

DAVID INMAN)
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 Claimant-Respondent)
)
 v.)
)
 PALMETTO BRIDGE CONSTRUCTORS,)
 INCORPORATED)
)
 and)
)
 ST. PAUL FIRE & MARINE INSURANCE) DATE ISSUED: 10/31/2006
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston,
Administrative Law Judge, United States Department of Labor.

Kirk E. Karamanian (O'Bryan Baun Cohen Kuebler), Birmingham,
Michigan, for claimant.

J. Marshall Allen and Sean D. Houseal (Buist Moore Smythe McGee,
P.A.), Charleston, South Carolina, for employer/carrier.

Peter B. Silvain, Jr. (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-1064) of Administrative Law Judge Richard E. Huddleston 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 alleged that he injured his back on May 16, 2002, during the course of his employment for employer as a heavy-lift foreman on a crane barge during a bridge construction project. Claimant continued working, but he sought treatment from Dr. Anguelova, who placed him on light-duty work restrictions on May 20, 2002. Claimant further alleged that he aggravated his back condition at work on May 24, 2002. After reviewing an MRI, Dr. Anguelova referred claimant to Dr. Poletti, an orthopedic surgeon. The MRI showed a ruptured disc at L5/S1. Dr. Poletti recommended surgery and claimant stopped working in July 2002. Claimant underwent a laminectomy/discectomy on September 12, 2002, a lumbar fusion on January 6, 2003, and a follow-up procedure to the disc fusion on January 12, 2004. Dr. Poletti opined that claimant's back condition reached maximum medical improvement on October 14, 2004, and that he is totally and permanently disabled due to a 40 percent impairment of the spine and a 10 percent impairment of the left leg. Claimant sought benefits under the Act for permanent total disability.

In his decision, the administrative law judge found that claimant's injury occurred on navigable waters while in the course of his employment and thus concluded, pursuant to *Director, OWCP v. Perini North River Associates (Perini)*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), that claimant's employment was covered under the Act. The administrative law judge found that claimant provided timely notice to employer of his injury under Section 12, 33 U.S.C. §912, and that the claim was timely filed inasmuch as the Section 13, 33 U.S.C. §913, statute of limitations was tolled by employer's payment of benefits pursuant to a South Carolina award of workers' compensation benefits. The administrative law judge found that claimant's back condition was caused or aggravated by his work injuries on May 16 and May 24, 2002. The administrative law judge credited the opinion of Dr. Poletti that claimant's back condition reached maximum medical improvement on October 14, 2004. He found it uncontested that claimant is unable to return to his usual employment as a heavy-lift foreman, and he rejected employer's labor market survey as establishing the availability of suitable alternate employment. The administrative law judge found claimant entitled to a Section 14(e) assessment, 33 U.S.C. §914(e), on compensation due from July 17, 2004, until May 27, 2004, limited to the difference between the amount paid pursuant to the South Carolina award and the greater amount awarded under the Act. Claimant was awarded compensation for temporary total

disability, 33 U.S.C. §908(b), from July 13, 2002, to October 14, 2004, and continuing compensation for permanent total disability from October 15, 2005. 33 U.S.C. §908(a). Finally, the administrative law judge denied employer's request for Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f). The administrative law judge found employer's application untimely pursuant to Section 8(f)(3), 33 U.S.C. §908(f)(3). Alternatively, the administrative law judge found that employer failed to establish that claimant's pre-existing back disability was manifest or that it contributed to claimant's permanent total disability.

On appeal, employer challenges the administrative law judge's findings that claimant's injury is within the Act's coverage, that claimant's notice of injury and claim were timely filed, that claimant's injuries are work-related and that claimant is totally disabled. Claimant responds, urging affirmance. Employer also contends the administrative law judge erred in denying it Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of Section 8(f) relief.

Employer first argues that the administrative law judge erred in finding coverage under the Act. Employer contends that claimant, a bridge builder, does not satisfy the status requirement for coverage and that the administrative law judge erred by finding that claimant's injury on actual navigable waters confers coverage.

Prior to the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, claimant had to establish that his injury occurred upon the navigable waters of the United States, including any dry dock. *See* 33 U.S.C. §903(a)(1970)(amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of Section 2(3), 33 U.S.C. §902(3), and to expand the sites covered under Section 3(a) landward. In *Perini*, the Supreme Court of the United States determined that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage from workers injured on navigable waters who were covered by the Act before 1972. 459 U.S. at 315-316, 15 BRBS at 76-77(CRT). Thus, the Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3). Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT). *See also Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1997). With regard to bridge workers specifically, prior to 1972, employees injured on navigable waters while engaged in bridge work were held covered by the Act. *See Davis v. Dept. of Labor*, 317 U.S. 249 (1942); *Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), *aff'd*, 463 F.2d 252 (3d Cir. 1972); *Dixon v. Oosting*, 238 F.Supp. 25 (E.D. Va. 1965).

In this case, employer does not contest the administrative law judge's finding that claimant's alleged injuries on May 16 and May 24, 2002, while on a crane barge in the

Cooper River occurred on navigable waters and that claimant thereby satisfies the situs test for coverage. Employer's Petition for Review at 23-24. Moreover, the administrative law judge properly found that whether claimant separately satisfies the Act's status requirement is irrelevant under *Perini*. See *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); see also *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991). The administrative law judge concluded that since claimant's work-related injuries occurred upon navigable waters, and he is not otherwise excluded from coverage, he has satisfied the situs and status elements and is entitled to coverage under the Act. Decision and Order at 32.

The administrative law judge's analysis of the coverage issue pursuant to *Perini* is rational, supported by substantial evidence, and in accordance with law. *Perini*, 459 U.S. at 315-316, 15 BRBS at 76-77(CRT). Therefore, his finding that claimant is covered under the Act is affirmed. *Walker*, 34 BRBS 176. As the administrative law judge found that claimant's injury occurred on navigable waters, there was no need for him to further consider the status issues in this case as urged by employer. *Zapata Haynie Corp.*, 933 F.2d 256, 24 BRBS 160(CRT).

Employer asserts that claimant's notice of injury was not timely as it was first received on July 17, 2002, more than 30 days after the purported dates of injury on May 16 and May 24, 2002. In this regard, employer argues that claimant was examined for back pain on May 20, 2002, by Dr. Anguelova, and on the following day he presented his supervisor with a light-duty work slip, but he failed to timely report that he had injured his back at work.

Section 12(a) of the Act requires, in a traumatic injury case, that claimant give employer written notice of his injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury and employment.¹ 33 U.S.C. §912(a); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). Contrary to employer's contention, "awareness" for purposes of Section 12 in a traumatic injury case occurs when claimant is aware, or should have been aware, of the relationship between the injury, the employment, and a likely impairment of his earning capacity, and not necessarily on the date of the accident. See, e.g., *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). Thus, a proper analysis requires the consideration of claimant's awareness of an injury, of its

¹ In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice of the injury pursuant to Section 12. See *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994).

relationship to claimant's work for employer, and of the resulting impact on wage-earning capacity. *See Lopez v. Stevedoring of America*, 39 BRBS 85 (2005).

In this case, the administrative law judge found that claimant immediately associated his back pain with the incidents at work. The administrative law judge credited claimant's testimony that he thought he had pulled a muscle and that he had not previously reported similar incidents to his supervisor because he had been able to continue working while the injury resolved itself. Decision and Order at 33. The administrative law judge also credited claimant's testimony that Dr. Anguelova told him during his initial visit on May 20, 2002, that he had a pulled muscle or arthritis. Tr. at 53. Claimant continued working for employer after the work incidents on May 16 and May 24, 2002. The administrative law judge found that claimant did not learn the extent of his back injury and its effect on his wage-earning capacity until he consulted with Dr. Poletti on July 15, 2002, and was informed of the MRI results. At this time, Dr. Poletti recommended back surgery, and he advised claimant not to return to work. Tr. at 57; CXs 17 at 50, 19. Accordingly, the administrative law judge found that claimant's notice of injury to employer on July 17, 2002, was timely as claimant provided notice within 30 days of his becoming aware of the relationship between his injuries, employment, and inability to return to work. Assuming, *arguendo*, that claimant's notice was not timely, the administrative law judge found the employer failed to establish any prejudice from the delay. *See* 33 U.S.C. §912(d)(2).

We affirm the administrative law judge's finding that claimant was unaware until July 15, 2002, of the likely impairment of his wage-earning capacity due to his work injuries as it is supported by substantial evidence. Claimant's awareness that he injured his back at work and Dr. Anguelova's releasing claimant to return to light-duty work are insufficient to establish that claimant was aware of the full extent of the harm resulting from his work injuries. *See Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Hodges v. Calipher, Inc.*, 36 BRBS 73 (2002). Employer does not challenge the administrative law judge's finding that claimant was able to return to work after his injuries until his examination by Dr. Poletti on July 15, 2002. Moreover, claimant testified that while he worked light-duty the day after his examination by Dr. Anguelova, thereafter he resumed his regular duties. Tr. at 54. The administrative law judge rationally determined from claimant's testimony and his continuing to work that claimant did not become aware of the relationship between his back injuries, employment, and impairment of his earning capacity until July 15, 2002, at which time the administrative law judge properly found that the 30-day period for providing employer notice of his injury began to run. *See Parker*, 935 F.2d 20, 24 BRBS

98(CRT); *Galen*, 605 F.2d 583, 10 BRBS 863; *Lopez*, 39 BRBS 85.² Therefore, we affirm the administrative law judge's finding that claimant's notice of injury on July 17, 2002, was timely.³

We next address employer's contention that the administrative law judge erred by finding that claimant's claim was timely filed under Section 13(a). Section 13(a) provides in pertinent part:

Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore (*sic*) is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment.

33 U.S.C. §913(a). In this case, claimant filed a South Carolina workers' compensation claim on August 21, 2002, and he was awarded benefits on September 9, 2003. Claimant filed a claim under the Act on March 18, 2004. CX 13. The administrative law judge found that this claim was timely inasmuch as the Section 13 statute of limitations was tolled by employer's payments under the state award. In reaching this finding, the administrative law judge applied the decision in *Reed v. Bath Iron Works*, 38 BRBS 1 (2004), in which the Board held that payments under a state award were payments "without an award" pursuant to Section 13 of the Act.

On appeal, employer argues that *Reed* was wrongly decided and should be overruled.⁴ In *Reed*, the Board held that the plain meaning of the term "award" in

² We reject employer's assertion that the administrative law judge erred by utilizing cases interpreting the Section 12 notice period in cases involving an occupational disease or analyzing the one-year statute of limitations under Section 13. Section 12(a) mirrors the language of Section 13(a) with regard to awareness. *See, e.g., Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *see also Lopez*, 39 BRBS 85.

³ Accordingly, we need not address employer's contention that the administrative law judge erred by finding there was no prejudice to employer from claimant providing notice on July 17, 2002.

Section 13 is not unambiguous, but that, in context, it is clear that “award” means an award under the Act. *Reed*, 38 BRBS at 4. The Board held that this statutory construction is consistent with the history of the Act, the policies underlying the interpretation of Section 13, and with Section 22 of the Act, 33 U.S.C. §922. we decline employer’s invitation to revisit this issue, and, for the reasons stated in *Reed*, we affirm the administrative law judge’s finding that the time limitation for filing a claim under the Act was tolled by employer’s payments under the South Carolina award, and that claimant’s claim under the Act was, therefore, timely filed.⁵

Employer next contends that the administrative law judge erred by invoking the Section 20(a) presumption. 33 U.S.C. §920(a). Specifically, employer asserts there is substantial evidence that claimant did not injure his back at work on May 16 and May 24, 2002, as he alleged. Section 20(a) provides claimant with a presumption that his disabling condition is causally related to his employment if claimant established a *prima facie* case by proving that he suffered a harm and that an accident occurred at work or working conditions existed which could have caused the harm. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Claimant’s theory as to how the harm occurred must go beyond “mere fancy.” *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

It is uncontested that claimant suffered a harm, *i.e.*, a herniated disc at L5-S1 for which he has undergone three surgeries. The administrative law judge found that claimant credibly testified that he injured his back at work, and that his testimony is supported by that of a co-worker, Allen Casey, that claimant reported the May 16 injury to him on their ride home from work that day, and the testimony of claimant’s wife that claimant appeared injured and that he informed her that his back pain arose at work. Decision and Order at 37-38; *see* Tr. at 45-46, 85-86, 116, 127-28, 134. The administrative law judge further credited claimant’s testimony that he thought his back condition would resolve itself and that he did not immediately report the injuries to employer or to Dr. Anguelova because he did not want to negatively affect his continued

⁴ Employer argues that *Moore v. Virginia International Terminals*, 2000-LHC-0331, 2000 WL 328026 (2000), is supporting authority for its contention. This decision is by an administrative law judge, and is thus not binding on the Board. Moreover, the administrative law judge’s finding that payment of compensation under a Virginia award is not payment of compensation without an award was reversed on appeal by the Board in *Moore v. Virginia International Terminals, Inc.*, 35 BRBS 28, 30-31 (2001), as Section 13 was held to be inapplicable. The Board held therein that claimant filed a timely motion for modification pursuant to Section 22.

⁵ As we affirm the administrative law judge’s finding that the claim was timely filed, we need not address claimant’s response that the Section 13 limitations period was tolled by employer’s failure to file a report of injury as required by Section 30(a) of the Act, 33 U.S.C. §930(a).

employment with employer. See Tr. at 47-48, 50, 92-95, 117. As substantial evidence supports the administrative law judge's finding that claimant established that injuries occurred at work on May 16 and May 24, 2002, we affirm the administrative law judge's finding that claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption that claimant's disc herniation is related to his work injuries. See *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); see also *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Employer next challenges the administrative law judge's finding that the evidence of claimant's pre-existing back symptomatology is insufficient to rebut the Section 20(a) presumption. Specifically, there is evidence of record that claimant has degenerative disc disease and that he informed Dr. Anguelova and his supervisor, Lou Collier, of prior back pain. Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by his employment. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); see also *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

The administrative law judge found that employer presented no medical evidence that claimant's back condition was not caused or aggravated by his alleged work injuries. Moreover, the administrative law judge found that employer's evidence of a pre-existing back condition is not sufficient to rebut the presumption that claimant's disc herniation was not caused or aggravated by his employment. Employer does not challenge the administrative law judge's finding that there is no medical evidence of record that claimant's disc herniation was not caused or aggravated by his employment. In addition, the mere existence of a prior back condition cannot rebut the Section 20(a) presumption as it cannot constitute substantial evidence that claimant's current condition was not aggravated by the incidents at work. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). In the absence of such evidence and, inasmuch as the administrative law judge found claimant's testimony that he injured his back at work on May 16 and May 24, 2002, was credible, we hold that the administrative law judge properly concluded that employer failed to rebut the Section 20(a) presumption that claimant's back condition is related to his employment. See, e.g., *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197(1998).

Employer next challenges the administrative law judge's finding that its labor market survey did not establish the availability of suitable alternate employment. Where it is undisputed that claimant is unable to perform his usual employment duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); see also *Newport News Shipbuilding &*

Dry Dock v. Tann, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d 129, 21 BRBS 109(CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992).

In rejecting employer's labor market survey, the administrative law judge found that the survey fails to identify actual jobs claimant could perform with specific employers, but lists only general positions. The administrative law judge rejected the specific positions listed in the survey because they are in Myrtle Beach or Charleston, South Carolina, which the administrative law judge found are approximately an hour and half driving distance from claimant's residence in Andrews, South Carolina. The administrative law judge credited Dr. Poletti's deposition testimony that claimant should not undertake employment requiring a long commute, and the testimony of claimant and his wife that driving to Charleston for a doctor's appointment aggravates his back condition. EX 28 at 62; Tr. at 73, 135, 205. Accordingly, the administrative law judge found that jobs identified in Myrtle Beach and Charleston are not within claimant's geographical area and do not constitute suitable alternate employment.

A labor market survey may be rationally discredited if the survey fails to take into consideration all relevant restrictions found by the administrative law judge. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1992). In this regard, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer in order to determine whether employer has met its burden of proof. *See Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). The administrative law judge found, based on the testimony of claimant's treating physician, Dr. Polletti, claimant, and his wife, that claimant's back condition prevents him from commuting to work in the Myrtle Beach and Charleston areas. Employer's vocational consultant, Pamela White, testified that her labor market survey targeted jobs in these areas, and that she did not identify any suitable alternate employment in Andrews where claimant resides. Tr. at 214-217. Inasmuch as the administrative law judge's finding that claimant is unable to commute to the metropolitan areas in which all of the specific and general jobs are located is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to identify the availability of suitable alternate employment, and his continuing award of

compensation for permanent total disability.⁶ *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

Finally, employer contends that the administrative law judge erred in finding that the absolute defense of Section 8(f)(3) bars its application for relief from continuing compensation liability pursuant to Section 8(f), and that the administrative law judge further erred by denying the request for Section 8(f) relief on the merits. 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 Special Fund relief, in a case where claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Section 8(f)(3) of the Act requires that employer raise its

⁶ Accordingly, any error in the administrative law judge's finding that the general job descriptions identified in the labor market survey are insufficient to establish suitable alternate employment is harmless, and we need not address employer's contention in this regard. *See Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); *see also Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Moreover, we need not address employer's contention that the Myrtle Beach and Charleston areas would, absent claimant's driving restriction, constitute the relevant labor market in this case for establishing the availability of suitable alternate employment. *See generally See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994).

claim for Section 8(f) relief while the case is pending before the district director.⁷

The administrative law judge found that claimant raised the permanency of his work-related injuries while the claim was before the district director; however, employer did not file its application for Section 8(f) relief until after referral of the claim to the Office of Administrative Law Judges. The administrative law judge found that employer did not establish that it could not have reasonably anticipated the liability of the Special Fund prior to consideration of the claim by the district director. The administrative law judge, therefore, concluded that employer's entitlement to Section 8(f) relief is barred pursuant to Section 8(f)(3). In the alternative, the administrative law judge addressed the merits of employer's application. The administrative law judge found that employer established that claimant had pre-existing degenerative disc disease. However, the administrative law judge found this pre-existing condition was not manifest to employer before claimant's May 16, 2002, work injury, and that employer's evidence was insufficient to establish that it contributed to claimant's permanent total disability.

In order to establish the contribution element of Section 8(f) in cases of permanent total disability, employer must show, by medical or other evidence, that a claimant's subsequent injury alone would not have caused the claimant's permanent total disability. *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003); *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT); *see also Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2^d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990). Moreover, the administrative law judge may not merely accept the assertions of the parties or their representatives, but he must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based. *Ward*, 326 F.3d 434, 37 BRBS 17(CRT); *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT). In this case, employer's evidence of contribution is a medical questionnaire in which Dr. Poletti checked the "Yes" box next to a series of questions, including whether claimant's May 16, 2002,

⁷ Section 8(f)(3) provides:

Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 44 of this title for the payment of compensation benefits, and a statement of the grounds therefore [sic], shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3).

work injury aggravated or combined with his pre-existing degenerative disc disease, and caused him to lose substantially more time from work and resulted in a higher percentage of permanent disability than he would have from the May 16, 2002, work injury alone. EX 6. The administrative law judge found that employer presented no testimony from Dr. Poletti explaining the basis for these conclusions. Moreover, there is no evidence that claimant's permanent total disability would not have resulted from the May 16, and May 24, 2002, work injuries alone. *See* EX 28 at 59-60. Based on this record, we hold that the administrative law judge rationally concluded that employer failed to establish that claimant's permanent total disability is not solely due to claimant's work injuries. *Ward*, 326 F.3d 434, 37 BRBS 17(CRT). Accordingly, the administrative law judge's denial of Section 8(f) relief is affirmed.⁸

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁸ We, therefore, need not address employer's contention that the administrative law judge erred in finding that the absolute defense of Section 8(f)(3) bars its application for relief from continuing compensation liability pursuant to Section 8(f), and that the administrative law judge also erred by finding that claimant's pre-existing degenerative disc disease was not manifest to employer.