BRB No. 10-0692

WILLIAM BLUE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TACOMA NARROWS CONSTRUCTORS	)	
	)	
and	)	
	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY	)	DATE ISSUED: 02/24/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
AMERICAN CIVIL CONTRACTORS/ HURLEN CONSTRUCTION	)	
	)	
and	)	
	)	
ALASKA NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

David B. Condon (Welch & Condon), Tacoma, Washington, for claimant.

Thomas Owen McElmeel, Seattle, Washington, for Tacoma Narrows Constructors and St. Paul Fire & Marine Insurance Company.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for American Civil Contractors/Hurlen Construction and Alaska National Insurance Company.

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

PER CURIAM:

Tacoma Narrows Constructors (TNC) appeals the Decision and Order Awarding Benefits (2005-LHC-02536) of Administrative Law Judge Jennifer Gee 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In October 2002, claimant commenced maritime employment with American Civil Contractors/Hurlen Construction (ACC/Hurlen) as a pile driver. Claimant's employment duties included using grinders and drills to extend a dock. On February 13, 2003, claimant developed pain and numbness in his hands while working with a welding machine and cables. Claimant, who lost no time from work as a result of this incident, sought medical treatment and was diagnosed with right trigger thumb, bilateral carpal tunnel syndrome, and inflammation of his elbow. Claimant received a steroid injection in his right thumb and, as he wished to continue working, he declined to undergo testing to confirm the diagnosis of carpal tunnel syndrome. In April 2003, claimant was laid off by ACC/Hurlen.

On May 8, 2003, claimant commenced employment with TNC, where he worked on floating caissons which were being constructed as part of the Tacoma Narrows Bridge project.[1] Claimant's employment duties with TNC, which claimant testified were considerably heavier than those he had performed with ACC/Hurlen, involved welding

[1]The two caissons on which claimant worked were described as hollow, watertight, box-like structures that were afloat on the water and were towed to positions in the Tacoma Narrows where they were anchored while TNC's employees increased their size. Employees of TNC, including claimant, erected concrete walls, which added height and depth to the caissons, which in turn resulted in the caissons' sinking deeper into the water of the Tacoma Narrows. After reaching bedrock, the caissons were attached to the sea floor in order to serve as the foundations for the two towers which were then constructed at either end of the new Tacoma Narrows Bridge.

with repetitive lifting, grasping, climbing and carrying objects weighing approximately 75 to 100 pounds. On August 27, 2003, claimant sought medical treatment at an emergency room for left arm and finger pain; claimant was diagnosed with a possible left arm nerve root compression and was advised to limit lifting and not engage in strenuous activity. While claimant testified that his symptoms, most notably hand pain, subsequently became worse, he did not miss time from work. However, on October 14, 2003, claimant sought medical care for his increasing arm symptomatology; a nerve conduction study performed at this time confirmed the prior diagnosis of bilateral carpal tunnel syndrome. While claimant was informed that surgery might be necessary to relieve his symptoms, he opted for conservative treatment including the use of a wrist brace. Claimant was laid off by TNC on or about December 8, 2003, when the caissons reached the sea bed floor. *See* n.1, *supra.* At this time, TNC offered claimant non-maritime employment on a project in Seattle, Washington; due to his ongoing hand symptoms, claimant declined TNC's offer of continued employment.

On January 13, 2004, claimant commenced treatment with Dr. Russell for complaints of upper extremity symptoms, including numbness and tingling in his arms. Dr. Russell opined that claimant's bilateral carpal tunnel syndrome and elbow inflammation were cumulative trauma disorders resulting from repetitive work activities and recommended conservative care. Claimant's symptoms did not improve, and Dr. Russell performed left carpal tunnel release surgery on April 2, 2004, and right carpal tunnel release surgery on May 14, 2004. Claimant continued to treat with Dr. Russell for pain in his fingers and elbows until November 2004; Dr. Russell recommended left trigger release surgery which TNC did not authorize.[2]

Claimant filed a claim for benefits against ACC/Hurlen on April 19, 2004, for the injury on February 13, 2003. ACC/Hurlen paid claimant benefits from February 10, 2004 to August 8, 2004. ACC/Hurlen then filed a notice of controversion on the ground that a subsequent employer is liable for claimant's condition. On September 29, 2004, claimant filed an amended claim for benefits, joining TNC as a potentially liable employer.

In her Decision and Order, the administrative law judge determined that claimant's work for TNC is covered under the Act, and that TNC is the employer liable for claimant's benefits. The administrative law judge found that claimant's thumb and elbow conditions had not reached maximum medical improvement, that claimant is unable to perform his usual employment duties as a pile driver, and that employer established the availability of suitable alternate employment as of February 16, 2006. Accordingly, after

[2]Soon after this date, Dr. Russell, for reasons related to his health, ended his medical practice.

calculating claimant's average weekly wage pursuant to Section 10(a), 33 U.S.C. §910(a), the administrative law judge awarded claimant temporary total disability benefits from February 10, 2004, through February 16, 2006, temporary partial disability benefits from February 17, 2006, and continuing, and medical benefits. 33 U.S.C. §§908(b), (e), 907.

On appeal, TNC challenges the administrative law judge's determination that claimant's employment duties with it were covered under the Act. Alternatively, TNC argues that the administrative law judge erred in finding that claimant's medical conditions are causally related to his employment with TNC such that it is the responsible employer. TNC additionally challenges the administrative law judge's findings regarding the nature and extent of claimant's disability and the calculation of claimant's average weekly wage. Claimant and ACC/Hurlen respond, urging affirmance of the administrative law judge's decision.

Coverage Under The Act

TNC first argues that the administrative law judge erred in finding that claimant's employment with it was covered under the Act. Specifically, TNC contends that those engaged in bridge construction are not covered under the Act, that claimant's work on the caissons is not work that was traditionally covered by the Act prior to the 1972 Amendments, and that, consequently, the administrative law judge erred by finding that claimant's employment on actual navigable waters conferred coverage under the Act.

Prior to the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, claimant had to establish that his injury occurred upon the navigable waters of the United States, including any dry dock. *See* 33 U.S.C. §903(a)(1970)(amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of Section 2(3), 33 U.S.C. §902(3), and to expand the sites covered under Section 3(a) landward. In *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), the Supreme Court of the United States held that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage from workers injured on navigable waters who were covered by the Act before 1972. Thus, the Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3) and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT); *see also Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1997). With regard to bridge workers specifically, prior to 1972, employees injured on navigable waters while engaged in bridge work were held covered by the Act. *See Davis v. Dept. of Labor*, 317

U.S. 249 (1942); *Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), *aff'd*, 463 F.2d 252 (3d Cir. 1972); *Dixon v. Oosting*, 238 F.Supp. 25 (E.D. Va. 1965). In contrast, workers injured on a bridge structure attached to land are not entitled to the Act's coverage because a bridge is an extension of land. *See, e.g., F.S. [Smith] v. Wellington Power Co.*, 43 BRBS 111 (2009); *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000); *Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996); *Cf. LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982) (worker injured on bridge being constructed to aid maritime navigation as well as land traffic is covered).

In this case, the administrative law judge reviewed the relevant case law, and rejected TNC's contention that claimant's work on the caissons did not establish his entitlement to coverage under the Act. The administrative law judge found that it is undisputed that all of claimant's employment with TNC involved his working on caissons that were suspended in the navigable waters of the Tacoma Narrows.[3] Decision and Order at 46. Citing the decision of the United States Court of Appeals for the Second Circuit in *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006), the administrative law judge determined that as the caissons were suspended in the navigable waters of the Tacoma Narrows, those structures were afloat upon, over or in navigable waters. The administrative law judge properly determined that it was not necessary to characterize the caissons on which claimant worked as "vessels," since the Act and case precedent look to whether the injured employee was on navigable waters, not whether he was on a vessel. Decision and Order at 48, *citing Morganti*, 412 F.3d at 415, 39 BRBS at 42-43(CRT). The administrative law judge concluded that, as claimant performed all of his employment duties for TNC on caissons suspended in and surrounded by the navigable waters of the Tacoma Narrows, claimant's work is covered under the Act. *Id.*

The administrative law judge's analysis of the coverage issue is rational, her findings of fact are supported by substantial evidence, and her conclusion is in accordance with law. *Perini*, 459 U.S. at 315-316, 15 BRBS at 76-77(CRT). It is undisputed that claimant performed all his employment duties for TNC while on navigable waters. *Id.; see Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985); *Morganti*, 412 F.3d 407, 39 BRBS 37(CRT); *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*). There is no evidence that the caissons were ever affixed to land or to the sea bed during the period of time claimant worked for TNC. The fact that this work was for the purpose of bridge construction is immaterial as such work is covered if, as here, it occurred on navigable waters. *Walker*,

[3]TNC concedes on appeal that claimant worked exclusively on the construction of the two caissons, and that claimant left its employ when the caissons were completed and lowered to the floor of the Tacoma Narrows. *See* TNC Br. at 4.

34 BRBS 176. Therefore, the administrative law judge's finding that claimant's employment with TNC is covered under the Act is affirmed. *Id.*

Responsible Employer

TNC challenges the administrative law judge's determination that it, rather than ACC/Hurlen, is the employer responsible for any benefits due claimant under the Act. In this regard, TNC asserts that while ACC/Hurlen admitted that claimant sustained a specific work-related injury while working on February 13, 2003,[4] the evidence of record fails to establish that claimant sustained a permanent aggravation of his condition due to his employment with TNC. We reject this contention of error.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated that, in allocating liability between successive employers in cases involving traumatic injury, the employer at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains a subsequent injury which aggravates, accelerates, or combines with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable.[5] *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). Where claimant's work results in an exacerbation of his symptoms, the employer at the time of the work events resulting in the exacerbation is responsible for any resulting disability. *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). In this regard, the Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also*

[4]The parties stipulated that claimant's employment duties with ACC/Hurlen were covered under the Act. H. Tr. at 10-11.

[5]Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. The relative contribution of the pre-existing condition and the aggravation injury are not weighed. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

Abbott v. Dillingham Marine & Manufacturing Co., 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

In this case, substantial evidence supports the administrative law judge's finding that claimant's employment with TNC altered the nature and increased the severity of his injuries, extended claimant's complaints into his upper arms, and aggravated his pre-existing wrist, thumb, and elbow conditions.[6] The administrative law judge made specific findings in concluding that claimant's employment with TNC between May 5 and December 8, 2003, aggravated and/or accelerated his pre-existing medical conditions: 1) claimant's credible testimony establishes the existence of work duties, specifically heavy labor, repetitive hand movements and exposure to cold temperatures, which the doctors agreed could aggravate carpal tunnel syndrome, *see* AX 25, 26; 2) Dr. Russell, the treating physician, opined that claimant's work for TNC had been injurious to his medical conditions; 3) claimant engaged in work requiring greater force while employed by TNC; 4) claimant engaged in work requiring more repetitive grasping while employed by TNC; 5) claimant testified that the severity of his symptoms became progressively worse during this period of employment; 6) claimant's complaints during this period expanded to include his upper arm, shoulder, and left thumb; 7) claimant sought medical treatment in August and October 2003 for his symptoms of pain; and 8) following his December 2003 lay-off, claimant declined TNC's offer of continued employment based upon his desire to pursue medical treatment for his continuing upper extremity conditions. *See* Decision and Order at 56 – 60.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In this case, the administrative law judge considered all of the evidence presented by the parties on this issue, and she relied on the aforementioned factors in finding that claimant's with TNC resulted in the progression, aggravation and acceleration of his symptoms resulting in disability. As the administrative law judge's finding is supported by substantial evidence and consistent with law, we affirm the

[6]The administrative law judge also addressed claimant's injury in terms of the occupational disease standard for determining the responsible employer. *See generally Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293 (9th Cir. 2010). We need not address the propriety of these findings as the administrative law judge made sufficient findings that claimant's disabling condition resulted from the aggravation of his condition while employed by TNC, as opposed from the natural progression of the injury sustained with ACC/Hurlen. *See Port of Portland v. Director, OWCP*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000).

administrative law judge's finding that TNC is liable for the benefits due claimant under the Act. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F.App'x 640 (9th Cir. 2010); *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 F.App'x 547 (9th Cir. 2001); *see also Amos v. Director, OWCP*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999).

Maximum Medical Improvement

TNC contends that the administrative law judge erred in failing to find that claimant's thumb and elbow conditions had reached maximum medical improvement.[7] Claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 349 U.S. 976 (1969); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). Moreover, a claimant may be found to have reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See, e.g., Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

In support of its allegation of error, TNC asserts that the opinions of Drs. Keck, Blue and Brooks establish that claimant's thumb and elbow conditions have reached a state of permanency.[8] In concluding, as of the closing of the record in February 2007, that claimant had not yet reached maximum medical improvement with regard to his

[7] The administrative law judge's finding that claimant's carpal tunnel syndrome has reached maximum medical improvement is not challenged on appeal.

[8] Dr. Keck, on June 7, 2006, opined that claimant's condition was at least stable and that there was no need for further treatment. AX 27 at 29 – 35. Dr. Blue, after examining claimant on September 6, 2006, opined that claimant's carpal tunnel syndrome had reached maximum medical improvement and rated claimant's upper extremity impairment at six percent. AX 26 at 20, 26 – 28. Dr. Brooks opined that while claimant may need surgery to treat his thumb condition, claimant's carpal tunnel and elbow conditions were stationary with no need for further testing or treatment. AX 25 at 75 – 77.

thumb and elbow conditions, the administrative law judge found that Dr. Russell, following his final examination of claimant on November 15, 2004, recommended further treatment and trigger release surgery for claimant's thumb condition. CX 4 at 142. She noted that Dr. Brooks similarly opined on October 16, 2006, that, should claimant continue to suffer from thumb triggering, he should undergo trigger release surgery. Decision and Order at 63; AX 25 at 75. Claimant testified that his thumb triggering had continued. H. Tr. at 75-76.

Regarding claimant's ongoing elbow symptoms, the administrative law judge noted Dr. Keck's diagnosis of ulnar neuritis and recommendation that claimant's elbow condition be monitored, and Dr. Blue's opinion that, while claimant's condition was stationary, enhanced MRI testing should be performed in light of claimant's complaints and that the results of such testing might indicate the need for additional surgery. Decision and Order at 64 – 65. The Board must respect the administrative law judge's weighing of the evidence and rational inferences drawn therefrom. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge could rationally conclude that claimant is in need of additional medical treatment with a view to improving his thumb and elbow conditions. Substantial evidence thus supports the administrative law judge's finding that claimant has not reached maximum medical improvement with regard to these two conditions. We therefore affirm the administrative law judge's finding on this issue. *See generally Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006); *Monta v. Navy Exchange Service Command,* 39 BRBS 104 (2005).

Extent of Claimant's Disability

TNC contends the administrative law judge erred in awarding total disability benefits after August 2004. In order to establish a *prima facie* case of total disability, claimant must demonstrate that he is unable to return to his usual work due to the work injury. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). If claimant establishes his inability to return to his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish that suitable work was realistically and regularly available to claimant on the open market. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). Since an injured claimant's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available, employer can attempt to meet its burden by submitting a retrospective labor market survey establishing the availability of suitable jobs at an earlier date than that of the vocational report. *See Stevens*

v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on recon.).

TNC first avers that the administrative law judge erred in awarding claimant total disability compensation subsequent to August 5, 2004, the date on which Dr. Russell opined that claimant could return to work. TX 25 at 78 – 79. We disagree. As TNC concedes in its brief, Dr. Russell released claimant to return to work with restrictions from "vibration or impact exposure" to his hands.[9] *Id.* In crediting Dr. Russell's opinion, the administrative law judge found that he had a "far clearer vision of the impact of pile driving duties on the Claimant's upper extremity conditions." *See* Decision and Order at 68. Additionally, the administrative law judge noted Dr. Brooks's concession that repetitive activities could certainly cause a flare up in claimant's thumb condition, H. Tr. at 115, 127, Dr. Blue's failure to state whether claimant's conditions limited his ability to return to work absent the performance of additional testing, AX 26 at 29, and claimant's testimony regarding the increase in his symptoms upon the use of a grinding tool, in concluding that claimant cannot return to work as a pile driver. Decision and Order at 68. In this case, employer has not established error in the administrative law judge's finding that claimant cannot return to his usual employment duties as a pile driver due to the restrictions placed on claimant's physical activities. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT) (1st Cir. 2004). We therefore affirm the administrative law judge's conclusion that claimant is entitled to total disability compensation from February 10, 2004, until the date on which employer established the availability of suitable alternate employment.

Alternatively, TNC contends that it established the availability of suitable alternate employment as of November 2004, based upon the written report of its vocational expert, Ms. Cohen. In her decision, the administrative law judge addressed at length the vocational evidence authored by Ms. Cohen and concluded that suitable alternate employment for claimant as a security guard was not established until February 17, 2006. Decision and Order at 68 – 74. The administrative law judge rejected Ms. Cohen's assertion that similar positions were available for claimant in November 2004. In this case, the only statement regarding the availability of employment positions suitable for claimant prior to February 16, 2006, is contained in an October 30, 2006, letter to TNC's counsel wherein Ms. Cohen wrote,

[9]On February 10, 2004, Dr. Russell stated that he was not in favor of claimant working as a pile driver. On July 22, 2004, Dr. Russell opined that claimant was permanently disabled from his job as a pile driver. *See* CX 4 at 129, 140.

> In follow-up to my report of April 6, 2006, please be advised that the 11 positions detailed in the labor market survey section of that report, specifically to include the job titles of Desk Clerk, Cashier, Security Guard, Production Worker, Teller, Machine Operator, and Customer Service Representative, are jobs that I find to be generally available in the Puget Sound labor market. Based on review of our in-house historic job bank, jobs of this type were available in November of 2004.

AX 24 at 256. In challenging the administrative law judge's finding that it did not establish the availability of suitable alternate employment as of November 2004, employer contends that Ms. Cohen's report "did refer to such specific jobs since it was based on her review of the actual job banks for that period." TNC's Br. at 43. We reject this contention of error. The administrative law judge rationally found this evidence insufficient to establish that specific, suitable jobs were available in November 2004. The administrative law judge must be able to determine the suitability of identified jobs and, without further information, the administrative law judge was unable to ascertain this with respect to any jobs available in November 2004. *See generally Fortier v. Electric Boat Corp.,* 38 BRBS 75 (2004). Consequently, we reject TNC's contention and affirm the finding that employer established the availability of suitable alternate employment as of February 16, 2006.

Average Weekly Wage

TNC challenges the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). In addressing the issue of average weekly wage, the administrative law judge found that claimant worked 190 days, over a span of 44 weeks, during the 52 weeks prior to his injury, and that therefore it was appropriate to apply Section 10(a) of the Act to calculate claimant's average weekly wage. The administrative law judge divided claimant's earnings for the 52-week period prior to claimant's injury, $57,107.50, by the number of days he worked, 190, and found that claimant's daily wage was $300.57, with corresponding annual earnings of $78,148.20. Dividing that figure by 52 pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), the administrative law judge found that claimant's average weekly wage was $1,502.85. In challenging the administrative law judge's decision to utilize Section 10(a) of the Act to determine claimant's average weekly wage, TNC contends that the administrative law judge overlooked the temporary nature of claimant's work with TNC and that the resulting figure is unreasonable in light of claimant's historical earnings. We reject TNC's assertions of error.

Section 10(a) of the Act, states:

> If the injured employee shall have worked in the employment in which he was working at the time of his injury, *whether for the same or another employer*, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a) (emphasis added). In this case, the administrative law judge found that claimant worked substantially the whole of the year as a pile driver with ACC/Hurlen, W.C. Frost, and TNC. The administrative law judge's finding that 44 weeks is "substantially the whole of the year," and that claimant's employment with the three employers was similar is affirmed as it is rational, supported by substantial evidence, and in accordance with law. *See Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006); *Hole v. Miami Shipyard Corp.*, 12 BRBS 38 (1980), *rev'd on other grounds*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). Thus, the fact that claimant's employment with TNC was temporary does not require the use of Section 10(c) to calculate claimant's average weekly wage. *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), *aff'd mem.*, 710 F.2d 836 (5th Cir. 1983). Claimant's employment with employer did not involve "fixed, determinable periods of inactivity" that would render Section 10(a) inapplicable. *See Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

Moreover, administrative law judge did not err in applying Section 10(a) merely because the resulting average weekly wage is greater than claimant's actual earnings. The Ninth Circuit has held that overcompensation alone is an insufficient reason to rebut the use of Section 10(a). *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). In *Matulic*, the Ninth Circuit held that when a claimant works 75 percent of the workdays of the measuring year Section 10(a) applies, if the necessary information is in the record. *Id.*, 154 F.3d at 1058, 32 BRBS 151-152(CRT). The administrative law judge found that claimant worked 73 percent of the days available to him during the applicable period and rationally concluded that Section 10(a) could be utilized to calculate claimant's average weekly wage. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). This result is not precluded by *Matulic* based on the rational finding that claimant worked substantially the whole of the year prior to injury. Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's calculation of claimant's average weekly wage as $1,502.85, pursuant to Section 10(a).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.[10]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[10] As the administrative law judge's Decision and Order is affirmed in its entirety, we need not address TNC's arguments regarding its ability to recoup any overpayment of benefits made to claimant. *See Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir. 1990), *cert. denied*, 505 U.S. 1230 (1992) (court concludes that Congress did not intend to permit an employer a federal cause of action against a claimant for repayment of alleged overpayments of compensation).