BRB No. 96-0211

NEVEN ZANKI	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
SOUTHWEST MARINE	)	
	)	
and	)	
	)	
HAMILTON BALLARD LIMITED	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Daniel F. Valenzuela (Samuelson, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

Mark Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-0588) of Administrative Law Judge David Di Nardi awarding benefits 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 applicable law. *O'Keeffe v. Smith,*

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On April 2, 1991, while working as a shipwright foreman for employer, claimant had a twinge in his lower back. On May 3, 1991, claimant had sudden pain in his right lower back, leg and buttock, which was later diagnosed as a disc herniation. Claimant has undergone two lumbar surgeries. Claimant received temporary total disability benefits from May 7, 1991 through September 6, 1993, and permanent partial disability benefits commencing September 7, 1993, and continuing. 33 U.S.C. §908(b), (c)(21). Claimant reached maximum medical improvement on October 26, 1992, and was found to have a 15 percent impairment of the whole man.

The sole issue before the administrative law judge was the applicability of Section 8(f), 33 U.S.C. §908(f). In the Decision and Order, the administrative law judge found that employer is not entitled to Section 8(f) relief from continuing compensation liability because the evidence fails to establish that claimant suffered from any pre-existing permanent partial disability which was manifest to employer and which contributed to claimant's present disability. On appeal, employer contends that the administrative law judge erred in finding it is not entitled to Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Section 8(f) of the Act, shifts the liability to pay compensation for permanent disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. Section 8(f) relief is available, in a case where claimant is permanently partially disabled, if three requirements are met: (1) claimant has a pre-existing permanent partial disability which (2) combines with the subsequent work-related injury to result in a materially and substantially greater degree of permanent disability than that which would have resulted from the work injury alone, and (3) the pre-existing disability was manifest to employer. *Director, OWCP v. Campbell Industries, Inc.* 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

Employer contends that claimant's pain on April 2, 1991, diagnosed as a torn annulus of the L5-S1 disk by Dr. London after the incident of May 3, 1991, was a manifest pre-existing disability inasmuch claimant testified that he reported the April 2 incident to his foreman, and that it contributed to claimant's permanent partial disability based on Dr. London's testimony to that effect.[1] The manifest requirement may be satisfied either by

[1]The administrative law judge found that there was a serious question as to whether the existence of a pre-existing disability had been established as there was no need for medical treatment after the April 2 incident and tests did not reveal a herniated disk until after the second incident on May 3. Decision and Order at 19.

employer's actual knowledge of the pre-existing condition or by medical records from which claimant's condition could be objectively determined and which were in existence prior to the subsequent injury. *Bunge Corp. v. Director, OWCP [Miller]*, 951 F.2d 1109, 25 BRBS 82 (CRT) (9th Cir. 1991).

In this case, claimant testified he told his general foreman that his back and legs were hurting on April 2, 1991, but he still continued to work.[2] *See* Emp. Ex. 6 at 76-77. Moreover, as the administrative law judge found, x-rays were not taken until May 6, 1991, Dr. London's first examination of claimant was May 10, 1991, and the record contains no medical or diagnostic reports concerning claimant's condition prior to the May 3, 1991 incident.[3] Although employer need not know the severity or exact nature of a pre-existing condition for it to be manifest, employer must have sufficient information regarding the existence of a serious, lasting physical problem. *Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992). This standard is not met, as a matter of law, by claimant's testimony as he merely mentioned pain to his foreman and continued working. Furthermore, as no medical records were in existence prior to the second incident, employer could not have actual or constructive knowledge of a prior condition before the occurrence of the second incident. *Bunge*, 951 F.2d at 1109, 25 BRBS at 85 (CRT). We therefore affirm the administrative law judge's finding that employer failed to establish the manifest element and the consequent finding that Section 8(f) relief is not available to employer.[4]

[2]Claimant testified he told his foreman on April 2, 1991, that "my back was hurting and my legs." Emp. Ex. 6 at 77. He stated he continued working thinking he just pulled a muscle, but that his condition worsened. *Id.*

[3]The administrative law judge's reliance on, and quoting of the district director's findings, is harmless as he made independent findings. *See* Decision and Order at 19.

[4]Thus, there is no need to address employer's contentions with regard to the remaining elements of Section 8(f) relief.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge