BRB No. 90-1027

CHARLES LEE BURROWS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Robert C. Manlowe (Williams, Kastner & Gibbs), Seattle, Washington, for employer/carrier.

Samuel J. Oshinsky, Counsel for Longshore (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

*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).

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (88-LHC-3391) of Administrative Law Judge Ellin M. O'Shea 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).

While working for employer as a longshoreman, claimant injured his left hip on April 9, 1986, which caused him ongoing back pain. In 1988 and 1989, Drs. Stump and Green diagnosed degenerative arthritis and spinal stenosis. They opined that claimant suffered from an eight percent permanent partial disability, with five percent due to his pre-existing lumbar degenerative disc disease and three percent due to his symptomatic spinal stenosis. They stated that claimant's April 1986 injury aggravated his back condition. The parties stipulated that employer paid permanent partial disability benefits from March 3, 1987 through March 9, 1989, and that such benefits continue inasmuch as claimant returned to longshore work on March 2, 1987, and has continued to work three or four days a week, with a loss in wage-earning capacity.[1] Employer sought relief from continuing liability for compensation pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Relying on the opinions of Drs. Stump and Green, the administrative law judge found that claimant's pre-existing degenerative spinal condition materially and substantially contributes to claimant's post-injury lumbar impairment. She found, however, that claimant's preexisting condition does not constitute a manifest pre-existing permanent partial disability, and therefore denied employer Section 8(f) relief. Employer appeals the administrative law judge's findings, and the Director, Office of Workers' Compensation Programs, responds, urging affirmance.

Section 8(f) of the Act shifts liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908(f), 944. Section 8(f) is applicable if employer establishes that: 1) the employee had an existing permanent partial disability prior to the employment injury; 2) the disability was manifest prior to the employment injury; and 3) the current disability is not due solely to the most recent injury. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991); *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82 (CRT)(9th Cir. 1991); *Director, OWCP v. Campbell Industries*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

On appeal, employer contends that the administrative law judge erred in determining that to meet the manifest requirement of Section 8(f), employer must demonstrate that claimant had a "serious lasting physical problem." Employer contends that the administrative law judge erred in

[1]The parties also stipulated that employer voluntarily paid claimant compensation for temporary total disability from April 14, 1986 through March 1, 1987.

finding that claimant's five back injuries pre-dating the April 1986 injury, three of which resulted in time lost from work, the 44 chiropractic back treatments by Dr. Austin in the year and a half preceding the April 1986 injury, as well as the 1973 x-ray allegedly showing degenerative arthritis do not reveal a pre-existing, manifest disability. Employer contends that the opinions expressed by Drs. Stump and Green in 1989 establish that the 1973 x-ray reveals degenerative arthritis. Employer also contends that the administrative law judge erred in rejecting Dr. Winkle's 1989 interpretation of the 1980 and 1984 x-rays because his interpretation post-dated the April 1986 injury.

Employer may meet the manifest requirement for Section 8(f) relief by establishing that it either had actual knowledge of the pre-existing condition or the condition was objectively determinable from medical records which were in existence prior to the work injury. *Bunge Corp.*, 951 F.2d at 1111, 25 BRBS at 84 (CRT); *see also Director, OWCP v. Berkstresser*, 921 F.2d 306, 311, 24 BRBS 69, 71-72 (CRT)(D.C. Cir. 1990); *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420, 426 (1990); *Vlasic v. American President Lines*, 20 BRBS 188, 191 (1988). The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest, so long as there is sufficient, unambiguous and obvious information of a serious physical condition that would motivate a cautious employer to discharge the employee because of a greatly increased risk of compensation liability. *See Bunge Corp.*, 951 F.2d at 1111, 25 BRBS at 85 (CRT); *Berkstresser*, 921 F.2d at 310, 24 BRBS at 71-72 (CRT); *Currie*, 23 BRBS at 425; *Armstrong v. General Dynamics Corp.*, 22 BRBS 276, 278 (1989). A *post hoc* diagnosis of a pre-existing condition, even a diagnosis based only on medical records in existence prior to the date of injury, is insufficient to meet the manifest requirement. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 99 (1992), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

The evidence pre-dating claimant's April 1986 injury consists of a 1973 x-ray, the Pacific Maritime Association (PMA) injury records, and the notes of claimant's chiropractor, Dr. Austin, whom claimant saw from December 26, 1980 through December 19, 1986. The 1973 x-ray report states that it shows minimal osteophyte formations throughout the vertebral bodies, sacralization at L5, and spina bifida occulta at S1. In 1989, Drs. Green and Stump stated that the 1973 x-ray documents pre-existing degenerative lumbar arthritis. The administrative law judge found that the 1973 x-ray by itself was insufficient to establish that claimant had a manifest, pre-existing condition, as no doctor of record explained the significance of minimal osteophyte formation either before or after the April 1986 injury.

In 1989, Dr. Winkle opined that x-rays taken in 1980 and 1984 document progressive degenerative disc disease. Those x-rays, however, are not in the record. The PMA injury records indicate that claimant suffered five back sprains or "undetermined" back problems in 1977, 1979, 1984 and 1985, which caused him to miss work in three instances as indicated by the letters "TL." The administrative law judge found that the PMA injury record does not establish claimant had "a serious, lasting physical problem" because it is general and lacks detailed description. Further, the administrative law judge noted that employer's record of weekly hours worked corroborates the PMA record in that it does not show claimant lost significant time from work due to his pre-1986

back injuries or back problems.

The administrative law judge considered Dr. Austin's notes at length, and found that on April 1, 1986, Dr. Austin noted claimant stated he felt good the past three months, that on October 3, 1985, claimant complained of pain in his shoulder blades, and in May and February 1985, stated his low back had been good. The administrative law judge determined that Dr. Austin's notes are largely illegible, but where readable, were insufficiently detailed or descriptive to establish that claimant's pre-existing condition was manifest. Further, the administrative law judge found that in his statements to his physicians since the April 1986 injury and in his hearing testimony, claimant made no reference to a history of back pain. The administrative law judge noted that claimant testified that he sought treatment from Drs. Ruffcorn and Austin for lower back and neck pain, but she discredited claimant's testimony finding claimant's memory was unclear and hazy.

We hold that the administrative law judge rationally determined that the evidence pre-dating the April 1986 injury does not establish that claimant's pre-existing condition was manifest. The administrative law judge rationally determined that the 1973 x-ray showing minimal osteophyte by itself does not establish claimant had a significant medical problem. *See Bunge Corp.*, 951 F.2d at 1111, 25 BRBS at 84-85 (CRT). The physicians' interpretations of the pre-April 1986 x-rays cannot establish claimant's pre-existing condition was manifest because their opinions post-date the April 1986 injury. *See Caudill*, 25 BRBS at 99. The administrative law judge properly found the PMA records which merely indicate that claimant suffered five back strains or "undetermined" back problems, three of which resulted in time lost, are insufficient to show claimant's pre-existing condition was manifest, and that employer's records of weekly hours showing no significant loss of time from work, corroborate her finding. *Vlasic*, 20 BRBS at 191. Additionally, the administrative law judge rationally determined that Dr. Austin's notes which were general and vague could not establish claimant had a manifest, pre-existing disability, and she acted within her discretion in discrediting claimant's testimony. *See Cordero v. Triple A Machine Corp.*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, while employer suggests the cumulative effect of the evidence pre-dating claimant's April 1986 injury establishes claimant's pre-existing condition was manifest, the administrative law judge considered all the relevant evidence, and rationally concluded that employer was not entitled

to Section 8(f) relief.[2]

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

[2]We reject employer's contention that it was prejudiced by the administrative law judge's 11 1/2 month delay in issuing the decision. Although we note that employer stated it was unable to obtain a copy of the hearing transcript, employer has not demonstrated it was prejudiced by the delay. *See Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981).