BRB No. 98-1604

MARK CARLISLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUNGE CORPORATION	)	DATE ISSUED: 9/13/99
	)	
and	)	
	)	
CIGNA PROPERTY AND CASUALTY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order on Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Albert E. Schoenbeck (Lathrop, Gage & Schoenbeck), St. Louis, Missouri, for claimant.

William A. Schmitt (Thomas Coburn), Belleville, Illinois, for employer/ carrier.

Kristin M. Dadey (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Officer of Workers' Compensation Programs, United States Department of Labor.

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

Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision and Order on Reconsideration (97-LHC-0735) of Administrative Law Judge Thomas M. Burke 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 worked as a river operator for employer from 1986 until 1996. As a river operator, claimant operated joysticks for usually three to four hours per day, but occasionally this would increase to eight hours a day for several weeks at a time.[1] In March 1996, claimant first sought medical treatment from his family doctor for pain and weakness in his hands. Dr. Jones diagnosed bilateral epicondyle, advised claimant to wear an arm splint and prescribed pain medication. Continued symptoms prompted claimant to visit Dr. Eller on April 11, 1996, and Dr. McGinty on June 5, 1997. Drs. Eller and McGinty each diagnosed carpal tunnel and cubital tunnel syndromes, and ultimately found claimant unable to perform his usual work. Dr. Eller testified that claimant's hand symptoms were worsened but not caused by his work-related activities. Dr. McGinty opined that, within a reasonable degree of medical certainty, claimant's carpal tunnel and cubital tunnel syndromes were directly related to his work for employer.

Claimant testified that he has not worked since April 1996, except for occasionally assisting his wife with her flea market business. He also testified that he did not know of the causal nexus between his employment and his injury until after Dr. McGinty rendered his conclusion on causation on June 13, 1997, and that he therefore did not file his LS-201, Notice of Injury, until June 25, 1997, and his claim for compensation until July 30, 1997.

Employer argued that claimant's claim is time-barred for failure to give timely notice and for failure to timely file his claim in accordance with Sections 12 and 13 of the Act, 33

[1]Claimant's other job duties included carrying heavy loads, pulling cables through loaded barges, climbing ladders, lifting barge doors, and scooping beans with a shovel.

U.S.C. §§912, 913. Alternatively, employer argued that claimant is otherwise not entitled to permanent total disability benefits.

In his decision, the administrative law judge first determined that claimant's carpal tunnel and cubital tunnel syndromes constitute "occupational diseases," for purposes of the extended statute of limitations, and therefore concluded that claimant provided timely notice of the injury to employer pursuant to Section 12, and timely filed his claim for compensation pursuant to Section 13(b)(2), 33 U.S.C. §913(b)(2). The administrative law judge next found that claimant is entitled to invocation of the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer could not establish rebuttal thereof. Accordingly, the administrative law judge concluded that claimant's condition is work-related. The administrative law judge further found that claimant could not return to his usual employment and that employer did not establish the availability of suitable alternate employment. Consequently, the administrative law judge found claimant entitled to temporary total disability benefits from March 18, 1996, until June 13, 1997,[2] and permanent total disability benefits thereafter. The administrative law judge also awarded medical benefits. In his Decision and Order on Reconsideration, the administrative law judge granted employer's motion for reconsideration but denied the relief requested and therefore affirmed his award of benefits.

On appeal, employer challenges the administrative law judge's findings that claimant's injury constitutes an occupational disease and thus, that his claim is not barred by Sections 12 and 13 of the Act, that claimant reached maximum medical improvement, that claimant's injury is work-related, and that claimant is entitled to total disability benefits. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds only to the issue of whether claimant's condition constitutes an occupational disease, and argues for affirmance of the administrative law judge's finding on that issue even though he contends that in rendering his finding, the administrative law judge relied upon an outdated and erroneous definition of the term "occupational disease."

TIMELINESS

Employer initially contends that the administrative law judge erred in finding that claimant's repetitive trauma injury constitutes an occupational disease and thereby in

[2]The administrative law judge determined that claimant reached maximum medical improvement on June 13, 1997.

applying the extended statute of limitations to his claim. In support of its contention, employer cites *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989), *aff'g* 22 BRBS 170 (1989), for the proposition that in order to constitute an occupational disease for purposes of the extended statute of limitations, claimant must show first that he suffers from a "disease," second that hazardous conditions of employment must be the cause of the disease, and third that the hazardous conditions must be peculiar to one's employment as opposed to employment generally. Employer argues that the record is insufficient to establish the third element, *i.e.*, that the hazardous conditions are peculiar to claimant's employment, since claimant's work activities were common to many occupations and, indeed, to life in general. Employer therefore argues that as claimant's condition does not constitute an occupational disease, his claim is barred by application of the one-year statute of limitations, since a period of more than 13 months passed between the time that claimant knew or should have known that his condition could be work-related and the filing of his claim.

The Director argues that the definition of occupational disease applied by the administrative law judge and argued by employer on appeal is erroneous, but nevertheless urges the Board to affirm the administrative law judge's ultimate conclusion on this issue, *i.e.*, that claimant's condition is an occupational disease, and thus his claim is timely filed. Specifically, the Director avers that an occupational disease pursuant to Section 2(2) of the Act, 33 U.S.C. §902(2), is defined as a disease process which "ar[ose] naturally out of [his] employment," 33 U.S.C. §902(2), and therefore, contrary to the standards applied by the United States Courts of Appeals for the Second and Fifth Circuits, and by the administrative law judge in the instant case, it does not include a "peculiar risk" doctrine.[3] The Director

[3]In particular, the Director avers that to the extent that the holdings in *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989), *aff'g* 22 BRBS 170 (1989), and *LeBlanc v. Cooper/T.Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195 (CRT)(5th Cir. 1997), require an application of a "peculiar risk" test for determining whether a claimant's alleged injury is an occupational disease, they are contrary to the plain language of the Act and its

also contends that it is improper for the administrative law judge to rule that delay in onset is a qualifying characteristic of occupational disease.

Section 12(a) of the Act requires a notice of injury, in a case involving an occupational disease which does not immediately result in disability, to be filed "within one year after the employee...becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the ... disability." 33 U.S.C. §912(a)(1998). Section 13(b)(2) provides that, in the case of an occupational disease which does not immediately result in disability, the claim is timely if filed within two years from the date of awareness of the relationship between the employment, the disease and the disability. *See, e.g., Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 156 (1996). Thus, in an occupational disease case, the filing period does not begin to run under Sections 12 and 13 until claimant is actually disabled. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986); 20 C.F.R. §§702.212(b), 702.222. In contrast, in a traumatic injury case, notice must be given within 30 days after the date of the injury, and the claim must be filed within one year after the date of the injury. 33 U.S.C. §§912(a), 913(a). Section 20(b), 33 U.S.C. §920(b), provides claimant with a presumption that his notice and claim are timely, placing the burden of proof on employer to produce substantial evidence that the claim was not timely filed or that notice was not timely given. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

The Act provides that an "injury" includes an occupational disease or infection that arises naturally out of employment or as naturally or unavoidably results from an accidental injury. 33 U.S.C. §902(2). An occupational disease has been defined by the courts as "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160, 31 BRBS 195, 197 (CRT) (5th Cir. 1997), *quoting Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176, 23 BRBS 13, 18 (CRT) (2d Cir. 1989)(quoting 1B A. Larson, THE LAW OF WORKMAN'S COMPENSATION §41.00, at 7-353).

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purpose. The Director seeks deference for his statutory interpretation of the definition of occupational disease, *i.e.*, that for purposes of determining whether an occupational disease constitutes an injury under Section 2(2) of the Act, claimant need only establish a causal nexus between his disease and employment.

In *Gencarelle*, the Second Circuit held that claimant's work activities were not "peculiar to" his employment as a maintenance man, as many occupations require repeated bending, stooping, squatting or climbing, as do non-occupational activities. The court concluded that "they are not the biomechanical stresses that have been recognized as leading to occupational diseases." *Gencarelle,* 892 F.2d at 177, 23 BRBS at 20 (CRT). The court thus affirmed the Board's holding that the extended statute of limitation provisions are inapplicable to a claim for chronic knee synovitis. *Id*. In *LeBlanc*, the claimant fell off of a ladder injuring his back and was ultimately diagnosed with degenerative facet disease. *LeBlanc*, 130 F.3d at 157, 31 BRBS at 195 (CRT). The Fifth Circuit, addressing the issue of occupational disease in terms of the applicable provision for calculating average weekly wage, *see* 33 U.S.C. §910(a)-(c), (i), held that claimant's disability did not result from a disease peculiar to his line of work, as his work activities of lifting, bending, and climbing ladders are typical of many occupations. *Id*.[4]

In discussing whether claimant's condition in this case is an occupational disease, the administrative law judge explicitly set out the aforementioned definition, *see* Decision and Order at 11, and applied it to the facts presented. Specifically, in his decision, the administrative law judge found, based upon the credible testimony of claimant and employer's description of claimant's job duties, that claimant's employment requiring the operation of joysticks and bobcat levers, involved "harmful" repetitive hand and arm movements, which are peculiar to his job as a river operator. Additionally, the administrative law judge found most persuasive Dr. McGinty's statement, in his report dated June 13, 1997, that claimant's use of joysticks would require "a marked amount of flexion/extension, ulnar and radial flexion in alternating movements," and thus, those activities are significantly attributable to his condition. Moreover, the administrative law judge credited Dr. Eller's

[4]The court, in *dicta*, concluded, after considering the legislative history of the 1984 Amendments, that it is not clear that repetitive motion or cumulative trauma injuries were intended by Congress for inclusion within the scope of "occupational diseases." *LeBlanc*, 130 F.3d at 160, 31 BRBS at 197 (CRT). This particular consideration was not necessary to the court's determination that LeBlanc's injury was not an occupational disease, however, as it already had held that it was not such because the conditions that gave rise to the injury were not "peculiar to" his employment.

opinion that claimant's condition is an ongoing disease process.

Upon reconsideration, the administrative law judge further articulated his rationale for finding that claimant's carpel tunnel and cubital tunnel syndromes fall within the definition of an occupational disease. The administrative law judge again noted that employer's letter to Dr. Eller describes claimant's job duties as including repetitive hand and arm movements, and observed that a duty "peculiar to or (of) increased degree" in claimant's job was the use of joysticks and bobcat levers. Additionally, the administrative law judge again found that Dr. McGinty attributed these duties, among others, as causing the development of claimant's conditions, and that Dr. Eller opined that these duties aggravated the conditions. The administrative law judge therefore reiterated his conclusion that it is evident that claimant's use of joysticks and bobcat levers for such significant, continuous periods of time is sufficiently "peculiar" and of an "increased degree by comparison with employment generally," to warrant a finding that claimant's condition is an occupational disease. The administrative law judge distinguished the instant case from *Gencarelle,* noting that the Second Circuit found that Gencarelle's activities were common to many occupations and indeed to life in general and were not, as the administrative law judge found claimant's activities are in the instant case, the repetitive biomechanical stresses that have been recognized as leading to occupational diseases. Similarly, in contrast to the Fifth Circuit's decision in *LeBlanc*, the administrative law judge herein determined that the conditions which gave rise to claimant's injury were "peculiar to" his employment.

Inasmuch as the administrative law judge properly set out and applied the legal standard espoused in *Gencarelle* and *LeBlanc* for determining whether there exists an occupational disease, and as the evidence supports the administrative law judge's determination that the conditions of claimant's employment were "peculiar to" that employment, *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963), we affirm the administrative law judge's finding that claimant's carpel tunnel and cubital tunnel syndromes are occupational diseases subject to the extended statute of limitations.

Contrary to the Director's contention, his broad definition of "occupational disease" to include any disease process which arose naturally out of his employment, without making any further inquiry such as the application of a peculiar or increased risk test, is without merit. First, we note that the Director's argument regarding Section 2(2) is not relevant to the specific query presented in the instant case, as it goes to the issue of the "compensability" of a condition, *i.e.*, whether it is work-related, rather than to the pertinent issue of whether a particular condition constitutes an occupational disease which does not immediately result in disability, and thus, is subject to the extended statute of limitations. Additionally, we note that the Larson treatise does not support the Director's position that the peculiar risk test has fallen out of favor in judicial determinations of an occupational disease. The Larson treatise

states that the current view of "occupational disease" is "that of the distinctive relation of the particular disease to the nature of the employment, as contrasted with diseases which might just as readily be contracted in other occupations or in everyday life apart from employment." 1B A. Larson, THE LAW OF WORKMAN'S COMPENSATION §41.32 (1998). When the term "occupational disease" is undefined, as it is in the Longshore Act, Larson states that most often the state courts look to whether the disease is "commonly regarded as natural to, inhering in, an incident and concomitant of, the work in question." *Harmon v. Republic Aviation Corp.*, 298 N.Y. 285 (1948). In other words, it must at the very least be produced or aggravated by the *distinctive* conditions or exertions of the employment. This, in essence, is the "peculiar to" employment test utilized by the Second and Fifth Circuits in *Gencarelle* and *LeBlanc*. As such, while the general state of workers' compensation law appears to be broadening the definition of "occupational diseases," it remains necessary for an individual to show more than that he/she has a disease process which "arose naturally out of his employment," in order for their malady to fall within the definition of an "occupational disease," and thus, within the extended statute of limitations at Section 13(b).[5]

Moreover, the Director's position that the administrative law judge clearly erred in ruling that delay in onset is a qualifying characteristic of occupational disease is also flawed.

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[5]The issue of compensability of an occupational disease as such does not arise under the Longshore Act due to the provisions of Section 2(2), 33 U.S.C. §902(2). However, an injury can occur over a gradual period of time and still be considered an accidental injury. *See Gencarelle, supra; Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd*, 640 F.2d 1385, 13 BRBS 101b (1st Cir. 1981). Rather, the issue that arises under the Act is whether a particular condition is an occupational disease that does not immediately result in death or disability in order to determine whether a claim is subject to the extended statute of limitations or to alternative average weekly wage provisions. 33 U.S.C. §§910(i), 912, 913. This inquiry requires consideration beyond whether the condition is work-related.

While not all occupational diseases will have gradual onset, *see, e.g.*, *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993), only occupational diseases with delayed onset qualify for the extended statute of limitations. *Id.* The facts in the instant case, as found by the administrative law judge, support the conclusion that claimant's injuries here, *i.e.*, carpel tunnel and cubital tunnel syndromes, meet the requirements of gradual onset as they involve, as Dr. Eller stated, on ongoing disease process.

Returning to employer's remaining contention on this issue, we reject employer's argument that the administrative law judge erred in finding that claimant's notice and claim are timely. The evidence of record fully supports the administrative law judge's finding that employer has not presented substantial evidence to rebut the Section 20(b) presumption that it was timely notified of the claim and that the claim was timely filed. As the administrative law judge found, claimant provided employer with adequate notice of injury within the one-year time limitation for occupational diseases as set forth at Section 12(a) of the Act.[6] Likewise, the administrative law judge rationally determined that the filing of claimant's claim on January 3, 1997, is timely as it is within two years of claimant's awareness as provided for in Section 13(b)(2) of the Act.[7] We therefore affirm the administrative law judge's application of Sections 12(a) and 13(b)(2) in the instant case, and his consequent finding that claimant's claim is not time-barred.

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[6]Employer's First Report of Injury or Occupational Illness, form LS-202, dated May 9, 1996, lists the date of injury as March 18, 1996, and states that claimant "told his superintendent [of the injury] on May 8, 1996." Employer's Exhibit [EX] 1. Employer thus complied with Section 30(a) of the Act, 33 U.S.C. §930(a). In response to claimant's notification, employer sent claimant to Dr. Eller and on June 13, 1996, filed its Notice to the Deputy Commissioner that Right to Compensation is Controverted. Therefore, at the very least, employer had actual knowledge of claimant's injury well within the one-year time limitation imposed by Section 12(a). 33 U.S.C. §912(d)(1); *see generally Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT) (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

[7]The administrative law judge did not make a specific date of awareness finding in the instant case. Employer avers that claimant admitted that his condition was work-related on May 8, 1996, as he specifically attributed his condition to his work activities at that time, and that he clearly knew that he was disabled from his employment by April 23, 1996, the date which claimant last worked. Even assuming that the date of awareness is April 23, 1996, claimant's claim, filed on July 30, 1997, remains timely under the occupational disease provisions.

CAUSATION

Employer next argues that the administrative law judge erred in invoking the Section 20(a) presumption that claimant's condition was work-related because he claimed only benefits for permanent partial disability, yet was awarded benefits for permanent total disability. In addition, employer argues that the objective evidence of record does not support the conclusion that claimant's condition is causally related to his employment.

The Section 20(a) presumption applies to the issue of whether an injury arises in the course of employment and, thus, is work-related, *see Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT)(8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301(1998)*; Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989), and does not apply to the issues of nature and extent of disability. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). Thus, the issue of whether claimant is seeking total or partial disability benefits is not relevant to Section 20(a). Accordingly, we hold that employer's contention in this regard is without merit.

In addition, contrary to employer's contention, the administrative law judge properly applied the presumption that claimant's condition is work-related as the evidence establishes that claimant sustained a harm, *i.e.*, carpel tunnel and cubital tunnel syndromes as diagnosed by Drs. McGinty and Eller, and the administrative law judge found that the requisite working conditions existed.[8] *See generally Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989). Furthermore, the administrative law judge properly concluded that employer did not rebut the Section 20(a) presumption as both physicians of record agree that claimant's condition is aggravated by his work and Dr. McGinty concluded that claimant's condition is itself work-related. As employer offered no evidence severing the causal connection between claimant's condition and his work, his finding that employer cannot establish rebuttal, and consequent conclusion that claimant's condition is work-related, is affirmed.[9] *Quinones v. H.B. Zachery,*

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[8]Specifically, the administrative law judge credited employer's description of claimant's job duties as including, among other things, hand and arm repetitive movements, in conjunction with the conclusions reached by Drs. Eller and McGinty, that sustained repetitive motion causes carpel tunnel syndrome. *See generally Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998).

[9]Moreover, employer's contention that it did not have notice that claimant sought a permanent total disability award is without merit, as claimant's counsel expressly requested that the administrative law judge enter an award for temporary total disability, and there is no significant difference in the burdens of proof required to challenge a claim for permanent as opposed to temporary total disability. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). In any event, the record contains

Inc., 32 BRBS 6 (1998); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

NATURE AND EXTENT OF DISABILITY

Employer argues that the administrative law judge erred in finding that claimant reached maximum medical improvement and thus, is permanently disabled as surgical treatment was recommended by Dr. Eller which may greatly relieve claimant's symptoms. Employer avers that the administrative law judge failed to address the issue of claimant's refusal to undergo the surgery and argues that since claimant's refusal in the instant case is unreasonable, the administrative law judge erred in finding that claimant reached maximum medical improvement and thus, that claimant is entitled to benefits.[10]

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sufficient evidence to establish employer's knowledge of a claim for total disability, as employer submitted evidence of suitable alternate employment at the hearing and thus, defended this case as if the claim was for permanent total disability. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

[10]We note that in arguing this issue, employer is operating under the misconception, as stated in its brief, "that an award of disability cannot be entered until claimant has reached maximum medical improvement." In fact, if claimant is shown to be disabled under the Act and maximum medical improvement has not yet been reached, the appropriate remedy is an award of temporary total or partial disability under Section 8(b) or (e), 33 U.S.C. §908(b), (e). *See Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

In addressing the issue of maximum medical improvement, the administrative law judge discussed the relevant medical opinions of Drs. McGinty and Eller regarding claimant's condition, and determined that claimant reached maximum medical improvement on June 13, 1997, as that is the date upon which Dr. McGinty rated the extent of permanent impairment as a result of claimant's work-related injury. *Sketoe v. Dolphin Titan Int'l,* 28 BRBS 212 (1994) (Smith, J., dissenting on other grounds). In rendering this finding, the administrative law judge also determined that the surgery suggested by Dr. Eller is not a viable option and thus, does not affect the date of permanency, as it may only improve claimant's symptoms temporarily, it would not alter the underlying condition, and it may only provide claimant with a fifty percent chance of returning to his prior employment. In addition, the administrative law judge found Dr. Eller's statement that if claimant did not undergo surgery there is little else to consider as claimant has reached maximum medical improvement, was supportive of Dr. McGinty's assessment of a permanent impairment rating and thus, supportive of his finding that claimant reached maximum medical improvement. *See generally Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). As the administrative law judge's finding that claimant reached maximum medical improvement on June 13, 1997, is rational and supported by substantial evidence, it is affirmed.[11] *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

Employer next argues that the administrative law judge erred in awarding total disability benefits, asserting that, contrary to the administrative law judge's finding, it

[11]Moreover, it should be noted that employer's contentions that claimant's refusal to undergo surgery is not reasonable and thus, that as a result of claimant's unreasonable refusal he is precluded from reaching maximum medical improvement are without merit. The issue of reasonableness of claimant's refusal, as well as the cases cited by employer in support of its contentions, *i.e., Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989), and *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979), are more appropriately argued in reference to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), regarding the suspension of compensation as a result of an unreasonable refusal to submit to treatment, and thus, are not particularly relevant to the issue presented in the instant case, *i.e.*, whether claimant reached maximum medical improvement with regard to his work-related hand injuries. In any event, contrary to employer's contention, the administrative law judge specifically addressed and rejected employer's contention that claimant's unreasonable refusal precludes a finding that claimant reached maximum medical improvement. Citing *Malone v. International Terminal Operating Co.*, 29 BRBS 109 (1995), the administrative law judge rationally found that employer failed to meet its initial burden of demonstrating, from an objective standpoint, that claimant's refusal to undergo the surgery suggested by Dr. Eller is unreasonable.

sufficiently established the availability of suitable alternate employment in this case through the labor market surveys and accompanying testimony of its expert, Ms. McKnight, whom, employer states, expressly took into consideration the physical restrictions and limitations placed upon claimant in identifying suitable jobs. Employer further argues that the administrative law judge erred by not considering claimant's lack of diligence in attempting to find alternate employment.

With regard to the issue of suitable alternate employment, the administrative law judge considered and rejected all of the jobs listed in Ms. McKnight's three labor market surveys. Specifically, the administrative law judge determined that all of the positions listed by Ms. McKnight do not contain any description of duties or qualifications required of the applicants. The administrative law judge nevertheless, where possible, reviewed the general descriptions contained in the *Dictionary of Occupational Titles* (DOT) for these positions,[12] but concluded that there is no indication regarding the extent of any repetitive hand and arm movements, fine manipulation, or lifting of weight in excess of 20 pounds required for the jobs, and thus, no means for determining whether the duties involved in any of these positions fall within the physical limitations set out by Dr. Eller[13] and/or claimant's qualifications. Moreover, the administrative law judge observed that no physician of record approved any of the jobs listed, and that Ms. McKnight's statement in the summary to her July 22, 1997, labor market survey, that the listed jobs "would possibly meet [claimant's] work limitations," Employer's Exhibit 6, exhibits her uncertainty as to whether the positions she identified are indeed compatible with claimant's limitations. Inasmuch as the administrative law judge explicitly considered each of the positions listed in Ms. McKnight's three labor market surveys, and by application of the DOT rationally determined, after consideration of the duties and requirements of these jobs in light of claimant's age,

[12]In discussing the labor market surveys, the administrative law judge observed that several positions listed therein did not describe any specific job, *e.g.*, Ms. McKnight's references to openings with Wal-mart, a home health care company, a modular home manufacturing company, a hiring agency, and in agriculture in her labor market survey dated March 12, 1997, from which the administrative law judge could find an equivalent listing in the DOT, to enable him to make the requisite comparison between the duties of each position and claimant's physical limitations and qualifications, and accordingly, rejected these positions on this basis.

[13]Dr. Eller testified that claimant could perform light duty or moderate duty, such as guard work where he would not be required to use his arms, wrists, or elbows repetitiously. Employer's Exhibit (EX) 12 at 21. He also stated that claimant could not do heavy lifting and would be limited to 15 to 20 pounds and noted that "[e]ven that wouldn't be repeated, but on an occasional basis he could lift 15 to 20 pounds, and might have some discomfort." EX 12 at 22-23. Additionally, Dr. Eller stated that fine manipulation would be difficult considering the sensory loss in claimant's limbs. Lastly, Dr. Eller concluded that "writing a great deal or using [a] computer or things of that nature in a prolonged fashion tend to aggravate these types of problems," and therefore, "would not be in [claimant's] best interest." EX 12 at 23.

education, work experience, and physical restrictions, that claimant is incapable of performing any of these jobs, the administrative law judge's conclusion that employer failed to meet its burden of demonstrating the availability of suitable alternate employment and consequent award of total disability benefits is affirmed,[14] as it is supported by substantial evidence.[15] *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188 (CRT)(8th Cir. 1998); *Thompson v. Lockheed Shipbuilding & Const. Co.*, 21 BRBS 94 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[14]Employer's reliance on *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997), in favor of its argument that the administrative law judge erred in his consideration of its evidence of suitable alternate employment is misplaced. The administrative law judge fully discussed the pertinent aspects of *Moore* in his decision, *see* Decision and Order at 16, n. 2, and his discussion of employer's evidence of suitable alternate employment conforms with that holding.

[15]Inasmuch as the administrative law judge rationally found that employer did not establish the availability of suitable alternate employment, he was not required to address the issue of whether claimant diligently sought work. *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987). Consequently, we decline to address employer's contention that claimant did not diligently seek work. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

JAMES F. BROWN
Administrative Appeals Judge