BRB Nos. 96-0280
and 96-0280A

PEDRO T. VINA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VESSEL REPAIR, INCORPORATED	)	
	)	
and	)	
	)	
HARTFORD FIRE INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Marilyn T. Hebinck (Royston, Rayzor, Vickery & Williams, L.L.P.), Houston, Texas, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor, Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order Awarding Benefits (94-LHC-0209) of Administrative Law Judge Lee J. Romero, Jr., 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a welder, injured his lower back during the course of his employment on April 21, 1992. In October 1992, claimant was released for light duty work, but none was available within his restrictions with this employer. Employer paid claimant temporary total disability compensation from April 23 through October 29, 1992. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge found that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), statutory presumption of causation, that claimant could not return to his usual employment duties with employer, and that employer established the availability of suitable alternate employment as of August 11, 1994. Accordingly, the administrative law judge awarded claimant temporary total disability compensation for the period of April 24 through October 13, 1992, permanent total disability compensation for the period of October 14, 1992, through August 11, 1994, and permanent partial disability thereafter based on a residual wage-earning capacity of $161.50. 33 U.S.C. §908(a), (b), (c)(21), (h). Finally, the administrative law judge determined that employer was entitled to relief pursuant to Section 8(f), 33 U.S.C. §908(f), of the Act.

On appeal, employer contends that the administrative law judge erred in finding causation established, in his consideration of the issue of suitable alternate employment, and in his determination of claimant's residual wage-earning capacity. The Director, in his cross-appeal, challenges the administrative law judge award of Section 8(f) relief to employer. Claimant has not responded to these appeals.

Employer initially contends that the administrative law judge erred in determining that claimant's current back and neck conditions are work-related. Where, as in the instant case, claimant establishes his *prima facie* case, claimant is entitled to a presumption under Section 20(a) that his injury or harm arose out of and in the course of his employment. *See U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). 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 Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). 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 Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In the instant case, the administrative law judge found that employer submitted no evidence sufficient to rebut the presumed causal link between claimant's conditions and his April 1992 work accident. This finding is supported by the record, as the testimony of Dr. Teuscher, upon whom employer relies, is insufficient to rebut the presumption. Dr. Teuscher acknowledged that claimant perhaps sustained a sprain in April 1992, but stated that he did not have an explanation for the source of claimant's pain. *See* Teuscher depo. Even assuming, *arguendo*, that this opinion is sufficient to rebut the Section 20(a) presumption, the administrative law judge's ultimate finding that causation is established is rational and supported by substantial evidence. Specifically, after determining that employer had failed to rebut the presumption, the administrative law judge rationally credited the opinion of Dr. Iceton that claimant's April 1992 work incident contributed to his degenerative changes and made his pre-existing arthritis clinically relevant over the opinion of Dr. Teuscher. It is within the administrative law judge's discretionary authority to credit the opinion of Dr. Iceton, since an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom, 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). We, therefore, affirm the administrative law judge's finding that a causal relationship is established between claimant's neck and back conditions and his employment with employer.

Employer next argues that the administrative law judge erred in finding that, subsequent to August 11, 1994, claimant's loss in wage-earning capacity should be based on the minimum wage claimant could obtain in the positions of either a restaurant porter or a car wash attendant. Specifically, employer contends that the administrative law judge erred in determining that the two bench welding positions identified by its vocational consultant, which paid substantially higher weekly wages, did not satisfy its burden of establishing the availability of suitable alternate employment. Where, as in the instant case, claimant is unable to return to his usual employment, the burden shifts to employer to establish the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In this case, Mr. Quintanilla, employer's vocational consultant, identified two specific bench welding positions which, after speaking with the positions' employers, he determined were both available and within claimant's physical restrictions. In contrast, Mr. Kramberg, claimant's vocational expert, stated in a letter that, after speaking to these employers, he was of the opinion that these jobs were not within claimant's restrictions, because they required overhead work or excessive lifting. In his decision, the administrative law judge found that employer identified positions as a restaurant porter and a car attendant which established the availability of suitable alternate

employment as of August 11, 1994. In addressing the conflicting evidence regarding the two bench welding positions, the administrative law judge accepted Mr. Kramberg's assessment and found that the two identified bench welding positions exceeded the restrictions placed on claimant. *See* Decision and Order at 23, 24.

We reject employer's contentions that the administrative law judge erred in failing to credit the testimony of Mr. Quintanilla, over the testimony of Mr. Kramberg, regarding the suitability of the identified bench welding positions. In regard to these two positions, both vocational experts contacted the identified employers, but reached conflicting conclusions regarding the positions' suitability. *See* Decision and Order at 13, 14. The administrative law judge addressed this conflicting testimony and, after noting that Mr. Quinanilla's identification of two welder positions was in apparent conflict with his prior conclusion that claimant was not employable in any past occupation, *see* Decision and Order at 22-23, rationally credited the contrary opinion of Mr. Kramberg. Decision and Order at 23-24. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1912). As this credibility determination is neither inherently incredible or patently unreasonable, we affirm the administrative law judge's finding that the two identified welding positions are insufficient to establish the availability of suitable alternate employment.[1] *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Employer next contends that the administrative law judge erred in adjusting the wages claimant was capable of earning as of August 11, 1994, for inflation by using the National Average Weekly Wage (NAWW). We agree. In his decision, the administrative law judge determined that the restaurant porter and car wash attendant positions, which he found constituted suitable alternate employment, paid minimum wage, *i.e.*, $170 per week. The administrative law judge then converted claimant's post-injury wage-earning capacity of $170 into 1992 dollars by reducing the 1994 figure by the five percent increase in the NAWW which occurred between 1992 and 1994, resulting in a figure of $161.50, which he then used to calculate claimant's loss in wage-earning capacity.

An award for permanent partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-

[1]Employer also contends that the administrative law judge erred in rejecting the numerous general employment positions listed by the Texas Employment Commission. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has stated that an employer can meet its burden of establishing the availability of suitable alternate employment by demonstrating the existence of only one job opportunity and the general availability of other suitable positions. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422, 29 BRBS 125 (CRT) (Sept. 19, 1994)(5th Cir. 1994)(unpublished). In the instant case, any error committed by the administrative law judge in rejecting the general availability of these additional positions is harmless, as the administrative law judge determined that employer established the availability of suitable alternate employment by demonstrating the availability of alternate employment as a restaurant porter and car wash attendant, and he did not err in basing claimant's wage-earning capacity on these positions.

injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Sections 8(c)(21) and 8(h) require that a claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C.Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Because the NAWW accurately reflects the increase in wages over time, the Board has held that the percentage increase in the NAWW for each year may be used to adjust the claimant's post-injury wages to the wages paid at the time of injury. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

In the instant case, however, it is uncontroverted that the minimum wage paid in August 1994 is the same as the minimum wage paid at the time of claimant's injury in 1992, $4.25 per hour. Moreover, there is no evidence in the record to suggest that the proposed employers would be exempt from the Fair Labor Standards Act which would require those employers to pay the federally mandated minimum wage. Thus, based upon the facts of this case, reducing claimant's post-injury wage-earning capacity by the increase in the NAWW would result in an hourly wage less than the federally mandated minimum wage. Accordingly, we vacate the administrative law judge's post-injury wage-earning capacity finding and modify the administrative law judge's decision to reflect claimant's entitlement to permanent partial disability compensation based upon a post-injury wage earning-capacity of $170 per week.

In his cross-appeal, the Director challenges the administrative law judge's award of Section 8(f) relief to employer. Initially, the Director contends that the administrative law judge erred in finding that the absolute defense to Special Fund liability did not bar employer's untimely claim for Section 8(f) relief.

The procedural history of this case is not in dispute. On February 5, 1993, employer controverted claimant's entitlement to permanent disability and on March 16, 1993, a Notice of Informal Conference was sent to the parties which listed permanency as an issue. DX C. At the informal conference, April 14, 1993, the parties discussed the date claimant reached maximum medical improvement. DX D. The case was referred to the Office of Administrative Law Judges (OALJ) on October 15, 1993. Employer filed its application for Section 8(f) relief at the time of the formal hearing with both the administrative law judge and the district director on July 13, 1994. The district director found the application untimely on July 22, 1994. DX B. On October 6, 1994, the Regional Solicitor filed a motion to dismiss the employer's request for Section 8(f) relief for failure to submit a timely and fully documented application before referral of this matter to the OALJ. 33 U.S.C. §908(f)(3).

The administrative law judge concluded that, under the circumstances of this case, employer was not able to file for Section 8(f) relief until after June 29, 1994, when it received a medical report authored by Dr. Ramos which established the existence of a prior injury and pre-existing degenerative changes. In the absence of such evidence of manifestation, the administrative law judge reasoned, employer could not have reasonably anticipated the Fund's liability and could not

have submitted a fully documented application as required. Accordingly, the administrative law judge concluded that employer was excused from filing before the district director prior to the case's referral to the OALJ and that, therefore, employer's application was timely and not barred by the absolute defense of Section 8(f)(3).

Section 8(f)(3) provides that a request for relief and a statement of the grounds therefor shall be presented to the district director prior to consideration of the claim by the district director, and that failure to present such a request shall be an absolute defense to the Special Fund's liability unless the employer could not have reasonably anticipated the liability of the Fund prior to issuance of a compensation order. 33 U.S.C. §908(f)(3)(1988). The implementing regulation, 20 C.F.R. §702.321, provides that employer must submit a fully documented application with its request for Section 8(f) relief, states the requirements for a fully documented application and states that a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known or is in dispute. 20 C.F.R. §702.321(a), (b). The regulation also provides that where a claimant's condition has not reached maximum medical improvement by the time the case is referred to the OALJ, an application need not be submitted to the district director to preserve employer's right to later seek Section 8(f) relief and that the failure to submit a fully documented application to the district director shall be an absolute defense to the liability of the Special Fund only if the defense is affirmatively raised and pleaded by the Director. Lastly, the regulation provides that the failure of an employer to present a timely and fully documented application for Section 8(f) relief may be excused only where the liability of the Special Fund could not have been reasonably anticipated prior to the district director's consideration of the claim. 20 C.F.R. §702.321(b)(3).

The Director argues that the report of Dr. Iceton, dated June 4, 1992, which states that claimant's condition was based on underlying degenerative changes was sufficient to trigger the necessity of employer's filing for Section 8(f) relief. Contrary to the Director's assertion, however, Dr. Iceton's conclusion after the injury that claimant suffered from a pre-existing disc disease does not establish that an earlier back condition was manifest or that medical records existed which would have established such a condition.

In rejecting the Director's assertion that the absolute bar applies in this case, the administrative law judge determined that employer could not have reasonably anticipated the liability of the Special Fund without some evidence that the manifest requirement could be met. *See* 20 C.F.R. §702.321(b)(3). In this regard, the administrative law judge noted employer's argument that claimant was less than forthcoming regarding his prior injuries and medical treatment, and that once the identity of Dr. Ramos became known through discovery efforts, his records, which were in storage, were obtained and an application for Section 8(f) relief filed immediately thereafter. As the administrative law judge's finding that employer could not have reasonably anticipated the liability of the Special Fund before the case was referred to the OALJ is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer's claim for Section 8(f) relief is not barred. *See Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990).

The Director next contends that the administrative law judge erred in finding employer

entitled to Section 8(f) relief. Specifically, the Director asserts that claimant's underlying degenerative disc disease did not constitute a manifest pre-existing permanent partial disability. Section 8(f) of the Act shifts liability to pay compensation for permanent 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 the following three prerequisites: 1) the injured employee had an existing permanent partial disability; 2) the pre-existing disability was manifest to employer prior to the employment injury; and 3) claimant's permanent disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. 33 U.S.C. §908(f); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994). In a case where claimant is permanently partially disabled, employer must also show that claimant's compensable disability was made materially and substantially greater as a result of the prior disability in order to satisfy the contribution requirement. 33 U.S.C. §908(f)(1).

In this case, the administrative law judge's findings regarding the contribution element are not challenged; the Director appeals the findings that claimant sustained a manifest, pre-existing permanent partial disability. The Director initially asserts that employer failed to establish that claimant's pre-existing degenerative disc disease constituted a permanent disability. In support of his contention, the Director argues that the mere existence of the underlying condition is not evidence of a pre-existing permanent partial disability. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). As the Director correctly contends, where claimant has a history of injury yet suffered no sign of medical problems or work restrictions the mere existence of these prior injuries does not establish a pre-existing disability for Section 8(f) purposes because the pre-existing condition must produce some serious lasting physical problem. *Mijangos v. Avondale Shipyards Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991). However, a pre-existing disability need not be an economic disability, *see Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting); rather, the pre-existing condition need only have been of sufficient seriousness that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of an employment-related accident and,8,
compensation liability. *See Dugas v. Durwood Dunn Inc.*, 21 BRBS 277 (1988); *Bickham v. New Orleans Stevedoring*, 18 BRBS 41 (1986). A permanent physical condition which makes a person's back more susceptible to further injury may be sufficient to establish a pre-existing permanent partial disability. *See Currie*, 23 BRBS at 420.

In addressing claimant's pre-existing condition, the administrative law judge stated:

> [t]here is no dispute that Claimant has pre-existing degenerative disc disease of the cervical and lumbar spine which created a permanent partial disability to claimant or a condition which would cause a cautious employer to be motivated to discharge an employee because of a greatly increased risk of compensation liability.

Decision at 31. The administrative law judge's conclusion is supported by the record. Specifically, Dr. Iceton opined that claimant's pre-existing degenerative arthritis would predispose claimant to future injuries; moreover, most of the restrictions imposed on claimant by Dr. Iceton were based on this pre-existing condition. EX 14. Similarly, Dr. Teuscher opined that because of his pre-existing condition, claimant was more likely to sustain an injury or an exacerbation of his condition. CX 14. Thus, even if the condition were asymptomatic, such a pre-existing condition which predisposes claimant to injury and which would cause a doctor to impose restrictions is a pre-existing permanent partial disability because it is a serious condition that would have caused a cautious employer to consider terminating him. *See Thompson v. Northwest Enviro Services Inc.*, 26 BRBS 53 (1992); *Currie*, 23 BRBS at 420. Accordingly, we affirm the administrative law judge's finding that employer has established a pre-existing partial disability.

Lastly, the Director asserts that the administrative law judge erred in finding that claimant's pre-existing condition was manifest because, even though claimant's degenerative disc disease may have been objectively determinable prior to the 1992 injury, there was no diagnosis or medical report noting the pre-existing permanent partial disability prior to the work injury. We disagree. The manifest element will be satisfied if either employer had actual knowledge of the pre-existing condition or if there were medical records in existence from which claimant's condition was objectively determinable. *See Lockhart v. General Dynamics*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp*. 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992); *Greene v. J.O. Hartman Meals*, 21 BRBS 214 (1988); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge rationally found that Dr. Ramos' medical records, which pre-date claimant's work-injury, made claimant's pre-existing condition manifest to employer. *See* EX

5; *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 reject the Director's contention regarding this issue, and we affirm the administrative law judge's finding that employer is entitled to Section 8(f) relief in this case.

Accordingly, the administrative law judge's finding regarding claimant's post-injury wage-earning capacity is vacated, and the decision modified to reflect claimant's entitlement to permanent partial disability compensation based upon a post-injury wage-earning capacity of $170 per week. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge