BRB No. 07-0756

T. M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREAT SOUTHERN OIL & GAS	)	DATE ISSUED: 05/29/2008
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Robert K. Guillory (Robert K. Guillory & Associates), Lafayette, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Decision on Motion for Reconsideration (2006-LHC-01226) of Administrative Law Judge C. Richard Avery 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his left knee on May 28, 1994, during the course of his employment as a derrick man. His knee was crushed when he slipped and fell between two barges. Tr. at 20-21, 46-47. Employer paid claimant compensation and medical benefits pursuant to the Louisiana workers' compensation statute. Claimant's state compensation benefits were terminated in 2006, and he sought compensation under the Act for his work injury. The sole issue before the administrative law judge was whether claimant's injury occurred in employment covered by the Act. 33 U.S.C. §§902(3), 903(a).

In his decision, the administrative law judge found that claimant worked on a keyway barge at the time of his injury, and that this barge is a "fixed" platform. Pursuant to the Supreme Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), denying coverage to a welder employed on a fixed offshore oil-drilling platform in state territorial waters, the administrative law judge found that claimant's work as a derrick man is not maritime employment, and that claimant therefore failed to establish that his claim falls within the coverage of the Act. Claimant's motion for reconsideration was denied.

On appeal, claimant challenges the administrative law judge's finding that he is not covered under the Act. Employer responds, urging affirmance.

Prior to the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, claimant had to establish that his injury occurred upon the navigable waters of the United States, including any dry dock. *See* 33 U.S.C. §903(a) (1970)(amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of Section 2(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 determined that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage under the Act from workers injured on navigable waters who would have been covered by the Act before 1972. *Id.*, 459 U.S. at 315-316, 15 BRBS at 76-77(CRT). Thus, 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). Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Id.*, 459 U.S. at 323, 15 BRBS at 80-81(CRT). In *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT), the Supreme Court noted that while the claimant would have been covered under the Act if he was injured on a floating platform and therefore his injury occurred on navigable waters, he was not covered because he worked on a fixed

platform in state waters and his work was not maritime in nature.[1] *Id*., 470 U.S. at 424 n.10, 17 BRBS at 83 n.10(CRT).

In this case, claimant and his crew were transported daily by boat to repair an offshore oil well. Tr. at 39. A truck-mounted repair rig was positioned on a keyway barge, which enveloped the oil well. *Id*. at 19. The keyway barge was "spudded" to prevent any movement. *Id*. at 23, 51, 54-55. A pipe barge and blending barge were attached to the keyway barge by lines. *Id*. at 29, 45, 51. A tugboat and crew boat were usually present at the job site. *Id*. at 25. The pipe and blending barges were repositioned around the keyway barge by the tugboat on occasion or were dispatched to the dock to pick up materials or equipment. *Id*. at 25, 29, 51. Significantly, the uncontradicted evidence of record establishes that claimant was injured while attempting to cross between the floating pipe and blending barges that were attached to the keyway barge. *Id*. at 20-21, 46-47; EX 1. Inasmuch as the pipe and blending barges moved during the course of the work day, there is no evidence that these barges were ever affixed to the water bed, and claimant's injury occurred while he was attempting to cross between these floating barges, claimant's injury occurred on actual navigable waters while in the course of his employment on those waters. Pursuant to *Perini*, claimant satisfies both the situs and status requirements, and he thus is entitled to coverage under the Act based on the actual site of his injury.[2] *Perini*, 459 U.S. at 323, 15 BRBS at 80-81(CRT).

Moreover, we agree with claimant that the administrative law judge erred in finding that claimant's injury is not within the coverage of the Act on the basis that his job duties as a derrick man on the keyway barge were performed on a fixed platform. Relying on cases which address the issue of whether a floating structure is a "vessel in navigation" for purposes of the Jones Act or the Longshore Act's member of a crew exclusion,[3] 33 U.S.C. §902(3)(G), 46 U.S.C. App. §688(a), the administrative law judge

[1] The Court relied on its decision in *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), which held that platforms permanently affixed to the ocean floor are considered to be islands, albeit artificial ones.

[2] There is no contention that claimant is excluded from coverage by any other provision of the Act.

[3] Specifically, the administrative law judge cited *Stewart v. Dutra Constr. Co., Inc.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005), a Supreme Court decision involving whether the site of claimant's injury was on a "vessel" and therefore excluded him from coverage under Section 2(3)(G) of the Act as a member of a crew. He also cited *Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441, 39 BRBS 67(CRT) (5th Cir. 2006), a case involving the issue of whether a floating barge used to house and feed employees during dredging projects was a vessel in navigation within the meaning of the Jones Act.

found that the keyway barge is a "fixed" platform. The administrative law judge found that the keyway barge was "spudded" and did not move while claimant was at the job site, it could remain secured at one location for months at a time, it was not used as a means of transportation, and any movement of the keyway barge was incidental to its use as a work platform. The administrative law judge also found that the barge was towed to another work site when the oil well repair was completed, it did not have sleeping quarters, and that claimant and his crew were land-based workers who were transported by crew boat to the barge, where they performed the same repair work as they had on land-based oil wells. Decision and Order at 8-9.

The administrative law judge erred in requiring that the keyway barge meet the test for a "vessel in navigation" in order for claimant working upon it to be covered. Rather, coverage under the Act concerns only whether the employee was upon, over, or in actual navigable waters at the time of his work injury. This issue was extensively discussed by the Board and the Second Circuit in *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *aff'g* 37 BRBS 126 (2003), *cert. denied*, 126 S.Ct. 2319 (2006). In *Morganti*, the administrative law judge also denied coverage because he found that the barge on which the decedent worked was a fixed platform. The Board held that the barge was not a fixed platform as there was no evidence that it was permanently affixed to the floor of the lake or to shore. The evidence showed that the barge floated and was moored by way of chains, anchors and sinkers, and that it could be moved as necessary. Accordingly, the Board reversed the administrative law judge's finding that the decedent's work aboard the barge was not on navigable waters. *Morganti*, 37 BRBS at 131-132. The Second Circuit affirmed the Board's holding inasmuch as it was undisputed that the barge floated and therefore was not a fixed platform. *Morganti*, 412 F.3d at 424, 39 BRBS at 42(CRT). The court observed that "vessel" status "is simply irrelevant" to the inquiry as to whether the claimant was injured on navigable waters. *Id.*

In this case, it is undisputed that claimant was injured attempting to cross from the pipe barge to the blending barge, and that these barges were afloat on navigable waters. Moreover, the evidence establishes that, while the keyway barge was affixed to the sea bed by "spudding" to prevent it from moving while work was performed, it was not permanently affixed to the sea bed. Rather, the keyway barge is otherwise afloat on navigable waters, and is fully capable of being moved when such movement is required after an oil well has been repaired. *See* Tr. at 29, 32, 41, 55. In fact, the administrative law judge found that the barge was moved to other sites as jobs were completed. Decision and Order at 9. Accordingly, as there is no evidence it was permanently attached to the ocean floor, we reverse the administrative law judge's determination that the keyway barge is a "fixed" platform, and his denial of coverage under the Act on this basis. *See Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959); *Morganti*, 37 BRBS

126, *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT); *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1998).

In its response brief, employer argues that coverage should be denied because the amount of time claimant spent working on navigable waters was minimal.[4] Claimant had worked for employer for approximately two and a half years in exclusively land-based employment. Tr. at 37-38. Claimant had worked for employer on the keyway barge for only four or five days prior to sustaining his injury. *Id*. at 19, 50. In *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*), the Fifth Circuit held that a worker injured upon navigable waters is engaged in maritime employment and meets the status test if his presence on the water at the time was neither "transient nor fortuitous."[5] The court declined to set "the exact amount of work performance on navigable waters sufficient to trigger [Longshore Act] coverage," instead electing to leave "that task to the case-by-case development for which the common law is so well suited." *Bienvenu*, 164 F.3d at 908, 32 BRBS at 223(CRT). The court, however, provided "some guiding thoughts on the matter," stating that "the threshold amount must be greater than a modicum of activity in order to preclude coverage to those employees who are merely commuting from shore to work by boat," and that "the routine activity of assisting in tying the vessel to the dock and loading or unloading one's tools and personal gear onto the vessel do not count as meaningful job responsibilities." *Id.* The court held the claimant in *Bienvenu* covered because he spent 8.3 percent of his time working on production equipment aboard a vessel. As this time was sufficient to confer coverage, the

[4] We will address this contention even though it was not raised in a cross-appeal as it supports the result reached by the administrative law judge. *Reed v. Bath Iron Works Corp*., 38 BRBS 1 (2004).

[5] This language is derived from the decision in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 324 n. 34, 15 BRBS 62, 81 n. 34(CRT) (1983), wherein the Supreme Court stated it expressed no opinion on whether coverage extends to a worker "injured while transiently or fortuitously on actual navigable water." In *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991), the Eleventh Circuit denied coverage to a land-based electrician injured on navigable waters en route to a job site on land. The court held that the employee was not engaged in maritime employment as there was no maritime connection to the general nature of his employment, and therefore he did not establish the status requirement for coverage under the Act. *Brockington*, 903 F.2d at 1527-1528; *see* 33 U.S.C. §902(3). Unlike the employee in *Brockington*, in this case, all of claimant's job duties while he was assigned to work on the keyway barge were performed on navigable waters.

court did not consider whether the time the claimant spent aboard the vessel being shuttled to various platforms should be included in determining whether he spent sufficient work time on navigable waters. *Id.*, 164 F.3d at 908 n. 6, 32 BRBS at 223 n. 6(CRT).

We reject employer's contention that claimant should be denied coverage because his job duties as a derrick hand were not performed upon navigable waters prior to his working on this job. Pursuant to *Perini*, the pertinent inquiry for establishing coverage under the pre-1972 Act is whether the worker was injured during the course of performing his employment duties on navigable waters. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80(CRT). The nature and location of claimant's work with previous employers or on other jobs with this employer are not relevant considerations. *See Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); *McGray Constr. Co. v. Director, OWCP*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 32 BRBS 41(CRT) (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998). In this case, there is no evidence that any part of claimant's 12-hour work days was land-based at the time of his injury. Claimant was transported by crew boat to work on the floating barges. *See* Tr. at 39, 57. Moreover, the record is uncontradicted that claimant was informed prior to the work injury that employer estimated his crew could anticipate approximately two years of this offshore work, and a member of claimant's crew testified that he worked approximately 50 percent of the time offshore for employer during the year and a half he was employed by employer after claimant's injury. Tr. at 16, 19-20, 38, 43. Therefore, we reject employer's contention that claimant should be denied coverage under the Longshore Act based on the extent of his work experience for employer on navigable waters as of the time of his injury.[6]

[6] We reject employer's reliance on testimony that claimant worked on a "relief crew" as evidence that claimant's job assignment at the time of his injury was temporary, and that he therefore did not establish the status element for coverage under the Act. *See* Tr. at 27-28. Claimant's work as part of a "relief crew" does not establish that claimant's job assignment was temporary as there is no evidence that the job duties of a "relief crew" are temporary in nature. Moreover, under *Perini*, when, as here, a worker is injured on actual navigable waters while in the course of his employment on those waters, he satisfies both the situs and status requirements and is covered under the Act. *Perini*, 459 U.S. at 323, 15 BRBS at 80-81(CRT).

Accordingly, the administrative law judge's Decision and Order and the Decision on Motion for Reconsideration denying claimant coverage under the Act are reversed. Claimant is entitled to benefits under the Act, and the case is remanded to the administrative law judge for entry of an award of benefits.[7]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[7] The administrative law judge stated at the formal hearing that should he find in favor of claimant the case would be remanded to the district director for implementation of benefits. Tr. at 5. However, it is within the administrative law judge's authority to enter an award. *See generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999).