

BRB Nos. 08-0119
and 08-0119A

J.T.)
)
Respondent)
Cross-Petitioner)
)
v.)
)
GLOBAL INTERNATIONAL)
OFFSHORE, LIMITED)
)
and)
)
LIBERTY MUTUAL INSURANCE) DATE ISSUED: 07/29/2009
COMPANY)
)
Employer/Carrier-)
Respondents)
Cross-Respondents)
)
KELLER FOUNDATION/CASE)
FOUNDATION)
)
and)
)
ACE U.S.A./E.S.I.S.)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents) DECISION and ORDER

Appeals of the Order Denying in Part and Granting in Part Employer's Motion for Summary Decision (Oct. 13, 2004), the Order Granting in Part and Denying in Part Employer's Motion for Summary Decision, and Granting in Part and Denying in Part Claimant's Cross Motion for Summary Decision (May 2, 2005), the Decision and Order Awarding Temporary Partial Disability Benefits and Hearing Loss Benefits, and the Order Granting Claimant's Motion for Reconsideration of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree and Paul R. Myers (Dupree Law), San Diego, California, for claimant.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for Global International Offshore, Limited, and Liberty Mutual Insurance Company.

Robert E. Babcock (Babcock/Haynes, L.L.P.), Lake Oswego, Oregon, for Keller Foundation/Case Foundation and Ace U.S.A./E.S.I.S.

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

PER CURIAM:

Keller Foundation (Keller) appeals and claimant cross-appeals the Order Denying in Part and Granting in Part Employer's Motion for Summary Decision (Oct. 13, 2004), the Order Granting in Part and Denying in Part Employer's Motion for Summary Decision, and Granting in Part and Denying in Part Claimant's Cross Motion for Summary Decision (May 2, 2005), the Decision and Order Awarding Temporary Partial Disability Benefits and Hearing Loss Benefits, and the Order Granting Claimant's Motion for Reconsideration (2004-LHC-0698) of Administrative Law Judge Anne Beytin Torkington 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).¹ 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Global Offshore (Global) in Louisiana from October 1995 until approximately February 1996. He was assigned to convert the *DB-1/Navajo* from a flat-deck barge to a derrick barge. He was then assigned to the *Hercules* which he accompanied on a job in the Gulf of Mexico. Between July 1996 and November 1997, claimant worked for Keller in San Diego, California. He worked on the South Bay Ocean Outfall sewer project where he worked from barge decks installing a temporary

¹On September 9, 2008, the Board dismissed these appeals and remanded the case to the district director for reconstruction of the record. In an order dated October 28, 2008, the Board acknowledged receipt of the complete record and reinstated the appeals.

platform approximately three miles offshore, he loaded and unloaded barges at the shore and the platform and outfitted the platform, and, during the last six months of his employment with Keller, he spent 95 percent of his time loading and unloading barges at the R.E. Staite shipyard. In March 1998, claimant contracted with Global to work as a barge foreman on the *Iroquois*. He worked on this vessel in the shipyard in Louisiana before its voyage, while it was being towed to Mexico, and while it was laying pipe off the coast of Del Carmen, Mexico. Thereafter, and until his heart attack in 2002 caused him to stop working, claimant worked overseas for Global on barges “264” and the *Seminole* and in ports in Malaysia, Singapore, and Indonesia. Decision and Order at 6-8; Oct. 2004 Order at 2-3.

Following recuperation from his 2002 heart attack,² claimant complained to his physician in August 2002 that he was having numbness and tingling in his hands.³ Decision and Order at 28; Cl. Ex. 3; Global Ex. 10, 26. The parties do not dispute that claimant suffers from bilateral carpal tunnel syndrome, bilateral arthritis of the hands, and bilateral ulnar entrapments. Decision and Order at 44. The parties also do not dispute that claimant suffers from hearing loss in his left ear. Claimant filed a claim for benefits for his hearing loss, upper extremity trauma, and heart condition against Global on February 24, 2003. Global Ex. 1. The administrative law judge issued an order joining Keller to the case in September 2005. Keller Ex. 3.

On May 5, 2004, Global filed a motion for summary decision alleging that claimant was excluded from coverage because he was a member of a crew and because his injuries did not occur on “navigable waters of the United States.” In her October 2004 Order, the administrative law judge found that claimant was not a member of a crew while renovating the *DB-1/Navajo* for Global in 1995-1996 and that there was a triable issue of fact as to whether he was covered by the Act during this period when he potentially suffered cumulative arm trauma. Additionally, the administrative law judge found that claimant was excluded from coverage when he suffered his 2002 heart attack because he was a member of the crew of the *Seminole*, a vessel in navigation. Oct. 2004 Order at 6-7.

²Claimant had a heart attack in 1999 and was off work from approximately October 21, 1999, until May 15, 2000. Cl. Ex. 25; Global Ex. 12 at 163, 168; Global Ex. 27 at 16; Cl. Reply Brief at 8.

³Claimant testified that he experienced numbness and pain prior to his 2002 heart attack and reported it to the barge medic, but he worked through the pain so as to not jeopardize his job. Global Ex. 19 at 94-96.

On January 5, 2005, claimant and Global filed motions for summary decision, both alleging they are entitled to summary decision on issues of either status or situs. The administrative law judge found there is a triable issue of fact regarding whether claimant's hand/arm injuries are due to cumulative trauma. She reiterated that claimant was not a member of a crew during his assignment on the *DB-1/Navajo* in 1995-1996 and that there was a triable issue as to whether he was covered by the Act during that period.⁴ The administrative law judge also found that claimant was a member of a crew and was thus not covered by the Act during his assignment to the *Hercules* in February 1996. May 2005 Order at 6-8. Additionally, the administrative law judge found that the Board's decision in *Weber v. S.C. Loveland Co. [Weber I]*, 28 BRBS 321 (1994), *decision after remand [Weber II]*, 35 BRBS 75 (2001), *on recon.*, 35 BRBS 190 (2002), is distinguishable and that any injuries claimant sustained in the Asian ports are not covered because the ports are not "navigable waters of the United States." Thus, she found that claimant was not a covered employee during his land-based assignments in Asia. May 2005 Order at 3, 9-10.⁵

In her Decision and Order on the merits, the administrative law judge found that claimant was not a covered employee during his last employment with Global between 1998 and 2002. She found that he was, however, a covered employee with Keller in 1997 because of his duties loading and unloading barges at the platform and on shore, as well as outfitting and dismantling a concrete mixing barge.⁶ Thus, the administrative law judge determined that Keller is the responsible employer. Decision and Order at 11-19. In addressing claimant's injury and compensation, the administrative law judge found that claimant's upper extremity condition "developed over time due to cumulative trauma from his work[.]" *id.* at 45, and that he was exposed to injurious noise during the course of his employment, *id.* at 47. She concluded that Keller is liable to claimant for temporary partial disability benefits for three different periods and for temporary total disability benefits for two different periods for the upper extremity injury.⁷ 33 U.S.C.

⁴The issue of status under the Act was not addressed in the May 2005 Order.

⁵Keller also filed a motion for summary decision at some point, and the administrative law judge denied the motion in a conference call without a formal order. Decision and Order at 7; Tr. at 6.

⁶The administrative law judge also found that claimant's work with Global in 1995 was covered employment. Decision and Order at 19.

⁷The administrative law judge awarded claimant the following benefits: temporary partial disability from June 26 through September 9, 2002, November 27, 2002, through December 7, 2004, and from January 20, 2005, until he reaches the maximum five-year time limit; and temporary total disability from September 10 through

§908(a), (e). The administrative law judge also awarded claimant hearing loss benefits on a binaural basis for 13.126 weeks, medical benefits for both upper extremities' conditions and hearing loss, and interest. She awarded Keller a credit for benefits already paid. Decision and Order at 99. In response to claimant's motion for reconsideration, the administrative law judge clarified that, due to her earlier rulings, claimant was not a covered employee during his second period of employment with Global between 1998 and 2002. Order Granting Cl. M/ Recon.

Keller appeals the administrative law judge's decision, arguing that it is not the responsible employer. Global responds, urging affirmance. BRB No. 08-0119. Claimant cross-appeals, arguing that Global should be held liable as the responsible employer and that, regardless of which employer is liable, the administrative law judge's findings on hearing loss, suitable alternate employment, average weekly wage, and maximum compensation rate are erroneous. Global responds, urging the Board to reject claimant's contentions. Keller responds, agreeing in part with claimant and agreeing in part with Global. BRB No. 08-0119A.

Estoppel

Claimant first contends Global is the responsible employer as it is estopped from denying coverage under the Act by virtue of claimant's employment contract with Global which, he argues, provides that he is covered by the Act in the event of occupational injury or illness.⁸ Specifically, claimant asserts that the administrative law judge erred in addressing this argument as if it were an equitable estoppel issue, contending she should have addressed it as a promissory estoppel issue. That is, claimant asserts he is entitled to a remedy based on Global's promise, as the contract between them "constituted an assurance that he would be entitled to recovery of compensation under the Longshore

November 26, 2002, and December 8, 2004, through January 19, 2005. Decision and Order at 99.

⁸The employment contract, *see* Global Brief at 4, states:

Employee is covered for workers' compensation benefits, if any, payable under the laws of the Employee's country of origin which benefits will be provided by the Employer's insurance carrier and shall be paid as the sole and exclusive remedy for any occupational injury or illness arising out of and in the course and scope of employment under this Agreement.

Act”⁹ making “Global’s crew-member and ‘extraterritoriality’ defenses” moot. Cl. Brief at 11-12; Cl. Reply Br. at 5. Global responds, arguing that, even if estoppel were to apply as to any Jones Act remedy claimant might have, if workers’ compensation is implicated, claimant’s injuries could fall under a state workers’ compensation law as opposed to the Longshore Act, as the contract does not specify that the applicable workers’ compensation law would be the Longshore Act. Global, therefore, argues that the administrative law judge properly allowed it to proceed with its coverage defenses.

The administrative law judge, as claimant states, applied the equitable estoppel doctrine to this issue and found that claimant did not satisfy the requisite elements.¹⁰ Specifically, she found that claimant did not claim he actually relied to his detriment on the contract language. Absent detrimental reliance, equitable estoppel cannot apply, and the administrative law judge concluded that there is insufficient evidence to bar Global from raising defenses to longshore coverage. Decision and Order at 20-21.

Claimant asserts that his contention should be addressed as a promissory estoppel argument; however, that doctrine is not applicable. Promissory estoppel is a state law doctrine of general applicability that creates legal obligations, never explicitly assumed by the parties, which are enforceable in the courts. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). Promissory estoppel is not applicable when there is a contract between the parties. *Id.* at 668. As claimant is asserting promissory estoppel or at least something similar in relation to his *contract* with Global, claimant’s argument is rejected. Moreover, claimant’s contract with Global is not a guarantee of coverage under the Act; rather, it is a guarantee that if workers’ compensation is implicated for an injury related to

⁹Claimant argues that the phrase pertaining to the laws of the “country of origin” refers to federal laws of the United States, not to individual state laws. Cl. Reply Br. at 5.

¹⁰Equitable estoppel is a doctrine in equity which prevents one party from taking a position inconsistent with a position it took in an earlier action such that the other party would be at a disadvantage. Reasonable reliance to the party’s detriment is essential for application of this doctrine. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *rev’d on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). To apply this doctrine to claims under the Act, four elements are necessary: “(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former’s conduct to his injury.” *Rambo*, 81 F.3d at 843, 30 BRBS at 29(CRT); *see also Betty B*, 194 F.3d at 504, 22 BLR at 2-23; *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

the contracted employment, then compensation will be paid pursuant to laws of claimant's home country. As Global asserts, this language could include workers' compensation under state law. Coverage under the Longshore Act is provided only for those employees who satisfy the Act's coverage requirements. 33 U.S.C. §§902(3), 903(a). As promissory estoppel is not applicable and as the administrative law judge rationally found that equitable estoppel is not applicable due to the lack of detrimental reliance, the administrative law judge correctly permitted Global to defend against coverage.

Coverage

The administrative law judge found that claimant was a covered employee from 1996 to 1997 when he worked for Keller. Keller does not appeal this finding. Instead, Keller contends the administrative law judge erred in finding that claimant was not covered for at least a portion of the time when he worked for a subsequent employer, Global, between 1998 and 2002. Keller asserts that claimant was not a member of a crew when he worked on the *Iroquois* in Louisiana in 1998 because, for a portion of that employment, his duties were land-based and he was only an "expectant seaman." Keller also asserts that claimant worked on a covered situs when he worked in the Asian ports because waters in foreign ports are covered sites pursuant to *Weber v. S.C. Loveland Co. [Weber I]*, 28 BRBS 321 (1994), *decision after remand [Weber II]*, 35 BRBS 75 (2001), *on recon.*, 35 BRBS 190 (2002). Claimant adopts Keller's arguments. Global responds, arguing that the Asian ports are not "navigable waters of the United States" and that the Act does not apply to territorial waters of a foreign country.

Keller first argues that claimant's employment with Global in 1998 should be addressed in phases coinciding with his land-based and ship-based work. Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), excludes from the Act's coverage "a master or member of a crew of any vessel." The term "member of a crew" is synonymous with the term "seaman" under the Jones Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991). An employee is a "member of a crew" if: (1) his duties contributed to the vessel's function or to the accomplishment of its mission, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991), and (2) he had a connection to a vessel in navigation that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *see also Stewart v. Dutra Constr. Co., Inc.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); *Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441, 39 BRBS 67(CRT) (5th Cir. 2006).

The administrative law judge found that claimant was hired in 1998 as the "barge foreman" of the *Iroquois*. He worked at Global's yard in Louisiana preparing the barge

for its voyage. He also worked on the *Iroquois* while it was being towed, while it was in port in Mexico, and again while it was laying pipe off the Mexican shore. Decision and Order at 9-11; Tr. at 223, 233, 647. The administrative law judge found that the *Iroquois* was a vessel in navigation the entire time claimant was employed to work on her. She also found that all of claimant's work contributed to the function and mission of the *Iroquois*, that claimant's connection to the vessel was substantial in duration and nature, and that the temporary assistance he rendered in loading/unloading another barge in Louisiana did not alter his connection with the *Iroquois*. In light of these findings, the administrative law judge concluded that claimant was a member of a crew while working for Global in 1998. Decision and Order at 12-14. We affirm this conclusion.

There is no dispute that the *Iroquois* is a vessel and that at least a portion of claimant's work was as a member of her crew. What is in dispute is when claimant attained "crew member" status. Citing *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), and *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996), Keller argues that claimant was only an "expectant seaman" while in the Louisiana port and is, therefore, covered under the Longshore Act. However, contrary to Keller's contention that the administrative law judge must consider claimant's work in phases, the Supreme Court emphasized in *Chandris*, 515 U.S. at 370, that the fact-finder must consider the "total circumstances" of employment, and it stressed in *Wilander*, 498 U.S. at 353-354, 26 BRBS at 82-83(CRT), that the key is the connection to the vessel not the job. See *Lacy v. Southern California Ship Services*, 38 BRBS 12, 15 (2004). Because a vessel remains a "vessel" whether it is moving, moored, or at the dock undergoing repairs, a claimant's status does not change with the movement or non-movement of the vessel. *Stewart*, 543 U.S. at 495-496, 39 BRBS at 11(CRT); *Chandris*, 515 U.S. at 363, 373-374; see also *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957); *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997).¹¹ Rather, "when a maritime worker's basic assignment changes, his member of a crew status may change as well." *Chandris*, 515 U.S. at 372; see also *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 33 BRBS 31(CRT) (3^d Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Lacy*, 38 BRBS at 15; *McCaskie v. Aalborg Ciseriv Norfolk, Inc.*, 34 BRBS 9, 11-12 (2000).

As the administrative law judge found that claimant was hired for service on and to the *Iroquois* and that all of his duties contributed to the function or mission of that vessel, she rationally concluded that the period of employment while the barge was

¹¹ "[A] vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside, and is in 'navigation,' although moored to a dock, if it remains in readiness for another voyage." *Foster*, 31 BRBS at 193 (citing *Chandris*, 515 U.S. at 374).

docked should not be isolated from the remainder of the assignment at sea.¹² Claimant can be a member of a crew even though a portion of his duties are tasks stereotypical of longshoremen. *Chandris*, 515 U.S. 347; *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991); *see generally Foster*, 31 BRBS 191. Therefore, we affirm the administrative law judge's finding that claimant was excluded from coverage under the Act during his employment with Global in 1998 because he was a member of the crew of the *Iroquois*. Thus, Global cannot be the responsible employer based on claimant's 1998 employment in Louisiana.

Next, Keller argues that, pursuant to *Weber II*, 35 BRBS 75, and *Weber I*, 28 BRBS 321, claimant was covered by the Longshore Act when he was a land-based employee working for Global in ports in Asia between 1998 and 2002.¹³ The administrative law judge found that claimant's employment situation is distinguishable from the facts in *Weber* and that he was not covered by the Act during his overseas land-based employment with Global. Specifically, she found that the Asian ports do not satisfy the situs requirement of Section 3(a), as they do not constitute "navigable waters

¹²*Desper* and *Heise* are distinguishable from this case. In *Desper*, 342 U.S. 187, the decedent was not assigned to any vessel and all boats were on blocks at the time of his death. Indeed, his employment had ended prior to the winter, and he was rehired in the early spring to prepare the vessels for the upcoming launchings. He would not receive his boat assignment until the season started, at which time his maritime status could change. The Supreme Court held that he was not a seaman under the Jones Act. In *Heise*, 79 F.3d 903, the claimant was a land-based worker hired temporarily to help perform repairs on a fishing vessel at the time of his injury. He was told he might be able to continue his employment if he performed well and if there was room on the crew for him. The court held he was not a seaman covered by the Jones Act but was, at most, a potential crewman or a candidate to be a crew member when he was injured.

¹³We reject Global's argument that Keller's appeal of the May 2005 Order is untimely. The May 2005 Order was an interlocutory decision issued by the administrative law judge in response to Global's motion for summary decision. Challenges to interlocutory orders may be made when the administrative law judge has issued a final order which has been appealed on the merits. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Accordingly, Keller's appeal of findings rendered in the May 2005 Order are properly before us.

of the United States.” 33 U.S.C. §903(a);¹⁴ May 2005 Order at 9. Keller argues that the two cases are materially indistinguishable.

In *Weber*, the claimant, who worked primarily in the United States, was sent from Louisiana to Kingston, Jamaica, to unload cargo from a vessel loaded in New Orleans. On the day he arrived, he was injured while walking on the catwalk of a barge, unloading the cargo which had been loaded in Louisiana. In addressing whether the claimant’s injury should be covered by the Act, the Board discussed a number of cases involving voyages from U.S. ports with deviations onto the high seas. *Weber I*, 28 BRBS at 327; *see also* 33 U.S.C. §939(b) (allowing Secretary to establish compensation districts including the high seas and providing a judicial district for “any injury or death occurring on the high seas”). In those decisions, the United States Courts of Appeals for the Second and Fifth Circuits extended the Act’s coverage to include injuries occurring on the high seas. *Kollias v. D & G Marine Maintenance*, 29 F.3d 678 BRBS 70(CRT) (2^d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995) (covered injury during voyage between U.S. ports with planned deviation onto high seas); *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986) (covered injury during sea trials of U.S. vessel on high seas); *Cove Tankers Corp. v. United Ship Repair*, 683 F.2d 38, 14 BRBS 916 (2^d Cir. 1982) (covered injuries during voyage between U.S. ports when vessel unexpectedly deviated onto high seas). The Board also addressed cases under the Jones Act and the Death on the High Seas Act (DOSHA), noting that they did not exclude foreign waters from the definition of “high seas.” *See Howard v. Crystal Cruises, Inc.*, 41 F.3d 527 (9th Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995) (DOSHA); *In re Air Crash Near Bombay, India on Jan. 1, 1978*, 531 F.Supp. 1175 (W.D. Wash. 1982) (DOSHA); *Mancuso v. Kimex, Inc.*, 484 F.Supp. 453, 455 (S.D. Fla. 1980) (DOSHA); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979) (*en banc*), *cert. denied*, 446 U.S. 956, *reh’g denied*, 448 U.S. 912 (1980) (Jones Act); *McClure v. United States Lines Co.*, 368 F.2d 197 (4th Cir. 1966) (Jones Act). The Board acknowledged the trend in admiralty law to extend coverage into foreign waters to provide uniform coverage for American workers,

¹⁴Section 3(a), 33 U.S.C. §903(a), states:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

especially when all contacts, except for the site of injury, are with the U.S. *Weber I*, 28 BRBS at 329. Thus, the Board held that the claimant's injury in the port in Kingston, Jamaica, was covered.¹⁵ *Weber II*, 35 BRBS at 78; *Weber I*, 28 BRBS at 333; *see also Grennan v. Crowley Marine Services, Inc.*, 128 Wash. App. 517, 116 P.3d 1024 (Wash. Ct. App. 2005) (pursuant to *Weber*, Washington court held that employee who worked and lived on barges off Sakhalin Island, Russia, is covered).¹⁶

Keller and claimant assert that claimant has sufficient U.S. ties to invoke the situs holding in *Weber*. While claimant has ties to the United States,¹⁷ the administrative law judge rationally found they are insufficient to overcome the differences between this case and *Weber*. *Weber* involved an American worker, based in Louisiana, who was sent to Jamaica to unload the very vessel he helped load in Louisiana, and when the ship was unloaded, he was to return home. He worked 90-95 percent of his time in the United States. He was not permanently assigned to the Kingston port; he was only injured there while on this temporary assignment. Thus, to comport with the purpose of the Act, the Board relied on the above cases holding it rational to cover this purely American controversy. *Weber I*, 28 BRBS at 333; *see also Kollias*, 29 F.3d 67, 28 BRBS 70(CRT); *Reynolds*, 788 F.2d 264, 19 BRBS 10(CRT); *Cove Tankers*, 683 F.2d 38, 14 BRBS 916; *Howard*, 41 F.3d 527; *In re Air Crash Near Bombay*, 531 F.Supp. 1175; *Mancuso*, 484 F.Supp. 453; *Ivy*, 606 F.2d 524; *McClure*, 368 F.2d 197.

¹⁵The Board stated, *Weber I*, 28 BRBS at 333:

Where, as here, the injury occurs in the territorial waters of a foreign nation and claimant is a citizen of the United States, employer is based in the United States, the ship was under American flag, no choice of law issues was raised by the parties, and claimant meets the status requirement of the Act, we hold that the Longshore Act applies. That claimant has a remedy under [state law] is not relevant....

¹⁶The Washington court stated that the employee was a U.S. citizen, who worked on a U.S. ship for a U.S. employer and was not permitted on Russian land, the status requirements were met, and no choice of law issue was raised; therefore, it held that the Act applies. *Grennan*, 128 Wash. App. at 529, 116 P.3d at 1030.

¹⁷Claimant is a U.S. citizen who was working for a subsidiary of a U.S. company, and his initial contact with that company was in the U.S. Additionally, claimant's employment was governed by a contract in which the parties agreed that the workers' compensation law of claimant's "country of origin" would apply. Thus, as U.S. law would apply, any choice of law issues are eliminated.

To the contrary, claimant in this case was a long-term, contractual, Global employee who was based overseas between 1998 and 2002. During that time, he spent many months in ports in Singapore, Malaysia, and Indonesia, and he worked aboard barges which were berthed in and departed from those ports. His voyages did not begin in the U.S., and they did not “merely deviate” onto the high seas or foreign waters. Rather, his assignments commenced and terminated in foreign territories on foreign waters. The administrative law judge relied on this prolonged foreign assignment to conclude that while claimant was working in Indonesia and Singapore, all of his contacts were with those countries, as his assignments never required him to enter the U.S. May 2005 Order at 9. Thus, the administrative law judge rationally found that the facts of this case are materially distinguishable from those in *Weber*. Consequently, it cannot be said that claimant’s injuries, developing either on land in Asia or on the foreign seas, occurred on “navigable waters of the United States.” 33 U.S.C. §903(a); see *Cormier v. Oceanic Contractors, Inc.*, 696 F.2d 1112 (5th Cir. 1983); *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981). Accordingly, we affirm the administrative law judge’s determination that *Weber* does not apply and that claimant was not a covered employee during the course of his employment with Global in Asia between 1998 and 2002. 33 U.S.C. §903(a). Keller thus is the last responsible employer based on claimant’s 1997 employment, and we affirm the administrative law judge’s finding that it is liable for disability resulting from claimant’s work-related injuries. See generally *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984); see also *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); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979).

Average Weekly Wage

As we have affirmed the administrative law judge’s finding that claimant last worked in covered employment for Keller in 1997, we now address the remaining issues concerning claimant’s compensation. Claimant contends the administrative law judge erred in calculating his average weekly wage for his upper extremities condition by averaging his earnings from the years 2000 and 2001 to arrive at an average weekly wage of \$1,409.66 instead of using or including his higher earnings closer to the time his disability became manifest in 2002.¹⁸ He argues that he worked a full year prior to his 2002 heart attack and that his 2000 earnings were diminished by the market situation and by his being out of work after his 1999 heart attack until May 15, 2000.

¹⁸In 2000, claimant earned \$57,949, in 2001, he earned \$88,656, and in 2002, prior to his heart attack, he earned \$51,622. Decision and Order at 92; Cl. Ex. 22.

The administrative law judge found that claimant's upper extremity condition constitutes a cumulative traumatic injury and not an occupational disease. She concluded that average weekly wage is to be calculated as of the date claimant's disability became manifest pursuant to *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), rather than as of the date he was injured. Therefore, although claimant's last covered employment was in 1997, she found that the relevant date for calculating the average weekly wage for his upper extremity disability is June 26, 2002, and she stated that "his earnings from the end of his employment with Global best represent his earning capacity at that time." Decision and Order at 90. Next, the administrative law judge determined that Section 10(c), 33 U.S.C. §910(c), should be used to calculate claimant's average weekly wage.¹⁹ Decision and Order at 91. Because she found that claimant rarely worked 52 consecutive weeks, the administrative law judge concluded that it would be inappropriate to use his earnings from the first quarter of 2002 and the last three quarters of 2001 "because that was a rare period when Claimant worked almost continuously," and she stated it would be problematic to use the earnings from the first quarter of 2002 because "it is largely speculative how much of the year he would have worked for the full year but for his heart attack and upper extremity injuries." *Id.* at 92. Therefore, the administrative law judge used the earnings from 2000 and 2001, finding those to be the most accurate reflection of his earning capacity toward the end of his career with Global because they "were the last two years when he was physically able to work a full year." *Id.* at 92. Consequently, the administrative law judge averaged the two years of earnings and calculated an average weekly wage of \$1,409.66. *Id.* at 92-93.

Under Section 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981); *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980) (average weekly wage represents amount of potential to earn absent injury). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that average weekly wage for latent traumatic injuries should be

¹⁹The administrative law judge found that claimant regularly worked seven days per week for two or three months at a time, and then he would be off for 30 days. Decision and Order at 91-92; *see* Tr. at 236. It is undisputed that neither Section 10(a) nor 10(b), 33 U.S.C. §910(a), (b), applies to this case because claimant was a seven-day worker, and the record contains no evidence of wages of similarly-situated employees.

calculated using earnings as of the date disability commences. *Johnson*, 911 F.2d at 249-250, 24 BRBS at 5-7(CRT).²⁰

In this case, despite finding that claimant's earnings at the end of his career with Global best represent his earning capacity at the time of the onset of his disability, Decision and Order at 90, the administrative law judge stated she would not use the 52-week period preceding claimant's disability onset because that was a rare period where he worked 52 weeks consecutively. She stated that she would use claimant's wages from 2000 and 2001 because that was the last period where he was physically able to work a full year, and it best represented his earning capacity toward the end of his career with Global, Decision and Order at 92. These statements conflict with each other and, thus, the rationale cannot stand. *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). It is not logical to reject the use of claimant's more recent earnings because he worked a full year and to accept his earlier earnings because that was the last period he was able to work for a full year.²¹ Therefore, we must vacate the finding regarding the average weekly wage for claimant's upper extremity injury and remand the case for further consideration. In recalculating average weekly wage, the administrative law judge should use either claimant's earnings during the 52-week period preceding the onset of his disability, as they would be indicative of his wage-earning capacity at that time, or she should calculate a wage based on all of claimant's earnings between 2000 and 2002 in order to give effect to her finding that claimant did not normally work 52 consecutive weeks. *See, e.g., Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998) (very rare that circumstances would permit earnings at time of injury to be wholly excluded from consideration); *Anderson v. Todd Shipyards*, 13 BRBS 593 (1981) (if a range of years is used to calculate average weekly wage, all wages during that period must be taken into account).

²⁰In *Johnson*, the claimant fell in December 1979 and injured her hands, wrist and hip. Although she worked intermittently thereafter, swelling in her hands caused her to cease work in 1983. The Ninth Circuit held that occupational diseases and latent traumatic injuries are comparable and that average weekly wage for latent injuries is to be computed as of the date of the onset of disability. Thus, the claimant's average weekly wage was to be calculated using her 1983 earnings. *Johnson*, 911 F.2d at 249-250, 24 BRBS at 5-7(CRT).

²¹Claimant returned to work in May 2000 after his 1999 heart attack, so he did not work a full year in 2000.

Maximum Compensation Rate

Claimant contends the administrative law judge erred in restricting his hearing loss benefits to the maximum compensation rate applicable at the time he left covered employment with Keller. He asserts that *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006), *appeal dismissed*, No. 06-75690 (9th Cir. June 1, 2007), was incorrectly decided and that his benefits should be subject to the maximum rate in 2007 when benefits were awarded.²² Keller and Global argue that *Resposky* was correctly decided and that the administrative law judge properly applied the 1997 maximum rate.

The administrative law judge found that the determinative audiogram was performed in 2004, two years after claimant ceased working, and that it demonstrates a 39.4 percent hearing loss in the left ear, which converts to a 6.6 percent binaural impairment. Decision and Order at 48; Global Ex. 7 at 67; *see discussion infra*. Pursuant to *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), and *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998), the administrative law judge determined that the relevant date for computing claimant's average weekly wage for his hearing loss is 1997 when claimant ended his employment with Keller and was last exposed to injurious noise by a covered employer.²³ Decision and Order at 90. Next, the administrative law judge found that claimant's corresponding compensation rate is \$1,420.43, but that Section 6(b), 33 U.S.C. §906(b), limits the amount of compensation claimant can receive. For his hearing loss, the administrative law judge found that claimant is limited to \$835.74 per week, the maximum rate in effect in November 1997 when claimant last worked for Keller. Decision and Order at 95.

Section 6, 33 U.S.C. §906, provides in pertinent part:

(b)(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

²²The maximum compensation rate in effect in September 2007 was \$1,114.44. Notice No. 121, A BRBS 3-177.

²³The administrative law judge found that claimant's average weekly wage while working for Keller was \$2,130.64. Decision and Order at 93.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

(c) Determinations under subsection (b)(3) of this section with respect to a period *shall apply to* employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as *those newly awarded compensation during such period*.

33 U.S.C. §906(b)(1), (3), (c) (emphasis added). The Board held in *Reposky* that, pursuant to Section 6(b)(1), (c), a claimant is limited to the maximum compensation rate in effect at the time his disability commences, which is generally, but not necessarily, when the injury occurs, and not at the time the award is issued. *Reposky*, 40 BRBS at 75; *see also Estate of C.H. v. Chevron USA, Inc.*, __ BRBS __, BRB No. 08-531 (March 13, 2009); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

As the Ninth Circuit has not addressed this issue, *Reposky* is controlling.²⁴ Under *Reposky*, claimant is subject to the maximum compensation rate in effect when his disability commenced. Under *Bath Iron Works*, hearing loss results in immediate injury and disability, and disability is complete as of the date of the last exposure to injurious noise. *Bath Iron Works*, 506 U.S. at 163-165, 26 BRBS at 154(CRT); *see R.H. v. Bath Iron Works Corp.*, 42 BRBS 5 (2008); *Steevens v. Umpqua River Navigation*, 35 BRBS 129, 135 (2001). Thus, the maximum compensation rate for a hearing loss claim is determined as of the date of the last covered exposure to injurious noise. *Cf. Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997) (where last exposure was pre-1972, court held post-1972 maximum at time of award applied); *see Estate of C.H.*, slip op. at 15-16. As the administrative law judge properly applied *Bath Iron Works* and *Reposky* to determine that claimant's hearing loss benefits are subject to the maximum compensation rate, \$835.74, in effect at the time his hearing loss disability

²⁴The Ninth Circuit has not addressed this issue but has two appeals pending. *Price v. Stevedoring Services of America*, No. 08-71719 (2008 WL 4133467); *Roberts v. Sea-Land Services*, No. 08-70268.

commenced, *i.e.*, when he was last exposed to work-related injurious noise in 1997, we affirm that finding. *Bath Iron Works*, 506 U.S. at 163-165, 26 BRBS at 154(CRT); *Reposky*, 40 BRBS at 75.

Disability

Hearing Loss

Claimant contends the administrative law judge erred in awarding compensation for his 39.4 percent sensorineural hearing loss in his left ear as if it were a binaural impairment of 6.6 percent. Specifically, claimant asserts that the Board should follow *Baker v. Bethlehem Steel Corp.*, 24 F.3d 632, 28 BRBS 27(CRT) (4th Cir. 1994), *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir. 1993), and *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17(CRT) (2^d Cir. 1993), wherein the courts recognized that a monaural impairment must be compensated under Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A).²⁵ See *Bullock v. Ingalls Shipbuilding, Inc.*, 28 BRBS 102 (1994) (decision on recon. *en banc*), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995). Keller and Global respond, urging the Board to affirm the award, arguing that the Ninth Circuit has not ruled on the matter, and the Board is bound by its own precedent, which requires the conversion from monaural to binaural impairment ratings.

We agree with claimant, and we modify the administrative law judge's decision to reflect claimant's entitlement to hearing loss benefits for a 39.4 percent monaural impairment rather than for a 6.6 percent binaural impairment. Although the Ninth Circuit has not addressed the issue, this is a well-settled matter. The United States Courts of Appeals for the Second, Fourth and Fifth Circuits have all reversed Board decisions to the contrary, leaving no "Board precedent" to follow. *Tanner v. Ingalls Shipbuilding, Inc.*, 26 BRBS 43 (1992) (*en banc*) (Smith and Dolder, JJ., dissenting), *rev'd*, 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir. 1993); *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 173 (1991) (*en banc*) (Smith and Dolder, JJ., dissenting), *rev'd mem.*, 955 F.2d 41 (4th Cir. 1992); *Rasmussen v. General Dynamics Corp.*, BRB No. 91-1396 (1992) (unpubl.), *rev'd*, 993 F.2d 1014, 27 BRBS 17(CRT) (2^d Cir. 1993). Additionally, the Board effectively ended the monaural-binaural debate in *Bullock*, 28 BRBS 102, when it modified the award from binaural to monaural based on the Fifth Circuit's decision in *Tanner*. Claimant is to be compensated for his work-related monaural impairment to his

²⁵Section 8(c)(13)(A) provides for "[c]ompensation for loss of hearing in one ear, fifty-two weeks."

left ear pursuant to Section 8(c)(13)(A) of the Act. Accordingly, the administrative law judge's decision is modified to reflect claimant's entitlement to 20.475 weeks (.39375 x 52 weeks) of benefits under the schedule for his monaural hearing loss at the weekly compensation rate of \$835.74.

Heart Condition

Claimant also argues that the administrative law judge erred in finding his heart condition non-compensable merely because she found that he was a member of a crew at the time of his 2002 heart attack. Claimant does not challenge the finding that he was a member of a crew of the *Seminole* at the time of his 2002 heart attack; rather, he contends he should have been permitted to present evidence showing that his covered employment contributed to his heart condition and to the myocardial infarction that occurred during his employment with Global. Claimant asks the Board to remand the case to the administrative law judge for further proceedings as to the compensability of the heart condition. Keller argues in response that claimant's failure to present evidence of the work-relatedness of the 2002 heart attack and/or its underlying disease for the administrative law judge's consideration precludes him from raising the issue on appeal. Global does not address this issue.

In her October 2004 Order, the administrative law judge determined that claimant's heart attack was excluded from coverage because he was a member of a crew at the time of his 2002 heart attack on the *Seminole*. October 2004 Order at 5-7; Tr. at 9-10. There is nothing in the record to establish that claimant raised before the administrative law judge the theory that his work with Keller contributed to his underlying condition and his heart attack. Consequently, he cannot raise it for the first time on appeal. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). Moreover, the administrative law judge rationally credited Dr. Green's opinion that claimant's heart attack and the underlying conditions are not work-related.²⁶ Decision and Order at 62-63; Global Ex. 6. Accordingly, we affirm the administrative law judge's determination that claimant's heart condition is not compensable.

²⁶Dr. Green stated that claimant has many risk factors for heart disease, including hypertension, smoking, family history, and cholesterol. He rejected work stress as a factor because the 1999 heart attack occurred while claimant was lifting his step-father. Further, he found that during the pre-placement exam for Global, claimant had calcification of the aorta, which established that atherosclerosis was already in progress. Finally, he stated that the 2002 heart attack occurred because the stent put in place following the first attack was blocked. None of this, he stated, related to claimant's employment. Global Ex. 6.

Suitable Alternate Employment

Claimant contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment. He argues that the jobs identified by the vocational experts are unsuitable because they do not accommodate all of his limitations. He asserts that the administrative law judge omitted from consideration the restrictions he received as a result of his heart condition, *i.e.*, a limitation to sedentary work, as well as restrictions related to other ailments and to his lack of skills. Specifically, claimant contends the security guard work is unsuitable for him because it is not sedentary, and he has little chance of securing and keeping a job due to his age, his lack of spelling skills, writing problems due to his wrist conditions, lack of transferable skills for security guard positions, and numerous medical appointments that would interfere with a regular work schedule. Keller and Global argue that the administrative law judge's decision should be affirmed, as the security guard positions are suitable and fall within claimant's restrictions and that his other conditions do not prevent him from performing security guard duties.

In order to establish a *prima facie* case of total disability, a claimant must establish that he cannot return to his usual work. If he does so, as here, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether work is realistically available to and suitable for the claimant. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *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). Restrictions from pre-existing conditions are to be considered in addressing a claimant's ability to work in alternate employment. *Fox v. West State, Inc.*, 31 BRBS 118 (1997). However, disability related to a subsequent non-covered injury is not compensable. *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981) (Miller, J., concurring in result) (Smith, C.J. dissenting); *see also Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on reh'g*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951). Thus, if a condition is the result of an intervening cause and is severable from the work-related condition, any disability related to that intervening cause is not compensable. *See generally Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc*, 31 BRBS 13 (1997).

It is undisputed, and the administrative law judge found, that claimant cannot return to his usual work. Accordingly, the burden shifted to employer to establish alternate work that is available to and suitable for claimant in order to demonstrate that he

is not totally disabled. The administrative law judge addressed numerous jobs presented by three vocational experts. Considering claimant's physical restrictions for his upper extremity conditions, *i.e.*, "no repetitive, heavy or forceful gripping, grasping, pushing, pulling, or squeezing, and no lifting or carrying more than 10 pounds[.]" Decision and Order at 66,²⁷ she found that three security job positions identified by one expert are suitable for claimant. Keller Ex. 5; Tr. at 1333, 1351. We reject claimant's argument that the administrative law judge erred in excluding physical restrictions not related to the upper extremity condition. The heart attack, which was the catalyst for the sedentary work restriction, occurred after claimant's covered employment with Keller ended. It was, therefore, a subsequent non-covered event, the restrictions from which are severable from those related to the work-related arm injury.²⁸ Keller cannot be held liable for disability related to the intervening heart condition, and it was proper for the administrative law judge to exclude restrictions related thereto from her consideration of suitable alternate employment.²⁹ *Cyr*, 211 F.2d 454; *Leach*, 13 BRBS 231.

With regard to other alleged limitations, claimant asserted that he would not be able to perform the security guard duties because of his poor spelling and writing skills or his lack of a high school diploma. The administrative law judge found that claimant has a GED and could get a "guard card" while on the job and that the writing requirements are so minimal that neither his upper extremity condition nor his weak handwriting or spelling skills would preclude him from obtaining or performing this job. She also found that his hearing loss is not a factor because it is correctable with a hearing aid. Decision and Order at 75. These findings are rational and are supported by substantial evidence. *See Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). As the security jobs are suitable given their compatibility with claimant's hand restrictions and vocational skills, we affirm the administrative law judge's finding that suitable alternate employment is available for claimant. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

²⁷The administrative law judge found that claimant's upper extremity conditions have not reached maximum medical improvement. Decision and Order at 58.

²⁸For the same reason, we reject claimant's assertion that physical restrictions related to his post-injury shoulder, knee and eye problems also should have been considered in assessing suitable alternate employment. *Leach*, 13 BRBS 231.

²⁹The administrative law judge noted, however, that even if she considered the heart-related restrictions, at least one security guard position was suitable because it permitted sitting 95 percent of the time. Decision and Order at 74.

Once an employer establishes the availability of suitable alternate employment, the claimant is, at most, partially disabled, unless he can demonstrate reasonable diligence in attempting to secure post-injury employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Claimant contends the administrative law judge erred in faulting his diligence in seeking work. The administrative law judge found that claimant was generally credible and that he visited a number of the employers identified in the labor market surveys, filled out applications, and participated in interviews. Nevertheless, she found that he was not actually seeking employment or willing to work. She refrained from stating that he sabotaged his efforts, but she found that he did nothing to improve his chances of getting a job when, for example, he disqualified himself from consideration if potential employers mentioned either use of a computer or the need to perform a physical activity he did not think he could manage. Decision and Order at 87. Additionally, the administrative law judge found that claimant conducted no independent search and did not create a résumé. Because claimant conceded he probably would have turned down any offer because of his many doctors' appointments or because the pay was low, she found that he was not really willing to work and she concluded that he is only partially disabled. Decision and Order at 87-88. The administrative law judge's findings are supported by substantial evidence of record. Tr. at 366, 381-382, 386, 665-667, 831-832, 847, 851, 854, 863, 866 1001, 1492-1495.³⁰ In view of the foregoing, we affirm the administrative law judge's rational finding that claimant is partially disabled based on his lack of diligence in seeking alternate work. *Berezin*, 34 BRBS 163; *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989) (Lawrence, J., dissenting).

³⁰For example, claimant testified that he did not want to work and that he preferred his time at home.

Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to 20.475 weeks of benefits for a 39.4 percent monaural hearing loss. Her determination of claimant's average weekly wage for his upper extremity injury is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions and orders are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge