ARMANDO L. TREVINO	)	BRB Nos. 00-824, 00-824A
	)	and 00-824B
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
FAIRWAY TERMINAL CORPORATION	)	DATE ISSUED:_____
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners-B	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	
Cross-Petitioner-A	)	
	)	
ARMANDO L. TREVINO	)	BRB No. 00-969
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FAIRWAY TERMINAL	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and Decision and Order on Section 22

Modification of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts & Associates), Houston, Texas, for claimant.

Rick L. Rambo and T. Neal Nobles (Fulbright & Jaworski, L.L.P.), Houston, Texas, for employer/carrier.

Andrew D. Auerbach (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the Director, Office of Workers' Compensation Programs (the Director), and employer each appeal the Decision and Order, and employer appeals the Decision and Order on Section 22 Modification (99-LHC-2194) of Administrative Law Judge James W. Kerr, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act) . We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleged that he was injured at work on June 15, 1994, when he fell and hit his head, left hip and feet. Prior to the June 1994 injury, claimant's duties included lifting and throwing sacks, and handling drums. He was treated in the emergency room by Dr. Cupic, an orthopedist, who became his treating physician. Dr. Cupic diagnosed severe cervical strain, moderately severe thoracic strain, severe lumbosacral strain, possible herniated nucleus pulposus and degenerative joint disease in the left hip. Cl. Ex. 5 at 1-3. Claimant had previous problems with his head, neck and back. According to Dr. Cupic, claimant was not responding to conservative treatment following the June 1994 incident, and his condition remained unimproved. On August 5, 1998, Dr. Cupic reported that claimant reached maximum medical improvement. Dr. Cupic advised that claimant could perform only sedentary work working with his hands, imposed a lifting restriction of 10-15 pounds, and stated that claimant must be allowed to stand up and move around as needed. Cl. Ex. 42. Claimant has not worked since the 1994 accident.

In his initial decision, the administrative law judge awarded claimant temporary total and permanent total disability benefits from the date of the accident until November 23,

1999, the date he found employer established suitable alternate employment, and continuing permanent partial disability benefits thereafter, based on an average weekly wage of $560.99 and a post-injury wage-earning capacity of $7 per hour. The administrative law judge determined that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In the Decision and Order on Section 22 Modification, the administrative law judge, based on the parties' agreement, modified claimant's average weekly wage from $560.99 to $841.49, and awarded claimant interest on the difference, retroactive to the date of his initial order.

On appeal, claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment, and, in the alternative, that he has a wage-earning capacity of $7 per hour, rather than the $5.15 minimum hourly wage. Employer responds, asserting that claimant sustained no permanent impairment, and in the alternative, urging that the administrative law judge's findings with regard to suitable alternate employment and wage-earning capacity be affirmed. In his appeal, the Director challenges the administrative law judge's granting employer Section 8(f) relief, alleging that employer failed to establish the contribution element. Employer responds, urging affirmance. In its appeal, employer argues that claimant did not establish a *prima facie* case of total disability. Claimant responds, urging that the administrative law judge's finding in this regard be affirmed. Employer has filed a separate appeal of the administrative law judge's decision on modification.[1]

Employer first contends that the administrative law judge erred in finding that claimant established a *prima facie* case of total disability, alleging that claimant sustained only a minor and temporary injury or aggravation, which has since resolved. Employer argues that the evidence does not support the conclusion that claimant cannot return to his usual work as a result of his back condition, as claimant has a history of malingering, that a majority of the physicians of record attribute his problems to symptom magnification and that the administrative law judge erred in relying on the opinion of Dr. Cupic simply because he is claimant's treating physician.

We affirm the administrative law judge's finding that claimant has an impairment to his back that precludes him from performing his usual work, as it is rational and supported by substantial evidence. Claimant bears the initial burden of demonstrating that he cannot return to his usual work in order to establish a *prima facie* case of total disability. *See Louisiana*

[1]By order dated July 14, 2000, the Board assigned employer's second appeal BRB No. 00-969, and consolidated it with employer's appeal in BRB No. 00-824B.

Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). If he meets this burden, then employer must establish the availability of suitable alternate employment in order to avoid liability for total disability benefits. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). The administrative law judge rationally inferred from Dr. Cupic's imposition of a 10 to 15-pound lifting restriction that claimant cannot return to his usual longshore employment. As the administrative law judge acted within his discretion in crediting the opinion of Dr. Cupic because of his status as claimant's treating physician, over the contrary opinions of Drs. Pennington and Wilde, who examined claimant only one time each, we affirm the administrative law judge's finding that claimant is unable to perform his usual employment. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *see generally James J. Flanagan Stevedores, Inc., v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

Claimant contends that he is totally disabled and that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. The administrative law judge found that employer established suitable alternate employment on November 23, 1999, based on five positions identified in a labor market survey by Mr. Quintanilla, a vocational counselor.[2] Emp. Ex. 13. Mr. Quintanilla, taking into account the restrictions imposed by Dr. Cupic, said that claimant could return to certain longshore positions within the light exertional range, or if claimant chose not to return to longshore work, thought claimant capable of performing entry-level, unskilled work within the sedentary to light exertional capacity that allows for alternating sitting, standing and walking. *Id.* at 3. As claimant summarily objects, but does not specifically point to any aspect of the positions which is incompatible with the restrictions imposed by Dr. Cupic, we affirm the administrative law judge's determination that employer established the availability of suitable alternate employment. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Moreover, we reject claimant's alternative argument that his wage-earning capacity should be based on the minimum wage, or $5.15 per hour, rather than $7 hourly rate determined by the administrative law judge, as the administrative law judge's determination, based on averaging the hourly wages of the positions found suitable, accords with law. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

[2]The positions identified include assembler with Product Resources, Inc. at $7 per hour, and with Link Staffing Services at $7-7.50 per hour; gate attendant at Westwood Ridge Apartments at $6.50 per hour; property guard with Allied Security, Inc. at $7 per hour; and courier for Tex Pack Express at $7 per hour.

We next address the Director's challenge to the administrative law judge's conclusion that claimant's current disability is not due solely to the subsequent injury and is materially and substantially greater due to the contribution of the pre-existing disability to claimant's current permanent partial disability and that therefore employer is entitled to Section 8(f) relief.[3] The Director contends that the administrative law judge applied an incorrect legal standard, failed to make necessary factual findings, and did not quantify the level of impairment from the work-related injury alone. In order to establish the contribution element in cases where the claimant is permanently partially disabled, employer must introduce substantial evidence that claimant's ultimate permanent partial disability is not due solely to the work injury and is materially and substantially greater due to claimant's pre-existing disability. 33 U.S.C. §908(f)(1); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT)(5th Cir. 1997).[4]

[3]The Director does not contest the administrative law judge's finding that claimant had a manifest permanent partial disability pre-existing his work injury. *See Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 888, 31 BRBS 141, 143(CRT) (5th Cir. 1997).

[4]In its response brief to the Director's appeal of the Section 8(f) issue, employer argues that since the Director did not participate in the formal hearing, he waived his right to appeal the issue. The Board has held that the Director has standing to appeal regardless of whether he participated before the administrative law judge. *See McDougall v. E.P. Paup Co.*, 21 BRBS 204, 213 n.9 (1988), *aff'd in pert. part and modified on other grounds sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

We agree with the Director that the administrative law judge's finding that employer established that claimant's pre-existing condition contributed to his current level of disability cannot stand. Although, as employer asserts, the administrative law judge does not have to use the "magic words" "materially and substantially greater," *Ladner*, 125 F.3d at 307, 31 BRBS at 148-149(CRT); *Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 391, 31 BRBS 91, 94(CRT) (5th Cir. 1997), and the administrative law judge references the proper standard when citing the law applicable for establishing the contribution element of Section 8(f), his ultimate finding that claimant's prior injuries rendered the second injury "more serious," is insufficient to satisfy the standard.[5] *See Ladner*, 125 F.3d at 308, 31 BRBS at 148-149(CRT); *see Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 126 (1996). The applicable law dictates that employer must offer some proof of the extent of the permanent partial disability had the pre-existing injury never existed, in order that the administrative law judge may determine if claimant's permanent partial disability is materially and substantially greater due to the pre-existing disability. *See Ladner*, 125 F.3d at 308, 31 BRBS at 149(CRT), *citing Director, OWCP v. Newport News & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 185-86, 27 BRBS 116, 130(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). The administrative law judge's inquiry may be resolved by inferences based on such factors as perceived severity of pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them. *Ladner*, 125 F.3d at 307, 31 BRBS at 149(CRT); *Ceres*, 118 F.3d at 391, 31 BRBS at 94(CRT).

The evidence in the instant case shows that despite claimant's prior back problems he had returned to longshore work in the past. As a result of the injury at issue here, however, the administrative law judge found that claimant could not return to his usual work. In discussing the evidence on the basis of which he found the existence of a pre-existing disability, the administrative law judge notes that *employer* points to the following evidence as support: that claimant had five separate back injuries prior to 1988 injury; that Dr. DeYoung assigned claimant a 15 percent permanent partial disability rating, and Dr. Moldovan a 15-20 percent rating; that prior to June 1994, claimant had at least six injuries to his cervical and lumbar spine; and that Dr. Wright assessed a 12 percent permanent partial disability to claimant's right knee. As the administrative law judge does not, however,

[5]We note that even if employer's allegations as to the degree of prior impairment are supported by the evidence, the United States Court of Appeals for the Fifth Circuit has rejected the "common sense test," which holds that if claimant, who had previous back problems, suffers a work-related injury to his back, the current disability is not due to the work injury alone. *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 750, 23 BRBS 34, 35(CRT) (5th Cir. 1990); *see also Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 888, 31 BRBS 141, 143(CRT) (5th Cir. 1997).

evaluate this evidence independently, explain how it relates to claimant's current permanent partial disability, or discuss the extent of claimant's current disability due to the work injury alone, we vacate his findings on this issue and remand the case. On remand, the administrative law judge must determine if claimant's permanent partial disability is not due solely to the subsequent injury and whether the pre-existing disability materially and substantially contributes to claimant's current disability, in accordance with applicable law.

Employer also appeals the administrative law judge's Decision and Order on Section 22 Modification, submitting the same brief it submitted in the original appeal, with a footnote referencing the administrative law judge's decision on modification. As this appeal raises no new issues for review, we affirm the administrative law judge's decision on modification.

Accordingly, the administrative law judge's finding that employer is entitled to Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects the Decision and Order and the Decision and Order on Section 22 Modification are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge