

BRB Nos. 93-1949
and 93-2255

ANTE LJUBIC)
)
 Claimant-Respondent)
)
 v.)
)
 UNITED FOOD PROCESSORS) DATE ISSUED:
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 and)
)
 AMERICAN INTERNATIONAL)
 ADJUSTING COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeals of the Decision and Order and Order for Fees and Costs of Henry B. Lasky, Administrative Law Judge, and the Compensation Order Award of Attorney Fees of Joyce L. Terry, District Director, United States Department of Labor.

Robert W. Nizich (Law Offices of Robert W. Nizich), San Pedro, California, for claimant.

Enrique M. Vassallo (Mullen & Filippi), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Employer/carrier appeals the Decision and Order and Order for Fees and Costs (93-LHC-104) of Administrative Law Judge Henry B. Lasky and the Compensation Order Award of Attorney Fees of District Director Joyce L. Terry (Case No. 18-51652) 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On March 18, 1992, claimant, a maintenance supervisor for employer, fell off a ladder while climbing it to fix a roof on one of employer's buildings at its fish cannery. Claimant fractured his left ankle and back, and injured his left knee and right elbow, and has not returned to work due to this

accident. The parties stipulated that the situs requirement under Section 3(a) of the Act, 33 U.S.C. §903(a), had been met. However, employer sought to exclude claimant from coverage under the Act by asserting that claimant was an aquaculture worker pursuant to Section 2(3)(E) of the Act, 33 U.S.C. §903(2)(3)(E) (1988), and 20 C.F.R. §701.301(12)(iii)(e) and therefore could not meet the status requirement of Section 2(3) of the Act, 33 U.S.C. §902(3). In his Decision and Order, the administrative law judge found that claimant was not an aquaculture worker and that he met the status requirement and was covered under the Act. Consequently, the administrative law judge ordered employer to pay claimant temporary total disability benefits from March 18, 1992 through January 1, 1993, interest, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Subsequent to the administrative law judge's award of benefits, both the administrative law judge and the district director awarded an attorney's fee to claimant's counsel.

On appeal, employer challenges the administrative law judge's finding that claimant was not an aquaculture worker and thus is covered under the Act, as well as the administrative law judge's award of an attorney's fee. BRB No. 93-1949. Employer also appeals the fee award of the district director.¹ BRB No. 93-2255. Claimant responds in support of the administrative law judge's award of benefits and the attorney's fee awards of both the administrative law judge and the district director.

Employer contends that the administrative law judge erred in finding that claimant is not excluded from coverage as an aquaculture worker. Section 2(3)(E) of the Act, 33 U.S.C. §902(3)(E), excludes aquaculture workers from coverage under the Act, provided they are covered under a state workers' compensation law. Although the Act does not define the term "aquaculture workers," the term is defined in the regulations. Section 701.301(12)(iii)(E) defines the term as:

Aquaculture workers, meaning those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species.

20 C.F.R. §701.301(12)(iii)(E). The legislative history pertaining to this provision notes that the cleaning, processing, or canning of fish has never been interpreted as maritime employment, and states congressional intent to keep this interpretation in place. H.R. Rep. No. 1027, 98th Cong. 2d Sess. 23, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2773.

In determining that claimant was not an aquaculture worker, the administrative law judge first discussed claimant's duties as a maintenance supervisor and mechanic for employer. Decision and Order at 3. Claimant was required to repair pumps and hoses that work as a vacuum to remove

¹The Board consolidated employer's appeals of the administrative law judge's Decision and Order and Order for Fees and Costs, BRB No. 93-1949, and employer's appeal of the district director's fee award, BRB No. 93-2255, in an Order dated September 8, 1993.

fish from vessels which moor at employer's docks, repair tanks that hold water under the employer's docks, repair conveyors which transport fish from the boats moored at the docks to employer's fish processing facility, repair cranes that pick up fish from boats that moor at employer's docks, and repair the docks, including the pipes and wood structure. Decision and Order at 3; Jt. Ex. 1 at 14-19. Forty percent of claimant's working time was spent performing maintenance work on the various structures and equipment on the docks that are used for unloading fish. Decision and Order at 3; Jt. Ex. 1 at 20. Claimant's other duties involved the repair and maintenance of the cannery buildings and machinery. The administrative law judge found that there is no evidence that the fish processed by employer were harvested in a controlled setting.

The repair and maintenance of docks and unloading equipment is indisputably maritime employment. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989) (repair of machinery used to load coal onto vessels is covered activity); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993) (repair of pipes used to transport water, fuel and steam to ships is covered employment); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir. 1990), *sur denial of reh'g*, 910 F.2d 1179 (1990), *cert. denied*, 498 U.S. 1067 (1991) (status requirement met where job involved connecting, disconnecting and flushing hoses through which fuel was pumped to ships); *Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994). Because claimant spent forty percent of his time in clearly maritime employment, we hold that the administrative law judge properly found that claimant is entitled to coverage under the Act. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977)(the status requirement is satisfied as long as some portion of an employee's time involves maritime activities); Decision and Order at 5. The administrative law judge also properly found that claimant is a maritime worker even if at the moment of injury he was performing other work not essential to the loading process, as claimant cannot walk in and out of coverage. *Id.*

Contrary to employer's arguments, the administrative law judge rationally determined that claimant was not an aquaculture worker pursuant to Section 2(3)(E) as claimant was not employed exclusively to repair fish processing, cleaning and canning equipment and buildings, notwithstanding that he was employed by a cannery. Although the term "exclusively" does not appear in the statute or regulation with regard to the aquaculture exclusion, *compare* 33 U.S.C. §902(3)(A),² the administrative law judge stated that the exclusion cannot apply to those engaged in the cleaning, processing or canning of fish if they are also engaged in maritime employment within the meaning of the Act. The administrative law judge also correctly noted that there was no evidence that claimant participated in the actual cutting, canning or processing of fish in the fish cannery. Decision and Order at 4; *see Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160 (CRT)(4th Cir. 1991), *aff'g* 23 BRBS 267 (1990). The administrative law judge properly focused on those of claimant's duties that are clearly covered under the Act, namely the maintenance

²This section excludes from coverage "individuals employed *exclusively* to perform office clerical, secretarial, security, or data processing work" if they are subject to a state workers' compensation remedy.

of unloading equipment and the repair of docking facilities. Inasmuch as the administrative law judge's finding that claimant spent forty percent of his time in indisputably covered activities is supported by the evidence and accords with law, we affirm the administrative law judge's finding that claimant is not excluded from coverage as an aquaculture worker and satisfies the status requirement of Section 2(3). *See Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT); *Caputo*, 432 U.S. at 249, 6 BRBS at 150.

Employer also challenges the awards of attorney's fees of both the administrative law judge and the district director. Employer contends that claimant's counsel is not entitled to an attorney's fee as claimant is an aquaculture worker and therefore excluded from coverage. As claimant's counsel accurately notes, employer does not challenge the amounts awarded by the administrative law judge and the district director.³ In light of our affirmance of the administrative law judge's finding that claimant is entitled to coverage under the Act, and the fact that employer does not challenge the amounts of the attorney's fee awarded by the administrative law judge and the district director, we affirm the attorney's fee awarded by the administrative law judge and the district director.

³The administrative law judge awarded counsel a fee of \$5,527.50, and the district director awarded counsel a fee of \$1,725.

Accordingly, the administrative law judge's Decision and Order and Order for Fees and Costs are affirmed. The district director's Compensation Order Award of Attorney Fees also is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge