

BRB Nos. 92-1087
and 92-1087A

NAPOLEON BARREN (Deceased))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
INTERNATIONAL PAPER COMPANY)	
)	
Employer-Respondent)	
Cross-Petitioner)	DATE ISSUED:
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

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

Sandy G. Robinson and Wendy A. Pierce (Helmsing, Lyons, Sims & Leach, P.C.), Mobile, Alabama, for employer.

Samuel J. Oshinsky, Counsel for Longshore (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant¹ appeals and employer cross-appeals the Decision and Order Awarding Benefits (90-LHC-2483) of Administrative Law Judge James W. Kerr, Jr., 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).

Decedent was employed by employer from 1941 until his retirement on June 1, 1975. On October 10, 1986, decedent underwent an audiometric examination which revealed a 50.6 percent binaural hearing impairment. Thereafter, on March 30, 1987, decedent filed a claim for benefits under the Act for a work-related hearing loss. On December 17, 1987, decedent died of causes unrelated to his employment.

Employer operates a pulp mill on the Chickasobogue Bayou, which is connected to the Mobile River. Employer's mill has its own barge slip 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. Decedent, during his thirty-four years of employment at employer's facility, worked at both employer's wood yard and barge facility, where he held positions such as laborer, recovery fireman, conveyor man, steel, cable and chain man, and, finally, cable slinging crane man.

In his Decision and Order, the administrative law judge found, based upon the testimony of a co-worker and employer, that decedent's regularly performed duties of unloading barges on navigable waters was sufficient to confer jurisdiction under the Act. Next, the administrative law judge found that causation had been established based upon decedent's demonstrated hearing loss, the testimony of a co-worker concerning the noisy conditions in the barge unloading area, and the failure of employer to provide any rebuttal evidence. Relying on *Ingalls Shipbuilding, Inc. v. Director, OWCP (Fairley)*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), the administrative law judge, after converting the 50.6 percent binaural hearing impairment revealed on the October 1986 audiogram to an 18 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment (AMA Guides)*, awarded decedent compensation pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988), commencing November 10, 1986, based upon an average weekly wage of \$302.66.

On appeal, claimant contends that the administrative law judge erred in awarding benefits

¹We note that the claimant in this case died before the adjudication of his claim which was then pursued by his widow, Hannah L. Roberts, who died on February 6, 1992. The claim is now being carried forward by the Executrix of her estate, claimant's daughter, Mary Barren Colston.

under Section 8(c)(23) rather than Section 8(c)(13), 33 U.S.C. §908(13)(1988). In its cross-appeal, employer contends that the administrative law judge erred in finding that claimant established jurisdiction under the Act. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in response to employer's cross-appeal, urging that the Board affirm the administrative law judge's determination that decedent established jurisdiction under the Act.

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. §902(3)(1988), and the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a)(1988). See *P.C. Pfeiffer Co., 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).

Employer, in its cross-appeal, initially contends that the administrative law judge erred in finding that decedent regularly performed maritime duties while working for employer and that, thus, decedent did not satisfy the status requirement of Section 2(3) of the Act.² We disagree.

²In 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 by the Act before 1972. *Perini*, 459 U.S. at 315-16, 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).

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

In determining that decedent's work was sufficient to confer jurisdiction under the Act, the administrative law judge found that decedent regularly unloaded 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 employment so long as some portion of his job activities constitute covered employment. *Caputo*, 432 U.S. at 275-76, 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 *Hullingshorst 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 decedent unloaded barges while employed by employer, see Tr. at 51, 54; rather, employer argues that decedent did not routinely or regularly perform such unloading duties, that it is not and never has been involved in the maritime industry, and that decedent was hired as a wood laborer, not as a maritime employee. Such unloading duties, however, have been found to constitute longshoring activities pursuant to Section 2(3). See *Browning v. B.F. Diamond Const. 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). Moreover, the administrative law judge set forth the testimony of Mr. Meardry, a co-worker of decedent, who testified that between 1946 and 1961 he and decedent worked in the wood yard of employer's pulp mill and assisted in the unloading of barges which were pulled by tugs to a slip near the mill. See Tr. at 17-18, 39. Mr. Meardry further testified that decedent assisted in unloading barges two to three times a week, and occasionally as many as five times a week. *Id.* at 20-25. This testimony was corroborated by that of employer's quality improvement facilitator, Mr. Smallwood, who testified that decedent's work duties included barge-unloading assignments and that decedent unloaded barges when he was "cable slinging" from 1968 to 1975. *Id.* at 54-55, 65-66. Based upon this uncontradicted testimony of record, we reject employer's unsupported assertions that decedent's barge unloading duties were sporadic or episodic; rather, the testimony set forth by the administrative law judge establishes that decedent's unloading duties were a regular and usual part of his employment duties. Accordingly, we affirm the administrative law judge determination that decedent's unloading duties were sufficient to confer jurisdiction under 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 the decedent

was injured on a covered situs; specifically, employer asserts that decedent's hearing loss did not occur while working in or around its 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 on the navigable waters of the United 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. Specifically, Mr. Smallwood testified that employer's barge facility was located on the Chickasobogue Bayou, that barges navigated this waterway, and that the bayou is navigable for at least two or three miles further upstream. Tr. at 44-45. Moreover, the administrative law judge specifically credited the testimony of Mr. Meardry that employer's barge facility was very noisy and that, because of the noise levels, employer's employees utilized signs in order to communicate with one another, in concluding that the noise to which decedent was exposed while unloading employer's barges contributed to or aggravated his hearing loss. See Decision and Order at 3-4; *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). We hold that the administrative law judge's credibility determinations are neither inherently incredible or patently unreasonable; accordingly, we affirm the administrative law judge's finding that decedent, when unloading barges on navigable water, was exposed to a noisy work environment, and that, thus, decedent had established jurisdiction under the Act.

II. AWARD OF BENEFITS

Claimant, on appeal, contends that the administrative law judge erred in awarding permanent partial disability compensation pursuant to Section 8(c)(23) of the Act. We agree. The United States Supreme Court's recent decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), is dispositive of the issue presented by claimant in this case. 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), 33 U.S.C. §908(c)(13). 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), 33 U.S.C. §908(c)(23), only applies to retirees with such occupational diseases, Section 8(c)(23) is inapplicable to hearing loss injuries.

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Since the

administrative law judge's findings that decedent suffered a 50.6 percent binaural hearing loss under the AMA *Guides* based on the October 10, 1986, audiogram, and that decedent's applicable average weekly wage is \$302.66, are unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits in the amount of \$201.77 per week for 101.2 weeks (50.6 percent of 200 weeks) pursuant to Section 8(c)(13) of the Act, commencing on June 1, 1975, the date of decedent's retirement.³ *Bath Iron Works*, 113 S.Ct at 699-700, 26 BRBS at 154 (CRT); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits under Section 8(c)(23) is vacated, and the decision is modified to award decedent compensation for a 50.6 percent binaural hearing loss pursuant to Section 8(c)(13). In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

³We note that as all benefits due decedent pursuant to Section 8(c)(13) accrued prior to his death, decedent's estate is entitled to the accrued benefits. See *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, *modified on recon.*, 28 BRBS 156 (1994).