BRB Nos. 09-0747
and 09-0747A

KELLY CAPPS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 04/16/2010
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order and the Decision and Order on Reconsideration of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order and the Decision and Order on Reconsideration (2008-LHC-0159) of Administrative Law Judge Kenneth A. Krantz 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 worked for employer as a chief clerk and planning clerk, dividing his time equally between these two positions. On April 16, 2005, claimant was working in an office area located in a converted warehouse in the Norfolk International Terminals (NIT), when he sustained a back injury. Claimant underwent an L4 through S1 laminectomy on June 6, 2005, and additional back surgery on July 7, 2006. Employer voluntarily paid claimant compensation from April 18, 2005, to January 22, 2007, and thereafter offered to modify claimant's job duties in order to accommodate his physical restrictions. Claimant sought compensation for ongoing temporary total disability, asserting that the modified positions proffered by employer within its facility are beyond his physical restrictions or, alternatively, constitute sheltered employment. Claimant retired shortly before the formal hearing in this case.

In his Decision and Order, the administrative law judge initially found that claimant is covered under the Act, since claimant's injury occurred within a terminal used for the loading and unloading of vessels and his employment duties were integral to the loading and unloading of vessels and were not exclusively clerical in nature. 33 U.S.C. §§902(3), 903(a). Regarding the merits of claimant's claim, the administrative law judge found that claimant's back condition is causally related to the April 16, 2005, work incident, that claimant is incapable of performing his usual employment duties, but that employer established the availability of suitable alternate employment when it offered claimant a modified planning clerk position in its facility.[1] He thus awarded claimant temporary total disability benefits from January 23, 2007 through August 9, 2007,

[1] With respect to the modified chief clerk position offered to claimant, the administrative law judge found that the proposed modifications to that position would render it unprofitable for employer and, thus, that position did not qualify as suitable alternate employment.

permanent total disability benefits from August 10, 2007 through May 20, 2008,[2] and permanent partial disability benefits thereafter.[3]

Both claimant and employer sought reconsideration. The administrative law judge granted employer's motion in part, finding that the record evidence establishes that employer offered claimant the modified planning clerk position on April 28, 2008, and, thus, the date of onset for permanent partial disability is April 28, 2008. The administrative law judge denied employer's request for reconsideration of the situs issue, reaffirming his finding that claimant was injured on a covered situs. The administrative law judge granted claimant's initial motion for reconsideration regarding the issue of claimant's wage-earning capacity for the period from April 28, 2008 through September 30, 2008, and found that the correct compensation rate for that period of time is $462.60 per week. Lastly, the administrative law judge denied claimant's supplemental motion for reconsideration in which he sought reimbursement for medical expenses that had been paid by claimant's private health insurance carrier.

On appeal, claimant challenges the administrative law judge's finding that employer established suitable alternate employment with its offer of a modified planning clerk position in its facility. Claimant also assigns error to the administrative law judge's determination that claimant is not entitled to seek reimbursement for medical expenses which were paid by his private insurance carrier. Employer responds, urging affirmance of the administrative law judge's findings on these issues. In its cross-appeal, employer contends that the administrative law judge erred in finding that claimant met the situs and status requirements for coverage under the Act. Claimant responds, urging affirmance of the administrative law judge's determination that the situs and status requirements were met in this case.

Initially, we will address the coverage issues raised by employer in its cross-appeal. Employer contends that the administrative law judge erred in finding that the office in which claimant was working at the time of his April 16, 2005 injury is a covered situs. Specifically, employer avers that because no loading or unloading of ships occurred at this location, the situs requirement is not met. We disagree.

[2] The administrative law judge found, based on Dr. Ordonez's opinion, that claimant reached maximum medical improvement as of August 10, 2007.

[3] The administrative law judge additionally found employer entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Section 3(a) of the Act states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, *terminal*, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

33 U.S.C. §903(a)(emphasis added). In this case, it is undisputed that the area where claimant's injury occurred is part of a warehouse, specifically designated Warehouse 4D, which is located within the boundaries of NIT. Moreover, there is no dispute that the loading and unloading of ships takes place at the Elizabeth River within the terminal's boundaries. *See* Decision and Order at 8-9, 35; Tr. at 39-41, 108-109; CXs 15 at 7-11, 40-42; 28 at 12-14, 39-40; 33. Contrary to employer's arguments in this regard, it is well established that an entire terminal which adjoins navigable waters is a situs covered under the Act and, thus, an injury occurring within the terminal's boundaries satisfies the situs requirement. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 279, 6 BRBS 150, 169 (1977)(as claimants were injured inside terminal which adjoined navigable waters, the situs requirement was met).[4] *See Parker v. Director, OWCP*, 75 F.3d 929, 933, 30 BRBS 10, 12(CRT) (4th Cir.), *cert. denied*, 519 U.S. 812 (1996)("the situs test may be satisfied if the injury occurs within the boundaries of a marine terminal that is contiguous with navigable waters."); *Sidwell v. Director, OWCP*, 71 F.3d 1134, 29 BRBS

[4] Employer's reliance on the Supreme Court's decision in *Caputo* to support its argument that the *entire* terminal must be used for loading and unloading vessels to meet the situs requirement is misplaced. First, the Court stated in *Caputo* that "it is not at all clear" that the phrase "customarily used [in loading, unloading…] was intended to modify more than the immediately preceding phrase 'other areas.'" *Caputo*, 432 U.S. at 280, 6 BRBS at 170. Thus, the Court recognized that the "customarily used" phrase may not be applicable to enumerated sites, such as terminals. In any event, the Court stated that even assuming that the phrase does apply to enumerated sites, the situs test was "unquestionably" met with respect to claimant Caputo who was injured while loading a truck within the terminal area. The Court also held claimant Blundo, who was injured on a pier used for stuffing and stripping containers and for storage, was covered because the "entire terminal facility adjoined the water and *one of its two finger piers* clearly was used for loading and unloading vessels." *Id.*, 432 U.S. at 281, 6 BRBS at 170 (emphasis added).

138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996);[5] *Martin v. Kaiser Co., Inc.*, 24 BRBS 112, 122 (1990). Thus, contrary to employer's contention on appeal, the question of whether claimant satisfied the situs requirement for coverage under the Act is not governed by whether ships were loaded or unloaded at Warehouse 4D. Accordingly, as claimant's injury occurred within the boundaries of NIT, which as a terminal is an enumerated site under Section 3(a), we affirm the administrative law judge's finding that the situs requirement necessary for coverage under the Act has been met. *Id.*

Employer next assigns error to the administrative law judge's determination that claimant's work as a chief clerk and planning clerk involved activities which were integral to the longshoring process and were neither exclusively clerical nor office-oriented. *See* Decision and Order at 34. Under Section 2(3) of the Act, a covered employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ." 33 U.S.C. 902(3). Generally, a claimant satisfies the status requirement as a maritime employee if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, claimant need only "spend at least some of [his] time" in indisputably maritime activities. *Caputo*, 432 U.S. at 273, 6 BRBS at 165. *See also CSX Transportation, Inc. v. Shives*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir.), *cert. denied*, 525 U.S. 1019 (1998). Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work. *Stalinski v. Electric Boat Corp.*, 38 BRBS 85, 87 (2005); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990). A key factor in determining status is the nature of the activity to which an employee may be assigned. *P.C. Pfeiffer*

[5] The United States Fourth Circuit for the Fourth Circuit, within whose jurisdiction the instant claim arises, observed in *Sidwell* that "a terminal is a situs expressly enumerated in the statute, 71 F.3d at 1136 n.2, 29 BRBS at 140 n.2(CRT); the court additionally observed that "[e]ach of these enumerated 'areas' is a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters. *Id.*, 71 F.3d at 1139, 29 BRBS at 143(CRT). Indeed, the court in *Sidwell* noted a Program Memorandum which states that, "'It is not unusual for marine terminals to cover many hundreds of acres. Such terminals are covered in their entirety; it is not necessary that the precise location be used for loading and unloading operations…; it suffices that the overall area which includes the location is a part of a terminal adjoining water.'" *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11(CRT), *quoting* LHWCA Program Memorandum No. 58 at 10-11 (1977)(footnote omitted).

Co. v. Ford, 444 U.S. 69, 82, 11 BRBS 320, 328 (1979); *Shives*, 151 F.3d at 169, 32 BRBS at 129(CRT).

In the instant case, the administrative law judge rejected employer's contention that the status determination should be based solely on claimant's duties on the specific day of his injury.[6] *See* Decision and Order at 32; *Shives*, 151 F.3d 164, 32 BRBS 125(CRT). The administrative law judge determined that claimant's work in both the chief clerk and planning clerk positions is integral to the loading and unloading process, and, thus, constitutes maritime employment. Decision and Order at 32. As this finding is supported by substantial evidence, it is affirmed.[7] *See generally Shives*, 151 F.3d 164, 32 BRBS 125(CRT).

The administrative law judge next considered whether claimant, although engaged in maritime employment, could nonetheless be excluded from coverage by the Section 2(3)(A) clerical exception. *See* Decision and Order at 32-34. In 1984, Congress amended Section 2(3) to specifically exclude certain employees from coverage. The pertinent provision in this case, Section 2(3)(A), provides for the exclusion of "[i]ndividuals employed *exclusively to perform office clerical*, secretarial, security, or data processing *work*," if such persons are covered by State workers' compensation laws. 33 U.S.C. §902(3)(A) (emphasis added). In this regard, the Board has stated that the legislative history regarding Section 2(3)(A) indicates that the term "office" modifies the term "clerical" such that "only clerical work performed exclusively in a business office is

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[6] On appeal, employer again argues that the status determination is based on claimant's work activities at the time of injury; as properly found by the administrative law judge, this argument lacks merit, since it is well settled that "coverage is not denied simply because the employee was not performing a maritime function at the time of his injury." *Shives*, 151 F.3d at 169, 32 BRBS at 129(CRT); *see also Caputo*, 432 U.S. at 273, 6 BRBS at 165. Moreover, we agree with the administrative law judge that employer's reliance on the Supreme Court's decision in *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34 (1997), is misplaced. *See* Decision and Order at 32. As discussed by the administrative law judge, the Court's decision in *Papai*, which arose under the Jones Act and not the Longshore Act, is not germane to the determination of status under Section 2(3). *See Riggio v. Maher Terminals, Inc.*, 35 BRBS 104, 111 (2001), *aff'd sub nom. Maher Terminals v. Director, OWCP*, 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir. 2003).

[7] The administrative law judge acknowledged and relied upon the testimony of William Parker, employer's general manager at the time of claimant's injury, who expressly testified on deposition that the functions performed by the chief clerk and planning clerk were essential to the loading process. *See* CX 15 at 23-24.

intended to be excluded." *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1, 3 (2003). In other words, the legislative history of Section 2(3)(A) reveals the intent to exclude employees who are "confined physically and by function to the administrative areas of the employer's operations." *Id.*, *citing* H.R. Rep. No. 570, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2737. The Board's prior decisions illustrate that the applicability of the Section 2(3)(A) clerical exception hinges on two key elements regarding the work performed: 1) whether the work is performed "exclusively" in an office setting; and 2) whether the work requires the exercise of judgment and expertise that goes beyond that typical of clerical work. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Stalinski*, 38 BRBS 85; *Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006); *Boone*, 37 BRBS 1; *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Jannuzzelli v. Maersk Container Serv. Co.*, 25 BRBS 66 (1991) (Clarke, J., dissenting).

In his decision, the administrative law judge first found that claimant's "duties during shifts as chief clerk involved decision-making and exercising judgment to prepare stowage plans and determine the location of cargo on the vessel, as well as to make changes to the stowage plans as needed." Decision and Order at 33; *see also id.* at 6-7, 31-32. Substantial evidence supports the administrative law judge's finding that claimant's duties as chief clerk required the exercise of judgment and decision-making beyond that of a typical clerical worker.[8] *See Wheeler*, 39 BRBS 49; *Morganti*, 37 BRBS 126.

[8] James Goss, who is employed as a chief clerk and planning clerk by employer, testified that although the chief clerk is provided with a basic stowage outline by the ship planner, the chief clerk exercises discretion regarding the actual placement of the containers. *See* Tr. at 24, 64-66. The chief clerk must determine the specific location for individual containers based on factors such as weight, location on the terminal, and optimal space utilization. *See* Tr. at 65-66; CX 28 at 10-12. When changes to the original stowage plan are required, for example, when dealing with hazardous cargo, the chief clerk either makes the changes on his own or communicates with the ship chief officer, the ship planner or other personnel to resolve these issues. *See* Tr. at 26-27, 58; CX 28 at 15-17. Both Mr. Goss and claimant testified that the chief clerk oversees the loading and unloading operation throughout its duration to ensure that everything is in order. *See* Tr. at 23, 31-32, 66-67; EX 25 at 26-27. Employer's general manager William Parker confirmed the accuracy of Mr. Goss's hearing testimony. Tr. at 99.

The administrative law judge next determined that both the chief clerk and planning clerk positions involve going onboard vessels and, thus, neither job is performed exclusively in an office. *See* Decision and Order at 32-33. The administrative law judge found that claimant's trips onboard vessels were frequent, particularly when working as a planning clerk, and that these trips were not merely incidental to clerical work as they involved consultations with the ship's crew regarding the stowage plans and any necessary changes to those plans.[9] *See id.* at 33-34. As employer's contention that claimant's trips onboard vessels were episodic and incidental to his clerical work was thoroughly addressed and rejected by the administrative law judge, *see* Decision and Order at 33-34, we affirm the administrative law judge's findings in this regard as they are rational and supported by substantial evidence. Additionally, as found by the administrative law judge, this case is factually distinguishable from *Stalinski*, 38 BRBS 85 (quality assurance department clerk whose sporadic trips outside an office were performed solely to satisfy clerical requirements held excluded by Section 2(3)(A)). *See also Ladd*, 32 BRBS 228; *Stone*, 30 BRBS 209. In this case, the administrative law judge rationally determined that, unlike the claimant in *Stalinski* whose rare forays outside of her office entailed little discretion or decision-making, claimant's frequent trips onboard vessels to consult with the ship's crew and to make necessary changes to the stowage plans required the exercise of judgment and expertise.[10] *See* Decision and Order at 34; *Wheeler*, 39 BRBS at 52. Accordingly, as substantial evidence supports the

[9] Mr. Goss testified that the chief clerk goes onboard ships to deliver new paper work or to meet with the chief officer to make any necessary changes. *See* Tr. at 26; CX 28 at 16-18. Additionally, with break-bulk cargo vessels, the chief clerk goes to the terminal to check the cargo's dimensions and to the vessels themselves to check on the stowage operations. *See* Tr. at 25; CX 28 at 16-17. Mr. Goss's testimony indicates that, at the time of claimant's injury, the chief clerk would have gone onboard approximately three to four times per month. *See* Tr. at 27-30.

Mr. Goss further testified that the planning clerk goes onboard the ship a minimum of two times, at the beginning and the end of the loading of each vessel, but if problems arise, he could go onboard numerous times. *See* Tr. at 31; CX 28 at 22-23. The planning clerk meets with the chief mate to go over all of the stowage paperwork, to verify that everything is correct, and to make any necessary changes. *See* Tr. at 30-31, 57; CX 28 at 21-22. The planning clerk spends 30 to 60 minutes onboard each time he boards the vessel. *See* Tr. at 58. *See* EX 25 at 29. The planning clerk job description reflects that the planning clerk may be required to board vessels on a daily basis. *See* EX 23.

[10] On appeal, employer also cites an administrative law judge decision, *Butler v. National Steel and Shipbuilding*, 34 BRBS 204 (ALJ) (2000), in support of its arguments. This decision, however, is not binding precedent on the Board.

administrative law judge's finding that the work that claimant performed as chief clerk and planning clerk was not exclusively office clerical work, his conclusion that the Section 2(3)(A) clerical exception to coverage is inapplicable is affirmed. *See Wheeler*, 39 BRBS 49; *Morganti*, 37 BRBS 126; *Boone*, 37 BRBS 1.

Turning now to the issues presented by claimant's appeal, we first address claimant's challenge to the administrative law judge's finding that employer established the availability of suitable alternate employment with its offer of a planning clerk position in its facility that would not involve going onboard vessels and would otherwise be modified to comply with claimant's specific work restrictions. Claimant initially contends in this regard that employer's job offer constitutes sheltered employment; alternatively, claimant avers that he is unable to perform the modified position. Where, as in the instant case, claimant establishes that he is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Employer can meet its burden by offering claimant a job in its facility, including a light duty job. *See Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001) (*en banc*). The Board has affirmed a finding of suitable alternate employment where employer offers claimant a job tailored to his specific restrictions so long as the work is necessary. *See, e.g., Buckland v. Dept. of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Sheltered employment, on the other hand, is a job for which claimant is paid even if he cannot do the work and which is unnecessary; such employment is insufficient to constitute suitable alternate employment. *Buckland*, 32 BRBS 99; *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

In the instant case, the administrative law judge found that the modified planning clerk position offered by employer was both necessary and profitable to employer and, thus, does not constitute sheltered employment. *See* Decision and Order at 48-50. Claimant argues that the position would not be profitable to employer, asserting that the administrative law judge's findings are not supported by various pieces of documentary evidence and testimony. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and factual findings of the administrative law judge which are supported by substantial evidence. *See, e.g., Tann*, 841 F.2d at 543, 21 BRBS at 15-

16(CRT). As the administrative law judge's determination that the modified planning clerk position would be profitable,[11] as well as necessary, to employer is rational and supported by substantial evidence, the administrative law judge's conclusion that it was not sheltered employment is affirmed. *See Buckland*, 32 BRBS 99.

Claimant next contends that the combination of his complaints of pain and use of narcotic pain medications renders him incapable of performing the modified planning clerk position found by the administrative law judge to be suitable alternate employment.[12] The administrative law judge thoroughly addressed the record evidence regarding the effect of claimant's pain and medications on his ability to return to work, including his ability to drive, *see* Decision and Order at 45-47, and concluded that the opinion of Dr. Spear, claimant's treating pain management specialist, was persuasive regarding claimant's ability to work given his pain and medication use. *Id.* at 47. In this regard, the administrative law judge inferred, based on Dr. Spear's approval of the chief clerk position on May 5, 2008, following a period in which he adjusted claimant's medications to minimize their side effects, that Dr. Spear held the opinion that claimant

[11] In this regard, the administrative law judge credited Mr. Parker's testimony that it was feasible to assign claimant to work as a planning clerk on only those ships that could be loaded in eight or fewer hours, and he thus rejected claimant's contention that accommodating claimant's eight-hour shift limitation would be unprofitable. *See* Decision and Order at 49; Tr. at 132. The administrative law judge further found that the other proposed accommodations to claimant would not be unprofitable based on Mr. Parker's testimony that the office already has an elevator and a mattress used by the clerks to lie down and that there is ample money allocated in the budget for modification of office work stations. *See* Decision and Order at 50; Tr. at 106-107, 111-112, 114, 139-140; *see also* Tr. at 57-58; CX 15 at 27-28.

[12] Claimant asserts that Dr. Ross was the only physician to approve the modified planning clerk position, while the other physicians approved only the modified chief clerk position. The administrative law judge expressly acknowledged that the opinions of the physicians who gave opinions regarding claimant's ability to return to work, other than Dr. Ross, dealt only with the modified chief clerk position as that was the only job description submitted for their approval. Decision and Order at 47. The administrative law judge rationally found, however, that the physical requirements of both modified jobs were the same. *Id.; see* Tr. at 186; EXs 23-24. Thus, the administrative law judge could reasonably rely on the approval of the modified chief clerk job by claimant's treating physicians Drs. Ordonez and Spear, as well as by Dr. Ross, to find that claimant is also capable of performing the modified planning clerk job. *See* Decision and Order at 46-48; Tr. at 186-191, 212; CXs 1, 6; EX 47.

was not precluded from performing this position by his pain or his medications. *Id.* at 46-47; *see* CX 1; EXs 57, 58. Contrary to claimant's argument on appeal that he should have been found totally disabled based on his demeanor at the hearing and his testimony and other evidence regarding his pain and the effects of his medications, the administrative law judge drew rational inferences considering the evidence as a whole and reasonably found Dr. Spear's opinion to be most persuasive regarding claimant's ability to work. *See generally Tann,* 841 F.2d at 543, 21 BRBS at 15-16(CRT). We therefore affirm the administrative law judge's conclusion that employer has established the availability of suitable alternate employment. *See, e.g.*, *Buckland,* 32 BRBS 99; *Darden,* 18 BRBS 224.

Claimant also challenges the administrative law judge's finding that claimant is not entitled to seek reimbursement by employer for medical expenses paid by Cigna, his private insurance carrier; claimant avers in this regard that he is seeking reimbursement directly to Cigna and not to himself. As recognized by the administrative law judge, a claimant is not entitled to reimbursement for medical bills paid by his private insurer because Section 7(d) provides that the employee may only recover amounts which he himself expended for medical treatment or services. *Lopez v. Stevedoring Services of America,* 39 BRBS 85, 92 n.9 (2005); *Nooner v. Nat'l Steel & Shipbuilding Co.*, 19 BRBS 43, 46 (1986). While it is well established that an insurance carrier providing coverage for non-occupational injuries may intervene under the Act to recover amounts mistakenly paid for injuries determined to be work-related, *see Aetna Life Ins. Co. v. Harris,* 578 F.2d 52 (3d Cir. 1978); *Quintana v. Crescent Wharf & Warehouse,* 19 BRBS 52 (1986)(Order on Reconsideration), the private health insurer must make a claim for reimbursement on its own behalf. *See Lopez,* 39 BRBS at 92 n.9; *Plappert v. Marine Corps Exch.*, 31 BRBS 109, 111 (1997)(Decision and Order on Reconsideration *en banc).* Claimant's private health insurer, Cigna, has not intervened in this case. Moreover, although claimant asserts on appeal that his interest in seeking reimbursement on Cigna's behalf is based on a $500,000 lifetime benefits provision in his medical plan, there is no evidence in the record regarding this lifetime maximum nor did claimant make this argument to the administrative law judge. We therefore decline to consider this argument as it is raised for the first time on appeal. *See Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 1222-1223, 43 BRBS 21, 25(CRT) (11th Cir. 2009); *Fox v. West State Inc.*, 31 BRBS 118, 121 n.3 (1997). Accordingly, we affirm the administrative law judge's rejection of claimant's contention that he is entitled to seek reimbursement on behalf of Cigna for medical expenses paid under his private medical plan. *See Lopez,* 39 BRBS at 92 n.9; *Plappert,* 31 BRBS at 111.

Lastly, by motion dated March 5, 2010, claimant requests that the Board remand the case to the district director for consideration of his request for modification under Section 22 of the Act, 33 U.S.C. §922, based on a change of condition. Specifically,

claimant avers that a new medical opinion from Dr. Spear, his treating pain management specialist, demonstrates that as a result of claimant's worsened medical condition, he is unable to perform the duties of the modified planning clerk position. Claimant's request is granted, and the case is remanded to the district director for consideration of claimant's modification request. 33 U.S.C. §922; 20 C.F.R. §702.373.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed. The case is remanded to the district director for consideration of claimant's request for Section 22 modification.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge