BRB Nos. 05-0381
and 05-0381A

JOSEPH STEPEK	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 01/20/2006
	)	
	)	
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 Awarding Benefits and the Supplemental Decision and Order Granting Employer's Motion for Reconsideration and Denying Claimant's Motion for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Miles R. Eisenstein, Baltimore, Maryland, for claimant.

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

Jennifer Marion (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits and the Supplemental Decision and Order Granting Employer's Motion for Reconsideration and Denying Claimant's Motion for Reconsideration (04-LHC-0798) of Administrative Law Judge Linda S. Chapman 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 at the CSX Rail Terminal, which was located at the Seagirt Marine Terminal, as a heavy machinery operator responsible for loading and unloading cargo to and from the trains and terminal grounds. Claimant operated a crane, and occasionally a fifth-wheel or hustler machine, before his retirement on September 29, 2003. On July 12, 2000, claimant was injured while unloading a bare chassis from the train. One of the hoses attached to the chassis broke off and went through the cockpit of the fifth-wheel claimant was driving. It struck claimant's right leg, right arm and right shoulder, causing pain and swelling. Claimant was seen at the emergency room the next day. Claimant attempted to return to work while he was being treated conservatively by Dr. Zimmerman. However, he continued to experience pain and swelling while using his arm at work, and suffered a number of infections in his right arm. At the suggestion of his physician, claimant retired from work with employer and has not been employed since. Claimant sought permanent total disability benefits under the Act.

In her decision, the administrative law judge found that claimant's injury occurred on a situs that is used in the process of loading and unloading of ships and is contiguous to navigable water. In addition, the administrative law judge found that claimant's duties involved moving cargo between ship and land transportation and thus satisfy the status requirement of the Act. Therefore, the administrative law judge found that claimant is covered by the Act. 33 U.S.C. §§902(3), 903(a). Regarding the merits of the claim, the administrative law judge found that claimant established invocation of the Section 20(a) presumption that his shoulder condition is causally related to the July 2000 work injury. 33 U.S.C. §920(a). However, she also found that employer established rebuttal of the presumption, and, after weighing the evidence as a whole, concluded that claimant does not suffer from a work-related shoulder impairment.

With regard to claimant's right arm, the administrative law judge found that the parties stipulated that claimant suffers from a 53 percent permanent impairment of his right arm. The administrative law judge also found that the weight of the evidence indicates that claimant cannot perform his usual employment, but that claimant is able to

perform certain tasks. After reviewing the vocational evidence submitted by employer and claimant, the administrative law judge found that claimant can work as a parking lot attendant or auto parts counterperson and that employer established that these positions were available at the time claimant left work. Moreover, the administrative law judge found that claimant did not diligently seek alternate work. Therefore, the administrative law judge concluded that claimant is limited to a scheduled award under Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1), for a 53 percent permanent impairment of the right arm.

The administrative law judge also found that employer is entitled to a credit for payments made to claimant under the schedule for previous injuries to claimant's right arm. Lastly, the administrative law judge awarded employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in allowing employer a credit for previous compensation benefits paid pursuant to the schedule for prior arm injuries. In addition, claimant contends that the administrative law judge erred in finding that his shoulder condition is not work-related. Claimant also contends that the administrative law judge erred in finding that employer established suitable alternate employment and that claimant did not make a diligent search for alternate employment. Lastly, claimant contends that if employer established suitable alternate employment, the administrative law judge should have awarded temporary total disability benefits until the date employer established suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's findings on these issues. However, on cross-appeal, employer contends that the administrative law judge erred in finding that claimant met the status and situs requirements for coverage under the Act. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's finding that the status and situs requirements were met in this case.

Situs

Initially, we will address the coverage issues raised by employer on cross-appeal. Employer contends that the rail yard in which claimant was working at the time of the July 2000 injury is not a covered situs. Specifically, employer contends that there is no evidence that the containers that were loaded and unloaded to and from the trains ever went onto the ships and that the administrative law judge ignored testimony that only one percent of the trains' containers came from the ships.

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). In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), the United States Court of Appeals for the Fourth Circuit held that an "other adjoining area" under Section 3(a) must be an area of the same type as the enumerated sites, *i.e.*, a pier, wharf, dry dock, terminal, building way or marine railway. The *Sidwell* court stated that "Each 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." *Sidwell*, 71 F.3d at 1139, 29 BRBS at 143(CRT). *Sidwell* also requires that the site have actual physical contiguity with navigable waters, but recognizes that it is an entire parcel of land that is the relevant area. *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144, n.11(CRT). The court later elaborated on this requirement. "The 'other area' annexed to navigable waters by the Act must again be 'adjoining' the water and must again be linked to the traditional longshoremen's work on the water." *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 221, 32 BRBS 86, 90(CRT) (4th Cir.), *cert. denied*, 525 U.S. 1040 (1998).

The administrative law judge in the present case found that the railhead was not an enumerated situs under Section 3(a). Therefore, she considered whether it was an "adjoining area" as contemplated by the Fourth Circuit. The administrative law judge rejected employer's contention that the only connection between the rail yard and the loading and unloading of ships is the employees' designation as longshoreman and the small portion of cargo that eventually makes its way to the rail yard by ship. The administrative law judge found that that the railhead satisfies the contiguity requirement of *Sidwell* and *Brickhouse* as it is only 200 feet from the ships docked at the terminal and is part of the Seagirt Marine Terminal. She noted that it is separated from other operations on the waterfront by security fences, which were erected after September 11, 2001, and thus were not present at the relevant time of claimant's injury, July 12, 2000. The administrative law judge rejected employer's contention that the security fence disconnects the railhead from the water so that they are not geographically contiguous. Rather, the administrative law judge found that the rail yard is not separated from the water by a street, building, or any other obstacle that would define it as an area distinct from the waterfront, and that the gate is simply used to monitor the cargo that passes through it. The administrative law judge addressed the testimony that some of the cargo moving through the railhead comes and goes through the back gate of the terminal where the other workers move the cargo directly to and from the ship. H. Tr. at 25-26; Decision and Order at 24. In addition, the administrative law judge found that the crane operators

were responsible for loading trains with cargo that had occasionally come from the ships docked at the terminal, and the administrative law judge concluded that without the operations of the railhead, a portion of the cargo arriving by ship would not leave the waterfront at all. *Id*.

The Director urges affirmance of the administrative law judge's finding that claimant was injured on a covered situs. The Director contends that the administrative law judge's finding that claimant was injured on a covered situs can be affirmed on the ground that the rail yard is a part of the Seagirt Marine Terminal, and thus is a "terminal," which is an enumerated site under Section 3(a). We agree with the Director that the administrative law judge's finding that the situs element is met can be affirmed on this basis. The Fourth Circuit, in a case post-dating *Sidwell* and *Brickhouse*, stated that "Seagirt Marine Terminal is an intermodal maritime situs where freight is transferred from train to ship, from train to truck, from truck to ship, and from truck to train." *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 169, 32 BRBS 125, 130(CRT) (4th Cir.), *cert. denied*, 525 U.S. 1019 (1998); *see also Hayes v. CSX Transportation, Inc.*, 985 F.2d 137 (4th Cir. 1993). The 2001 addendum agreement between the ILA and the Steamship Trade Association, including association employer-member Ceres, states that the rail yard is "at" the Seagirt Marine Terminal. Moreover, claimant testified that the rail yard is a part of the Marine Terminal. H. Tr. at 24. The Director also notes that it is undisputed that the Seagirt Marine Terminal adjoins the navigable waters of the United States and is used, at least in part, to load and unload ships, H. Tr. at 25-26, and that it is the Director's longstanding position that the entire terminal is a covered situs.[1] The only difference between the Seagirt Marine Terminal in the earlier cases and this case is the presence of the security fence, and the administrative law judge found that this was used to monitor the cargo movement within the terminal for security reasons and did not sever the relationship between the rail yard and the navigable waters. Moreover, the injury occurred prior to September 2001, and thus the subsequent installation of the security fences is not relevant to this case. Therefore, we affirm the administrative law judge's finding that claimant was injured on a covered situs, on the grounds that the railhead is a part of the terminal, which is an enumerated site under Section 3(a).

[1] Indeed, the court in *Sidwell* noted the Director's 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).

In addition, we affirm the administrative law judge's actual finding that the rail yard is an "adjoining area" used, at least in part, for the loading and unloading of ships. The rail yard adjoins the ships' docking area and is separated only by the security fence between the two areas. In addition, the rail yard is located at Seagirt's Intermodal Container Transfer Facility, and the administrative law judge found that its purpose is to connect the different modes of transportation that carry maritime cargo. The applicable labor agreement, while not dispositive on the issue of claimant's status, requires "longshoremen" to act as the intermediaries between rail and ship at the terminal. Claimant testified that the cargo unloaded from the trains is taken either out the gate by truck or out the back gate to the ships. H. Tr. at 26. He also testified that the incoming cargo is brought to the train by a fifth-wheel from either the ships or incoming trucks, and that cargo is brought from the ship to the rail yard workers to be put on the train. H. Tr. at 59. The administrative law judge addressed the testimony of employer's representatives who stated that they did not have any idea where the cargo came from or went to when it was loaded and unloaded from the train. The administrative law judge concluded that "employer asks this tribunal to accept the untenable position that a rail yard located directly on the property of a sea port along the eastern seaboard, where cargo is brought to port via ship, and where the claimant works to move cargo, is not a situs covered by the Act." Decision and Order at 24. Rather, the administrative law judge found that "the operations at the CSX Railhead performed by Employer's workers are without doubt directly involved in the shipment of cargo at the Baltimore marine terminal." *Id.* As substantial evidence supports the administrative law judge's finding that the rail yard is geographically contiguous to the waterfront and is a facility used to load and unload vessels, we affirm her finding that claimant was injured on a covered situs.

Status

Employer also contends that the administrative law judge erred in finding that claimant established the status requirement for coverage under the Act. Generally, a claimant satisfies the "status" requirement of the Act if he is an employee engaged in work which involves loading, unloading, constructing, or repairing vessels. 33 U.S.C. §902(3). Employees of railroads are covered under the Act if they perform work which is essential to the loading and unloading of vessels. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Shives*, 151 F.3d 164, 32 BRBS 125(CRT). In *Schwalb*, the Supreme Court held that employees of a railroad who repair and maintain equipment used in the loading or unloading process are integral to those processes and, thus, are covered employees. *Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT). In reaching this conclusion, the Supreme Court stated that Section 2(3) requires only that a land-based employee's activity be "an integral part of and essential to" loading or unloading. *Id*. Though the activity must be essential to this process in order to satisfy the Section 2(3) requirement, the employee need only "spend at least

some of [his] time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977).

The administrative law judge further addressed the Supreme Court's decision in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979), in which the Court held that the provisions of Section 2(3) were met because the claimants were engaged in intermediate steps of moving cargo between ship and land transportation and were not merely picking up cargo for further transshipment by land. The Court held:

> Persons moving cargo directly from ship to land transportation are engaged in maritime employment. [cite omitted]. A worker responsible for some portion of that activity is as much an integral part of the process of loading and unloading a ship as a person who participates in the entire process.

Ford, 444 U.S. at 83, 11 BRBS at 328. The administrative law judge found that claimant's duties in the present case are similar to those of the claimants in *Ford*, in that he was responsible for performing work traditionally delegated to longshoreman. The administrative law judge found that it was not relevant that claimant did not move cargo directly from trains to ships and vice versa, as he was responsible for the intermediate step of getting ship-carried cargo to a means of land transportation. The administrative law judge thus rejected employer's contention that claimant is "no different than truck drivers and train drivers who take the cargo inland."

As a crane operator, claimant's duties included removing the containers off of the train and placing them in the yard for pick up. Other workers would then take the cargo either out the front gate for shipment by truck or out the back gate for shipment by ship. Likewise, these workers would bring containers to claimant for loading onto a train from either source.[2]

Employer contends that the administrative law judge erred in finding that claimant had the requisite status as it is undisputed that he was not loading cargo that had come from ships on the day he was injured. However, the courts have rejected the "moment of injury" test in favor of the holding that coverage is found where an employee "spends at least some of his time in indisputably longshore operations." *Caputo*, 432 U.S. at 278-279, 6 BRBS at 168-169. *See, e.g., Sea-Land Services, Inc. v. Director, OWCP [Ganish]*, 685 F.2d 1121 (9th Cir. 1982). In this regard, the Fourth Circuit has held that the Act focuses on the employee's occupation as a whole at the time of injury, and not on

[2] Prior to the July 2000 injury, and sometimes afterwards, claimant also worked as a fifth-wheel driver who would remove the containers that had been unloaded by crane. He was driving a fifth-wheel when he was injured on July 12, 2000.

whether the particular duties performed at the time of injury are maritime in nature. *Shives*, 151 F.3d at 170, 32 BRS at 130(CRT).

The Director urges affirmance of the administrative law judge's finding that claimant was a covered employee under the Act. The Director cites the Fourth Circuit's decision in *Hayes*, 985 F.2d 137, in which the court found that a crane operator at the rail yard at Seagirt Marine Terminal was an employee covered under the Longshore Act. The court held that the employee in *Hayes* was engaged in completing the unloading process and in moving the cargo from ship to land transportation, and that his duties were essential to the unloading process. *Hayes*, 985 F.2d at 142. In addition, the court considered a case in which the employee worked as a carman at the rail yard at Seagirt Marine Terminal.[3] The court held that the employee was expected to "unload all of [CSXT]'s freight, whether that freight was destined for truck or for ship." *Shives*, 151 F.3d at 170, 32 BRBS at 130(CRT). Moreover, the court concluded that "because its carmen's duties consisted of loading and unloading at a marine terminal and some of the loading and unloading involved ships, the carmen by occupation were engaged in maritime employment." *Id*.

In the present case, as discussed above, the administrative law judge rejected employer's characterization of the work performed at the rail yard located on the site of Seagirt Marine Terminal. Rather, the administrative law judge found that at least some of the cargo leaving and arriving at the rail head was transported by ship, and employer has not submitted any credible evidence to the contrary. The administrative law judge's decision is supported by claimant's and his co-workers' testimony that some of the cargo that they load on the train comes from the ships and that some of the cargo they unload is taken to the ships. In addition, the Fourth Circuit has repeatedly found that the duties performed by the railhead workers at the Seagirt Marine Terminal are intermediate steps in the loading and unloading process and therefore are covered under the Act. *Shives*, 151 F.3d at 170, 32 BRBS at 130(CRT); *Hayes*, 985 F.2d at 142. Therefore, we affirm the administrative law judge's finding that claimant is a covered employee as it is rational, supported by substantial evidence, and in accordance with law.

Section 20(a) - Shoulder Impairment

Claimant contends that the evidence establishes a *prima facie* case of total disability. However, the administrative law judge agreed that claimant was prevented from returning to his former job due to the injury to his right arm, and thus that he had established a *prima facie* case of total disability. Decision and Order at 33. Claimant's

[3] As a carman, the employee inspected train cars and assisted in loading and unloading them.

contentions regarding this issue seem to go to the question of whether claimant currently suffers from a disabling work-related shoulder impairment.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The administrative law judge found that claimant established invocation of the Section 20(a) presumption because the July 2000 accident could have caused the impingement syndrome in claimant's right shoulder.

Once Section 20(a) is invoked, employer bears the burden of producing substantial evidence that the claimant's condition was not caused or aggravated by his employment. *See 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); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997). If it does so, the presumption falls from the case and the administrative law judge must weigh all of the evidence, with claimant bearing the burden of persuasion on the issue of the work-relatedness of his condition. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge found rebuttal based on Dr. Pollak's opinion that claimant currently suffers from right shoulder pain that is due to an impingement syndrome that is not related to the July 2000 injury. Although claimant is correct in stating that Dr. Pollak diagnosed a shoulder contusion from the 2000 accident, Dr. Pollak also opined that the contusion had healed shortly after the injury and that his current condition, impingement syndrome, is not related to the accident. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. *See Coffey v. Marine Terminals Corp.*, 24 BRBS 85 (2000).

In weighing the evidence as a whole, the administrative law judge accorded little weight to the opinion of Dr. Carlton. Dr. Carlton reported that a number of symptoms prevent claimant from working and that they are related to the "above injuries," referring to claimant's numerous work-related accidents. Cl. Ex. 2. He does not offer an explanation or rationale as to which accident caused or aggravated which symptom. Moreover, the administrative law judge found that there are no other physicians of record who state that claimant's shoulder impingement syndrome is related to the July 2000 accident. The administrative law judge found that the contrary evidence is more compelling. Specifically, Dr. Pollak stated that the evidence shows that claimant was

having pain in the extreme range of motion in his shoulder prior to the July 2000 accident. H. Tr. at 112-116. He opined that claimant's current condition is a natural progression of this pre-existing condition and that it was not permanently aggravated or accelerated by the July 2000 injury. Emp. Ex. 37. He explained that the mechanics of the accident in July 2000 would not have had this impact on claimant's shoulder, but rather caused only a contusion which was healed by December 1, 2000. The administrative law judge found that this explanation is well-reasoned and supported by the evidence, namely the reports showing that claimant's shoulder was improving soon after the July accident and the reports of Drs. Shetty and Riederman that concur with Dr. Pollak. As the administrative law judge's finding is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish that his current right shoulder impingement syndrome is related to his work accident in July 2000. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Extent of Disability

Claimant contends that the administrative law judge erred in finding that he is not totally disabled. The administrative law judge found initially that claimant cannot return to his former duties due to his work-related arm injury, and this finding is not contested on appeal. Once a claimant has shown his inability to return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. In order to meet its burden, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience and physical capacity and restrictions, is capable of performing. *See See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). A vocational specialist's opinion and survey which properly considers claimant's vocational background and experience and mental and physical capacities may be sufficient to establish that claimant is capable of performing available jobs. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). In addition, employer may attempt to establish suitable alternate employment with a retrospective labor market survey. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

In the present case, the administrative law judge found that Ms. Mason's labor market survey includes detailed descriptions of the wages, physical demands, and necessary experience for the listed positions, and that the reports are "well-tailored" to this particular claimant. However, the administrative law judge did not agree that claimant, given his physical restrictions, can perform the duties required of all the

positions identified in the labor market survey. Specifically, the administrative law judge noted that Ms. Mason did not adequately consider the full effect of claimant's lack of fingertip dexterity and inability to perform repetitive motions. The administrative law judge also considered the contrary opinion of Mr. Smolkin that claimant cannot perform any of the identified jobs and found that his vocational assessment was "reasonably thorough," but that Mr. Smolkin did not consider the actual duties required of the particular positions identified by Ms. Mason.

After reviewing the positions identified, and considering claimant's physical restrictions and relevant background, the administrative law judge concluded that claimant is unable to perform the jobs of assembler, due to his lack of dexterity, and fast-food cashier, due to the required repetitive motions. In addition, the administrative law judge found that claimant would be incapable of securing a position as a security guard due to his criminal record. However, the administrative law judge found that claimant would be physically capable of working as a parking lot attendant or auto parts counterperson, and that employer has established that these positions were available on September 29, 2003, the date of claimant's retirement. The administrative law judge credited Ms. Mason's supplemental labor market survey in which she reported that she contacted the employers in her original survey and was told that claimant's past criminal convictions would not pose a barrier to his obtaining a position as a parking lot attendant. Moreover, contrary to Mr. Smolkin's testimony, Ms Mason reported that the lot attendant positions do not require claimant to move vehicles or park cars. The administrative law judge found that neither the lot attendant nor the counterperson position requires repetitive motion or heavy lifting.

The contentions raised by claimant on appeal were fully considered by the administrative law judge in her decision. The administrative law judge rationally found that the positions of auto-parts counterperson and parking lot attendant are within claimant's medical restrictions and capabilities based on the information contained in Ms. Mason's "comprehensive" labor market surveys, Decision and Order at 34-36, and claimant has raised no reversible error in this finding on appeal. Therefore, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment as it is rational and supported by substantial evidence.[4] *See*

[4] The parties stipulated that claimant reached maximum medical improvement on August 18, 2003. However, he continued to work for employer until his retirement on September 29, 2003. Claimant does not aver that he continued to work in spite of considerable pain and through extraordinary effort. The administrative law judge found that claimant was not entitled to permanent disability benefits until he left work due to the work-related injury. Moreover, the administrative law judge found that employer established suitable alternate employment as of September 29, 2003, the date of claimant's retirement. Therefore, we reject claimant's contention that he is entitled to a

Wheeler v. Newport News Shipbuilding & Dry Dock Co., 37 BRBS 107 (2003); *see also Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

Once employer demonstrates that suitable jobs are available, the burden shifts back to claimant to demonstrate that he was unable to secure employment although he diligently tried. *Fox v. West State, Inc.*, 31 BRBS 118 (1997). In *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984), the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, described claimant's burden in this regard as one of "establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. . . . Job availability should depend on whether there is a reasonable opportunity for the claimant to compete in a manner normally pursued by a person *genuinely* seeking work with his determined capabilities," quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981)(emphasis in original). The administrative law judge must make specific findings regarding the nature and sufficiency of claimant's alleged efforts in order to determine whether claimant did in fact diligently try, without success, to find another job. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). If claimant cannot satisfy this burden, then at the most, his disability is partial and not total, and claimant in this case is limited to an award under the schedule. 33 U.S.C. §908(c)(1); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

In the present case, the administrative law judge found it relevant that claimant did not make an effort to seek alternate employment until eight months after he retired from his position with employer; that he applied for only four jobs between May 2004 and June 15, 2004; that claimant only applied for 3 of the 16 jobs identified in the labor market survey; and that claimant did not follow up with employers he contacted on his own. The administrative law judge found that although claimant testified that he visited Salvo Auto Parts and the Downtown Parking location, he did not establish that he had applied for the positions. The administrative law judge credited Ms. Mason's testimony that she had determined that claimant's prior criminal conviction would not prevent him from securing a position as a parking lot attendant.

Claimant contends on appeal that he had employer's labor market survey addendum for only six days prior to the hearing, and thus did not have an appropriate amount of time to seek employment. However, the initial labor market survey was performed in March 2004 and served on claimant's attorney. It identified the jobs the

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period of temporary total disability benefits for the time prior to the date employer established suitable alternate employment.

administrative law judge found were suitable as alternate employment. The labor market survey addendum issued in August 2004, six days before the hearing, identified a number of fast-food cashier positions which the administrative law judge found were not suitable given claimant's medical condition. Of the positions the administrative law judge found were suitable, claimant testified that he applied at Advanced Auto, but never heard back, and that he was told by Salvo Auto Parts that the position was not suitable for him given his medical condition. However, the administrative law judge credited Ms. Mason's testimony that the auto-parts counterperson position was suitable given claimant's physical limitations and background, and found it persuasive that she obtained a written statement from Advance Auto Parts that their position was suitable for someone like claimant. The record also contains similar letters from Central Park, Landmark Parking, and Parts America. Emp. Ex. 46. Claimant also testified that he applied to a number of other jobs, but, other than to identify the employers, did not specify as to what the jobs entailed or if they were suitable. Although claimant made inquiries into alternate employment, the administrative law judge rationally found that claimant's efforts were "casual" and "cursory." Decision and Order at 36-37. The Board is not entitled to reweigh the evidence and the administrative law judge's reasonable inferences must be affirmed. Thus, the administrative law judge's finding that claimant did not exercise diligence in his search for alternate employment is affirmed as it is rational and supported by substantial evidence. *See generally Fortier,* 38 BRBS 75; *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

Credit for Previous Scheduled Injuries

Claimant contends that the administrative law judge erred in allowing employer a credit for compensation benefits paid pursuant to "settlements" for previous injuries to claimant's right arm in 1987 and 1994.[5] Generally, in cases under the schedule where claimant has a prior injury which has already been compensated, and a subsequent injury results in increased disability to the scheduled body part, employer is liable only for the increased disability. Otherwise, double recovery to claimant would result. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*)(the court affirmed the Board's holding that employer is entitled to a credit for the actual amount claimant received due to a settlement of a claim for a previous injury to the same scheduled member). This "credit doctrine" has been applied as a limit on the aggravation rule requiring an employer to compensate its employees for the combination of current and prior injuries. *See Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd in pert. part and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

[5] In fact, the prior payments were made pursuant to stipulated compensation orders and not Section 8(i) settlements.

Claimant contends that subsequent to *Nash*, the Fifth Circuit rejected application of the "credit doctrine" in cases involving "settlements." *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). However, *Ibos* involved Section 8(i) settlements between the claimant and other potentially liable employers in a single occupational disease case. The court held the responsible employer could not receive credit for amounts received from other potentially liable employers, noting that the case involved a single occupational disease claim rather than successive injuries and the aggravation rule. The court distinguished the facts from *Nash* on the basis that the amounts received from the settling employers are irrelevant to the amount owed by the responsible employer and should not reduce its liability. Likewise, the Ninth Circuit held in *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002), that the general credit doctrine acts to prevent double recoveries that would be obtained due to the application of the aggravation rule. However, as *Alexander* involved a single injury occupational disease, and the claimant received settlements which were alternatives to an entire award against any one of the three settling employers, the court held that the aggregation rule was not applicable.

In the instant case, the administrative law judge found that since claimant actually received compensation for a prior scheduled injury, and is now entitled to compensation for an injury to the same scheduled member, employer is entitled to a credit for the compensation paid for the previous scheduled injuries. Contrary to claimant's contention, the administrative law judge did not award a "double credit," but properly awarded a credit in the amount actually paid for the prior injuries rather than based on a percentage difference between claimant's previous impairment ratings and his current impairment rating. *Brown*, 19 BRBS at 204. Thus, as it comports with law, we affirm the administrative law judge's award of a credit for the amounts claimant actually received for his previous injuries.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

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