BRB No. 07-0248

R.W.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
METRO MACHINE CORPORATION	)	DATE ISSUED: 07/26/2007
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

F. Nash Bilisoly and Kimberley H. Timms (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Matthew W. Boyle (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2003-LHC-1019) of Administrative Law Judge Larry W. Price 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). This is the third time this case is before the Board.

The procedural history of this claim is discussed in the Board's prior two decisions: *[R.W.] v. Metro Machine Corp.,* BRB No. 00-0977 (Feb. 28, 2001) (unpub.)(Board Decision I); *[R.W.] v. Metro Machine Corp.*, BRB No. 05-0649 (April 28, 2006)(unpub.)(Board Decision II). Briefly, claimant suffered two head injuries during the course of his employment. Since the second injury, on December 20, 1991, claimant has been unable to return to work. EX 8. The parties stipulated to claimant's entitlement to temporary total disability benefits from December 21, 1991 to February 6, 1996, and to permanent total disability benefits thereafter. The only issue before the administrative law judge has been employer's entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), on the basis of claimant's pre-existing cervical arthritis.[1]

The administrative law judge denied employer's petition for relief under Section 8(f), concluding that employer failed to establish the manifest requirement necessary for such entitlement. Employer appealed. The Board held that the administrative law judge failed to address all of the relevant evidence relating to whether claimant's arthritic condition was manifest to employer and the case was remanded for his further consideration. Board Decision II at 4-5. On remand, the administrative law judge again denied Section 8(f) relief on the basis of employer's failure to establish the manifest element.

Employer appeals, contending that the administrative law judge erred in determining that it failed to establish that claimant's pre-existing cervical spondylosis and degenerative disc disease were manifest to employer following the first work

[1] Employer may be granted relief under Section 8(f), which shifts the liability to pay compensation for permanent disability after 104 weeks from the employer to the Special Fund established in Section 44, 33 U.S.C. §944, 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-related injury. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT)(2d Cir. 1992); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co*., 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982).

injury, which occurred in 1989.[2] The Director, Office of Workers' Compensation Programs responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

A pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence from which the condition was objectively determinable. *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). Without a documented diagnosis there must be sufficient unambiguous information in the available record regarding a serious lasting physical condition. *See, e.g., Wiggins v. Newport News Shipbuilding & Dry Dock Co.,* 31 BRBS 5142 (1997).

In this case, the administrative law judge found that claimant's pre-existing cervical problems were not well-documented and that the record does not contain sufficient and unambiguous information regarding the existence of a serious lasting physical problem. Dr. Mistry, who was claimant's treating physician at the time of the 1989 injury, wrote that claimant had an "irregularity at C-5" and "mild OA." EX 5 at 1. Claimant's x-ray was normal. EX 6 at 1. Claimant also was advised at that time to wear a cervical collar as a result of this injury. The administrative law judge discussed the cervical collar, noting that there is no evidence that claimant ever wore it. Moreover, he noted that Dr. Klara had opined that the radiologist's failure to mention the spondylosis or degenerative changes on the x-ray was probably due to the fact that such changes are apparent in all cervical x-rays in persons of this age group. EX 7. The administrative law judge found that the notations made by Dr. Mistry were neither unambiguous nor obvious information regarding the existence of a serious, lasting physical problem, particularly in light of the fact that claimant saw Dr. Mistry only twice following the first injury and by the second visit was much improved. Decision and Order on Remand at 2.

We affirm the administrative law judge's finding that employer did not establish that claimant had a manifest cervical degenerative condition. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990). The administrative law judge rationally found that Dr. Mistry's notation does not reflect an obvious, objective indication of a serious lasting physical condition, *see Transbay Container Terminal v.*

[2] We decline to address employer's further arguments regarding Dr. Klara's opinion of the 1989 x-ray as the Board affirmed the administrative law judge's finding that Dr. Klara's opinion is insufficient to satisfy the manifest element in Board Decision II at 4, and the decision constitutes the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005).

U.S. Dept. of Labor, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998), in view of the normal x-ray and claimant's lack of continuing medical treatment for his "acute" condition. EX 5, 6. Moreover, the administrative law judge rationally found that employer did not meet its burden of establishing that claimant actually wore a cervical collar such that employer had knowledge of a lasting cervical condition. *See generally G.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994). The administrative law judge's finding that claimant's pre-existing cervical condition was neither actually nor constructively manifest prior to claimant's 1991 work injury is therefore affirmed as it is supported by substantial evidence. *See Callnan v. Morale Welfare & Recreation, Dep't of the Navy*, 32 BRBS 246 (1998). Therefore, we affirm the administrative law judge's denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order on Remand denying employer Section 8(f) relief is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge