BRB Nos. 97-0347

EDWARD MUNOZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELLER & COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
MIDLAND INSURANCE COMPANY c/o TEXAS RECEIVERSHIP	)	
	)	
Employer/Carrier- Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATE DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Steven M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Jad J. Stepp and Dennis J. Sullivan (Eastham, Watson, Dale & Forney, L.L.P.), Houston, Texas, 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 (86-LHC-0778) of Administrative Law Judge Quentin P. McColgin 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was operating a forklift while working as a longshoreman for employer on

May 13, 1983, when the vehicle's radiator exploded, causing him to jump from the machine and collide with a coworker. As a consequence, claimant suffered burns and injured his back. Employer voluntarily paid claimant temporary total disability benefits in the amount of $274,991.27 for various periods up through March 16, 1995.[1]

Claimant sought permanent total disability benefits, and employer applied for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). After a formal hearing, the administrative law judge issued the Decision and Order awarding claimant temporary total disability benefits for the period from May 13, 1983 through April 20, 1988, permanent partial disability compensation thereafter, and both interest and medical benefits. The administrative law judge granted employer a credit for compensation payments previously made, but denied employer's request for Section 8(f) relief.

On appeal, employer contests the administrative law judge's denial of relief under Section 8(f), as well as the administrative law judge's finding that claimant's current disability resulted from the injury that occurred on May 13, 1983, during his employment with employer, and not during subsequent employment on December 20, 1983.[2] Upon consideration of the Decision and Order of the administrative law judge, the administrative record as a whole and the arguments raised on appeal, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that it accords with applicable law. We therefore affirm the Decision and Order Awarding Benefits in all respects.

[1]The parties stipulated that claimant reached maximum medical improvement on April 21, 1988. *See* JX-1.

[2]The record does not disclose the identity of claimant's employer at the time of this subsequent event.

We reject employer's argument that the administrative law judge erred in denying it relief pursuant to Section 8(f) because employer failed to establish that claimant's pre-existing degenerative disc disease was "manifest."[3] The administrative law judge determined that no specific diagnosis of degenerative disease had been rendered prior to claimant's injury, rationally ruling that interpretations by Dr. Raines, a chiropractor, of "decreased interosseus spacing"[4] in claimant's spine and records of "low back sprain syndrome" were insufficient to constitute a "diagnosis" that rendered claimant's pre-existing degenerative disc disease manifest, *Greene v. J.O. Hartman Meats*, 21 BRBS 214, 218 (1988), and that post-injury diagnoses of degenerative disc disease are insufficient to render this pre-existing condition manifest. *See 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). As the administrative law judge reasonably found that claimant's degenerative disc disease was not objectively determinable on the basis of medical records in existence prior to the second injury, *see Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1224, 22 BRBS 11, 13 (CRT) (5th Cir. 1989), we affirm the administrative law judge's denial of Section 8(f) relief.

Employer also challenges the administrative law judge's causation findings, contending that a subsequent injury which occurred on December 21, 1983 constitutes an intervening cause of claimant's disability.[5] We disagree. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is

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[3]Section 8(f) shifts liability to pay compensation for permanent partial disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes that: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's current disability has been rendered materially and substantially greater by the contribution of the pre-existing permanent partial disability. *See Two "R" Drilling Co. v. Director, OWCP,* 894 F.2d 748, 750, 23 BRBS 34, 35 (CRT)(5th Cir. 1990); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 126-27 (1996). The administrative law judge found that claimant's degenerative disc disease is a pre-existing disability that contributed to his current permanent partial disability.

[4]Dr. Albina, an orthopedic surgeon, testified that this term is not one used in orthopedic medicine, and he was not sure what this term meant. *See* EX-O at 23. When asked whether Dr. Raines's findings of decreased spacing are consistent with a degenerative disc disease, Dr. Albina replied that "[t]here are probably indications of at least an acute lumbar sprain." *Id*. at 21.

[5]Claimant attempted to go back to work on the docks in November 1983. According to his testimony, he was "still hurting." Tr. at 27. On December 21st, although claimant had been released to light duty status by Dr. Minyard, *see* CX-7:3, he was shoveling grain that had spilled while being loaded onto a ship. Claimant said that this was an activity he could not "tolerate," and he experienced back and leg pain. *Id*.

causally related to his employment. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 8 (1995); *accord Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 295, 24 BRBS 75, 80 (CRT) (D.C. Cir. 1990). Employer may rebut the Section 20(a) presumption by showing that claimant's disabling condition was caused by a subsequent injury, provided the employer also proves that the intervening cause was not derived from claimant's work-related injury. *See generally Plappert v. Marine Corps Exchange*, 31 BRBS 13, 15 (1997); *Bass v. Broadway Maintenance*, 28 BRBS 11, 15 (1994); *see generally Buchanan v. International Transportation Services*, 31 BRBS __, BRB Nos. 96-1424 *et al.*, slip op. at 7 (July 9, 1997).

The administrative law judge rationally discounted the opinion of Dr. Albina to find that claimant did not suffer a second injury on December 21, 1983. Based on a hypothetical question supposing that claimant returned to work as a "longshoreman," Dr. Albina testified in his deposition that claimant suffered an “intervening injury,” and that he would reexamine an earlier conclusion that claimant’s pain was due to his work-related injury. *See* CX-13 at 30-34. The administrative law judge reasonably concluded that the hypothetical question was defective given its omission of claimant's light duty status, which the administrative law judge found indicates the presence of an existing impairment, and he therefore concluded that this testimony is not sufficient to rebut the Section 20(a) presumption. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

The administrative law judge has considerable discretion in evaluating the evidence of record, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962), and the administrative law judge’s evaluation of Dr. Albina’s hypothetical-based opinion on the issue of the cause of claimant’s impairment is neither inherently incredible nor patently unreasonable, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's finding that claimant's disability is caused by his work-related injury. *See generally Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64 (CRT)(7th Cir. 1992).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in all respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge