BRB Nos. 08-0272
and 08-0272A

A.D. Claimant Cross-Respondent v. METRO MACHINE CORPORATION and SIGNAL MUTUAL INDEMNITY ASSOCIATION Employer/Carrier- Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: 09/22/2008 DECISION and ORDER

Appeals of the Decision and Order–Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy D. McNair, Erie, Pennsylvania, for claimant.

Michael D. Schaff (Schaff & Young, P.C.), Philadelphia, Pennsylvania, for employer/carrier.

Peter B. Silvain, Jr. (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Compensation Programs (the Director), appeals and employer cross-appeals the Decision and Order-Awarding Benefits (2006-LHC-1964) of Administrative Law Judge Richard A. Morgan 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 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has been before the Board previously. To briefly summarize, claimant sustained an injury to his cervical spine in a work-related accident on January 15, 2001. Employer voluntarily paid claimant temporary total disability benefits from December 21, 2001, through August 28, 2002. Administrative Law Judge Leland awarded claimant continuing temporary total disability benefits beginning August 29, 2002. Employer appealed, and the Board affirmed the award of benefits. [*A.D.*] *v. Metro Machine Corp.*, BRB No. 04-0487 (Feb. 23, 2005)(unpub.).

On July 24, 2006, claimant filed a request for modification after undergoing additional cervical surgery on March 28, 2006. 33 U.S.C. §922. His current diagnosis is cervical myelopathy with spinal cord injury and post-surgical spine syndrome. Claimant alleged this change in his physical condition entitled him to permanent total disability benefits. Employer disputed claimant's allegation of total disability, arguing that he is at most partially disabled. Employer also requested relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Administrative Law Judge Morgan (the administrative law judge) found that claimant reached maximum medical improvement on July 24, 2006, the date the claim for modification was filed. He found that claimant cannot return to his usual employment as an assistant foreman and that employer presented insufficient evidence to establish suitable alternate employment. Accordingly, the administrative law judge awarded claimant permanent total disability benefits. The administrative law judge also found employer entitled to Section 8(f) relief.

On appeal, the Director contends that the administrative law judge erred in awarding employer Section 8(f) relief. Employer responds to the Director's appeal, urging affirmance of the administrative law judge's award of Section 8(f) relief. In its appeal, employer contends the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment such that claimant is entitled to

only partial disability benefits. Claimant responds to employer's appeal, urging affirmance of the administrative law judge's award of total disability benefits.

We first address employer's appeal, as the extent of claimant's disability can affect the applicability of Section 8(f). Employer does not challenge the administrative law judge's finding that the positions identified in its labor market survey are not suitable for claimant, but it avers that claimant is not totally disabled as he owns a bait shop and earns wages from his own labor. Once, as here, claimant establishes his inability to return to his usual employment due to his injury, he has established a *prima facie* case of total disability. The burden then shifts to employer to establish that claimant is only partially disabled by establishing the availability of suitable alternate employment. For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine that jobs are realistically available to claimant and suitable for him given his age, education, medical restrictions and other relevant factors. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *See, e.g., Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Devor v. Dept. of the Army*, 41 BRBS 77 (2007); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Working with the Pennsylvania Office of Vocational Rehabilitation, claimant opened a bait shop on Lake Erie in May 2006. Tr. at 25-28. Claimant testified that he cannot work a regular schedule due to his pain and that the shop is run with the help of family and friends. *Id.* at 28. Employer submitted into evidence surveillance videotapes in an attempt to establish that claimant has a greater physical capacity than he claims and that he is earning wages at the bait shop through his own labor. Self-employment may constitute suitable alternate employment. *Sledge v. Sealand Terminal*, 14 BRBS 334 (1981). That claimant owns a business enterprise is not sufficient, of itself, to meet employer's burden of showing suitable alternate employment. Rather, employer must establish that claimant has earnings resulting from his personal services which may serve as indicia of a wage-earning capacity. *Id.* at 337; *Mitchell v. Bath Iron Works Corp.*, 11 BRBS 770 (1980). Income from a business owned by the employee, even though he contributes some work to it, should not be used to reduce disability compensation. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405-406 (1989), citing 2 A. Larson, *The Law of Workmen's Compensation*, §57.51 at 10-164.64 (1987). Where, however, the claimant performs such extensive services for the business that the income represents salary rather than profits, the income should be considered in determining wage-earning capacity. *Id.*, citing Larson, §57.51 at 10-164.64-10.164.66.[1]

[1] The current version of *Larson's Workers' Compensation Law* states that the inquiry concerns:

We affirm the administrative law judge's finding that employer did not demonstrate that claimant retains a wage-earning capacity by virtue of his ownership of the bait shop.[2] The administrative law judge found that the videotapes show claimant engaged in non-arduous activities at the bait shop. He stated that the videotapes do not show claimant continuously sitting, standing, using his hands, or lifting or carrying over a period of hours. Rather, the administrative law judge found the tapes consistent with claimant's credible testimony concerning his pain and need to move around frequently, and with the opinions of Drs. Loesch and Babins to that effect.[3] The administrative law judge also found the tapes instructive for what they do not show: any activities of those who assist claimant in running the shop. Decision and Order at 21-22. He concluded they were not inconsistent with the evidence which he credited establishing the "substantial assistance" claimant receives from family and friends in order to run the bait shop. Several people testified that they assist claimant, without pay, in the operation of the shop. *See, e.g.,* Tr. at 28, 32, 39, 75, 78.

Substantial evidence supports the administrative law judge's finding that claimant is totally disabled. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge, as the trier-of-fact, is entitled to evaluate the credibility of all witnesses and to accord weight to the evidence of record. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge rationally rejected employer's premise that the videotapes demonstrate claimant's ability to work. Moreover, he rationally relied on medical

---

> claimant's ability to command regular income as the result of his or her personal labor [. Thus], it is plain that income from a business owned by the claimant, even though he or she contributes some work to it, should not be used to reduce disability. The result may be different, however, if it can be said that the business income was the direct result of the worker's personal management and endeavor.

A. Larson and L. Larson, 4 *Larson's Workers' Compensation Law,* §83.05 (2007).

[2] Claimant testified that the bait shop has not made a profit and he does not pay himself wages from the business. Tr. at 31.

[3] Dr. Babins opined that claimant can perform "significantly limited" sedentary work. *See* Babins Dep. (Aug. 1, 2007) at 14-15. Dr. Loesch stated that claimant cannot reliably perform sedentary work and that claimant's continued ability to run the bait shop depends on his pain tolerance. CX 4 at 18-19.

evidence regarding the limited nature of claimant's physical capabilities due to his pain and testimony establishing that the continued operation of the bait shop is dependent upon significant help from claimant's family and friends. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). Thus, as employer did not demonstrate that claimant engages in self-employment activities demonstrating a retained wage-earning capacity, we reject employer's contention that claimant's ownership of the bait shop establishes suitable alternate employment. *See generally Seidel*, 22 BRBS 403. We therefore affirm the administrative law judge's award of permanent total disability benefits.

As we have affirmed the administrative law judge's finding that claimant is entitled to continuing permanent total disability benefits beginning August 29, 2002, we now address the Director's appeal of the administrative law judge's award of Section 8(f) relief to employer. 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 the case of permanent total disability, if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000).

The administrative law judge found that claimant suffered from left shoulder pain on a few occasions in 1997, and that he fell off a ladder at work in October 1997. EXs 19, 20. The administrative law judge also found that Dr. Babins testified that claimant had pre-existing cervical spondylitic disease at the time he sustained his work injury in 2001. Babins Dep. (Aug. 1, 2007) at 4. The administrative law judge found that employer was actually aware of these pre-existing permanent partial disabilities because some of claimant's injuries occurred at work. The administrative law judge further found that if claimant did not have the pre-existing cervical condition, claimant's current disabling neck condition may not have been as severe. Decision and Order at 33-34. Thus, the administrative law judge awarded employer Section 8(f) relief.

On appeal, the Director contends the administrative law judge's award is not in accordance with law or supported by substantial evidence. We agree with the Director that the administrative law judge's award of Section 8(f) relief cannot be affirmed as he did not provide an adequate discussion of the medical evidence or the evidentiary and legal bases for his findings. Thus, we vacate the award of Section 8(f) relief and remand for further findings.

The administrative law judge discussed various physical "maladies" claimant sustained prior to the work injury, but he did not evaluate whether the injuries claimant sustained to his shoulder and neck constituted a "serious lasting physical condition that

would motivate a cautious employer to discharge the employee because of an increased risk of compensation liability." *See C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see also Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976). To support an award of Section 8(f) relief, the administrative law judge must make specific findings of fact that the pre-existing injury was serious and lasting. *See, e.g., Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998). The mere fact that claimant sustained a prior injury will not suffice. *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146(CRT) (D.C. Cir. 1985).

The manifest element is met if employer is actually aware of the pre-existing disability or if there are medical records pre-dating the subsequent injury that would confirm the presence of a disability such that employer was constructively aware of the condition. *Director, OWCP v. Sun Ship, Inc. [Ehrentraut]*, 150 F.3d 288, 32 BRBS 132(CRT) (3d Cir. 1998); *Director, OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 8 BRBS 498 (3d Cir. 1978). If a specific diagnosis is not stated in the medical records, there must be "sufficient unambiguous, objective, and obvious indication of a disability" for the manifest element to be satisfied. *Transbay Container Terminal v. U.S. Dep't of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998); *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997). A post-hoc diagnosis of a pre-existing condition will not satisfy the manifest element. *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997*), aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.2d 132 (2d Cir. 1997). In this case, the administrative law judge did not specify the evidence that satisfies this element, stating only that claimant was previously injured while in employer's employ.

Finally, employer must establish that claimant's disability is not due solely to the subsequent injury. 33 U.S.C. §908(f)(1). In *Lewis*, the Third Circuit explained what employer must do in order to satisfy this requirement for Section 8(f) relief:

> an employer must demonstrate that its worker would have been able to continue working after his workplace accident if he had not already been suffering from a pre-existing, permanent partial disability.

202 F.3d at 660, 34 BRBS at 58(CRT). This can be accomplished by medical or other evidence specifically stating the basis for such a conclusion, *see Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996); *Pino v. Int'l Terminal Operating Co., Inc.*, 26 BRBS 81 (1992), or the administrative law judge's "'inquiry must of necessity be resolved by inferences based on such factors as the perceived severity of the pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them.'" *Lewis*, 202 F.3d at 662, 34 BRBS at 59(CRT), *quoting Ceres Marine Terminal*,

118 F.3d at 391, 31 BRBS at 94(CRT). The administrative law judge found that Dr. Babins opined that a "significant portion" of claimant's current disability is related to a pre-existing condition. Babins Dep. (Aug. 1, 2007) at 35. The administrative law judge, however, did not discuss Dr. Loesch's opinion, which he had credited earlier in his decision, that claimant's disability is due solely to the subsequent injury. Decision and Order at 25; CX 4 at 55.

Thus, on remand, the administrative law judge must make specific findings of fact on each element of Section 8(f) entitlement in light of the applicable law. He must weigh conflicting evidence and provide a rational basis for selection from among competing opinions and inferences. *See generally Cotter v. Harris*, 642 F.2d 700 (3d Cir. 1981).

Accordingly, we affirm the administrative law judge's award of permanent total disability benefits to claimant. We vacate the award of Section 8(f) relief and remand the case to the administrative law judge for reconsideration in accordance with this opinion.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge