BRB Nos. 09-0218
and 09-0218A

L.G.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ASSOCIATED NAVAL ARCHITECTS, INCORPORATED	)	DATE ISSUED: 05/21/2009
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order 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.

F. Nash Bilisoly (Vandeventer Black LLP), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer has filed a timely motion for reconsideration of the Board's Order in *L.G. v. Associated Naval Architects, Inc.*, BRB Nos. 09-0218/A (Apr. 13, 2009), 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407, in which the Board dismissed employer's appeal, BRB No. 09-0218, and claimant's cross-appeal, BRB No. 09-0218A, pursuant to claimant's motion to remand the case to the district director for consideration of

claimant's petition for modification. 33 U.S.C. §922; 20 C.F.R. §§702.373, 802.301. As this case is fully briefed and remand at this juncture will impair employer's right to have its appeal, which challenges the finding on causation, decided in a timely manner, we grant employer's motion for reconsideration. Both appeals are thus reinstated on the Board's docket, and the case shall be remanded to the district director after consideration of the arguments on appeal.[1]

Employer appeals and claimant cross-appeals the Decision and Order (2007-LHC-1763) 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 findings of fact and conclusions of law of the administrative law judge which 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, a working supervisor and licensed tugboat and crane operator, sustained work-related injuries to his back in 1991, 1994, and 1995. Claimant had surgery after the injuries in 1991 and 1994. On September 1, 2006, claimant experienced severe back pain at work and was sent home by his supervisor. Claimant had decompression and transforaminal lumbar interbody fusion surgery on September 21, 2006, and has not returned to work. Claimant sought temporary total disability and medical benefits.

In his decision, the administrative law judge found claimant entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his current back condition is related to his employment activities on and prior to September 1, 2006, and that employer did not offer substantial evidence to rebut the presumption. The administrative law judge further found that employer established the availability of suitable alternate employment as of November 12, 2007. Accordingly, he awarded claimant compensation for temporary total disability from September 2, 2006, through November 11, 2007, and for temporary partial disability from November 12, 2007, and continuing, as well as medical benefits. 33 U.S.C. §§907, 908(b), (e).

Employer appeals, contending that the administrative law judge erred in applying the Section 20(a) presumption to a claim based on claimant's general working conditions, as claimant alleged he was injured on September 1, 2006. Employer further contends that claimant did not establish he was injured on September 1, 2006. Claimant responds, urging affirmance of the administrative law judge's finding that his current back

[1] Claimant has filed an objection to employer's motion for reconsideration. Given our remand of this case to the district director, claimant's objection is moot.

condition is related to his employment. Claimant cross-appeals, contending the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of this finding.

Employer contends the administrative law judge erred in giving claimant the benefit of the Section 20(a) presumption because claimant did not establish the "accident/working conditions" element of his *prima facie* case. Employer contends claimant's condition is the result of the natural progression of his prior injuries, for which no claims were filed.[2]

In establishing that an injury is work-related, a claimant is aided by Section 20(a) which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm alleged. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not related to his employment. *Id.* In a case such as this where claimant had a pre-existing back condition, employer also must establish that the employment did not aggravate claimant's condition.[3] *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

It is undisputed that claimant's back condition constitutes a "harm." Employer alleges that claimant did not establish that any specific incident occurred on the date he claimed injury, September 1, 2006, and that the administrative law judge erred in relying on claimant's general working conditions preceding September 1, 2006, to invoke the Section 20(a) presumption.

[2] As a result, employer notes that its prior carriers were not joined to the proceedings before the administrative law judge.

[3] Pursuant to the aggravation rule, employer is liable for the entire resultant disability if a work injury aggravates, accelerates or combines with a pre-existing condition. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982)

It is clear that the Section 20(a) presumption cannot be invoked merely because claimant has a physical harm and that the presumption does not attach to a claim that was not made. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 616, 14 BRBS 631, 632 (1982). In this case, claimant's claim form states that the date of injury was "09/01/06 on or about," and describes the injury as due to "repetitive climbing in and out of the crane, tying down tugs, bending, pulling on lines, cables." EX 1 to Cl. Post-hearing Resp. Brief. Claimant testified that prior to September 1, 2006, his back had been bothering him and claimant's medical records indicate he had been receiving medical treatment for about six months prior to September 1, 2006. HT at 21-22; EX 3. Claimant testified that his general job duties involve pulling winches, tying down vessels with ropes, and operating mechanical cranes. HT at 17-18. On Friday, September 1, 2006, a heavy storm or hurricane was anticipated and claimant was engaged in securing vessels and equipment at the shipyard, with a minimal crew. HT at 22. Observing claimant to be in pain, Mr. Axley advised claimant to go home. *Id.* Claimant rested over the weekend, saw a physician on Tuesday, September 6, and had surgery on September 21. HT at 22; EX 3. Claimant's claim form reflects that he worked five hours on September 1 and first lost time because of his injury on that day.

We reject employer's contentions of error. Substantial evidence supports the administrative law judge's finding that claimant established the "accident/working conditions" element of his *prima facie* case. Although claimant testified that there was no "specific incident" on September 1, 2006, this statement does not establish that claimant's normal work on that day did not cause him pain. It merely establishes that no separate traumatic accident occurred at work that day. The administrative law judge properly noted that an injury can occur gradually and need not be traceable to a definite time, and that claimant claimed "repetitive" climbing in and out of the crane caused injury. *See Gardner v. v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). In this case, the administrative law judge rationally found that claimant's actual working conditions leading up to and culminating on September 1, 2006, the date of the claimed injury, could have contributed to claimant's current back condition. *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). In this regard, we note that an employer accepts a claimant as he is, *i.e.*, with any predisposition to injury. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998). As the administrative law judge's finding is rational, supported by substantial evidence, and in accordance with law, we affirm the

administrative law judge's finding that the Section 20(a) presumption is invoked in this case.[4] *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumed causal nexus with substantial evidence. *See generally Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). The administrative law judge found that employer did not offer substantial evidence stating that claimant's condition was not caused or aggravated by his employment. Decision and Order at 15. Employer does not directly challenge this finding, but contends the administrative law judge erroneously put the burden on it to establish that claimant's condition is solely the result of the natural progression of his pre-existing condition. Initially, as Section 20(a) was invoked, employer indeed bore the burden of submitting evidence that claimant's work did not aggravate his condition; as it did not do so, the finding that claimant had a work-related injury based on his work through September 1, 2006, is affirmed.

As the pre-existing condition to which employer refers is the result of work injuries sustained in employer's employ, employer's contention also raises responsible carrier principles. As the only employer/carrier claimed against or joined to the proceedings, *see* n. 2, *supra*, employer and Signal bore the burden of establishing that they are not the responsible employer/carrier, which requires proving that claimant's condition is due solely to the natural progression of his pre-existing condition. *See Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997) and 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hospital, Inc.*, 7 Fed. Appx. 547 (9th Cir. 2001). *See also Norfolk Shipbuilding & Dry Dock Co. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992)(in occupational disease context, courts hold employer has burden of proving another employer is liable). As employer does not contend on appeal that it offered any evidence to establish this fact, and as substantial evidence supports the administrative law judge's finding that claimant's employment culminating on September 1, 2006, aggravated claimant's condition, we affirm the finding that claimant's condition is work-related and that employer/carrier is liable for the benefits awarded. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

[4] In addition, the administrative law judge relied on the opinions of Drs. Kerner and Quidgley-Nevares that claimant's continued work activity after the 1994 surgery aggravated claimant's condition. EX 3 at 63; EX 9 at 22; CX 8 at 8.

We next turn to claimant's contention that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. As it is uncontested that claimant is unable to perform his usual work, the burden shifted to employer to demonstrate the availability of a range of available job opportunities that are suitable for claimant given his age, vocational history, education and work restrictions. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Norfolk Shipbuilding & Drydock Corp. v. Hord,* 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Moore,* 126 F.3d 256, 31 BRBS 119(CRT).

The administrative law judge found that employer established the availability of suitable alternate employment based on the labor market survey conducted by Ms. Byers, a vocational consultant, who identified seven sedentary positions for which claimant was qualified based on his educational and vocational history and the restrictions placed by Dr. Kerner. Dr. Kerner stated in February 2007 that claimant has the capacity to attempt part-time sedentary work, "that is work without standing or walking or lifting, desk work." EX 3 at 60. Dr. Kerner also stated, however, that it is possible that claimant is totally disabled due to his pain. EX 9 at 24. As of March 16, 2007, Dr. Kerner stated that claimant may be totally disabled, but that he feels obliged to push his patients to attempt functional work. EX 9 at 25-26. The administrative law judge found that two of the identified positions, Cox Communications customer service representative and a tow truck dispatcher, are consistent with claimant's medical restrictions and his testimony concerning his need to change positions frequently. Accordingly, the administrative law judge found suitable alternate employment established as of the date of employer's survey, November 12, 2007. The administrative law judge awarded claimant temporary partial disability benefits as of this date based on a post-injury wage-earning capacity of $214 per week.[5]

Claimant contends the administrative law judge erred in finding suitable alternate employment established because: (1) Ms. Byers did not contact claimant's doctor to ascertain whether the jobs she identified are suitable for claimant; (2) Ms. Byers erroneously testified that she personally contacted the prospective employers; and (3) the Cox Communications job was not actually available. Claimant further contends the two credited jobs are not suitable in view of Dr. Kerner's restrictions and claimant's testimony concerning his pain.

[5] The administrative law judge found that claimant did not diligently seek work, and therefore is limited to a partial disability award. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

We reject claimant's contention that Ms. Byers's survey is flawed because she did not directly ask Dr. Kerner to approve the jobs she identified as suitable for claimant. She testified she took his restrictions into account in assessing the suitability of positions, HT at 64, and the administrative law judge appropriately assessed the jobs identified in light of those restrictions. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In this regard, we note that the administrative law judge rejected five of the identified jobs because they had requirements that exceed claimant's physical capabilities. Decision and Order at 17. Moreover, that Ms. Byers did not personally contact the prospective employers does not establish the inaccuracy of the labor market survey, as she is not required to do so, *Moore*, 126 F.3d 256, 31 BRBS 119(CRT), and is entitled to rely on information collected by her employee, Mr. Bates. In addition, the administrative law judge was not required to take official notice of the Cox Communications website where, claimant alleges, the job openings identified in the survey were not listed. The administrative law judge gave claimant the opportunity, post-hearing, to respond to employer's labor market survey. Claimant submitted specific internet-based evidence with regard to a position at KB Home, *see* EX 2 to Claimant's Post-Hearing Brief, but merely contended with regard to the Cox Communications job that the administrative law judge should take official notice of the jobs posted, or not posted, on the Cox Communications' website. We cannot conclude from these circumstances that the administrative law judge erred in not doing so.[6] *See generally Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986).

Claimant also contends that the physical restrictions imposed by Dr. Kerner do not account for his statement that claimant's radiographic history is consistent with individuals who are totally disabled. EX 9 at 20. Dr. Kerner, however, also stated that it was his obligation to "push his patient…to get them back to functional work activities" and the only way to know if a patient is totally disabled is for them to actually try returning to work. EX 9 at 25-26. Thus, the administrative law judge rationally found claimant employable based on Dr. Kerner's opinion and properly addressed the suitability of the jobs in view of Dr. Kerner's limiting claimant to desk work. *See LaRosa v. King & Co.*, 40 BRBS 29 (2006). Moreover, the administrative law judge rationally found the dispatcher position within Dr. Kerner's limiting claimant to part-time desk work, based on his crediting Ms Byers's testimony that the position is sedentary.[7] *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). Finally, we reject claimant's contention that the administrative law judge was required to find him totally disabled based on his testimony

[6] We decline to take official notice of the jobs listed on this website, as such might require the Board to engage in fact-finding regarding the availability of jobs.

[7] Claimant does not raise any specific contentions concerning the suitability of the position with Cox Communications.

regarding his pain. Claimant testified that he can only sleep a few hours and must change positions and move around a lot to alleviate his pain. Tr. at 26. The administrative law judge found that the dispatcher and customer service position permit claimant to sit or stand as needed. Decision and Order at 17. Based on this record, the administrative law judge was not required to infer that claimant could not work at all due to his pain. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). As the finding that employer established the availability of two available, suitable positions is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's award of temporary partial disability benefits. *Id.*

Accordingly, the administrative law judge's Decision and Order is affirmed. The case is remanded to the Office of the District Director for consideration of claimant's petition for modification. 33 U.S.C. §922; 20 C.F.R. §§702.373, 802.301.

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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BETTY JEAN HALL
Administrative Appeals Judge