BRB No. 87-1078

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| MARIO GASPARIC | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| SEALAND TERMINALS, INCORPORATED | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| UTICA MUTUAL INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits and Decision and Order Denying Petition for Modification of Robert M. Glennon, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision and Order Denying Petition for Modification (82-LHC-0162) of Administrative Law Judge Robert M. Glennon 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). The Board 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).

On February 19, 1981, claimant sustained injuries to his right shoulder, side, back, and big toe during the course of his employment with employer, when he slipped and fell while moving banana crates on a conveyor belt.

In his Decision and Order, the administrative law judge awarded claimant permanent total disability compensation, 33 U.S.C. §908(a), and denied employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C.§908(f).[1] In his Decision and Order Denying Petition for Modification, the administrative law judge found that neither claimant's prior knee injuries nor his degenerative back disease entitled employer to relief under Section 8(f); moreover, relying on *Price v. Greyhound Bus Lines, Inc.*, 14 BRBS 439 (1981), the administrative law judge found that as claimant's February 1981 work-injury rendered claimant totally and permanently disabled, Section 8(f) relief was not applicable based on claimant's knee conditions, regardless of their nature. Employer's request for Section 8(f) relief was thus denied.

On appeal, employer challenges the administrative law judge's reliance upon the opinion of Dr. Braaf to find that claimant's present condition is causally related to his employment; employer additionally contends that the administrative law judge erred in denying its request for relief under Section 8(f). Claimant responds urging the Board to affirm the administrative law judge's award of disability benefits.

Since it is uncontroverted that claimant has established an injury and that an accident occurred at work which could have caused that injury, claimant is entitled to the presumption at 33 U.S.C. §920(a) which applies to link claimant's condition to his employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Sam v. Loffland Bros. Co.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the instant case, the administrative law judge did not apply the Section 20(a) presumption. The Board has held, however, that an administrative law judge's failure to apply the Section 20(a) presumption is harmless error where the administrative law judge weighs all of the evidence in finding causation established and his conclusion is supported by substantial evidence. *See Reed v.*

[1] Employer appealed this decision to the Board. BRB No. 85-183. In an Order dated March 31, 1986, the Board dismissed this appeal without prejudice and remanded the case to the Office of Administrative Law Judges for consideration of employer's Petition for Modification.

*The Macke Co.*, 14 BRBS 568 (1981); *see also Jones v. Genco, Inc.*, 21 BRBS 12 (1988). In the instant case, the administrative law judge, after setting forth and discussing the medical evidence of record, credited the testimony of Dr. Braaf, noting that that physician gave proper deference to claimant's subjective symptoms and overall work and medical histories and that his analysis is well-reasoned and based on a full clinical view of claimant's condition in a context which integrates those histories. *See* Decision and Order at 5. In a report dated November 9, 1982, Dr. Braaf stated that claimant's February 1981 work-incident resulted in the herniation of a lumbar disc, as well as sprains of both his lumbosacral spine and right shoulder, which render claimant incapable of returning to his usual employment duties with employer.[2] *See* CX-2. The administrative law judge thus concluded that claimant's February 19, 1981 work accident aggravated and made symptomatic a pre-existing degenerative disc condition. The administrative law judge is entitled to weight the medical evidence and draw his own inferences from it, *see generally Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), and he is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge's finding is rational and supported by substantial evidence, we affirm the administrative law judge's determination that a causal nexus exists between claimant's present medical conditions and his February 19, 1981, work accident. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Employer additionally challenges the administrative law judge's finding that it failed to establish entitlement to relief pursuant to Section 8(f) of the Act; specifically, employer alleges that the administrative law judge erred in failing to find that claimant's pre-injury knee and back conditions constituted pre-existing permanent partial disabilities which were manifest to employer and which contributed to claimant's post-injury permanent total disability. Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for permanent total disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently totally disabled, Section 8(f) relief is available to employer if employer proves the following: 1) the claimant has a pre-existing permanent partial disability which 2) combines with the subsequent work-related injury to result in permanent total disability, and 3) the pre-existing disability was manifest to employer. *See* 33 U.S.C. §908(f); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992), *rev'g Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989).

Employer initially contends that the administrative law judge erred in failing to award Section 8(f) relief based upon the existence of two prior knee injuries sustained by claimant in 1972 and 1978. We disagree. In order to limit its liability and obtain Section 8(f) relief, the courts and the Board have generally required that an employer present credible evidence which establishes that claimant's total disability following the second injury is due to a combination of the pre-existing disability and subsequent injury. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT); *John T.*

[2]In contrast, Dr. Rizzo opined that, while claimant's February 1981 fall had aggravated his pre-existing degenerative back condition, the effects of that fall had since resolved. Dr. Avella similarly testified that claimant's symptomatology was attributable to his pre-existing arthritic process.

*Clark & Son of Maryland, Inc. v. Benefits Review Board*, 622 F.2d 93 n.5, 12 BRBS 229 n.5 (4th Cir. 1980); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). In the instant case, employer submitted no evidence into the record in support of its contention that claimant's pre-injury knee conditions combined with his subsequent work-related back condition to result in a greater degree of permanent disability. Employer thus has not shown claimant's post-injury back condition is not in itself totally disabling.[3] We therefore affirm the administrative law judge's determination that employer has not established the contribution element with regard to the relationship between claimant's back condition and his pre-injury knee conditions. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT).

Next, we affirm the administrative law judge's determination that claimant's pre-existing degenerative back condition was not manifest to employer prior to claimant's February 1981 work injury. A pre-existing disability will meet the manifest requirement if, prior to the subsequent injury, employer had either actual knowledge of the pre-existing condition, or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable. *Armstrong*, 22 BRBS at 276. A pre-existing condition is considered actually or constructively manifest where it is clearly diagnosed and identified in medical records available to the employer. Absent such a diagnosis, there must be sufficient unambiguous, objective and obvious indication of a serious lasting physical condition in the medical records in existence at the time of injury. *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420 (1990). In the instant case, employer has set forth no medical records which pre-date claimant's February 1981 injury; rather, employer contends that claimant's complaints of pain alone are sufficient to satisfy the manifest requirement. Claimant's occasional complaints, however, do not satisfy the manifest requirement, *see Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984); the administrative law judge's finding that claimant's low back condition was not manifest to employer for Section 8(f) purposes is therefore affirmed.

Lastly, employer urges the Board to eliminate the manifest requirement of Section 8(f). The requirement that employer establish that an employee's pre-existing disability was manifest to the employer is not a statutory requirement but rather has been added by the courts and has been consistently applied. *See, e.g., Eymard & Sons Shipyards v. Smith*, 862 F.2d 1220, 22 BRBS 11 (CRT)(5th Cir. 1989); *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70 (CRT)(1st Cir. 1987); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Director, OWCP v. Campbell Industries*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982); *Equitable Equipment Co., Inc. v. Hardy*, 559 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); *Duluth, Missabe and Iron Range Railway v. Department of Labor*, 533 F.2d 1144, 5 BRBS 756 (8th Cir. 1977); *Atlantic & Gulf Stevedores v. Director, OWCP*, 542 F.2d 602 (3d Cir. 1974); *Dillingham Corp. v. Massey*, 505 F.2d 1126 (9th Cir. 1974); *American Mutual Insurance Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Only one court has declined to adopt the requirement for traumatic injuries. *See American Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15 (CRT)(6th Cir. 1989), and even that case indicates that an employer must present objective evidence in existence at the time of the second injury demonstrating that the prior condition manifested itself to someone

[3]We note that, contrary to employer's contention, claimant's hearing testimony regarding his February 19, 1981 fall does not support a conclusion that claimant fell as a result of a pre-existing knee condition. *See* Hearing transcript at 12.

prior to the second injury. Based upon this longstanding judicial acceptance and application of the manifest requirement, we decline to abandon that requirement for Section 8(f) relief in this case.

Accordingly, the administrative law judge's Decision and Order and Decision and Order Denying Petition for Modification are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge