BRB No. 92-1808

ELIJAH MITCHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERNATIONAL PAPER COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Sandy G. Robinson (Helmsing, Lyons, Sims & Leach, P.C.), Mobile, Alabama, for self-insured employer.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (91-LHC-1363) of Administrative Law Judge Quentin P. McColgin 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 from 1945 until 1967 where he performed various jobs in and around employer's paper mill. On March 12, 1988, claimant underwent an audiometric examination which revealed a 25 percent binaural impairment. Thereafter, on August 11, 1988, claimant filed a claim for benefits under the Act for a work-related hearing loss. Claimant underwent a second audiometric examination on January 16, 1992, which revealed an 8.1 percent binaural impairment.

Employer operates a pulp mill on the Chickasobogue Bayou, which is connected to the Mobile River. Employer's mill has its own barge facility on the bayou, which is navigable for approximately two to three miles beyond employer's mill, where employer receives 15 to 20 percent of the raw materials utilized by the mill. The wood products delivered to the mill by the barges are unloaded by crane. Claimant testified that from 1945 to 1963,[1] he was required to work at employer's barge facility unloading barges 2 to 3 three times per month, eight hours a day, where he was exposed to loud noise from the crane and conveyor machinery.

In his Decision and Order, the administrative law judge first found that causation had been established based on claimant's demonstrated hearing loss, his testimony concerning the noisy conditions in the barge facility, and the failure of employer to provide credible rebuttal evidence. Next, the administrative law judge found, based on claimant's testimony, that claimant's duties unloading barges on navigable waters were sufficient to confer jurisdiction under the Act. After accepting claimant's lower hearing test results, the administrative law judge found that claimant suffers from a binaural hearing impairment of 8.1 percent, and thus awarded claimant permanent partial disability compensation pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13)(1988), commencing on March 12, 1988, based upon an average weekly wage of $302.66.

On appeal, employer contends that the administrative law judge erred in finding that claimant established jurisdiction under the Act, and in awarding benefits under Section 8(c)(13) rather than Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). Both claimant and the Director, Office of Workers' Compensation Programs (the Director) have filed briefs in response to employer's appeal, urging that the Board affirm the administrative law judge's determination that claimant established jurisdiction under the Act. Claimant and the Director further urge the Board to reserve judgment of the compensation issue until the United States Supreme Court decides this issue.

[1]In May 1963 claimant lost his right arm in an industrial accident while working for employer. Thereafter, he worked for employer in light duty positions until 1967.

I. JURISDICTION

In order to be covered under the Act, a claimant must satisfy both the status requirement of Section 2(3) of the Act, 33 U.S.C. §2(3)(1988), and the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a)(1988). *See P.C. Pfeiffer Company, Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northwest Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *see also Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Department of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 1252 (1993)(coverage is determined by jurisdictional provisions in effect on date of manifestation).

Employer contends that the administrative law judge erred in finding that claimant regularly performed maritime duties while working for employer and that, thus, claimant did not satisfy the requirement of Section 2(3) of the Act.[2] We disagree.

In determining that claimant's work was sufficient to confer jurisdiction under the Act, the administrative law judge found that, although claimant's primary duties were unrelated to the Act, claimant did regularly unload barges while working for employer. Section 2(3) defines an "employee" for purposes of coverage under the Act as "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 . . . ." *See* 33 U.S.C. §902(3)(1988). Accordingly, while maritime employment is not limited to the occupations specifically enumerated in Section 2(3), an employee's employment must bear a relationship to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). Moreover, an employee is engaged in maritime

[2]In 1972, Congress amended the Act to add the status requirements of Section 2(3), 33 U.S.C. §902(3), and to expand the sites covered under Section 3(a) landward. In *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983), the United States Supreme Court held that in making these changes to expand coverage, Congress did not intend to withdraw coverage of the Act from workers injured on navigable waters who would have been covered before 1972. *Perini*, 459 U.S. at 315-316, 15 BRBS at 76-77 (CRT). Accordingly, the Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3) and, as such, satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT). *See also Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

The Director in the instant case argues that claimant, who worked aboard the barges while unloading them, was injured upon "the navigable waters of the United States," and thus, is covered under the Act pursuant to *Perini*. However, she, as well as the other parties to this appeal, base their arguments upon the administrative law judge's application of Sections 3(a) and 2(3) to this claim.

employment so long as some portion of his job activities constitute covered employment. *Caputo*, 432 U.S. at 275-276, 6 BRBS at 166. Whether particular job skills are uniquely maritime is not dispositive in determining whether the status test is satisfied; rather, non-maritime skills applied to a maritime project are maritime for purposes of the maritime employment test of the Act. *See Hullinghorst Industries v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

In the instant case, employer does not challenge the administrative law judge's finding that claimant unloaded barges while employed by employer. Rather, employer argues that claimant did not routinely or regularly perform such unloading duties, that it is not and never has been involved in the maritime industry, and that claimant was hired as a paper mill employee, not as a maritime employee. Unloading duties such as those performed by claimant, however, have been found to constitute longshoring activities pursuant to Section 2(3). *See Browning v. B.F. Diamond Construction Co.*, 676 F.2d 547, 14 BRBS 803 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983). The administrative law judge credited claimant's testimony that from 1945 until 1963, he was summoned to help unload barges two to three times a month, eight hours per day. *See* Tr. at 22-23, 25. Based upon this uncontradicted testimony of record, we reject employer's unsupported assertion that claimant's barge unloading duties were sporadic or episodic; rather, the testimony set forth by the administrative law judge establishes, at the very least, that "some portion" of claimant's job activities constituted maritime employment. *See Caputo*, 432 U.S. at 275-276, 6 BRBS at 166; *see also Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT)(11th Cir. 1990); *Boudloche v. Howard Trucking Company, Inc.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Accordingly, we affirm the administrative law judge's determination that claimant's unloading duties were sufficient to confer coverage under Section 2(3) of the Act, as that finding is supported by substantial evidence and is in accordance with law. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT).

Employer also contends that the administrative law judge erred in finding that claimant was injured on a covered situs; specifically, employer asserts that claimant's hearing loss did not occur while working in or around the barge facility but in other areas of its facility where noise levels were higher. Section 3(a) of the Act provides coverage for a disability resulting "from an injury occurring upon the navigable waters of the Unites 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)." 33 U.S.C. §903(a)(1988). Accordingly, coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *See Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992); *Alford v. MP Industries of Florida, Inc.*, 16 BRBS 261 (1984).

In the instant case, employer does not contend that its barge facility is not a covered situs, but rather asserts that claimant was not "injured" in this area because he was not exposed to sufficient noise. Employer's quality improvement facilitator, Mr. Smallwood, testified that

employer's barge facility is located on the Chickasobogue Bayou, which connects with the Mobile River, and that the bayou is navigable for at least two or three miles further upstream. Tr. at 34, 51. The administrative law judge credited claimant's testimony that he was exposed to loud noises while working at employer's barge facility and he was not furnished any ear protection. Tr. at 23. This testimony was corroborated by Mr. Smallwood's testimony that the crane used at the barge facility produced high levels of noise. Tr. at 53. Thus, the administrative law judge found that the noise to which claimant was exposed while unloading employer's barges caused permanent injury to his hearing. Decision and Order at 5; *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991). Employer's contention that claimant was exposed to greater noise while working in the mill, and thus was not injured on a covered situs, is without merit.[3] It is well-established that an employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *See Peterson*, 25 BRBS at 71; *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). As the administrative law judge's credibility determinations are neither inherently incredible nor patently unreasonable, we affirm the administrative law judge's finding that claimant, when unloading barges on navigable water, was exposed to a noisy work environment, and that, thus, claimant established jurisdiction under the Act.

II. AWARD OF BENEFITS

Employer next argues that the administrative law judge erred in awarding permanent partial disability compensation pursuant to Section 8(c)(13) of the Act, and not pursuant to Section 8(c)(23). Subsequent to the filing of employer's appeal in the instant case, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), which is dispositive of the compensation issue. In *Bath Iron Works*, the Court held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) of the Act. Specifically, the Court stated that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise and, thus, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." *See* 33 U.S.C. §910(i). Since Section 8(c)(23) only applies to retirees with such occupational diseases, it is inapplicable to hearing loss injuries. Therefore, pursuant to *Bath Iron Works*, we affirm the administrative law judge's award of permanent partial disability compensation under Section 8(c)(13) of the Act.

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

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[3]Employer's noise surveys, which purported to show that noise in the mill area was greater than that produced at the barge facility, were discredited by the administrative law judge, since the surveys did not include noise produced by the crane and the conveyor machinery at the barge facility. Decision and Order at 5; Tr. at 47-48. In any event, the issue is whether the covered employment was in a harmful environment; it is irrelevant that employment not covered by the Act was in a worse environment.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge