BRB Nos. 96-0799
and 96-0799A

ROBERT JACKSON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CHRISTINA SERVICE COMPANY	)	
	)	
and	)	DATE ISSUED:_____
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER
Cross-Respondents		

Appeals of the Decision and Order - Awarding Benefits of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Steven J. Harlen and Barbara D. Huntoon (Schwartz, Campbell and Detweiler), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order-Awarding Benefits of (95-LHC-2297) of Administrative Law Judge Frank D. Marden 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).

On December 14, 1994, claimant was employed by employer as a "chocker." Among the tasks required for this position was the responsibility to handle four to eight foot, and six to ten pound, logs called "chocks." These logs were placed under and between levels of cargo that had been unloaded onto a yard that adjoined the dock at the Port of Wilmington. Usually, two persons were employed as "chockers." On the date in question, claimant, who was working alone for most of his shift, suffered an injury when he aggravated a preexisting degenerative back condition. Claimant notified employer of this injury and filed a claim for benefits under the Act on January 25, 1995. CX-B; EX-2. Employer voluntarily paid claimant compensation for temporary total disability from March 10 through May 18, 1995, based on a stipulated average weekly wage of $952.76.

The administrative law judge found that claimant was totally disabled from December 22, 1994, through July 21, 1995, and that he suffered from a temporary partial disability from the latter date forward. The Decision and Order also directed the payment of any applicable interest, provided a credit to employer for benefits already paid, and ordered the provision of any necessary medical benefits. Employer appeals the award, and claimant has filed a cross-appeal challenging the administrative law judge's finding of temporary partial disability.

On appeal, employer challenges the administrative law judge's finding of causation, asserting that claimant failed to demonstrate that his December 14, 1994 injury aggravated a pre-existing condition. Employer also avers that claimant failed to prove that he was disabled by any work-related injury. Lastly, employer questions findings made by the administrative law judge with respect to the onset date of claimant's temporary partial disability and the extent of claimant's temporary disability. In his cross-appeal, claimant argues that he is totally disabled, as the administrative law judge erred in finding that employer established the availability of suitable alternate employment.

Initially, we reject employer's causation arguments. Employer concedes that the administrative law judge correctly invoked Section 20(a), 33 U.S.C. §920(a), which affords claimant with a presumption that his disabling condition is causally related to his employment. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 8-9 (1995); *see Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 295, 24 BRBS 75, 80 (CRT) (D.C. Cir. 1990). The burden then shifted to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1081, 1083, 4 BRBS 466, 475, 477 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The administrative law judge properly found the evidence of record insufficient to rebut the Section 20(a) presumption as no physician unequivocally stated that the work accident did not cause, contribute to or accelerate the underlying condition.[1] *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 90

[1]Employer's reliance on Dr. Bong Lee's statement that a pre-existing degenerative condition such as that suffered by claimant could have progressed without further aggravation to buttress its contention that claimant failed to prove causation, disregards employer's burden to introduce "specific and comprehensive" evidence which severs the presumed connection between claimant's

(1995); *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1991), *cert. denied*, 507 U.S. 909 (1993). The administrative law judge also reasonably found that claimant's continuing post-injury employment for two weeks, which employer contends offered an alternate etiology of claimant's disability, and claimant's failure to seek prompt treatment or realize the full extent of his December 14, 1994 injury are insufficient to support employer's burden on rebuttal. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297, 23 BRBS 22, 25 (CRT)(11th Cir. 1990)(employee failed to mention accident to physicians); *see also Kubin v. Pro Football Inc.*, 29 BRBS 116, 119 (1995). We therefore affirm the administrative law judge's finding that claimant's disability is causally related to his injury of December 14, 1994.

We also disagree with the parties' arguments with respect to the administrative law judge's findings as to the nature and extent of claimant's temporary partial disability. Claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of his work-related injury, *see Anderson v. Lockheed Shipbuilding & Const. Co.*, 28 BRBS 290, 292 (1994); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56, 59 (1985), and must initially establish a *prima facie* case of total disability by demonstrating that he is unable to return to his usual employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1, 5 (CRT)(2d Cir. 1991); *see Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986). The administrative law judge found that claimant was precluded from returning to his former longshore employment, and his finding is supported by substantial evidence. Decision and Order at 11. Dr. Bong Lee ruled out claimant's return to the longshore work he was performing at the date of the injury, and stated that claimant is qualified for "sedentary" work. CX-P: 12, 14-22. Dr. Gross admitted in an October 3, 1995, report that claimant could not return to his longshore work and is suitable for "sedentary/light duty only." EX-4.

The burden then shifted to employer to prove that the claimant is only partially disabled by establishing the availability of other jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041, 14 BRBS 156, 163 (5th Cir. 1981); *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122, 123 (1996). For the alternate employment opportunities to be considered realistic, the employer must establish their precise nature, terms and availability. *White*, 29 BRBS at 12. We do not agree with claimant that the evidence of suitable alternate employment proffered by employer does not satisfy the standards for such evidence. The labor market survey evidence generated by Mr. Caldwell is sufficient, if credited, to demonstrate the availability of suitable alternate employment. Employer's burden to show suitable alternate employment "is a limited evidentiary one" and employer is not required to become an "employment agency." *See Palombo*, 937 F.2d at 74, 25 BRBS at 7 (CRT). Mr. Caldwell identified a total of ten jobs, and pointed out their availability, the hours, and the salary, as well as the position title. He provided job descriptions to

---

current disabling condition and his work-related injury. *See* CX-K; EX-7. In addition, Dr. Gross' opinion that the effects of claimant's work-related aggravation of the degenerative disc disease would have resolved within six months of the accident, *see* EX-4; Tr. at 47, is an "estimate" based on Dr. Gross' general experience. *See* Tr. at 59-67; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

Dr. Gross for approval, and notified claimant of these job openings and informed claimant whether the employers were taking applications. *See* EX-5; Tr. 135-143; 144-46. Dr. Bong Lee reviewed seven of the low-skilled positions, and approved five of them as within claimant's restrictions. CX-P: 20-21. The evidence of suitable alternate employment found by Mr. Caldwell is sufficiently "precise [as to the] nature, terms, and availability of the alternate positions identified." *Compare Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (1989)(evidence consisting primarily of classified advertisements inadequate). Accordingly, we reject claimant's challenge on cross-appeal to the legal sufficiency of the vocational evidence.

We disagree with employer that the administrative law judge erred in finding that claimant rebutted employer's showing of suitable alternate employment with respect to the accounting positions identified by Mr. Caldwell. After learning of claimant's accounting degrees, Mr. Caldwell identified three additional jobs, one of which was disclosed at the hearing. Tr. at 139-141. The administrative law judge declined to find that those accounting positions reflected claimant's post-injury wage-earning capacity because of claimant's lack of success in applying for at least two of the positions, and thus rationally found that these accounting jobs were not realistically available to claimant. Decision and Order at 15; *see Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986). We therefore affirm the administrative law judge's finding of claimant's post-injury wage-earning capacity on the basis of the "unskilled" positions identified by Mr. Caldwell and approved by Dr. Bong Lee. *See generally Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990) (administrative law judge should look to record as a whole in setting post-injury wage-earning capacity).

With respect to the commencement date for claimant's temporary partial disability, the record supports employer's contention that the Security Officer position with Doyle Protective Services, which was found to be the first position suitable for claimant, became available on June 22, 1995, rather than July 21, 1995, as found by the administrative law judge. A claimant's total disability becomes partial on the date that suitable alternate employment becomes available. *See Palombo*, 937 F.2d at 75-77, 25 BRBS at 9-12 (CRT). Accordingly, we modify the Decision and Order to reflect that claimant's temporary partial disability commenced on June 22, 1995.

Claimant has also requested an attorney's fee for work performed before the Board in response to employer's appeal. Employer has lodged no objection to the fee petition. Upon consideration of the fee petition, and in view of claimant's success in defending against employer's appeal, we conclude that the hourly rate of $175 is not excessive, and that the 4 hours claimed are reasonable and commensurate with the necessary services provided. We therefore grant the fee petition and award claimant's counsel a fee of $700, to be paid directly to counsel by employer. *See* 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is modified to reflect that employer shall pay claimant compensation for temporary partial disability from June 22, 1995 and continuing. In all other respects, the Decision and Order -Awarding

Benefits is affirmed. Claimant's counsel is awarded an attorney's fee of $700 to be paid directly to counsel by employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge