BRB No. 91-124

CLIFFORD DALEN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CROWLEY CONSTRUCTORS, INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE	)	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 Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Robert A. Ruby (Schmit, Morris, Bittner & Schmit), Oakland, California, for employer/carrier.

Marianne Demetral Smith (Judith E. Kramer, Acting 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: STAGE, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (89-LHC-2776) of Administrative Law Judge Ellin M. O'Shea 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 July 16, 1987, claimant injured his back while carrying a 5-gallon oil drum, weighing 60-65 pounds, during the course of his employment for employer. Decision and Order at 3. Claimant was treated by Dr. Goodwin, a chiropractor, and Dr. Antounian, an orthopedic surgeon. Dr. Goodwin first diagnosed lumbosacral sprain/strain then later updated it to reflect "chronic recurrent lumbosacral strain with associated L5-S1 radiculitis." Jt. Ex 1 at 9. Dr. Antounian diagnosed "severe degenerative spine disease with degenerative scoliosis." Jt. Ex. 4 at 1.

Prior to the hearing, the parties stipulated, *inter alia*, that there was no claim for medical benefits pursuant to Section 7, 33 U.S.C. §907, and that claimant was temporarily totally disabled from July 21, 1987 through January 29, 1988. Claimant and employer stipulated that claimant was permanently totally disabled from January 29, 1988 until March 7, 1990; however, they could not agree on the appropriate average weekly wage. Decision and Order at 2. Mid-hearing, the parties, including the Director, Office of Workers' Compensation Programs (the Director), agreed and stipulated to an average weekly wage of $745 and a residual wage-earning capacity of $220. Consequently, the only issues before the administrative law judge concerned employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief from continuing compensation liability and the date claimant's condition reached maximum medical improvement. *Id.*

The administrative law judge found that claimant's condition reached maximum medical improvement on January 29, 1988. Decision and Order at 11. She awarded claimant temporary total disability benefits for the period from July 21, 1987 through January 29, 1988, permanent total disability benefits from January 30, 1988 to March 7, 1990, and permanent partial disability benefits from March 7, 1990 and continuing, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21) (1988). Decision and Order at 12-13. However, she denied employer Section 8(f) relief because of employer's failure to establish the existence of a permanent partial disability prior to July 16, 1987 or that such was manifest. Decision and Order at 11, 13. Employer appeals the denial of Section 8(f) relief only. The Director responds, urging affirmance.

Employer challenges the administrative law judge's denial of Section 8(f) relief, contending it established all elements necessary for such relief. Section 8(f) shifts the 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. Employer may be granted Special Fund relief if it establishes: 1) the injured employee had an existing permanent partial disability prior to the employment injury; 2) the pre-existing disability was manifest to employer prior to the

employment injury; and 3) any permanent total disability is not due solely to the most recent employment injury and any permanent partial disability is materially and substantially greater than that which would have resulted from the most recent injury alone. *See generally Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1991); *Bunge Corp. v. Miller*, 951 F.2d 1109, 25 BRBS 82 (CRT) (9th Cir. 1991); 33 U.S.C. §908(f)(1). Specifically, in this case employer argues that claimant had a pre-existing permanent disability in his spine that was manifest to it prior to July 1987. An employer need not have actual knowledge of an employee's pre-existing condition for the condition to be manifest. If the condition is readily discoverable from the employee's medical records, knowledge of the condition is imputed. *Bunge Corp.*, 951 F.2d at 1109, 25 BRBS at 82 (CRT); *Director, OWCP v. Campbell Industries*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

The record indicates that claimant suffered a work-related back injury on May 6, 1985. Following the 1985 injury, Dr. Goodwin diagnosed lumbosacral sprain/strain and x-rays revealed "spinal misalignments" at D12-L1 and L4-5 and disc degeneration at L5-S1. Jt. Ex. 1 at 24. Claimant returned to work on June 18, 1985. On July 8, 1985, Dr. Goodwin found that claimant's condition was nearing permanent and stationary status, with no residuals expected. He noted that tightness and soreness persisted and he updated his diagnosis to "resolving lumbosacral sprain/strain." *Id.* at 20. Dr. Goodwin examined claimant again on September 9, 1985, and he again noted some continued tightness and tenderness in claimant's low back. Although he made these findings, Dr. Goodwin determined that claimant's condition reached a permanent and stationary pre-injury status and released claimant from further treatment. *Id.* at 19.

Claimant testified that he continued to suffer back pain after he returned to work following his 1985 injury. He admitted, however, his job duties did not change upon his return to work, nor did he request that they be changed. Claimant also testified that he adjusted his work habits and sought help from his co-workers when necessary to prevent further injury to his back. Tr. at 49, 61, 65-66. The record contains no evidence indicating employer's awareness of claimant's precautions. Further, claimant stated that he did not lose any time from work between late 1985 and July 1987 as a result of back pain. Although he filed a notice of injury for an incident on November 4, 1986, there is no evidence showing that claimant received medical treatment or lost work as a result of that incident. *See* Emp. Ex. 3.

Thus, the only medical evidence available to employer before July 1987 consisted of Dr. Goodwin's 1985 reports. Given that Dr. Goodwin stated unambiguously that no residuals were expected and that claimant's condition had reached a "permanent and stationary pre-injury status," and that the evidence as a whole indicates claimant was able to perform the duties required of his job at all times following his 1985 injury, the administrative law judge's determination that any disability claimant might have had was not manifest to employer prior to claimant's last work injury is rational and supported by substantial evidence. *See Bunge Corp.*, 951 F.2d at 1109, 25 BRBS at 82 (CRT); *Campbell Industries*, 678 F.2d at 836, 14 BRBS at 974. Contrary to employer's argument, the administrative law judge acted within her discretion in determining that the 1985 x-ray showing disc degeneration in and of itself does not manifest a pre-existing permanent partial disability. *See*

Director, OWCP v. Berkstresser, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990). We, therefore, reject employer's contentions and affirm the administrative law judge's denial of Section 8(f) relief.[1]

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[1]We note that, in determining whether claimant suffered from a pre-existing permanent partial disability, the administrative law judge erred in discrediting the post-injury medical opinions merely because they were generated after the last injury. *See, e.g., Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25 (CRT) (9th Cir. 1990); *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990); Decision and Order at 11. Because we affirm the administrative law judge's finding that employer has not met the manifest requirement for Section 8(f) relief, however, we need not address whether claimant had a pre-existing permanent partial disability, as that issue is not dispositive in this case.