BRB No. 09-0661

REYLANS TAPANES	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
POMTOC	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED c/o LAMORTE BURNS & COMPANY	)	DATE ISSUED: 10/29/2010
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	ORDER on MOTION
Petitioner	)	for RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's Decision and Order in *Tapanes v. POMTOC*, BRB No. 09-0661 (May 20, 2010). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer argues that the Board erred in reversing the administrative law judge's award of Section 8(f), 33 U.S.C. §908(f), relief because it had both actual and constructive knowledge of claimant's April 2005 heart attack which occurred prior to his October 2005 work accident. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's motion. As the record contains no pre-injury evidence documenting claimant's heart attack, and there is no legal error in the Board's holding that employer failed to establish the manifest element for Section 8(f) relief, we deny employer's motion.

It is well settled that an administrative law judge's decision must be based on the evidence of record and that evidence must be formally admitted into the record. 5 U.S.C. §557(c)(3)(A); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61

(1985); *Ross v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 224 (1984); 20 C.F.R. §702.338. It is also well settled that documents post-dating the work injury cannot satisfy the Section 8(f) manifest requirement. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Consequently, post-injury doctors' reports referencing claimant's pre-injury heart attack and mere argument that documents concerning the heart attack "must exist" somewhere, but were not entered into the record, do not satisfy employer's burden of establishing the manifest element. *C. G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11(CRT) (5th Cir. 1989). As no pre-injury records were submitted into evidence, employer's assertion that it had both actual and constructive knowledge of claimant's pre-injury condition must fail.[1] As claimant's deposition, standing alone, describing the 2005 heart attack would not remedy the situation in this case, we decline employer's request to remand the case for the submission of this deposition.[2] *See C.G. Willis*, 31 F.3d at 1117, 28 BRBS at 88(CRT). Thus, employer has demonstrated no error in the Board's decision reversing the award of Section 8(f) relief.

[1]To the extent *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007), involved a situation where pre-injury tests were non-existent, whereas this case involves documentation that employer is sure exists but merely is absent from the record, employer is correct that the cases are factually distinguishable. Although employer is correct that the standard for constructive knowledge of a pre-existing permanent partial disability is whether the evidence is "discoverable," the issue of whether evidence is "discoverable" pertains to whether it exists and the information therein can be imputed to the employer, despite the absence of the employer's actual knowledge. Contrary to employer's assertion, the evidence must not only be discoverable, it also must be submitted into evidence in order to establish the principle for which it is propounded. *C.G. Willis*, 31 F.3d at 1117, 28 BRBS at 88(CRT); *Williams*, 17 BRBS 61.

[2]Final decisions may be challenged on the grounds of mistake in the determination of fact or change in conditions. 33 U.S.C. §922. Modification based on a mistake in fact may be available to employer in this situation. *See Bath Iron Works Corp. v. Director, OWCP [Bailey]*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991); *Washington Society for the Blind v. Allison*, 919 F.2d 763 (D.C. Cir. 1991); *Lucas v. Louisiana Ins. Guaranty Assoc.*, 28 BRBS 1 (1994); *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988); 20 C.F.R. §702.373.

Accordingly, employer's motion for reconsideration is denied, and the Board's decision is affirmed. 20 C.F.R. §802.409.

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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JUDITH S. BOGGS
Administrative Appeals Judge