BRB Nos. 00-0137
and 00-0137A

DARREN C. LANEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LONE STAR NORTHWEST, INCORPORATED	)	DATE ISSUED: Oct. 6, 2000
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order-Denying Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Ronald W. Atwood, Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer/carrier (employer) cross-appeals the Decision and Order-Denying Benefits (99-LHC-360, 99-LHC-361) of Administrative Law Judge Edward C. Burch 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 alleges two injuries in the course of his employment as a loader operator for

employer. Employer is in the business of producing crushed rock at its Santosh facility, which is located adjacent to the Columbia River. Approximately 75 to 80 percent of the crushed rock is loaded onto barges for shipment. Claimant operated a front end loader which pushed the crushed rock onto conveyor belts which eventually transported the rock onto the barges.

The first incident at issue in this case took place on August 1, 1997, when claimant, while operating a loader, alleged that his right lower leg was sprayed by leaking antifreeze; several days later, claimant developed a skin rash, which was subsequently diagnosed as contact dermatitis due to solvent fluid. The second injury took place on May 15, 1998, when claimant alleged that the loader he was operating bounced as it ran over an obstruction, resulting in an injury to his neck and back. Claimant filed a claim for the skin condition on April 30, 1998, Cl. Ex. 3, and for his neck pain on May 21, 1998, Cl. Ex. 11, under the Oregon workers= compensation statute. ORS 656. Claimant subsequently filed his LS-203 forms on July 24, 1998, claiming benefits under the Act for both injuries; employer controverted both claims.

In the state proceeding, claimant argued that he could pursue claims under both the state act and Longshore Act, as there is concurrent state and federal jurisdiction pursuant to *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 713 (1980). Under Oregon law, ORS 656.027(4), however, claimant is not entitled to benefits under the state workers= compensation system if he is a Aperson for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States.@ In an Opinion and Order issued on April 16, 1999, the state administrative law judge determined that claimant could proceed under the state law based on the fact that claimant did not have an accepted Longshore Act claim. The judge summarily stated that the evidence did not establish that recovery for claimant was provided under the Longshore Act, as required by ORS 656.027(4). Addressing the merits, she found that claimant carried his burden of proof in establishing compensability for both the dermatitis and cervical/thoracic conditions under state law.

In the proceeding under the Longshore Act, the administrative law judge first determined that claimant met the situs and status requirements for coverage as to both injuries. He then found that claimant did not establish that his dermatitis was work-related, and thus found this condition is not compensable under the Longshore Act. The administrative law judge then found that claimant established that the accident aggravated his neck condition and that he was temporarily partially disabled. After making these findings, he stated that because the Oregon administrative law judge determined that claimant=s claim in the state action was not precluded under Oregon law, he was bound to give collateral estoppel effect to the state judge=s finding, and therefore there is no jurisdiction under the Longshore Act. Accordingly, the administrative law judge denied benefits under the

Longshore Act.

In his appeal to the Board, claimant challenges the administrative law judge=s finding that jurisdiction does not lie under the Longshore Act. Claimant argues that the federal administrative law judge mischaracterized the finding of the state administrative law judge, and that the state judge made no findings regarding whether claimant met the coverage requirements of the Longshore Act. Claimant next contends that the state administrative law judge=s finding that claimant=s dermatitis was work-related should be given full faith and credit in the federal forum. Claimant also asserts that employer did not establish the availability of suitable alternate employment and that claimant is entitled to total, rather than partial, disability benefits. Employer responds that the federal administrative law judge correctly found that claimant is collaterally estopped from receiving benefits under the Longshore Act by virtue of the Oregon judge=s finding that the state claim was compensable. Employer also urges that the administrative law judge=s finding that claimant is partially, rather than totally, disabled be affirmed. Claimant replies, reiterating his arguments.

On cross-appeal, employer challenges the administrative law judge=s finding that claimant established that his neck condition is work-related, asserting that the administrative law judge erred in rejecting the results of testing it did on its loaders in order to determine whether the accident could have occurred as described as being too speculative. Claimant responds to the cross-appeal, arguing that the federal administrative law judge was estopped by the state judge=s decision to consider the work-relatedness of the neck injury, and that in any case, his finding in this regard is supported by substantial evidence. Employer replies, challenging the administrative law judge=s finding that claimant established a *prima facie* case with regard to the neck injury.

Initially, we reverse the administrative law judge=s finding that collateral estoppel applies to the state administrative law judge=s Afinding that there is no jurisdiction under the Longshore Act.@ Decision and Order at 24. As the state judge did not make such a finding, claimant=s argument that the federal administrative law judge misread the state judge=s opinion has merit. The state judge did not decide Longshore Act coverage; she did not even attempt to render findings of fact or conclusions of law on claimant=s status or situs under the Act, *see* 33 U.S.C. ''902(3), 903(a), and as discussed *infra,* lacks authority to do so. In fact, the state judge=s decision simply recognizes that *potential* Longshore Act coverage does not bar the state claim, as employer, which bears the burden of proof on this issue, must provide evidence of actual federal coverage in order for ORS 656.027(4) to apply. In finding that claimant may proceed with his state workers= compensation claims, the Oregon administrative law judge stated:

> In this case claimant has filed LHWCA claims which have been denied. Hearings on the denials have yet to be held. Thus, claimant does not have an accepted LHWCA claim. Nor is he in receipt of LHWCA benefits. Moreover,

> the evidence does not establish claimant is a worker >for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States.= For these reasons, I find ORS 656.027(4) is not applicable ... The issue of termination of state benefits in the event claimant prevails on his federal claims is not ripe for decision.

Opinion and Order at 5.[1] Thus, the state judge clearly recognized that claimant=s federal claims remained pending. The federal administrative law judge=s conclusion that the state judge Afound@ that there is no Longshore Act jurisdiction is thus not supported by the plain language of the state Order.

[1]The sentence regarding the denial of claimant=s Longshore claims appears to refer to the district director level under the Act as the next line states hearings have not yet been held and, in fact, the claim was pending hearing at the time of the state decision.

Our interpretation of the state Order is further supported by the Order on Review issued by the Oregon Workers= Compensation Board upon carrier=s appeal of the state administrative law judge=s decision.[2] The Oregon Board adopted and affirmed the state administrative law judge=s Order, but provided a supplemental discussion on jurisdiction which is germane to the appeal before us. The Oregon Board initially discussed insurer=s argument for remand to the state administrative law judge for consideration of a post-hearing stipulation that claimant=s neck claim arises under the Longshore Act. The Oregon Board, however, agreed with claimant that any stipulation regarding coverage would be ineffective, as jurisdiction cannot be stipulated. The Oregon Board also explained that ORS 656.027(4) does not apply until Longshore Act coverage is resolved in a federal forum, stating that the Oregon administrative law judge

lacks authority to determine federal jurisdiction and *potential* federal

[2]This decision issued on November 3, 1999, subsequent to the administrative law judge=s decision. On December 7, 1999, claimant filed a motion with the Board to take judicial notice of the decision. In an accompanying affidavit, claimant=s counsel stated that the appeal was pending at the time of the federal administrative law judge=s hearing. Employer opposed the motion on the basis that the appellate decision is not part of the record before the administrative law judge. By Order dated December 22, 1999, the Board denied claimant=s motion. Upon further review, we vacate the Board=s previous Order. The Oregon Board=s decision on appeal is relevant, is a matter of public record, and is properly the subject of judicial notice. *See Hill v. Avondale Industries, Inc.,* 32 BRBS 186, 188 (1998), *aff=d sub nom. Hill v. Director, OWCP,* 195 F.3d 790, 33 BRBS 184 (CRT) (5th Cir. 1999), *cert. denied,* 120 S.Ct. 2215 (2000). The decision by an appellate tribunal is not Anew evidence@ which requires a motion for modification under 33 U.S.C. ' 922 in order to be considered.

> jurisdiction would not be determinative in any event. As the administrative law judge in this case explained, the insurer=s contention that claimant=s cervical and thoracic claim arises under the LHWCA is essentially an affirmative defense that can only succeed with evidence that coverage is *provided* under a federal claim.

Order on Review at 2 (emphasis in original). The Oregon Board agreed that employer failed to establish that claimant is covered under the Longshore Act in the absence of a declaration from a federal forum acknowledging jurisdiction.

Collateral estoppel bars a party from relitigating an issue if: (1) the issue at stake is identical to one alleged in prior litigation; (2) the issue was actually litigated in prior litigation; and (3) a determination on the issue in prior litigation was a critical and necessary part of the judgment in the earlier action. *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992); *Mellin v. Marine World-Wide Services*, 32 BRBS 271, 273 n.5 (1998). The administrative law judge found that the elements needed for collateral estoppel to apply were satisfied in this case, commenting that Athe issue of jurisdiction under the Longshore Act is identical in the two proceedings.@ Decision and Order at 24. The administrative law judge stated that Ait is apparent from the [state] administrative law judge=s opinion that the issue of jurisdiction under the Longshore Act was actually litigated and was essential to a final decision on the merits.@ Decision and Order at 24. As we have explained, however, there is no basis for this conclusion in the state opinion. In order for a claim to be covered under the Longshore Act, a claimant must establish that his injury occurred upon a covered situs under Section 3(a) and that he was a maritime employee under Section 2(3) of the Act.[3] 33 U.S.C. ''902(3), 903(a). The state judge here made no attempt to address these questions and, as the Oregon Workers= Compensation Board explicitly stated, lacked authority to do so. It is apparent from these state decisions that the exclusion of ORS 656.027(4) is triggered by evidence that the claim has been found covered by the Longshore Act in a federal forum. Because the issue of coverage under the Act was not actually litigated at the state level in this case, collateral estoppel cannot apply to this issue. *See Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995). Therefore, the administrative law judge=s conclusion below that he is compelled by the state decision to find claimant lacks jurisdiction under the Longshore Act is erroneous.[4] Accordingly, the administrative law judge=s determination that claimant=s

[3]In the longshore proceeding employer conceded claimant=s status as to both injuries, and situs as to claimant=s neck injury of May 15, 1998, but disputed that the alleged August 1, 1997, incident of leaking antifreeze took place on a covered situs. Decision and Order at 10.

[4]In response to claimant=s arguments, employer asserts that the Longshore and Oregon Compensation schemes are Amutually exclusive.@ However, while the State Act

claim is barred on this basis is reversed. As the administrative law judge=s finding that claimant established status and situs under the Longshore Act is unchallenged on appeal, we hold that claimant has established jurisdiction under the Longshore Act.

Claimant next argues that the state administrative law judge=s finding that claimant established the compensability of his dermatological condition should be given collateral estoppel effect. The state administrative law judge concluded that this condition was compensable,[5] finding after weighing the medical and other relevant evidence that claimant met his burden of proof in establishing the required causal nexus. In the Longshore proceeding, the administrative law judge also weighed the evidence, reaching a contrary result and finding that claimant failed to establish a causal relationship between the dermatitis and work.

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does indeed exclude those found covered by the Longshore Act, there is no exclusion under federal law for those found covered by the state. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 713 (1980). Moreover, the Oregon system recognizes that the question of federal coverage must be resolved in the federal forum. Under the Longshore Act, where claimant is covered by the Longshore Act, employer is entitled to a credit for state benefits paid. 33 U.S.C. ' 903(e).

[5]The state administrative law judge found claimant=s dermatitis compensable both on an accidental injury theory, and as an occupational disease, based on part of the statute covering Acontact with . . . dust, fumes, vapors, gases, radiation or other substances.@ ORS 656.802(a). Decision at 7-8.

Claimant argues that the state administrative law judge=s findings are binding under the Longshore Act by virtue of collateral estoppel. In addition to the elements for collateral estoppel discussed previously, *supra* at 5, in order for collateral estoppel effect to be given to a finding in a state court proceeding by an administrative law judge deciding a claim under the Act, the same legal standards must be applicable in both forums. *See, e.g., Plourde v. Bath Iron Works Corp.,* 34 BRBS 45 (2000); *Vodanovich v. Fishing Vessel Owner Marine Ways, Inc.,* 27 BRBS 286 (1994); *Smith v. ITT Continental Baking Co.,* 20 BRBS 142 (1987).[6] Claimant asserts that this requirement is met, arguing that in fact he was required to meet a higher burden in establishing a causal relationship under Oregon law. Under state law, claimant has to show that work activities were a Amaterial contributing cause.@[7] ORS 656.005(7)(a). Under the Longshore Act, claimant=s condition must arise out of and in the course of his employment, 33 U.S.C. ' 902(2); claimant also benefits from a presumption, 33 U.S.C. ' 920(a), that his condition did so arise if he shows is that working conditions existed or that the accident occurred which *could have* caused or aggravated the condition. *See Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.,* 22 BRBS 170 (1989), *aff'd,* 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once Section 20(a) is invoked, employer bears the burden of producing substantial evidence that the condition did not arise out of employment. If it does so, the presumption falls from the case and the administrative law judge weighs all of the evidence, with claimant bearing the burden of persuasion. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In analyzing the issue of whether claimant=s skin condition is work-related, the administrative law judge made no reference to the findings of the state judge with regard to

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[6]Employer=s argument that the state judge=s causation findings can only be given collateral estoppel effect if her jurisdiction findings are also adopted is rejected. As discussed, the administrative law judge in the state proceeding did not make any findings of fact relevant to coverage under the Longshore Act. However, she fully addressed causation.

[7]In addition, under the state statute, claimant=s injury must be Aestablished by medical evidence supported by objective findings.@ ORS 656.005(7)(a); *Mathel v. Josephine County*, 319 Or. 235, 875 P.2d 455, *recon. denied* (1994).

this issue. Employer argued at the state hearing that claimant was not exposed to antifreeze as alleged. Oregon Opinion and Order at 7. The state administrative law judge, in finding this claim compensable, credited claimant=s testimony that the incident occurred or could have occurred as alleged. *Id.* The administrative law judge in the Longshore proceeding discredited claimant=s testimony that he was exposed to antifreeze, and therefore found that claimant did not establish a *prima facie* case that the dermatitis was related to his employment. The federal administrative law judge then found that even if claimant had established a *prima facie* case, employer rebutted the presumption of causation, and upon weighing the evidence as a whole, concluded that claimant failed to establish a causal relationship by a preponderance of evidence. As the causation issue was litigated by the parties in the state action, and claimant prevailed on this issue under an arguably more stringent standard, the administrative law judge in the longshore hearing should have addressed whether he is collaterally estopped from reexamining this issue. This determination requires review of the necessary elements for application of collateral estoppel, *supra* at 5. Thus, the administrative law judge=s finding that claimant failed to establish the work-relatedness of his skin condition is vacated, and the case is remanded for the administrative law judge to consider whether the finding of the state administrative law judge should be given collateral estoppel effect. *See generally Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997).

Turning to employer=s appeal of the administrative law judge=s finding that claimant=s neck injury is causally related to his employment, we affirm. No party disputes that claimant sustained a harm, *i.e.*, an injury to his neck. The administrative law judges in both the state and federal proceedings found this condition work-related. The federal administrative law judge credited claimant=s testimony that he hit an obstruction while driving the loader. Thus, an accident occurred which could have caused or aggravated the neck condition, and the administrative law judge found Section 20(a) invoked. He found employer rebutted the presumption and, weighing the evidence as a whole, concluded causation was established. In weighing the evidence, the administrative law judge rejected as too speculative employer=s technical evidence regarding tests to determine acceleration forces the wheels undergo when driven over the pile of gravel as described by claimant. In these tests, employer attempted to show that the wheels could not have left the ground, and that therefore, the accident could not have taken place as described by claimant. We reject employer=s challenge to the administrative law judge=s finding in this regard.

Initially, it was within the administrative law judge=s discretion to find employer=s evidence too speculative, as he rationally concluded that the circumstances could have differed in the test situation and the actual event. *See Port Cooper/T. Smith Stevedoring Co. Inc. v. Hunter*, F.3d , 2000 WL 1262604, No. 99-60599 (5th Cir. Sept. 21, 2000). The administrative law judge was entitled to rely on claimant=s testimony regarding the circumstances of the accident. Employer=s argument is nothing more than an attempt to

persuade the Board to reweigh the evidence, which we may not do.[8] *Id.* The administrative law judge also noted reports by Drs. Dodge, Ackerman and Syna diagnosing a cervical strain immediately after the incident. While he found that the reports presented conflicting views as to the cause of claimant=s current condition, he found the opinion of Dr. Berkeley that the incident aggravated claimant=s pre-existing neck condition most persuasive. This opinion constitutes substantial evidence in support of the administrative law judge=s conclusion. Accordingly, as the administrative law judge=s finding that claimant=s neck problem is causally related to the work accident is supported by substantial evidence,[9] it is affirmed.

Claimant next challenges the administrative law judge=s finding that he is partially, rather than totally, disabled. Claimant argues that he cannot perform any job, and is therefore temporarily totally disabled.[10] The parties do not dispute that claimant cannot return to his usual employment as a loader. Once claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to

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[8]In addition to rejecting the testing evidence as speculative, the administrative law judge stated that even if the testing had depicted conditions at the time of injury, the impact may nonetheless have been strong enough to aggravate claimant=s prior neck condition. Employer challenges this Asecond reason@ as being unsupported by evidence. We need not address this argument, as the administrative law judge gave a valid reason for giving less weight to employer=s evidence and this additional observation does not detract from his conclusion.

[9]We note that the state administrative law judge also found the neck injury compensable under an arguably more stringent standard.

[10]Claimant does not challenge the administrative law judge=s finding that he has not reached maximum medical improvement or assert he is permanently disabled.

establish the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). The administrative law judge found that employer established the availability of suitable alternate employment in the light to medium category on September 1, 1998, based on a labor market survey performed by employer=s vocational consultant, Roy Katzen.

Claimant argues that the administrative law judge erred in relying on Mr. Katzen=s vocational report and that he did not discuss the limitations set by Drs. Berkeley, Syna or Gilbert, relying only on those prescribed by Drs. Ackerman and Duff. We reject this argument. Dr. Syna in her June 22, 1998, report does not mention limitations other than prescribing medication and advising claimant to continue to wear a cervical collar. Cl. Ex. 20 at 69. Dr. Gilbert=s May 27, 1998, report also noted medication prescribed, but makes no reference to restrictions. Dr. Berkeley also did not discuss medical limitations in either his report or on deposition. Cl. Ex. 21 at 70. Drs. Ackerman and Duff, however, stated limitations as to lifting and driving.[11] Cl. Ex. 17 at 63. As the medical opinions on which claimant relies do not include medical limitations on claimant=s ability to work, they cannot provide a basis for determining job suitability.

Mr. Katzen=s vocational evaluation dated June 11, 1999, contained three labor market surveys. Emp. Ex. 44. He testified that the jobs listed fall within the work restrictions imposed in two reports by Dr. Duff. Tr. at 155-156. Mr. Katzen said he took a conservative approach, given Dr. Duff=s reference to light work in addition to specific restrictions, and identified jobs requiring lifting of no more than 10 pounds frequently and 20 pounds occasionally. *Id.* Although claimant alleges that the vocational consultant did not consider claimant=s complaints of pain and disability, Mr. Katzen met with claimant and specifically asked about his symptoms. Emp. Ex. 44. He testified that his identification of suitable employment for claimant was based partly on claimant=s own description of what he felt capable of doing.

Claimant challenges the administrative law judge=s reliance on Mr. Katzen=s evaluation on various grounds. Initially, contrary to claimant=s argument, the fact that he was on medication and undergoing physical therapy does not demonstrate in and of itself that

[11]On May 21, 1998, Dr. Ackerman stated claimant could perform modified duties with no lifting over 10 pounds and avoidance of driving heavy equipment. Dr. Duff is an orthopedic surgeon who examined claimant on August 11, 1998, and June 1, 1999. Regarding the extent of disability, he opined claimant could not return to his former job but could perform light duty work with restrictions including no driving heavy equipment on rough ground and no lifting of more than 25 pounds repeatedly or 50 pounds at any time.

he is incapable of any employment, as there is no evidence that these factors would prevent him from performing the duties of the jobs. *Cf. Bryant v. Carolina Shipping Co., Inc,* 25 BRBS 294, 297-298 (1992) (Board remanded for the administrative law judge to consider effect of medication which made claimant drowsy and sluggish and might impede his ability to perform job as courier). Claimant also contends that Mr. Katzen had never seen Dr. Berkeley=s report. In fact, at the June 22, 1999, hearing, Mr. Katzen stated that he did not see Dr.Berkeley=s report in his file. In his June 11, 1999, vocational evaluation, however, Mr. Katzen wrote in the medical review portion, AIn 8/98, Dr. Berkeley was considering surgery.@ Emp. Ex. 44 at 120. When asked at the hearing whether he would expect claimant to go looking for work while waiting for authorization for surgery, Mr. Katzen answered AI don=t know what kind of activity recommendation Dr. Berkeley made along with that recommendation for surgery.@ Tr. at 164. In fact Dr. Berkeley did not impose specific restrictions or give an opinion as to whether claimant could perform any kind of work in his August 1998 report. Therefore, claimant=s argument does not demonstrate error in the administrative law judge=s decision to credit Mr. Katzen=s evaluation.

Claimant also asserts that the administrative law judge erred in finding he could work during the period after Dr. Berkeley recommended surgery, as during this time he was awaiting carrier=s authorization for surgery to which he was entitled pursuant to *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 120 S.Ct. 40 (1999). Claimant contends that Dr. Berkeley recommended in August 1998 that he undergo a cervical fusion and that it is inconsistent with *Amos* to find that he must seek work while he was awaiting authorization for this surgery from the carrier. In *Amos*, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that, although an employer is not required to pay for unreasonable and inappropriate treatment, when an injured employee is faced with competing medical opinions about the best way to treat his work-related injury, each of them medically reasonable, it is for the patient--not the employer or the administrative law judge--to decide what is best for him. The issue in *Amos* thus involved authorization for medical treatment claimant was pursuing. It does not establish a rule that claimant is entitled to benefits for total disability where surgery is recommended.[12] In any event, the initial decision in *Amos* was issued in 1998, and the amended decision on January 12, 1999. The hearing in this case was held on June 22, 1999, and claimant submitted his closing argument to the administrative law judge on August 20, 1999. Claimant did not raise any argument based on *Amos* at that time. As claimant did not raise the argument before the administrative law judge that he was entitled to temporary total disability during the period when employer

[12]Moreover, Dr. Berkeley retired in January 1999, and claimant does not allege that he continued to pursue surgery. The doctors treating claimant now have been treating him conservatively, with medication and physical therapy. Tr. at 43-47.

denied authorization for surgery, it is not properly raised on appeal. *See generally Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991). Therefore, as the administrative law judge could properly rely upon Mr. Katzen=s evaluation, his finding that employer established the availability of suitable alternate employment is supported by substantial evidence and is affirmed. Claimant is thus entitled to temporary partial disability benefits from September 1, 1998, and continuing at the rate of $259.71 per week, as found by the administrative law judge.

Accordingly, the administrative law judge=s conclusion that claimant did not establish jurisdiction under the Longshore Act is reversed. The finding that claimant did not establish that his dermatological condition is related to the work accident is vacated, and the case is

remanded for further consideration consistent with this decision. In all other respects, the administrative law judge=s decision is affirmed. In accordance with these findings, the decision is thus modified to award claimant temporary total and partial disability benefits and medical benefits for his neck condition.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge