BRB No. 96-854

JAMES GONSALVES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHWEST MARINE, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Derek B. Jacobson (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Frank B. Hugg and Wendy B. Moseley, San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Denying Reconsideration (95-LHC-208) of Administrative Law Judge Thomas Schneider 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).

Claimant worked in the tool room at employer's facility. While lifting a mag base

drill press to the bench for inspection and repair on September 19, 1990, he injured his back. He reported the injury immediately and then began receiving chiropractic treatment. Tr. at 47-49. Claimant and employer agree that claimant is unable to return to his usual work in the tool room; therefore, claimant underwent vocational rehabilitation, taking courses to become a locksmith. Thereafter, claimant filed a claim for temporary total, permanent total and permanent partial disability benefits. Employer paid all periods of temporary total and permanent total disability benefits.[1] Before the administrative law judge, claimant sought permanent partial disability benefits from February 18, 1992, through January 24, 1993, based on a post-injury wage-earning capacity of $200 per week, and from January 25, 1993, and continuing, based on a post-injury wage-earning capacity of $300 per week.

The administrative law judge determined that claimant's actual wages are representative of his post-injury wage-earning capacity, pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h). Consequently, he awarded claimant the requested permanent partial disability benefits based on a post-injury loss of wage-earning capacity of $506.53 per week through January 24, 1993, and $406.53 per week thereafter. Decision and Order at 2-4. The administrative law judge also found that employer is not entitled to relief under Section 8(f), 33 U.S.C. §908(f), because employer failed to establish that claimant had a manifest pre-existing permanent partial disability. *Id.* at 4-5. Thereafter, the administrative law judge summarily denied employer's motion for reconsideration. Employer appeals these decisions, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in concluding that claimant's actual wages reasonably represent his post-injury wage-earning capacity. Employer argues that the evidence of record establishes that, as an experienced locksmith, claimant is underpaid; therefore, it asserts that his actual wages do not reasonably represent his wage-earning capacity. Claimant responds, maintaining he is unable to work as a service (or outdoor) locksmith because he cannot perform all the required bending, twisting, lifting and stooping. Thus, he argues that his actual wages as an indoor locksmith are representative of his post-injury capabilities.

Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), provides for an award of permanent partial disability benefits based on the difference between a claimant's pre-injury

[1]Employer paid temporary total disability benefits from September 19, 1990, through April 8, 1991, and permanent total disability benefits from April 9, 1991, through February 17, 1992. Emp. Ex. 8.

average weekly wage and his post-injury wage-earning capacity. Section 8(h), 33 U.S.C. §908(h), provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent her wage-earning capacity. If these earnings do not represent the claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

In this case, claimant was hired as a locksmith in February 1992 at the entry-level rate of $5 per hour. One year later, he obtained a position in which he earned $7.50 per hour. Emp. Exs. 2-3. Although the testimony from the vocational counselors, claimant's co-worker, and claimant reveals that, in general, this wage is lower than the amount claimant should be able to command as an experienced locksmith, Tr. at 91-92, 102, 141, 157-163, claimant also testified that he cannot perform the duties of an outdoor locksmith. Tr. at 141-143. He stated that the bending, lifting, twisting and other awkward positions often required when a locksmith makes a service call prohibit him from becoming an outdoor locksmith and earning the higher wages.

The administrative law judge credited claimant's testimony that he cannot perform outdoor locksmith work, in conjunction with the medical restrictions, and the co-worker's testimony that he earns only $9.75 per hour after expenses. Decision and Order at 3-4. Based on this testimony, the administrative law judge determined that claimant's actual wages as an indoor locksmith reasonably represent his post-injury wage-earning capacity. As questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), we hold that there is substantial evidence of record to support the administrative law judge's finding on this matter. Therefore, his award of permanent partial disability benefits based on claimant's loss of wage-earning capacity, as computed by using claimant's actual wages, is affirmed. *See Guthrie*, 30 BRBS at 52-53.

Next, employer contends the administrative law judge erred in denying it relief under Section 8(f) of the Act. Specifically, it argues that claimant had a manifest pre-existing permanent partial disability to his back which contributed to his current disability. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted this Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is

not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see generally CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996). To constitute a pre-existing permanent partial disability, the prior injury must have resulted in a serious lasting physical problem prior to the injury on which the compensation claim is based. *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*, 564 F.2d at 513, 6 BRBS at 415.

In denying employer Section 8(f) relief, the administrative law judge found there is no evidence to support its contention that claimant had a manifest pre-existing back disability. He correctly stated that the only evidence, other than claimant's testimony, of pre-September 1990 medical treatment consists of notes created during the course of claimant's previous chiropractic treatment. There is evidence of such treatment in 1985, 1987, and in early 1990, but the administrative law judge found nothing in the records to indicate that claimant had a permanent back condition. Emp. Ex. 10. The legible portions of the 1985 and 1987 notations state there was chiropractic treatment for claimant's back. The notes also state that claimant was able to return to work. The treatment from March 30 through August 3, 1990, was for low back and neck pain. As the administrative law judge rationally found that none of these documents establishes that claimant's back condition was a serious, lasting physical impairment, we affirm his conclusion that employer failed to establish that claimant had a pre-existing permanent back disability. *Vlasic v. American President Lines*, 20 BRBS 188 (1987).

Employer relies on Dr. Stark's report which states that in x-rays taken after claimant's September 1990 injury there is evidence of degenerative disc disease which developed prior to the injury. Dr. Stark concluded that this disease pre-existed claimant's September 1990 injury, was manifest in the x-rays, and contributed to claimant's current condition. Emp. Ex. 4. Contrary to employer's argument, a pre-existing permanent partial disability must be manifest prior to the work-related second injury. *Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984). Therefore, we hold that the administrative law judge properly concluded that employer failed to establish the existence of a manifest pre-existing permanent partial disability, and we affirm the denial of Section 8(f) relief.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge