BRB No. 05-0454

DAVID B. KOLINA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PORT OF OAKLAND CONSTRUCTORS	)	
	)	
and	)	
	)	
CAMBRIDGE INTEGRATED SERVICES GROUP, INCORPORATED	)	DATE ISSUED: 02/21/2006
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Derek B. Jacobson (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco, California, for employer/carrier.

Peter B. Silvain, Jr. (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.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-LHC-0289) of Administrative Law Judge William Dorsey 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 if they 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).

Claimant, a journeyman pile driver, suffered injuries to his neck on February 9, 2001, when he was catapulted into the air by a falling piece of wood while removing forms from the underside of a concrete bridge. Claimant returned to light-duty work the next day but stopped working due to pain and physical restrictions on February 12, 2001. The parties stipulated that claimant has been unable to return to his usual work since that time.

In his Decision and Order, the administrative law judge found claimant totally disabled from February 9, 2001, to March 3, 2003. He found that employer established suitable alternate employment as of March 4, 2003, and accordingly awarded claimant permanent partial disability benefits from March 4, 2003, through February 21, 2004, based on a residual wage-earning capacity of $300 per week.[1] From February 21, 2004, and continuing, the administrative law judge based claimant's permanent partial disability benefits on his actual weekly earnings of $377.20 as a limousine driver. The administrative law judge further found that employer did not establish its entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Employer appeals, contending that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity and in denying it relief pursuant to Section 8(f). Claimant responds that the administrative law judge's finding regarding his residual wage-earning capacity should be affirmed. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Employer contends that the administrative law judge erred in finding that claimant's post-injury wage-earning capacity is $300 and $377 per week. Employer contends that claimant could have obtained suitable jobs paying between $400 and $600 per week. An award for permanent partial disability under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), is based on two-thirds of the difference between claimant's pre-

[1] The parties stipulated that claimant's average weekly wage was $1,316.61.

injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(h). Section 8(h) provides that claimant's actual post-injury earnings will represent his post-injury earning capacity unless the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity. Under such circumstances, claimant's wage-earning capacity may be fixed based on such factors as the nature of claimant's injury, the degree of his physical impairment, his usual employment, and any other relevant factors. The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wages to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *see generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). The party contending that the employee's actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternative reasonable wage-earning capacity. *See, e.g., Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Based upon a March 2003 labor market survey, the administrative law judge found that employer established the availability of suitable alternate employment. The entry level wages of the suitable jobs paid, in 2003 dollars, between $240 and $527 per week.[2] EX 11. Ms. Melamed, employer's vocational consultant, also provided the upper wage rates for these positions. *Id.* The administrative law judge, however, found it likely that claimant would be able to obtain only entry level positions, and thus found that claimant's wage-earning capacity was $300 per week, up to the time he obtained the limousine driver position in February 2004.

We cannot affirm this finding, as employer correctly contends that the administrative law judge did not discuss and weigh all relevant evidence. The administrative law judge found that the skills claimant obtained in his past construction work would not have given him any advantage in obtaining anything more than a low-paying entry level position. However, the administrative law judge did not discuss the entry level wages of the positions that paid more than $300 per week.[3] The administrative law judge noted, but did not weigh, the testimony of Mr. Farrell, a vocational counselor secured by OWCP, who stated that claimant could obtain jobs that

[2] The administrative law judge also found suitable positions as a sales associate, security operator/guard, parking lot attendant and cashier. The administrative law judge found unsuitable or unavailable positions as a substitute teacher, photography apprentice, telemarketer, and appraiser trainee. EX 11; Decision and Order at 7-8. The labor market survey provided the wages the positions paid at the time of injury.

[3] *See, e.g.*, EX 11 at 17.

paid $10 to $15 per hour.[4] Farrell Dep. at 38-40. As employer contends, the administrative law judge also did not discuss claimant's college degree, extensive experience in the construction industry, his Class A engineering license, and his completion of a vocational rehabilitation program in the field of construction estimating which may qualify him for higher than entry level positions. *See, e.g., id.* at 20-21. Because the administrative law judge did not discuss some of the factors relevant to a determination of claimant's wage-earning capacity prior to February 21, 2004, we must vacate his finding that claimant's wage-earning capacity is $300 per week, and we remand this case for further consideration. *See Container Stevedoring Co. v. Director, OWCP*, 935 F.3d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988).

With regard to claimant's wage-earning capacity as of February 21, 2004, the administrative law judge found that the wage claimant earns as a limousine driver represents his post-injury wage-earning capacity. When claimant works in a post-injury job, the burden of establishing an alternative wage-earning capacity is on the party contending that the claimant's actual post-injury wages do not fairly and reasonably represent his wage-earning capacity. *See Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997). The administrative law judge did not address employer's contention that claimant's actual wages do not represent his capacity earn wages because claimant works only part-time of his own volition.[5] *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994) Therefore, we must remand the case for the administrative law judge to reconsider this finding as well. In addition, in light of his findings on remand regarding claimant's wage-earning capacity prior to his obtaining the limousine driver position, the administrative law judge should address whether claimant's wage-earning capacity after February 2004 is higher than that represented by his actual wages. *Id.*

Employer also appeals the administrative law judge's denial of relief under Section 8(f). The administrative law judge found that employer failed to establish that claimant had a manifest pre-existing permanent partial disability.[6] The Director responds that the administrative law judge's findings in this regard should be affirmed.

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[4] Mr. Farrell also stated that claimant refused to consider entry level positions as an order or rental clerk or in building material sales. Farrell Dep. at 38-40.

[5] There is no medical evidence that restricts claimant to a part-time position. His limitation of his hours is based on his personal choice. HT. at 102-103.

[6] Because the administrative law judge found that claimant suffered no pre-existing disability, he did not reach the issue of contribution.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief in a case where a claimant is permanently partially disabled if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury, and is "materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT)(9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1006), *cert. denied*, 520 U.S. 1155 (1997); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

Employer contends it is entitled to Section 8(f) relief based upon neck injuries claimant sustained in a 1993 accident. On December 20, 1993, claimant was involved in a car accident when he lost control of his vehicle on black ice. HT at 74-75. As a result, he sustained a broken neck in four places, specifically a displacement of the C1 vertebrae and fractures to his C-2 and C-3 vertebrae and odontoid bone. For several months he wore an external halo fixator to immobilize his neck. HT at 75. Claimant returned to his usual pile driving job eleven months later without any physical restrictions. However, in April 1996, claimant applied to the Division of Vocational Rehabilitation of the State of Washington for assistance; claimant reported that he was suffering from cervical pain which became severe when he performed heavy work. EX 6 at 29 Dr. Stark reviewed a CT scan taken on February 23, 2004, after claimant's work injuries, and opined that claimant exhibited the "best possible healing results" from the broken neck with no significant alignment abnormalities. EX 18 at 17. He stated, however, that the 1993 injury made claimant more susceptible to further and more extensive injuries to his cervical spine. *Id.* at 18.

The administrative law judge found that claimant's neck condition did not constitute a pre-existing disability because it did not diminish his wage-earning capacity. He also summarily stated that a cautious employer would not have been motivated to dismiss claimant. Decision and Order at 11. We cannot affirm this finding as the administrative law judge applied an improper standard.

The mere fact that a claimant previously sustained an injury does not, standing alone, establish that he had a pre-existing permanent partial disability. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 22(CRT) (1st Cir. 1991); *Director, OWCP v. Campbell Industries*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1993). However, the medical condition need not cause economic disability in order to constitute a pre-existing permanent partial disability. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989); *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988). An asymptomatic

condition which was aggravated due to the work injury may constitute a pre-existing permanent partial disability within the meaning of Section 8(f). *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1980). A pre-existing disability has been defined as "'such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.'" *Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 1430, 24 BRBS 25, 29-30(CRT) (9th Cir. 1990), quoting *C & P Telephone Co.*, 564 F.2d at 513, 6 BRBS at 415. A pre-existing condition that puts claimant at risk for further and more extensive injuries may constitute a pre-existing disability. *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42(1989).

In the instant case, the administrative law judge did not address whether claimant sustained a "serious, lasting physical" problem as a result of his 1993 accident. Although the fractures healed well and claimant testified that his condition was asymptomatic before the work injury, Dr. Stark testified that claimant should not have been involved in the stressful occupation in which he worked. EXs 13, 18. Moreover, Dr. Stark opined that claimant's condition predisposed him to further and more extensive injury. *Id*. As the administrative law judge focused solely on whether the neck condition caused an economic disability prior to the work injury, we vacate the finding that employer did not establish the pre-existing permanent partial disability element. The case is remanded to the administrative law judge to evaluate the evidence under the proper standard.

We next address employer's argument that the administrative law judge erred in finding that employer failed to establish the manifest element.[7] The administrative law judge found that employer did not have actual or constructive knowledge of any prior

[7] In his discussion of the manifest requirement, the administrative law judge rolled together claimant's spondylosis and neck injuries. We agree that claimant's spondylosis, although due to the broken neck, was neither observed nor diagnosed until after the work injury, and therefore, by itself, does not meet the manifest requirement. *See Caudill v. SeaTac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd sub nom. SeaTac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993)(table). Similarly, we need not address employer's contention that claimant's sustained a disabling brain injury in the car accident. Although claimant did not recall the accident, there is no contemporaneous medical evidence that claimant had ongoing amnesia or any other neurological problems resulting from the car accident. Thus, the manifest element is not met as to this alleged condition. *See Bunge Corp. v. Director, OWCP*,, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991)

disabilities to claimant's neck, based on the testimony of claimant and his wife that claimant recovered fully from the car accident. Decision and Order at 11. We cannot affirm this finding, as the administrative law judge did not address the evidence in view of the appropriate law. The Ninth Circuit, within whose jurisdiction this case arises, stated, in regard to the manifest element, that, "The employee's appearance, medical reports and work experience are relevant, but the critical element is what the employer has available to him. . . ." and that the "key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." *Dillingham Corp. v. Massey*, 505 F.2d 1126, 1128 (9th Cir. 1974); *see also Transbay Container Terminal v. U.S. Dep't of Labor, Benefits Review Board*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998); *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991). The record contains medical documents dating from 1993 to 1996 concerning the injuries claimant sustained in the 1993 car accident that the administrative law judge did not address pursuant to this precedent. Therefore, we vacate that administrative law judge's finding that the manifest element is not satisfied and we remand the case for further findings consistent with law.

In order to obtain relief pursuant to Section 8(f), employer also must establish that claimant's current disability is not due solely to the work injury and is materially and substantially worse due to the contribution of the pre-existing disability. *See [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT). Because he concluded that claimant suffered no pre-existing permanent partial disability from any source, the administrative law judge did not address the contribution element. Decision and Order at 11. On remand, the administrative law judge must address this requirement if he determines that the other elements are satisfied.

Accordingly, the administrative law judge's findings regarding claimant's post-injury wage-earning capacity and the denial of Section 8(f) relief are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge