

BRB No. 98-1596

ERIC C. HANSEN)	
)	
Claimant-Petitioner))
)	
v.)	
)	
CALDWELL DIVING COMPANY, INCORPORATED)	DATE ISSUED: <u>9/7/99</u>
)	
and)	
)	
EMPLOYER'S INSURANCE OF WAUSAU)	
)	
Employer/Carrier- Respondents))
)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Michael T. Collins (Law Offices of Michael T. Collins), Manahawkin, New Jersey, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-LHC-02304) of Administrative Law Judge Ainsworth H. Brown 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, a commercial diver for employer, suffered work-related injuries to

his back, knees and intestines on April 17, 1991, when he was struck by a crane boom while working aboard the barge COHEN 165 in Battery Creek, South Carolina. At the time of the accident, claimant served as a member of a dive team employed to facilitate the mission of the COHEN 165, which was the installation of underwater cable. Employer voluntarily paid claimant temporary total and temporary partial disability compensation, as well as medical benefits, until January 1994. 33 U.S.C. §§908(b), (e), 907. Previously, on November 17, 1993, claimant had filed a civil action against employer under the Jones Act, 46 U.S.C. §688; the parties agreed to a settlement of this suit in 1996. Pursuant to this settlement, claimant received \$1,139,165.84, plus a waiver of employer's lien of \$181,160.04, representing the amount it previously paid in compensation and medical benefits under the Act. This amount was placed in an escrow account, to be disbursed to claimant upon approval of a settlement of his longshore claim under Section 8(i) of the Act, 33 U.S.C. §908(i). However, after the district director tolled the time upon which approval of the settlement would be made, claimant indicated that he was not ready to settle his claim under the Act. Thereafter, the district director terminated consideration of the Section 8(i) settlement, and claimant's claim was referred to the Office of Administrative Law Judges. The funds held in the escrow account have not been disbursed to either claimant or employer.

In his Decision and Order, the administrative law judge found that the COHEN 165 is a vessel, that claimant's work as a diver furthered the mission of the vessel, and that claimant's connection to the vessel was substantial in nature and duration. Thus, the administrative law judge found that claimant was a "member of a crew" of a vessel under Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G)(1994), and thus not entitled to benefits under the Act.

On appeal, claimant challenges the administrative law judge's determination that he is not entitled to benefits under the Act. Specifically, claimant contends that the administrative law judge erred in finding that he had a connection to a vessel that was substantial in either nature or duration. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

The sole issue presented by the instant appeal is whether the administrative law judge erred in finding that claimant was a "member of a crew" of a vessel, and thus excluded from coverage under the 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 "master or member of a crew of any vessel" under the Longshore Act. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT)(1991);

see also *Chandris v. Latsis*, 515 U.S. 347 (1995). An employee is a member of a crew if: (1) he was permanently assigned to or performed a substantial part of his work on a vessel or fleet of vessels; and (2) his duties contributed to the vessel's function or operation. See *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535, 31 BRBS 34 (CRT)(1997); *Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992); *Griffin v. T. Smith & Sons, Inc.*, 25 BRBS 196 (1992). "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 must have a connection to a vessel that is 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).

In the instant case, the administrative law judge's finding that the COHEN 165 is a vessel is unchallenged on appeal.¹ In addition, claimant does not contest the administrative law judge's finding that his duties contributed to the accomplishment of the mission of the COHEN 165. Rather, on appeal, claimant asserts that contrary to the administrative law judge's determination, he lacked a connection to a vessel that was substantial in both its nature and duration. For the reasons that follow, we reject claimant's contentions.

In rendering his decision, the administrative law judge credited claimant's testimony that he played no role in the navigation or function of the COHEN 165 as it traveled from New Jersey to South Carolina, and that claimant drove with employer's diving team to the work site in South Carolina in mid-March 1991 and resided at a nearby motel, as there were no living quarters on the barge. Tr. at 223-226. Accessing the barge either by tug boat or boarding the barge when it was docked, see *id.* at 157, claimant worked on board the COHEN 165 on a daily basis for approximately four weeks prior to his accident, preparing the barge for the assignment of underwater cable installation. The preparation work included setting up and maintaining the diving equipment, maintaining the compressor which was stationed on the barge, and surveying the surrounding marshes in advance of the cable installation. *Id.* at 225-227, 286-288. Claimant was also required to perform

¹The COHEN 165 is a barge incapable of self-propulsion. Prior to claimant's injury, it was transported by virtue of a tug boat from its port in New Jersey to Battery Creek, South Carolina. It is undisputed that claimant played no part in the navigation of the COHEN 165. Tr. at 223, 227-228.

underwater dives, as well as assist other divers while they were underwater by tending their lines and communicating with them over a two-way radio. *Id.* at 228-229, 287. The diving responsibilities involved clearing away underwater obstructions to the cable. *Id.* at 94, 290. Claimant conceded that his work was essential to the completion of the mission of the COHEN 165. *Id.* at 289.

In his decision, the administrative law judge found that claimant's work as a diver was maritime in nature, regularly exposing him to the perils of the sea. Relying on claimant's credited testimony, the administrative law judge found that claimant's work had a connection to the COHEN 165 that was substantial in nature. See Decision and Order at 7. Next, the administrative law judge found that claimant's connection to the COHEN 165 was substantial in terms of its duration based on the fact that claimant began his preparation work approximately four weeks prior to his injury, and testified that the actual laying of the cable would have taken two to three weeks. Tr. at 290. The administrative law judge found that a period of approximately seven weeks to complete the mission of the vessel was of substantial duration. See Decision and Order at 8. Thus, the administrative law judge determined that claimant was a "member of a crew" of a vessel pursuant to Section 2(3)(G) of the Act, and therefore excluded from coverage under the Act.

We affirm the administrative law judge's conclusion, as it is supported by substantial evidence and consistent with applicable law. In *Papai*, the Supreme Court established the following test for determining whether an employee had a substantial connection to a vessel:

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). In *Papai*, the Court ruled that a painter who was hired for one day to paint a tug boat was not a seaman, as his assignment on the day of the injury was of a transitory and sporadic connection to the vessel.² *Id.*, 520 U.S. at 559-560, 31 BRBS at 39 (CRT). In *Foulk v. Donjon*

²At issue in *Papai* was whether the employee, who worked several painting jobs in two and a half months for three different employers, established a substantial connection to a vessel or identifiable group of vessels. The Court held that the relevant inquiry with regard to this issue is whether the vessels are subject to common ownership or control. The Court held that the only common link between

Marine Company, Inc., 144 F.3d 252 (3d Cir. 1998), a case which concerned a commercial diver hired for 10 days to work on a crane barge used for the construction of an artificial reef, the United States Court of Appeals for the Third Circuit held that the employee's connection to the vessel was substantial in nature. Recognizing that the employee's work was necessary for the successful completion of the vessel's mission, the court held that commercial divers are protected by the Jones Act as they are regularly exposed to the perils of the sea. *Id.*, 144 F.3d at 258-259; see also *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 436 (5th Cir. 1984)(commercial diver, who embodies traditional maritime risk of navigation, has legal protections of a seaman when substantial part of duties are performed on vessels). In the instant case, the administrative law judge's finding that claimant's work was necessary in order for the COHEN 165 to accomplish its mission is supported by claimant's testimony. Moreover, the administrative law judge's finding that claimant's employment as a commercial diver for employer was maritime in nature, requiring regular exposure to the perils of the sea, is in accordance with law. Accordingly, we affirm the administrative law judge's finding that claimant's connection with the COHEN 165 was substantial in nature.³

We next consider claimant's contention that the administrative law judge erred in finding that claimant's connection to the COHEN 165 was substantial in duration, the second part of the second element for seaman status under *Chandris*. In *Chandris*, the Court held that "[i]n evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated by the jurisprudence." *Chandris*, 515 U.S. at 363. In its analysis of whether the employee's connection to the vessel was substantial in duration, the Third Circuit in *Foulk* did not evaluate the employee's connection to the vessel at the moment of injury, but rather, considered his intended relationship as if he had completed his mission uninjured. *Foulk*, 144 F.3d at 259. In that case, the court reversed the district court's finding that a 10-day relationship

the employers, the practice of hiring from the same union hall, was insufficient to establish this element. *Papai*, 520 U.S. at 560, 31 BRBS at 39 (CRT).

³The instant case is distinguishable from *Bundens v. J.E. Brenneman Co.*, 28 BRBS 20 (1994), *aff'd in part, part*, 46 F.3d 292, 29 BRBS 52 (CRT)(3d Cir. 1995), where the Board affirmed the administrative law judge's finding that the employee was not a member of a crew. In that case, although the employee performed some diving work off barges, his primary work duties related to pier and dock construction, activities covered under Section 2(3) of the Act. In the instant case, claimant worked solely as a diver.

was too short to satisfy the durational requirement, holding that it was inappropriate to determine the minimum durational element by an absolute number. The ultimate inquiry, the court held, was whether the employee was a member of a vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. The temporal element and the nature of the activities performed, taken together, determine seaman status. *Id.*

In the instant case, claimant worked aboard the COHEN 165 for approximately four weeks in preparation for the installation of underwater cable prior to his injury. It is apparent from claimant's testimony that his injury occurred just prior to the actual cable installation. Claimant testified that had he not been injured, he would have worked for another two to three weeks to complete the barge's mission of installing underwater cable. See Tr. at 290. The administrative law judge found that a period of approximately seven weeks for the COHEN 165 to complete its mission was sufficiently substantial to satisfy the temporal element for seaman status. In light of the decisions in *Chandris* and *Foulk*, we hold that the administrative law judge properly found that claimant's work was of sufficient duration to confer seaman status. Accordingly, we affirm the administrative law judge's finding that claimant's connection to the COHEN 165 was substantial in duration, and thus affirm his conclusion that claimant was a "member of a crew" of a vessel and excluded from coverage under the Act.

Lastly, employer, in its response brief, requests that if the Board affirms the administrative law judge's decision, it should issue an order requiring the escrow agent to release the funds held in escrow to employer. Employer's request must be denied, as the Board is without authority to issue an order compelling the release of escrow funds from a Jones Act settlement.⁴

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

⁴We note that Section 3(e) of the Act, 33 U.S.C. §903(e), provides that any amounts an employer has paid pursuant to a recovery under the Jones Act shall be credited against the employer's liability under the Act.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge