BRB Nos. 03-0239, 03-0239A
and 03-0239B

DARLETTE MAUMAU (Widow of FINEFEUIAKI MAUMAU) Claimant-Respondent Cross-Respondent SHELLY DAGGETT (Mother of SALESI and MAIKA MAUMAU) Claimant-Cross-Petitioner B v. HEALY TIBBITTS BUILDERS, INCORPORATED and HAWAII EMPLOYER'S MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners Cross-Respondents JOHN M. MANNERING Employer-Respondent Cross-Respondent Cross-Petitioner A	)	DATE ISSUED: Dec. 8, 2003 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Preston Easley (Law Offices of Preston Easley), San Pedro, California, for claimant Darlette Maumau.

Shelley Daggett, Elk Grove, Pennsylvania, for Salesi and Maika Maumau, *pro*

se.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for Healy Tibbitts.

Paul A. Schraff and Valerie M. Kato (Dwyer Schraff Meyer Jossem & Bushnell) Honolulu, Hawaii, for John M. Mannering.

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

PER CURIAM:

Healy Tibbitts Builders, Incorporated (Healy Tibbitts) (BRB No. 03-0239), John M. Mannering (BRB No. 03-0239A), and Shelley Daggett (BRB No. 03-0239B), each have filed appeals of the Decision and Order Awarding Benefits (2002-LHC-0938) of Administrative Law Judge Daniel F. Sutton rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers= Compensation Act, as amended, 33 U.S.C. ' 901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. ' 8171 *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).

Finefeuiaki Maumau (decedent) was fatally injured while working as a laborer for John M. Mannering (Mannering) on August 16, 2001, at the United States Naval Submarine Base at Pearl Harbor, Hawaii. Mannering was a subcontractor hired by Healy Tibbitts, the general contractor, on what was known as the P-123 Berthing Wharves Project (P-123 Project). This project involved the demolition and rebuilding of three Navy submarine berths, and Mannering was engaged to dig trenches for the placement of electrical cables that would, upon completion of the project, provide shore power to submarines and shore-side electricity at the berths. Decedent was fatally injured when a steel "trench shield," used to support the sidewalls of an excavated trench, collapsed, pinning him against the existing concrete deck approximately 15-20 feet from land. Decedent's surviving spouse, Darlette Maumau, thereafter filed a claim for death benefits under the Act. Shelley Daggett also filed a claim on behalf of decedent's two minor children, Salesi and Maika Maumau.

In his decision, the administrative law judge initially found that the situs and status requirements of the Act are satisfied. 33 U.S.C. §§902(3), 903(a). Specifically, the administrative law judge observed that the parties stipulated to situs, and he determined that decedent was a covered harbor worker since, at the time of his fatal injury, decedent was engaged in the construction of an inherently maritime structure. The administrative law

judge next found that decedent was an employee of an uninsured subcontractor, Mannering, and thus, that Healy Tibbitts is liable for all compensation payable under the Act pursuant to Section 4(a), 33 U.S.C. §904(a).

With regard to the merits, the administrative law judge calculated decedent's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c), by dividing the total amount which decedent would have earned on the P-123 Project, $22,168.90, by the total number of weeks he would have worked on that project, 19. He therefore found that decedent's average weekly wage was $1,166.78. Accordingly, the administrative law judge awarded death benefits to the widow, claimant Maumau, and to claimant Daggett, on behalf of decedent's two minor children, from August 17, 2001, pursuant to Section 9(b) of the Act, 33 U.S.C. §909(b). The administrative law judge also awarded claimant Maumau funeral expenses of $3,000 pursuant to Section 9(a) of the Act, 33 U.S.C. §909(a).

On appeal, Healy Tibbitts and Mannering challenge the administrative law judge's determinations regarding status and average weekly wage. Claimant Daggett, appearing without the assistance of counsel, also filed an appeal of the administrative law judge's decision. Claimant Maumau responds, urging affirmance of the administrative law judge's decision in all respects.

Status

Healy Tibbitts argues that the administrative law judge's findings that decedent was a covered harbor worker, and thus that the status requirement is established in this case, are erroneous. Healy Tibbitts maintains that the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, in *McGray Constr. Co. v. Director, OWCP [Hurston]*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), explicitly refused to adopt the Board's "extended" definition of harbor worker in *Hawkins v. Reid Associates*, 26 BRBS 8 (1992), and that the administrative law judge's application of this definition is thus erroneous. Healy Tibbitts posits that decedent's tasks, digging trenches on land for electrical cables, are insufficient to confer coverage as they are not integral or essential to the loading or unloading process. Mannering adds that the holding in *Hurston* precludes coverage in this case as decedent was "neither ship repairman, nor ship builder, nor ship-breaker." *Hurston*, 181 F.3d at 1012-13; 33 BRBS at 84(CRT).

Section 2(3) of the Act, 33 U.S.C. ' 902(3), states:

The term "employee" means any person engaged in maritime employment,

> including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . .

The Board has defined the term "harbor worker" as including "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships). . . ." *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980) (in affirming the holding that dry dock construction was covered, the Fourth Circuit did not specifically address the term "harbor-worker," but noted that the Board's definition was "apt" in this case); *see Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). It is clear the Act covers those workers injured during the construction of "inherently maritime" structures, such as piers and dry docks. *Pittman Mechanical Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980); *Joyner*, 607 F.2d 1087, 11 BRBS 86; *Hawkins*, 26 BRBS 8 (1992).

In *Hurston*, 181 F.3d 1008, 33 BRBS 81(CRT), the Ninth Circuit held that the claimant, who was working as a pile driver on an oil-production pier, was not a covered employee because he was injured while performing non-maritime work, as the pier was not used for any maritime purpose. Specifically, the Ninth Circuit stated that the claimant's "engagement was for pile driving, which was pier construction, not ship construction . . . . In no way was it longshoreman's or shipbuilder's work or anything like those categories." *Hurston*, 181 F.3d at 1012, 33 BRBS at 84(CRT). In rejecting the assertion by the Director, Office of Workers' Compensation Programs, that the claimant was covered as a "harbor-worker" under the Act, the Ninth Circuit stated:

> The Director argues that Mr. Hurston was a "harbor-worker" under a previous Board decision that defined the term to include "persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)." The Board's cases involving construction workers on piers have held that the work was not maritime where the piers were not used to accommodate ships. The argument has no force in this case, because the Board's own case qualified "piers" with the phrase "used in the loading, unloading, repair or construction of ships," and the pier in this case was not so used. *Mr. Hurston was not working on a pier used to accommodate ships, or on any sort of shelter or facility for ships, nor does the*

record establish that he was working in a harbor, which is a place for ships.

Hurston, 181 F.3d at 1013, 33 BRBS at 84-85(CRT) (emphasis added).

In contrast to the facts in *Hurston*, *Hawkins*, 26 BRBS 8, which was relied upon by the administrative law judge here, involved construction work on facilities used by vessels. Specifically, in *Hawkins,* the Board affirmed the administrative law judge's determination that claimant, a heavy equipment operator who worked at a nuclear submarine repair facility, and whose specific task was to dig trenches and pull up old pipes in preparation for the laying of the utility lines or heavy pipes underground, was an employee covered under Section 2(3) of the Act. The Board found claimant covered on two grounds: 1) he was directly involved in the construction or alteration of a harbor facility, *see Stewart*, 7 BRBS at 365, and 2) he was engaged in the maintenance of shipbuilding facilities, *see Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). The Board noted that the utility work which claimant performed was a link in the process of repairing and building ships, and that the facility being built at the naval shipyard would later be used to service nuclear submarines. *Hawkins*, 26 BRBS at 11.

Similarly, in *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), the Board and the United States Court of Appeals for the Fourth Circuit held claimant covered under Section 2(3) where he was working as a welder on pipelines on a pier which were to be used for loading steam, water and jet fuel onto aircraft carriers. The Board affirmed the administrative law judge's finding that claimant's work involving the repair and maintenance of equipment was an integral part of the overall process of loading or unloading a ship. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96, 99(CRT) (1989). Moreover, the Board rejected employer's contention that the claimant was not covered because he was a land-based employee performing non-maritime welding work, holding that it is immaterial that the skills used by the employee are essentially non-maritime in character *if the purpose of the work is maritime*. *See Hullinghorst Industries v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980). Lastly, the Board noted that the claimant also met the status requirement on the alternate ground that he was a harbor-worker directly involved in the construction or alteration of a pier used in the loading and unloading of ships. *See Hawkins*, 26 BRBS at 10-11; *Ripley v. Century Concrete Services*, 23 BRBS 336 (1990). In affirming the Board in *Simonds*, the Fourth Circuit held that since the claimant was actually engaged in the installation and repair of equipment necessary for the loading process, he was engaged in maritime employment covered under the Act. *Simonds*, 35 F.3d 122, 28 BRBS 89(CRT).

In contrast, in *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001), the Board rejected the claimant's contention that his construction of a facility destined for a future maritime use afforded him status as a "harbor-worker" under Section 2(3) of the Act, based on the Fourth Circuit's holding in *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995) (a pipefitter injured during the construction of a power plant on the Norfolk Naval Base was not a covered employee since his connection to maritime employment was merely that power from the plant may be essential to the shipbuilding process in the future; thus, there was no present maritime use). After a review of relevant cases, the Board concluded that "where the facility under construction or renovation does not have a uniquely maritime purpose, the workers engaged in its construction have not been covered." *Moon*, 35 BRBS at 154. In affirming the administrative law judge's denial of coverage, the Board relied on the facts that the building was not a pier, dry dock or other uniquely maritime structure, but rather was a warehouse whose use as a maritime storage facility was a future, rather than current, one. *Id.*

With this background, we address the issue of status in the instant case. The facts regarding decedent's work at the time of his fatal accident on the P-123 Project are not in dispute. As previously noted, decedent was employed as a laborer with Mannering, a subcontractor to Healy Tibbitts on the P-123 Project, which involved the refurbishing of three submarine berthing wharves at the United States Naval Submarine Base at Pearl Harbor, Hawaii. The berthing wharves are concrete piers or decks, supported by pilings and extending from the shore over navigable waters, which are used to accommodate submarines and other ocean-going vessels while they are in port. They include electrical lines which run from manholes on shore underground through a series of concrete-encased "duct backs" to supply power to berthed submarines. The P-123 Project involved replacing the existing 28-foot concrete decks with new 50 foot concrete decks, and in rerouting the electrical supply by relocating the "duct backs." HT at 119-121, 156. Mannering was brought in to demolish the existing duct banks and manholes, excavate for the new duct banks and manholes, pour concrete over the new duct banks which were installed by another subcontractor, and cover the new duct banks with fill. HT at 81, 120-122, 127, 144; CX 16. Richard Heltzel, president of Healy Tibbitts, stated that Mannering's work was essential to the completion of a part of the contract. HT at 120. Decedent, whose job title was machine operator, was one of three Mannering employees on Project 123, and they all performed various duties related to the demolition, excavation, and the pouring of concrete for the new duct backs. HT at 81-82, 141-142, 152.

In his decision, the administrative law judge initially agreed with employers that *Hurston* rejected the Board's definition of the term "harbor worker" insofar as it would include a worker engaged in the construction of a pier that was not used to dock ships or for any other traditional maritime purpose. Nonetheless, the administrative law judge found that *Hawkins* is entirely consistent with *Hurston* since Hawkins, like decedent herein, was injured

while engaged in the construction of a facility that was used for a traditional maritime purpose, *i.e.*, berthing submarines. The administrative law judge distinguished the holdings in *Hurston* and *Herb's Welding* from the instant case since decedent was injured while engaged in the improvement and replacement of three existing berthing wharves used to accommodate submarines and other vessels. In this regard, the administrative law judge found that there is no question that these berthing wharves have a past, current, and future use in docking submarines and other vessels.

The administrative law judge also agreed with employers that there was nothing "inherently maritime" with regard to decedent's specific job tasks. The administrative law judge, however, determined that employers misstated the proper inquiry, which is whether the injured worker was engaged in the construction of a maritime structure, not whether the worker's specific job tasks or skills used were inherently maritime in nature. As the berthing wharves have a past, present, and future use to accommodate submarines and other vessels, the administrative law judge concluded the project had a clearly maritime purpose which is an "integral or essential part of loading or unloading" a vessel and as such is "materially distinguishable" from the non-maritime construction in *Hurston* (oil production pier) and *Prevetire* (future power plant).

The administrative law judge's analysis and resolution of the status issue is in accordance with law. First, the administrative law judge properly found that the holdings in *Hawkins* and *Hurston* are not mutually exclusive since, as evidenced by the above discussion of the case law, there is a clear distinction in the facts of the two cases that explains their divergent holdings on status. The critical factual distinction in those cases and other similar cases is whether the facility under construction or renovation has a uniquely maritime purpose. *See also Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir.), *cert. denied*, 525 U.S. 981 (1998) (Second Circuit deferred to the Director's position that term "harbor-worker" includes marine construction workers, so long as the project has a connection to ships; court also rejected administrative law judge's approach that claimant is not covered unless he has a connection to loading and unloading, etc.); *Hullinghorst*, 650 F.2d 750, 14 BRBS 373 (claimant who erected scaffolding as part of a pier repair project performed the work of a "typical harbor-worker"); *Joyner*, 607 F.2d 1087, 11 BRBS 86 (Fourth Circuit noted that the Board's definition of harbor-worker was "apt"); *cf. Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981) (construction of sewage treatment plant in river does not have connection to ships; therefore claimant not a harbor-worker). In *Hawkins*, 26 BRBS 8, and *Simonds*, 27 BRBS 124, the claimants performed work integral to a maritime project as they were directly involved in the construction or alteration of a pier used in the loading and unloading of ships. In contrast, the Ninth Circuit in *Hurston* recognized that the claimant was not working on a pier used to accommodate ships but rather used exclusively for oil production. The Ninth Circuit's rejection of the Director's "harbor-worker" argument was, in fact, premised on that

very finding. *Hurston*, 181 F.3d at 1013, 33 BRBS at 85(CRT). In the instant case, decedent, as the administrative law judge found, was engaged in the construction and improvement of wharves used to berth submarines. Thus, like the claimants in *Hawkins* and *Simonds*, decedent herein is covered by the Act as he was directly involved in a project which was inherently maritime. Moreover, employers' contention that decedent is not covered because his specific job duties involved skills used in non-maritime work is also rejected, as it is the connection of the project to maritime activity which controls.[1] *See Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Hullinghorst*, 650 F.2d 750, 14 BRBS 373; *White*, 633 F.2d 1070, 12 BRBS 598. Consequently, the administrative law judge's finding that decedent was a covered employee pursuant to Section 2(3) of the Act is affirmed.

Average Weekly Wage

Healy Tibbitts argues that the administrative law judge's use of the total earnings that decedent would have received on the P-123 Project to calculate his average weekly wage is erroneous. In particular, Healy Tibbitts asserts that the facts that decedent had no earnings whatsoever in the six years preceding his work for Mannering in May 2001, that his union status was probationary, that he was not certified to operate a crane, and that claimant offered no evidence of post-project work for decedent with Mannering or any other employer make the administrative law judge's calculations so speculative as to be arbitrary. Healy Tibbitts also contends that the administrative law judge erred by not considering, in a negative manner, claimant's failure to acquire "similar worker wages" for calculation of decedent's average weekly wage under Section 10(b) of the Act, 33 U.S.C. §910(b). Mannering similarly submits that the administrative law judge's calculation of decedent's average weekly wage is arbitrary given that decedent was not able to find any profitable employment, and in fact lost money operating his own company, during the four years prior to his job with Mannering.

Decedent's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910. *See* 33 U.S.C. §910(a)-(c). Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate decedent's average weekly wage at the time of injury. *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir.

[1] As the court explained in *Schwalb*, the fact that the repair and janitorial work performed at the railway loading facility in that case was no different from that performed by railroad employees at other locations makes no difference. The test concerns not the type of skills an employee possesses, but whether his use of those skills is integral to loading, unloading, building or repairing a vessel. Work on a pier used for berthing vessels has the requisite connection.

1979). The Board will affirm an administrative law judge's average weekly wage determination under Section 10(c) if the amount represents a reasonable estimate of the employee's annual earning capacity at the time of the injury. *See Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); *Fox v. West State Inc.*, 31 BRBS 118 (1997). Furthermore, we note that a definition of "earning capacity" for purposes of Section 10(c) is the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury," *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); *see also Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74 (9th Cir. 1932), and thus encompasses consideration of his potential future earnings.

In his decision, the administrative law judge initially determined that Sections 10(a) and 10(b) are inapplicable to this case, and thus, assessed decedent's average weekly wage under Section 10(c).[2] In calculating claimant's average weekly wage, the administrative law judge considered decedent's work history and scant earnings prior to his employment with Mannering, but found that the evidence on decedent's probable future employment with the operating engineer's union was more relevant to his query. In this regard, he relied on the credible testimony of Mr. Maika Mataele, a current member of the operating engineer's union, as substantially corroborated by the testimony of John Mannering and claimant Maumau, that someone with decedent's significant marketable skills would be able to receive regular work through the union, to conclude that it is more likely than not, despite the speculative nature of the evidence regarding decedent's continued employment with Mannering, that decedent would have continued to perform regular work through the operating engineer's union at the rate he was earning at the time of his fatal accident. Consequently, the administrative law judge found, based on the uncontradicted evidence that decedent had the ability, willingness and opportunity to work on a regular basis through the union's hiring hall, that decedent's average weekly wage should be calculated based on the employment in which he was working at the time of his fatal accident, taking into account the four weeks that Mannering's employees continued to work on the P-123 Project. Accordingly, the administrative law judge calculated decedent's average weekly wage by adding his actual earnings on the berthing wharves project, $17,501.76, to what he would have earned in the remaining four weeks on that job, $4,667.14, and dividing that total, $22,168.90, by the total number of weeks that decedent would have worked on this project

[2] The administrative law judge properly determined that Section 10(b) could not be used since the record contains no evidence of the actual wages of employees with decedent's similar qualifications and employment circumstances. In contrast to Healy Tibbitts' contention, claimant is not required to produce evidence to establish decedent's average weekly wage under Section 10(b). In the instant case, claimant presented evidence and sought to have decedent's average weekly wage determined under Section 10(c), which given the total circumstances in this case was appropriate for the administrative law judge to consider. Healy Tibbitts' contention in this regard is therefore rejected.

barring his fatal accident, 19, to arrive at an average weekly wage of $1,166.78.

The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c), *see Wayland v. Moore Dry Dock,* 25 BRBS 53 (1991); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979), and he fully reviewed the evidence presented in this case. As the administrative law judge's credibility findings regarding the testimony are not "inherently incredible or patently unreasonable," we thus affirm his finding that decedent, in all likelihood, would have continued to work regularly through the union at the same wage as he was earning at the time of his injury. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987). Accordingly, the administrative law judge's calculation of decedent's average weekly wage pursuant to Section 10(c) is affirmed.[3]

[3] Ms. Daggett, on behalf of decedent's minor children, filed an appeal in this case. However, there are no findings adverse to the minor children in the administrative law judge's decision, although the administrative law judge did not explicitly state the distribution of the death benefit among decedent's widow and his surviving children. For clarification, Section 9(b) provides that a surviving widow is entitled to benefits equaling 50 percent of the employee's average weekly wage during widowhood with two years' compensation in one sum upon remarriage, and that each surviving minor child is entitled to an additional 16 and 2/3 percent of such average weekly wage, provided that the total award to all entitled survivors does not exceed 66 and 2/3 percent of the employee's average weekly wage. 33 U.S.C. §909(b).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge