BRB Nos. 00-0819 and
00-819A

GERALD LORIMER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
GREAT LAKES DREDGE & DOCK COMPANY	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits and the Order Awarding Attorney's Fees of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Robert W. Nizich and Howard D. Sacks, San Pedro, California, for claimant.

James P. Aleccia (Law Offices of James P. Aleccia), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (99-LHC-1884), and claimant and employer each appeal the Order Awarding Attorney's Fees of Administrative Law Judge Edward C. Burch rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law

judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer on Dredge No. 53 as a deckhand. His duties included tying up and pulling lines on the barge as well as painting, greasing, cleaning and other maintenance tasks. He was transported from shore to the dredge on a crew boat or tug, and worked there 12 hours a day, 7 days a week. Claimant was injured on October 27, 1997, when he was knocked backwards onto his buttocks. He testified that he immediately felt pain in his back and tail bone. He sought benefits under the Act.

In his decision, the administrative law judge found that claimant satisfied the situs and status requirements to confer coverage under the Act. The administrative law judge rejected employer's contention that claimant is excluded under the Act as a member of a crew. He found that claimant's connection to the vessel was not substantial in nature as his duties did not take him to sea or expose him to the perils of the sea. Thus, the administrative law judge concluded that claimant is covered by the Act. The administrative law judge also found that claimant established that he had sustained an injury to his back on October 27, 1997, which combined with and aggravated his pre-existing back condition. *See* 33 U.S.C. §920(a). The administrative law judge further found that claimant has reached maximum medical improvement, that the evidence establishes that he cannot return to his former employment, and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded permanent total disability and medical benefits for claimant's back condition. The administrative law judge also granted employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's pre-existing back problems.

On appeal, employer contends that the administrative law judge erred in issuing a decision while there was a pending appeal before the Board. In addition, employer contends that the administrative law judge erred in finding that claimant was not a member of a crew, asserting that he misinterpreted language referring to the "perils of the sea" in court opinions. Claimant responds, urging affirmance of the administrative law judge's finding that claimant is not a "member of a crew," and rejection of employer's contention that the administrative law judge did not have jurisdiction to render a decision.

Subsequent to the issuance of the administrative law judge's decision, claimant's counsel submitted a fee petition requesting $47,789.84, representing 176.25 hours of legal services performed before the administrative law judge at the hourly rate of $250, and $3,727.34 in costs. Employer submitted objections to the petition, including objections to the hourly rate, the billing method, and specific objections to numerous line items. After considering the petition and employer's objections, the administrative law judge reduced the

hourly rate to $225, reduced a number of the hours requested, disallowed a number of items requested, and found that the costs requested were reasonable and necessary. Thus, the administrative law judge awarded counsel a fee in the amount of $33,806.25, representing 150.25 hours of legal services at the hourly rate of $225, plus $3,727.34 in costs.

On appeal, claimant contends that the administrative law judge erred in reducing the hourly rate from $250 to $225, and in making a number of the reductions in time. Employer responds, urging affirmance of the hourly reduction and the line item reductions. However, employer contends on cross-appeal, that if its appeal of the decision on the merits is successful, claimant did not successfully prosecute the case and thus is not entitled to an award of an attorney's fee payable by employer. In addition, employer contends that the administrative law judge erred in awarding time in 1/4 hour billing increments and in awarding time for "block billing" as it lacks specificity.

Initially, we reject employer's contention that the administrative law judge did not have jurisdiction to render a decision in the instant case. The administrative law judge issued an Order denying motions for summary decision, and employer appealed the Order to the Board on December 3, 1999. Employer informed the administrative law judge at a calendar call on December 6 that the appeal had been filed, but the administrative law judge proceeded with the hearing on December 7, 1999. The Board dismissed the appeal as interlocutory on December 23, 1999. The administrative law judge issued his decision on April 19, 2000, and thus had jurisdiction at that time. Employer participated fully in the hearing on December 7, submitting evidence and presenting witnesses. In the current appeal, employer asks that the Board hold that the administrative law judge did not retain jurisdiction at the time of the hearing and remand the case to the administrative law judge for further proceedings, but does not explain what "additional proceedings" are necessary at this point in the case.[1] In the interest of judicial economy, we deny employer's request as employer had a

[1]Employer asserts that it filed the appeal in order to argue that the administrative law judge's Order denying summary judgment failed to provide a full rationale for his decision as required by the Administrative Procedure Act, 5 U.S.C. §557. Employer contends that in so doing, the administrative law judge denied the parties the opportunity to properly evaluate the coverage issue and potential for settlement. However, employer now has a decision which fully addresses coverage, and it has had ample opportunity to explore settlement.

full opportunity to participate in the hearing before the administrative law judge and fails to raise any error affecting its defense of the claim.

Employer also contends that the administrative law judge erred in finding that claimant was not a member of a crew and thus, is not excluded from coverage under the Longshore Act. Section 2(3)(G) of the Act excludes from coverage "a master or member of a crew of any vessel." 33 U.S.C. §902(3)(G). The United States Supreme Court has held that the Longshore Act and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is the same as a "member of a crew" under the Longshore Act. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991); *see also Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). An employee is a member of a crew if: (1) his connection to a vessel in navigation is substantial in nature and duration; and (2) his duties contributed to the vessel's function or operation. *See Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997). "The key to seaman status is an employment-related connection to a vessel in navigation .... It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Wilander*, 498 U.S. at 354, 26 BRBS at 83(CRT). The employee's connection to a vessel must be substantial in terms of both its nature and duration in order to separate sea-based workers entitled to coverage under the Jones Act from land-based workers with only a transitory or sporadic connection to a vessel in navigation. *Chandris*, 515 U.S. at 368; *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

Initially, the administrative law judge found that Dredge No. 53 is a vessel as it was free-floating, capable of movement on its own, and documented as a vessel with the U.S. Coast Guard, American Bureau of Shipping, and the U.S. Army Corp of Engineers. This finding is not contested on appeal. The administrative law judge also found that claimant's duties contributed to the function of the vessel or the accomplishment of its mission of underwater dredging and excavation to facilitate the construction of harbor facilities at the Long Beach Harbor. He noted that Dredge No. 53 is a clamshell dredge that is used for underwater dredging and excavation work. Claimant was assigned to Dredge No. 53 as a deckhand, and his job duties included tying up and putting lines on the barge as well as painting, greasing, cleaning and other maintenance tasks. The finding that claimant's work contributed to the vessel's function also is not challenged on appeal.

Thus, the administrative law judge's finding that claimant is not a "member of a crew" turns on the nature of his connection to the vessel. In finding that claimant lacked a substantial connection to the vessel, the administrative law judge relied on language from *Papai* which he interpreted as requiring that the inquiry focus on whether claimant's duties took him to sea. In concluding that claimant was not a sea-based employee and was not regularly exposed to the perils of the sea, the administrative law judge found the following facts convincing: claimant slept ashore and was transported by a crew boat or tug from shore to the dredge where he worked 12 hour days 7 days a week; his duties as a deckhand

included: tying up and putting lines on the barge as well as painting, greasing, cleaning, and other maintenance tasks; claimant testified that all of his work was performed within the harbor waters and he did not go outside the breakwater; and claimant does not have any Coast Guard or seaman papers.

The Supreme Court stated in *Papai* that "for the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees." *Papai*, 520 U.S. at 555, 31 BRBS at 37(CRT). The Court held that the claimant in that case, who was injured when hired for one day to paint a tug, was not a "member of a crew," inasmuch as he did not have a substantial connection with "an identifiable group of ... vessels."

In *Hansen v. Caldwell Diving Co*., 33 BRBS 129 (1999), *aff'd*, 243 F.3d 537 (4th Cir. 2001)(table), the claimant was a commercial diver who worked aboard a barge in Battery Creek, S.C. As in the instant case, the claimant accessed the barge on a daily basis either by tugboat or boarding the barge when it was docked, as there were no living quarters on the barge. He worked on the barge for four weeks prior to his accident, preparing the barge for the assignment of underwater cable installation, and conceded that his work was essential to the completion of the mission of the barge. The Board quoted the language above from *Papai*, *Hansen*, 33 BRBS at 131, and affirmed the administrative law judge's finding that claimant's employment as a commercial diver for employer was maritime in nature, as it required regular exposure to the perils of the sea. The Board concluded that claimant's connection with the vessel was substantial in terms of nature and duration, and thus affirmed the administrative law judge's finding that claimant was a "member of a crew." *Hansen*, 33 BRBS at 132.

The administrative law judge in the instant case found that claimant was not a sea-based employee, and was not regularly exposed to the perils of the sea, apparently based on his finding that the areas in which the dredge worked were inside the breakwater of a harbor, specifically, Los Angeles Harbor and Long Beach Harbor. *See* Decision and Order at 9. However, there has been no case law to suggest that an employee aboard a vessel must be on the open sea or beyond a breakwater in order to qualify as a "member of a crew." The United States Court of Appeals for the Fifth Circuit recently reviewed a case in which a crane operator was injured aboard a vessel in the Mississippi River. *See In re Endeavor Marine Inc.*, 234 F.3d 287 (5th Cir. 2000). It was undisputed that the claimant's duties contributed to the function and the mission of the "vessel in navigation." Moreover, the claimant's connection to the vessel was substantial in duration given that he spent almost all of his time working on the vessel in the eighteen months prior to his accident. Thus, as in the instant case, the sole question presented was whether the claimant had an employment-related

connection to the vessel that was substantial in terms of its nature. The Fifth Circuit rejected the district court's finding that the connection was not substantial in nature because "it did not take him to sea" because his work brought him aboard the barge only after the vessel was moored or in the process of mooring in the river. The court held that the Supreme Court's decision in *Papai* did not require that a claimant go to sea, but stated only that it was "helpful" in determining whether he has the requisite connection to the vessel. Thus, the court held that "the district court incorrectly concluded that [the claimant] is not a Jones Act seaman merely because his duties do not literally carry him to sea." *In re Endeavor Marine Inc.*, 234 F.3d at 292. The court also noted that claimant's duties placed him on the waters of the Mississippi River.

Prior to its decision in *Wilander*, the Supreme Court considered a case in which the petitioner was employed as a handyman to assist with dredging operations being conducted in the Mississippi River. *Senko v. La Cross Dredging Corp.*, 352 U.S. 370 (1957). The dredge was anchored to the shore at the time of petitioner's injury and during all the time petitioner worked for respondent. The injury occurred in a shed on land. The Supreme Court held the fact that petitioner's injury occurred on land is not material as "coverage of the Jones Act depends only on a finding that the injured was an employee of the vessel, engaged in the course of his employment' at the time of his injury," and stated that "there can be no doubt that members of the [the vessel's] crew would be covered by the Jones Act ... even though the ship was never in transit during [the] employment." *Senko*, 352 U.S. at 372. In *Chandris*, the Supreme Court cited *Senko*, and further held that, for purposes of coverage under the Jones Act, a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside; the vessel is in navigation although moored to a dock, if it remains in readiness for another voyage. *Chandris*, 515 U.S. at 374; *see also Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997).

Based on the applicable case law, and the undisputed facts in this case, we reverse the administrative law judge's finding that claimant is not a "member of a crew." In finding claimant lacked the requisite connection to a vessel, the administrative law judge found it persuasive that claimant slept ashore and was transported to the dredge every day by crew boat or tug. However, as the holding in *Hansen* illustrates, these facts are not determinative of whether the claimant has a substantial connection with a vessel. In addition, the administrative law judge relied on the fact that claimant worked on the dredge only while it was in the Los Angeles and Long Beach Harbors. The case law discussed above does not support a conclusion that claimant must venture onto the open seas in order to be a seaman, and it is undisputed that he spent his work days on a vessel in navigable water. Moreover, the fact that claimant does not have seaman papers does not preclude his being a member of a crew. *See Noble Drilling Corp. v. Smith,* 412 F.2d 952 (5th Cir. 1969). As claimant's work for employer was performed exclusively on Dredge No. 53, claimant had a connection to a specific vessel which was substantial in nature. Although the administrative law judge did

not reach the issue of the duration of claimant's connection to Dredge No. 53, it is undisputed that claimant worked from June 1997 to November 1997 exclusively on the dredge, 12 hours a day, 7 days a week. These facts demonstrate that claimant's connection to the vessel was also substantial in duration. Therefore, as the administrative law judge's finding that claimant is not a sea-based employee cannot be affirmed, and the facts found below establish that claimant had a substantial connection to a vessel in navigation, we hold that claimant is excluded from coverage under the Act as a member of a crew. The award of benefits must therefore be vacated.

On cross-appeal, claimant contends that the administrative law judge erred in reducing the hourly rate awarded for the attorney's fee, and in reducing a number of the line items requested. Employer requests in a supplemental appeal that the fee award be vacated if the Board finds on appeal that claimant is excluded from coverage under the Act. Inasmuch as we have held that claimant is excluded from coverage as he is a "member of a crew," we agree with employer. We thus need not address claimant's contentions on cross-appeal, as the administrative law judge's fee award must be vacated. *See Bluhm v. Cooper Stevedoring Co.*, 13 BRBS 427 (1981).

Accordingly, the decision of the administrative law judge finding that claimant is not a member of a crew is reversed, and claimant is excluded from coverage under the Act. 33 U.S.C. §902(3)(G). Consequently, the administrative law judge's awards of disability and medical benefits and an attorney's fee are vacated.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge