BRB No. 13-0108

RONALD CZIKOWSKY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OCEAN PERFORMANCE, INCORPORATED	)	DATE ISSUED: 09/20/2013
	)	
	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Nathan Julian Shafner (Embry and Neusner), Groton, Connecticut, for claimant.

John J. Carta, Jr. (Law Offices of John J. Carta, Jr., LLC), Essex, Connecticut, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-LHC-02285) of Administrative Law Judge Jonathan C. Calianos 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 worked for employer for 19 years as a marine mechanic, beginning in 1992.[1] Claimant performed his repair work primarily at employer's principal place of business on Route 1 in Old Saybrook, Connecticut; he also repaired boats where they

[1]Employer is a retailer of recreational vessels and is also in the business of repairing, storing and delivering boats; it does not build them.

were moored on the water. In addition to performing work on vessels that employer had sold to customers, claimant also repaired the engines of boats owned by the town of Old Saybrook and utilized by the fire department as rescue vessels. Claimant asserts he sustained a hearing loss during the course of his employment, and he filed a claim for benefits under both the Connecticut state act and the Longshore Act. He underwent audiograms on April 10 and August 14, 2009. On September 23, 2009, his doctor wrote a letter explaining that claimant has binaural sensorineural hearing loss due to his many years of exposure to noise at work. On December 16, 2009, the doctor revised his opinion of the extent of claimant's hearing loss, based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, and he reported that claimant has a 19 percent loss in his right ear, a 28 percent loss in his left ear, and a binaural loss of 20 percent, or 26 percent if tinnitus is included. Cl. Ex. 1. Claimant settled his state claim but pursued his Longshore Act claim.

Claimant acknowledged that most of the vessels he worked on were recreational; however, he stated that some of those vessels had engines which had logged more than the expected number of hours for a recreational vessel, and he deduced they were used as charter fishing boats. Thus, claimant asserted he worked on "commercial" vessels - the fire department's boats and the charter boats - as well as on recreational vessels, and is covered by the Act. The administrative law judge found that the new version of Section 2(3)(F), 33 U.S.C. §902(3)(F) (amended 2009) (Supp. 2011), and its implementing regulations, 20 C.F.R. §701.501 *et seq.*, exclude claimant from coverage, and he denied benefits. He found that the regulation states that the focus of the definition of "recreational vessel" is on the manufacturer's intent in building the boat, and the boats on which claimant worked, even as claimant admitted, were all intended for recreational purposes. Moreover, the administrative law judge found the fact that certain vessels had "excessive hours," without more, is insufficient to conclude they are "commercial" vessels. Additionally, the administrative law judge found the inflatable boats used by the fire department are "recreational." As the amended Act excludes an employee who repairs *any* recreational vessels, the administrative law judge found claimant excluded from the Longshore Act and covered by the state law. He, thus, denied benefits under the Act. Decision and Order at 4-6.

Claimant appeals. He sets forth three issues, contending: 1) the administrative law judge erred in finding that claimant worked only on recreational vessels by relying solely on the manufacturer's intent to determine the classification of a vessel; 2) the administrative law judge did not address whether his injury is covered by a state workers' compensation law; and 3) the administrative law judge erred in using a "substantial portion test" with regard to the amount of claimant's work performed on commercial vessels. Employer urges affirmance of the denial of benefits.

Section 2(3)(F) of the Act, as amended in 2009, provides:

> (3) The term "employee" means any person engaged in maritime employment, . . ., but such term does not include— . . .
>
> (F) individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to *repair any recreational vessel*, or to dismantle any part of a recreational vessel in connection with the repair of such vessel; . . .
>
> if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. §902(3)(F) (amended 2009) (Supp. 2011) (emphasis added); *see* 20 C.F.R. §701.501 *et seq.* ("recreational vessel" defined). The effective date of this amendment was February 17, 2009. 20 C.F.R. §701.503. Because we hold that the former version of Section 2(3)(F) is applicable to this case, and not the amended version, we vacate the administrative law judge's denial of benefits, and we remand the case for further consideration.

After a brief discussion at the hearing regarding whether the pre-2009 or the amended version of Section 2(3)(F) applies, the parties and the administrative law judge concluded that the amendment applies to this case. Decision and Order at 4-6; Tr. at 19-22. On appeal, the parties agree that April 10, 2009, the date of claimant's first audiogram, is the "date of injury," making the amended version applicable. However, the Department issued regulations effective January 30, 2012, redefining the phrase "date of injury" for purposes of determining the applicability of amended Section 2(3)(F). 76 Fed. Reg. 82117, 82118, 82129; 20 C.F.R. §701.504. For a hearing loss injury, the regulations provide:

> If the individual claims compensation for hearing loss, the date of injury is the date the individual was exposed to harmful workplace noise or other stimulus that is capable of causing hearing loss.

20 C.F.R. §701.504(a)(3). If the date of injury is before February 17, 2009, the former version of Section 2(3)(F) applies; if it is on or after February 17, 2009, the amended version applies. 20 C.F.R. §701.504(b), (c). Thus, the date of the audiogram identifying claimant's hearing loss is not, as the parties surmised, the relevant date for determining which version of Section 2(3)(F) is applicable. Rather, the relevant date for ascertaining which version of Section 2(3)(F) applies in this hearing loss case is the date of exposure to injurious noise. Moreover, the date of exposure does not necessarily mean the date of *last* exposure.

The explanation of the final regulations contained in the Federal Register, dated December 30, 2011,[2] and the website of the Division of Longshore and Harbor Workers' Compensation (DLHWC) of the Office of Workers' Compensation Programs,[3] address the amended recreational vessel exclusion. The section-by-section explanation in the Federal Register states that, although the date of the audiogram was first proposed to be the "date of injury," comments and further reflection led to the adoption of an exposure rule, as was also done for occupational diseases. 76 Fed. Reg. 82123-24; *see* 20 C.F.R. §701.504(a)(2)-(3). The Department stated: "[s]uch a rule is less arbitrary, recognizes that the genesis of the injury is when the exposure occurs, and is fair to all parties by giving them the benefits of an insurance contract that covers injuries based on when the exposure occurred." 76 Fed. Reg. 82124. Therefore, the Department concluded that the date of injury for determining which version of Section 2(3)(F) applies in hearing loss cases is the date of exposure. The Department acknowledged that hearing loss occurs over a period of time and stated (emphasis added): "[i]f *some* or all exposures occurred prior to February 17, 2009, the amendment would simply not apply with respect to a disability resulting from those exposures." *Id*. The DLHWC website contains a chart with sample injuries and coverage. The relevant example set the date of the last exposure to cumulative noise as February 17, 2009, and the audiogram date at February 18, 2009, and indicated this person would be covered under the prior version of Section 2(3)(F), as his coverage is derived from exposure during covered employment prior to February 17, 2009. *See* n.3, *supra*. Therefore, because hearing loss due to noise exposure occurs over a period of time, the date of last exposure is not the relevant date for ascertaining the applicability of the amended version of Section 2(3)(F) – if any injurious noise exposure occurred prior to February 17, 2009, regardless of whether there was additional exposure afterward or whether the audiogram identifying the loss was administered afterward, the earlier version is applicable.

In this case, there are no specific dates regarding claimant's noise exposure with employer, although the parties agree claimant was an employee as of the date of the April 2009 audiogram.[4] However, it is evident from the record that the amended version does not apply in this case. As stated above, the explanation of the amended regulations implementing the statute clearly states that if any injurious noise exposure occurred before the effective date of the amendment, the amendment does not apply. Claimant's doctor opined that claimant's hearing loss was caused by "many years" of noise exposure

[2]76 Fed. Reg. 82117 (Dec. 30, 2011); https://federalregister.gov/a/2011-32880.

[3]http://www.dol.gov/owcp/dlhwc/lsnewregfaqs.htm.

[4]As of the hearing, July 24, 2012, claimant stated he was still a marine mechanic but he was no longer working for employer. Tr. at 30-31.

at his employment. Cl. Ex. 1. As the audiograms revealing claimant's hearing loss were administered in April and August 2009, and the letter of explanation was written in September 2009, the "many years" time-frame includes exposures prior to February 17, 2009. Accordingly, we vacate the administrative law judge's application of the amended version of Section 2(3)(F) and hold that, in light of undisputed evidence,[5] the new version of Section 2(3)(F) does not apply to this case. *See generally Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (application/effective date of Section 8(j) amendment); *Paul v. General Dynamics Corp*., 16 BRBS 290 (1984) (application of pre- or post-1972 version of Act). Therefore, claimant's status as a maritime employee must be ascertained by using the pre-2009 version of Section 2(3)(F).

The pre-2009 version of Section 2(3)(F) states that, provided they are covered by state law, "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length" are excluded from the Act's coverage. 33 U.S.C. §902(3)(F) (2006). There is no evidence in the record regarding the length of the vessels claimant repaired. Absent this evidence, we cannot address whether claimant worked solely on recreational vessels. Accordingly, we remand the case to the administrative law judge for further fact-finding and analysis. *See Redmond v. Sea Ray Boats*, 32 BRBS 195, *vacating in part on recon.* 32 BRBS 1 (1998); *Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994).

In the interest of judicial economy, we shall address and dispose of claimant's two remaining contentions. Initially, we reject claimant's assertion that the administrative law judge erred in finding claimant covered by Connecticut law.[6] Claimant's two-sentence "argument," Cl. Brief at 7, is inadequately briefed and lacking support. *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997). In any event, as claimant and employer agree that claimant settled his state claim for the same hearing loss he contends is compensable under the Act, and the settlement, which is part of the record, provides that the parties are subject to state law, claimant's challenge to the administrative law judge's implicit finding that claimant's work is covered by state law is disingenuous. Cl. Ex. 3;[7] Tr. at 30. In light of the settlement

[5]There is no evidence to contradict a finding that claimant's injury is a hearing loss due to years of noise exposure. Cl. Ex. 1.

[6]As both versions of Section 2(3)(F) require state coverage for excluded workers, this is a relevant issue.

[7]In September 2011, claimant settled the state claim with employer and its state insurer for $20,000. Stipulation #2 of the agreement, Cl. Ex. 3 at 2 (emphasis added), stated:

evidence, it was rational for the administrative law judge to implicitly conclude, without further discussion, that claimant's injury is covered by state law.[8] Decision and Order at 4. Thus, the administrative law judge is not precluded from applying the exclusion at Section 2(3)(F).[9] *See, e.g., Peru v. Sharpshooter Spectrum Venture, LLC*, 493 F.3d 1058, 41 BRBS 28(CRT) (9th Cir. 2007); *Daul v. Petroleum Communications Inc.*, 32 BRBS 47 (1998), *aff'd*, 196 F.3d 611, 33 BRBS 193(CRT) (5th Cir. 1999). If, on remand, the administrative law judge finds that claimant's employment satisfies the exclusion at Section 2(3)(F), claimant's work-related injury is not covered by the Longshore Act and benefits are properly denied. *See generally Powers v. Sea Ray Boats*, 31 BRBS 206 (1998); *Redmond*, 32 BRBS 195. If claimant's work is covered by the Act, the administrative law judge must address any remaining issues to determine claimant's entitlement to benefits.

We also reject claimant's contention that the administrative law judge erred in denying coverage by using "something akin to a substantial portion test." Claimant's assertion is based on his position that he worked on both commercial and recreational vessels and that it does not matter how his work was apportioned; as long as some of it was on commercial vessels, he is covered. While claimant is correct that the "substantial

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> WHEREAS, said *Claimant and his employer* had accepted and *were at all times herein mentioned subject to Part B of the Workers' Compensation Act of the State of Connecticut*, as amended, and the said employer had insured its full liability thereunder with New Hampshire Insurance Company/AIG Claims Services, Inc., a/k/a Chartis Insurance, a corporation duly authorized to take such risks in this State. . . .

[8]The administrative law judge, upon the joint stipulation of the parties, dismissed, without prejudice, employer's state carrier from the Longshore claim. ALJ Order (Mar. 19, 2012). Moreover, at the hearing, claimant's attorney acknowledged Section 3(e), 33 U.S.C. §903(e), which provides employer a credit against payments made to claimant for the same injury or disability under the state law. Tr. at 13-16.

[9]To the extent claimant argues that a finding of state coverage requires him to be excluded automatically from the Act's coverage, claimant is mistaken. Such a finding means only that a claimant may be excluded if he satisfies the exclusion. 33 U.S.C. §902(3)(A)-(F); *see, e.g., Daul v. Petroleum Communications Inc.*, 32 BRBS 47 (1998), *aff'd*, 196 F.3d 611, 33 BRBS 193(CRT) (5th Cir. 1999). To the extent claimant asserts that his work on "commercial vessels" renders state coverage irrelevant, claimant also is mistaken. The issue of whether claimant worked on any "commercial vessels" has yet to be determined.

portion" test is not a valid test for determining coverage, *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977) (a claimant need spend only "at least some of his time" in maritime work), the administrative law judge, having determined that *all* of claimant's work was performed on recreational vessels, in accordance with the amended version of Section 2(3(F), did not address how claimant's work was apportioned between recreational and commercial vessels. Thus, he did not deny coverage based on claimant's having worked on recreational vessels a "substantial portion" of the time. In any event, on remand, the administrative law judge will have to determine whether at least some of claimant's work is covered. 33 U.S.C. §902(3)(F) (2006).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge