BRB Nos. 08-0323
and 08-0323A

D.B.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
UNITED PRODUCTION AND CONSTRUCTION	)	DATE ISSUED: 09/29/2008
	)	
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

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

Lawrence N. Curtis, Lafayette, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2007-LHC-0807) of Administrative Law Judge C. Richard Avery 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 welder on an offshore platform, fell on February 14, 2006, and injured his right leg. Claimant has not worked since that time, contending that his fall resulted in disabling back and neck conditions. Employer paid claimant his regular salary until April 19, 2006, at which time claimant's employment was terminated when he did not report for light-duty work.

In his Decision and Order, the administrative law judge determined that claimant is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his back and neck injuries are work-related. He found that employer did not rebut the Section 20(a) presumption. Additionally, he found that claimant established his *prima facie* case of total disability as of July 12, 2006, but that employer established suitable alternate employment by its offer of a suitable job at its on-shore facility at claimant's prior salary. Thus, the administrative law judge found that claimant is not entitled to any compensation. The administrative law judge found that because claimant failed to seek authorization for the treatment for his neck and back injuries, employer is not liable for the medical expenses claimant incurred for these conditions. The administrative law judge stated, however, that employer is not precluded from liability for future medical benefits for these injuries.

Claimant appeals and employer cross-appeals this decision. Claimant contends that the administrative law judge erred in concluding that employer established the availability of suitable alternate employment and in finding that employer is not liable for all of his past medical expenses related to the treatment of his neck and back injuries. Employer cross-appeals, contending that the administrative law judge erred in finding that claimant's current neck and back condition arose out of the work accident and in finding it liable for claimant's future medical expenses related to those injuries.

We address first employer's argument that the administrative law judge erred in finding a causal relationship between claimant's neck and back conditions and his fall at work. Employer contends that the administrative law judge erred in invoking the Section 20(a) presumption, in finding that employer did not rebut the presumption, and in finding that claimant established a causal relationship between his condition and his employment based on the record evidence.

In establishing that an injury is work-related, a claimant is aided by Section 20(a) of the Act which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, however, 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. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). The claimant "must at least allege an injury that arose in the course of employment as well as out of employment." *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 262, 31 BRBS 119, 123(CRT) (4th Cir. 1997), *quoting U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 625, 14 BRBS 631, 633 (1982); *see also Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990)(referencing "minimal requirements" for invocation of the Section 20(a) presumption). Contrary to employer's contention, claimant is not required to affirmatively connect his harm to the work accident via medical evidence in order to establish his *prima facie* case. *See, e.g., Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

In this case, it is uncontested that claimant fell while transferring from the platform to a crew boat on February 14, 2006. Thus, claimant has satisfied the "accident" prong of his *prima facie* case. *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in part and rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). It also is uncontested that claimant suffers chronic and acute abnormalities of his cervical and lumbar spine.[1] CX 10. As claimant's physical harm could have been caused by the fall at work, the administrative law judge was both factually and legally correct in concluding that claimant established a *prima facie* case linking his cervical and back conditions to the accident. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not due, even in part, to the work accident. *See, e.g., Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The administrative law judge found that employer failed to establish rebuttal of the Section 20(a) presumption. Employer argues it established rebuttal based on claimant's failure to seek

[1] An MRI administered on July 25, 2006, revealed C3-4/C4-5 central annular bulging; C5-6 disc desiccation with disc space narrowing and left paracentral disc herniation; C6-7 paracentral disc herniation with ventral annular tear; C5-6/C6-7 borderline paracentral spinal stenosis; T12-L1 disc space narrowing; L1-2 disc desiccation; L2-3 generalized disc bulging, facet arthropathy and ligamentous hypertrophy; L3-4 central disc herniation with associated ventral annular tear; L4-5 disc desiccation with left paracentral disc herniation; and L5-S1 disc desiccation, disc space narrowing and central annular bulging. CX 10.

medical help specifically for any back or cervical condition until five months after the accident despite testifying to pain and on the opinions of Drs. Cobb and Montgomery.

We affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. The administrative law judge discussed the relevant opinions of Dr. Cobb and Dr. Montgomery. Dr. Cobb opined that claimant's neck and back conditions are related to the work accident, noting that such pain and conditions can have a gradual onset. Cobb Dep. at 40-41. He stated that it is "possible" that other activities could have caused claimant's symptoms to become symptomatic, *id.* at 80, but Dr. Cobb did not state that the work accident did not cause claimant's condition or render it symptomatic. Thus, this opinion is insufficient to rebut the Section 20(a) presumption. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

In discussing Dr. Montgomery's opinion, the administrative law judge found that the doctor initially opined that claimant's acute condition more likely than not was related to the February incident.[2] Montgomery Dep. at 9-10, 27. However, when employer's counsel presented him with a fact pattern assuming that claimant had not complained of pain for five months after the accident, during which time he had several emergency room visits, the doctor stated that it would be "highly irregular" for a person with claimant's injury to not complain of pain and that he would have to assume, on those facts, that it was not work-related. *Id.* at 34-35. The administrative law judge found that Dr. Montgomery's opinion is not sufficient to rebut the Section 20(a) presumption because claimant did, in fact, complain of a backache to Dr. Michel within one month of the accident, CX 5 at 11, and because claimant's other trips to the emergency room were for more pressing matters including a leg wound, chest pains and bronchitis. *See* CX 6. The administrative law judge's findings in this regard are supported by substantial evidence and thus establish that the assumptions on which Dr. Montgomery's revised opinion was based were incorrect. Under these circumstances, the administrative law judge rationally concluded that Dr. Montgomery's opinion does not constitute substantial evidence rebutting the Section 20(a) presumption. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). Thus, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section

[2] Dr. Montgomery noted that claimant presented with both longstanding degenerative conditions and acute symptoms at L3-4 and L4-5 on the right side. Montgomery Dep. at 26-27.

20(a) presumption and that claimant's back condition is, therefore, work-related.[3] *Preston*, 380 F.3d 597, 38 BRBS 60(CRT).

We next address claimant's argument that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. The administrative law judge found that employer met its burden in this regard with its proffer to claimant of light-duty work in its land-based facility in New Iberia, Louisiana, at the same rate of pay as his former offshore job. The administrative law judge found that claimant chose to ignore this offer of employment and that, therefore, employer is not liable for any disability compensation. Claimant contends that this conclusion is in error as the offered position is not within claimant's geographic location.

Where, as in the instant case, claimant has established that he is unable to return to his usual employment duties with employer as a result of his work-related injury,[4] the burden shifts to employer to establish the availability of realistically available jobs which claimant is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Employer may meet its burden by offering an injured employee a light-duty job in its facility which is tailored to the employee's physical limitations, *Darby v. Ingalls Shipbuilding & Dry Dock Co.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996), so long as the job is necessary and claimant is capable of performing it. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Claimant lives in Pineville, Louisiana, which is approximately 112 miles from employer's main facility in New Iberia, Louisiana, the location of the proffered position. In his pre-injury welding job on the offshore platform, claimant drove to this same facility, as it was the departure point for the offshore platform. Tr. at 17. Thus, the position employer offered was the same distance from claimant's home as was his prior

[3] Therefore, we need not address employer's contentions regarding the administrative law judge's summary statement that he would also find causation based on a weighing of the evidence as a whole. Decision and Order at 15.

[4] The administrative law judge found that claimant was not taken off his usual work until July 12, 2006, when Dr. Cobb found that claimant was unable to work as a welder. Cobb Dep. at 23, 75-77. Dr. Cobb stated claimant could perform sedentary work. *Id.* at 75.

job. Claimant offered no evidence that, due to his injury, he is unable to drive this distance occasionally. Contrary to claimant's contention, moreover, the administrative law judge's finding that employer offered him lodging at this location is supported by substantial evidence. The administrative law judge rationally credited the testimony of Randall Gunn, employer's Safety Coordinator, that lodging would have been offered to claimant as it was to other employees on modified duty on shore. Tr. at 99. Thus, claimant would not have to drive 224 miles each day to perform the job employer offered, but would drive the 112 miles each way every week, which is exactly the same commute to work as his former job entailed. On these facts, the job employer offered is geographically suitable for claimant. *See Patterson v. Omniplex World Services,* 36 BRBS 149 (2003). As claimant does not contend that the offered job was physically or vocationally unsuitable for him, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment.[5] In addition, claimant raises no issues concerning his post-injury wage-earning capacity. Therefore, as the offered job paid the same wages as claimant's pre-injury employment, the finding that claimant is not entitled to any disability benefits is also affirmed.

Having affirmed the administrative law judge's determination that claimant's back and neck conditions are work-related, we now address the contentions of both parties regarding his findings as to employer's liability for medical expenses arising out of this injury. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Thus, even where a claimant is not entitled to disability benefits, employer may be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including claimant's initial choice. *See Maguire v. Todd Shipyards Corp.,* 25 BRBS 299 (1992);

[5] Claimant's argument that the offered position does not constitute suitable alternate employment because employer withdrew the offer is without merit. Employer offered claimant light-duty work for two months during which time claimant neither accepted the position nor provided medical documentation that he was unable to work. Moreover, although employer terminated claimant's employment, employer never officially withdrew the offer and Mr. Gunn testified that such positions remain open. Tr. at 97-100. *Cf. Norfolk Shipbuilding & Drydock Co. v. Hord,* 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

Shahady v. Atlas Tile & Marble, 13 BRBS 1007 (1981)(Miller, J. dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). An employer must consent to a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant's injury. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a).[6]

The administrative law judge found that employer is not liable for the past medical treatment provided by Dr. Cobb for claimant's neck and back conditions because claimant did not seek employer's authorization to treat with Dr. Cobb. On appeal, claimant does not contend that he sought authorization for his treatment by Dr. Cobb nor does he contend that he was refused treatment by his initial physician, Dr. Michel, who is not a specialist. Rather, claimant contends that employer, through Dr. Michel's treatment notes, knew that he was referred to Dr. Cobb, a specialist in treating back injuries, and therefore employer could not refuse to consent to the treatment pursuant to 20 C.F.R. §702.406(a).

The administrative law judge found that employer has no liability for treatment associated with a medical condition it did not know existed. Claimant's argument that employer knew of the back injury based on a notation in Dr. Michel's record is without merit. Although employer knew of the work accident and the injury to claimant's leg, the administrative law judge rationally found there is nothing to support a finding that employer knew of the back injury at the time claimant commenced treatment with Dr. Cobb in July 2006. This finding is supported by the further notation made by Dr. Michel that claimant is to contact "workers' compensation" to determine his course of action. CX 5 at 11. Moreover, the administrative law judge found that claimant was referred to Dr. Cobb by his attorney, not by Dr. Michel.[7] This interpretation of the evidence is

[6] Section 702.406(a) states:

> Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

[7] Contrary to claimant's assertion, Dr. Michel's notation that claimant is to see Dr. Watkins for further treatment of his leg does not necessarily support his contention that Dr. Michel also referred him to a back specialist. Dr. Michel's chart note specifically states that claimant is referred to Dr. Cobb by his attorney. Moreover, claimant saw Dr.

rational and supported by the documentation. *See* CX 5 at 11; *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). As Dr. Michel did not refer claimant to Dr. Cobb, claimant's failure to request employer's prior authorization defeats his claim for reimbursement of medical benefits. *Id.; see also Ranks v. Bath Iron Works Corp.*, 22 BRBS 302 (1989). Accordingly, as the administrative law judge's finding is rational, supported by substantial evidence, and in accordance with law, we affirm his determination that employer is not liable for the past medical treatment provided by Dr. Cobb.

Employer contends that it is not liable for future medical expenses related to claimant's back condition as that condition is not work related. As we have affirmed the administrative law judge's finding that claimant's back condition is work-related, employer's arguments regarding its liability for the treatment of this condition are without merit. We affirm the administrative law judge's finding in this regard. Decision and Order at 20 n.15.

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

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

Watkins almost immediately for his leg injury, but did not see Dr. Cobb for four months. CXs 5, 7; EXs 10, 11.