluation of the relevant evidence, *id.* at 25-28; and he articulated his ultimate conclusion in terms of that specific standard. In resolving this issue, the administrative law judge explicitly found that employer was not aware that claimant had a pre-existing back condition until the date of his May 10, 2004, deposition, and that the evidence of record established that it could not have reasonably anticipated the liability of the Special Fund until that time. *Id.* at 28.

In finding that employer could not "reasonably anticipate" Special Fund liability until claimant was deposed in May 2004, the administrative law judge relied on claimant's testimony that despite receiving conservative treatment from Drs. Meals and Burrow for "back problems, back stiffness and soreness and possibly arthritis" prior to the January 15, 2003, work injury, he did not miss any work nor was he ever given any work restrictions as a result of those visits. HT at 44-45. Claimant also testified that he never told anyone at employer's facility about the ongoing pre-January 15, 2003, arthritic problems he was having with his lower back, and that as far as he knew, nobody with employer was aware of his condition.<sup>3</sup> HT at 57-58, 61. Claimant, moreover,

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<sup>3</sup> Claimant's testimony is corroborated by the statements of a co-worker, Larry Day, that claimant "never complained" about being unable to perform his work, HT at 72, and never appeared to have any trouble with the physical aspects of his work, HT at 78, and statements of employer's safety manager, Tom Freeman, that claimant never informed him of any back condition prior to January 15, 2003, that there was nothing in claimant's job performance to indicate that he might have had any such back problems, and that he did not become aware of the prior back problem until the date of claimant's deposition on May 10, 2004. The administrative law judge found that the testimony of

acknowledged that he did not send medical records relating to his treatment with Drs. Meals and Burrow to employer until sometime after his deposition in 2004. HT at 57. Furthermore, the initial post-January 15, 2003, medical evaluations of Drs. Davies and Park corroborate claimant's statements.<sup>4</sup> Thus, the administrative law judge's finding that employer could not have reasonably anticipated the liability of the Special Fund until it learned, via claimant's May 10, 2004, deposition testimony, that he had been receiving ongoing treatment for a back condition for a number of years prior to the January 15, 2003, work injury is supported by substantial evidence. *See, e.g., Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991); *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990).

In this regard, we must reject the Director's specific assertions regarding the administrative law judge's interpretation of the evidence of record. Specifically, the Director's position that Dr. Davies's January 19, 2003, discharge summary and claimant's February 21, 1991, lumbar spine x-ray are sufficient to establish that employer should have reasonably anticipated the liability of the Special Fund does not accurately reflect the contents of those documents. In Dr. Davies's report, he lists, as "FINAL DIAGNOSES: 1. Acute low back strain; 2. Lumbar disk degeneration; 3. Lumbar spondylosis." CX C. The physician also observed that an MRI presumably done at the time of claimant's January 15, 2003, work injury "showed some early spondylosis, disk degeneration, bulge at the L5-S1, but no clear cut nerve root impingement," as well as "some narrowing of the foramina toward 4-5," with "the worst changes at L5-S1 some narrowing of the foramina, facet changes, ligamentum flavum hypertrophy." CX C. The February 21, 1991, lumbar spine x-ray indicated

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Mr. Day and Mr. Freeman was "credible and entitled to full probative weight." Decision and Order at 9.

<sup>4</sup> In particular, Dr. Davies opined, on January 16, 2003, that "the patient has not had any real back problems before," CX C, and Dr. Park's opinion dated June 5, 2003, reflects that claimant "denies any previous history of back trouble." CX E.

“very mild degenerative changes” but “no serious disqualifying defect.”<sup>5</sup> Dr. Davies’s January 19, 2003, discharge summary and the February 21, 1991, pre-employment x-ray, are therefore indicative of some structural changes in claimant’s back prior to the time of his January 15, 2003, work injury. The administrative law judge, however, rationally chose to credit other evidence of record, notably the testimony and statements by claimant, Mr. Day and Mr. Freeman, and the medical reports of Drs. Davies and Park, to find that employer did not have sufficient knowledge of claimant’s prior back condition to support a claim for Section 8(f) relief until claimant’s deposition. Given the evidence on this issue, which the administrative law judge is entitled to weigh, the Director has not demonstrated reversible error in the administrative law judge’s findings.

Furthermore, we reject the Director’s contention that the LS-203 claim form in this case was sufficient to put employer on notice of the potential for Special Fund liability.<sup>6</sup> The pertinent part of claimant’s LS-203 states, in describing his injury, that he:

Reached under a shelf in the tool room to get a port-a-power. When claimant began to stand up with the port-a-power, pain immediately hit his low back. Claimant went down to the floor. Claimant also has back and neck pain as a result of doing heavy work for James Marine over the course of 12 years.

EX 1. The administrative law judge rationally found that, in light of the other evidence in existence at that time, this statement does not establish that claimant had any permanent and disabling condition in his low back before his January 15, 2003, injury that might entitle employer to Section 8(f) relief. The administrative law judge’s decision is consistent with the decision of the United States Court of Appeals for the Fifth Circuit, in *Vina*, 168 F.3d 190, 33 BRBS 65(CRT), wherein the court stated “the bare fact of a back

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<sup>5</sup> Claimant, however, in his pre-employment physical examination report dated February 28, 1991, indicated that he had never had any injury or disease, minor or serious, to his neck or back, and the examining physician, Dr. Crawford, opined that claimant’s upper and lower extremities and spine were “normal.” EX F.

<sup>6</sup> We need not address the Director’s assertion that the administrative law judge improperly dismissed the LS-203 claim form because the Director had not stipulated to the date the claim form was filed, as the administrative law judge’s finding relating to that contention represents an alternative rationale for his primary finding, which is supported by substantial evidence, that the LS-203 claim form does not indicate that prior to his January 15, 2003, injury claimant had any permanent disabling condition to his low back before that might entitle employer to Section 8(f) relief.

condition is not necessarily a warrant for discovery regarding the existence of a medical record making the condition manifest.” *Vina*, 168 F.3d at 196, 33 BRBS at 69(CRT). Consequently, the administrative law judge rationally rejected the Director’s arguments on this issue.

Next, contrary to the Director’s assertion, the determinations relevant to the “reasonable anticipation” standard under Section 8(f)(3) and the “cautious employer” standard under Section 8(f) do not rest on the same legal and factual bases. The findings relevant to determining whether employer could have reasonably anticipated the liability of the Special Fund turn on the date it first gained actual knowledge of claimant’s pre-existing back condition. The date the liable employer knows of a prior permanent partial disability, however, is not determinative of whether claimant has a permanent partial disability under the cautious employer test.

The cautious employer test holds that a claimant has a permanent partial disability when he has “such a serious physical disability in fact that a cautious employer . . . would [be] motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.” *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977); *see also Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6<sup>th</sup> Cir. 1998); *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 115(CRT) (1<sup>st</sup> Cir. 1992); *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139(CRT) (2<sup>d</sup> Cir. 1992). In this regard, the question for resolution involves a theoretical assessment as to whether claimant’s pre-existing condition was such that it might motivate a cautious employer to discriminate against that employee. *Id.* A particular employer’s knowledge of the pre-existing condition is simply not relevant to this determination. The administrative law judge must discern only whether claimant has a pre-existing physical disability, and if so, as to whether this condition is sufficiently serious that it might motivate a hypothetical “cautious employer” to discriminate against that employee. The administrative law judge herein was therefore not required to conclude that this employer had sufficient knowledge to be motivated to discharge claimant in order to find the cautious employer test had been met and a pre-existing permanent partial disability established for purposes of Section 8(f).<sup>7</sup> Consequently, we

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<sup>7</sup> Employer’s actual knowledge of the pre-existing condition is also not necessary for a pre-existing permanent disability to be manifest. The manifest requirement of Section 8(f) does not require that the employee’s employer have actual knowledge of his pre-existing condition prior to his injury; rather, an employer “must, by presenting objective evidence that was in existence prior to the second injury, establish that the condition manifested itself to someone prior to that injury.” *American Ship Building Co. v. Director, OWCP*, 865 F.2 727, 22 BRBS 15(CRT) (6<sup>th</sup> Cir. 1989). The opinions of Drs. Meals and Burrow were in existence at the relevant time, and thus their very

reject the Director's assertion that the factual basis for the administrative law judge's finding that employer could not have reasonably anticipated the Special Fund's liability due to its lack of knowledge regarding claimant's pre-existing condition is inconsistent with his application of the cautious employer test in finding that employer established that claimant had pre-existing permanent partial disability for purposes of its request for Section 8(f) relief. Accordingly, the administrative law judge's conclusion that the absolute defense does not bar employer's request for Section 8(f) relief is affirmed as it is rational, in accordance with law and supported by substantial evidence.

The Director also challenges the administrative law judge's consideration of Section 8(f) on the merits. We note, as employer argues in its response brief, that at no time prior to this appeal did the Director challenge the merits of employer's application for Section 8(f) relief; at the hearing, the Director's representative explicitly stated he was not challenging the merits of the application but its timeliness. *See, e.g.,* Decision and Order at 23; HT at 30. Nevertheless, we will address the Director's arguments regarding the administrative law judge's Section 8(f) findings. In this regard, we reject the Director's contention regarding the contribution element, and thus we affirm the administrative law judge's conclusion that employer is entitled to Section 8(f) relief in this case. In order to establish the contribution element in a case where the claimant is permanently totally disabled, employer must demonstrate that claimant's present disability is "not due solely to" the work injury; thus, a claimant's total disability must have been caused by both the work injury and the pre-existing condition. *Director, OWCP v. Luccitelli*, 965 F.2d 1303, 26 BRBS 1(CRT) (2<sup>d</sup> Cir.1992). *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). In addressing the contribution element, the administrative law judge found that "claimant's totally disabling condition is not due solely to the 2003 injury." Decision and Order at 30. In making this determination, the administrative law judge found that Drs. Meals, Davies and Park "all opined that the January 15, 2003, injury aggravated claimant's pre-existing condition, which resulted in [claimant's] current condition today." *Id.* Moreover, the record reveals that Dr. Davies opined that fifty percent of claimant's present condition is due to his pre-existing disc degeneration and spondylosis, thereby supporting the administrative law judge's conclusion that claimant's present total disability is not due solely to the January 15, 2003, work injury but rather was caused by his pre-existing back condition in conjunction with the work-related back injury sustained on January 15, 2003. *See generally Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5<sup>th</sup> Cir. 1997); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9<sup>th</sup> Cir. 1993);

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existence is sufficient to satisfy the manifest requirement in this case. *Id.* The finding that claimant's condition was manifest does not establish employer's actual knowledge and is thus not inconsistent with the administrative law judge's finding employer did not possess such knowledge until claimant's deposition.

*Dominey*, 30 BRBS 134. As the administrative law judge's finding that employer established the contribution element for purposes of its entitlement to Section 8(f) relief is supported by substantial evidence, it is affirmed. The administrative law judge's conclusion that employer is entitled to Section 8(f) relief is therefore affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Granting Employer Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge