U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0217

FOUSSEINI TOUNKARA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GLACIER FISH COMPANY	)	DATE ISSUED: Jan. 28, 2016
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Fousseini Tounkara, Bronx, New York, *pro se*.

Pamela J. Lormand and Kelly M. Morton (Brewer & Lormand, PLLC), New Orleans, Louisiana, for employer/carrier.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-LHC-00474) of Administrative Law Judge Adele Higgins Odegard 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On July 21, 2008, employer hired claimant to work in its shipyard under a "Crew

Member Agreement" for the *Pacific Glacier*, one of employer's fishing vessels,[1] which had returned to port after an onboard fire on February 26, 2008, caused significant damage to the vessel's wheelhouse and living accommodations. EX 5 at 109-111; Tr. at 117-118, 152. Although the *Pacific Glacier* sailed under its own power into an Alaskan port after the fire, employer towed it from Alaska to the Seattle shipyard due to concern for the health and safety of the crew. While the *Pacific Glacier* was dry docked, upgrades were performed on the vessel in addition to repairing the fire damage, which included enlarging the wheelhouse and moving it up one level, adding sponsons, and removing and replacing electronics for system upgrades. Tr. at 227-228. Claimant was hired "in the midst of the major work." *Id*. at 152. Claimant testified that his assignment was only to help rebuild the ship, and employer's recruiter told him there was no guarantee he would go to sea on a fishing mission. *Id*. at 38-39. Claimant stated that his duties in the shipyard included: working as a fire watch for welders employed by outside contractors; painting; cleaning; stripping metal; and loading and unloading equipment, parts, and waste with a forklift or crane. *Id.* at 39-41. When the vessel was nearly ready to return to fishing,[2] claimant testified he was not assigned as a crew member and his name was not on the vessel's wait list to be a crew member. However, on the evening his employment in the shipyard ended, employer's recruiter offered him a fishing position and told him to report to the vessel the next morning. Claimant stated that after arriving on May 19, 2009, he signed a new employment contract, which set his pay at a 1.25 share of the catch. *Id.* at 42-43; EX 5 at 115. Claimant continued to work for employer on fishing missions and in its shipyard until February 2010.

In February 2010, while waiting for his flight to Alaska to commence another fishing trip, claimant was detained in Tacoma, Washington and confined to a detention center until April 13, 2010. Claimant testified that because it was a sunny day when he was released, he first realized there were problems with his vision. Tr. at 47. Claimant was diagnosed with cataracts on April 26, 2010. He notified employer of his injury in September 2010, after an appointment with Dr. Geggel, during which, claimant stated, he first became aware of a connection between his vision problems and his work for employer during the vessel repair project. EX 2 at 11, 15, 20; Tr. at 51, 89-90.

[1] Employer is a Seattle-based owner and operator of three factory fishing vessels. Tr. at 145-146. Employer's *Pacific Glacier* is a factory trawler which processes, freezes, and boxes the catch on board for future sale. *Id.* at 150. It has a 9000-ton cargo hold, the filling of which marks the end of a fishing trip. Trips lasted anywhere from 10-28 days. *Id.* at 46, 151; EX 5 at 133.

[2] The vessel returned to fishing in May 2009.

Claimant filed a claim under the Act, which employer controverted. Claimant asserted that his cataracts resulted from exposure to electric arc welding during his fire watch duties while the *Pacific Glacier* was in dry dock.[3] Claimant further averred that, at the time of his exposure, he was not a "member of a crew" because the *Pacific Glacier* was removed from navigation for extensive repairs and reconstruction. Tr. at 28-29, 40. Employer countered that claimant is excluded from the Act's coverage because he was a member of the *Pacific Glacier's* crew. Employer asserted that the *Pacific Glacier* remained in navigation during claimant's period of deleterious exposure, as the repairs and modifications performed were in preparation for the vessel's next voyage. Employer additionally argued that claimant's cataracts did not result from his employment.

The administrative law judge found claimant covered by the Act from July 21, 2008 until May 19, 2009, as claimant was engaged in covered work as a ship repairman at the shipyard, an exclusively maritime location. Decision and Order at 26; 33 U.S.C. §§902(3), 903(a). Although claimant's work had a substantial connection to the *Pacific Glacier's* mission as a factory trawler, the administrative law judge found that claimant was not excluded from the Act's coverage as a "member of a crew" because the vessel was not "in navigation" during the period it was under repair in dry dock.[4] 33 U.S.C. §902(3)(G); Decision and Order at 29, 31. On the merits of claimant's claim, the administrative law judge found claimant established by a preponderance of evidence that his cataracts are related, at least in part, to his employment with employer prior to May 19, 2009,[5] that claimant has been totally disabled since November 8, 2010, as that is the date his condition precluded his return to his usual work, and that employer did not establish the availability of suitable alternate employment. *Id.* at 34, 37, 45. Accordingly, the administrative law judge awarded claimant temporary total disability and medical benefits. *Id*. at 51. On appeal, employer challenges only the administrative law judge's finding that it is liable for claimant's benefits under the Act because the *Pacific Glacier* was not "in navigation" at the time of claimant's injury. Claimant, who is without counsel, responds, urging affirmance.

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[3] Claimant was not represented by counsel before the administrative law judge.

[4] The administrative law judge further found that claimant was a member of a crew as of May 19, 2009, and, therefore, precluded from the Act's coverage as of this date. Decision and Order at 29; *see* 33 U.S.C. §902(3)(G).

[5] The administrative law judge found claimant became aware that his condition may have been work related on June 11, 2010, and he filed his claim on February 23, 2011. As the claim was filed within the two-year period required by Section 13(b)(2) of the Act for occupational disease cases, the administrative law judge found that the claim was timely. Decision and Order at 43; 33 U.S.C. §913(b)(2).

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 Supreme Court has held that the Longshore Act and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is synonymous with a "member of a crew of any vessel" under the Longshore Act. *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 seaman/member of a crew if: 1) his employment contributes to the function of the vessel or the accomplishment of its mission; and 2) he has a connection to a vessel in navigation that is substantial in both its duration and nature. *Chandris*, 515 U.S. at 368; *Keller Found. v. Tracy*, 696 F.3d 835, 841-842, 46 BRBS 69, 72(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013). A vessel is in navigation when it is engaged as an instrument of commerce and transportation on navigable waters. *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 570-572 (9th Cir. 1992). A structure's locomotion at any given moment is not dispositive of its status as a "vessel in navigation;" rather, the "in navigation" requirement is an element of the vessel status of a watercraft, relevant to whether "the craft is 'used, or capable of being used' for maritime transportation." *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 496, 39 BRBS 5, 11(CRT) (2005). The question in all cases is whether the watercraft's use for maritime transportation is a practical possibility or merely a theoretical one. *Id.* A vessel is in navigation, although moored to a dock, if it remains in readiness for another voyage, or when taken to a dry dock or shipyard for repairs in preparation for making another voyage. *Chandris*, 515 U.S. at 374. At some point, however, repairs may become sufficiently significant that the vessel can no longer be considered "in navigation." *Id.*; *West v. United States*, 361 U.S. 118 (1959). Ships being transformed over extended periods of time through "major" overhauls or renovations may lose their status as vessels in navigation until they are rendered capable of maritime transport. *Stewart*, 543 U.S. at 496, 39 BRBS at 11(CRT); *see also McKinley*, 980 F.2d at 570-572.

Employer asserts the administrative law judge erred in failing to find that the *Pacific Glacier* remained "in navigation" at the time of claimant's injury. Employer contends the *Pacific Glacier* remained in navigation at all times because the engine was not disabled by the fire, none of the repairs or modifications were required to make the vessel seaworthy, and the work done was not extensive. Whether or not a vessel is "in navigation" is a factual determination for the administrative law judge. *Chandris*, 515 U.S. at 373-375. The Board may not reweigh the evidence. *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). For the reasons discussed below, we affirm the administrative law judge's finding as it is supported by substantial evidence.

In addressing whether the *Pacific Glacier* was "in navigation" at the time of claimant's injury, the administrative law judge applied the criteria outlined in *West*, 361 U.S. at 122. In assessing whether a vessel is in navigation, "the focus should be upon the

status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done." *Id*. The administrative law judge found that the purpose of the *Pacific Glacier's* idling went beyond mere preparation for another voyage, as the owner decided to make "major systems upgrades" and elective modifications to the vessel. Decision and Order at 28; Tr. at 228. Further, the administrative law judge found these repairs were "extensive" because they involved major elements of the vessel's construction, took over one year to complete, employer relinquished some control while the *Pacific Glacier* was docked, and, because, upon completion of the repairs, the *Pacific Glacier* was submitted to sea trials to determine its seaworthiness.[6] Decision and Order at 29; Tr. at 169. The administrative law judge found the *Pacific Glacier* was not practically capable of maritime transport after the fire or while undergoing repairs, because, despite the operability of the engine, employer towed the vessel from Alaska to the Seattle shipyard out of concern for the crew's health and safety, and many of the crew took jobs on employer's other fishing vessels or went to work for other companies while the *Pacific Glacier* was in dry dock. Decision and Order at 29; Tr. at 226. The administrative law judge also found navigation was improbable while the ship underwent modifications to significant elements of its construction, including relocation of its wheelhouse and the addition of sponsons, which changed the dimensions and buoyancy of the vessel's hull. Decision and Order at 29; Tr. at 40-41, 228. For these reasons, the administrative law judge concluded that the pattern of the repairs, the extensive nature of the repair work, and the status of the ship all supported a finding that the *Pacific Glacier* was not in navigation at the time of claimant's injury.

We reject employer's assertion that the administrative law judge erred in considering the upgrades and modifications in her analysis because the vessel was first idled to repair fire damage. Employer cites no support for its contention that there cannot be multiple reasons for a vessel's idling, and neither the Supreme Court nor the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has enunciated such a standard. As the upgrades and modifications contributed to the vessel's idling at the shipyard, the administrative law judge rationally included them in her analysis of whether the vessel remained "in navigation."

Moreover, the administrative law judge rationally determined that the purpose of the repairs exceeded those performed in mere preparation for another voyage. *West*, 361 U.S. at 122, 39 BRBS at 11(CRT); *McKinley*, 980 F.2d at 570. In this respect, we reject

[6] The administrative law judge found the *Pacific Glacier* was akin to a newly reconstructed vessel whose seaworthiness was established at sea trials. Decision and Order at 29; *McKinley*, 980 F.2d at 569; *see also Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5th Cir.), *cert. denied* , 479 U.S. 885 (1986).

employer's assertions that the administrative law judge erred in finding that the *Pacific Glacier* had been removed from navigation because: 1) the *Pacific Glacier* was not converted to an alternative use, such as the vessel in *McKinley*; 2) the duration of repairs was insufficient to remove the *Pacific Glacier* from navigation; and, 3) its engine remained operable after the fire. It is well established that major renovations can take a ship out of navigation, even though its use before and after the repairs will be the same. *See West*, 361 U.S. 118; *McKinley*, 980 F.2d at 570.[7] Further, although the Supreme Court indicated in *Chandris* that six months is a "relatively short period of time for important repairs" and that such duration may weigh against finding the repairs to be "extensive," the Court held this was not dispositive of a vessel's navigation status where the work performed is otherwise extensive.[8] *Chandris*, 515 U.S. at 374-375. In this case, the administrative law judge rationally found that the work done on the *Pacific Glacier* was extensive, as it involved major elements of the vessel's construction, took more than one year to complete, and led to the vessel's submission to sea trials upon their completion.[9] *Stewart*, 543 U.S. at 496, 39 BRBS at 11(CRT); *Chandris*, 515 U.S. at 375; *West*, 361 U.S. at 122; *McKinley*, 980 F.2d at 570-572.

Moreover, the administrative law judge rationally determined that the *Pacific Glacier* was not practically capable of maritime transport after the fire and throughout the repair period, despite the operability of its engine, where employer towed the ship to the shipyard after the fire due to health and safety concerns; the crew size was reduced; and the wheelhouse was relocated during the project.[10] *Stewart*, 543 U.S. at 496, 39 BRBS at 11(CRT); *Chandris*, 515 U.S. at 375; *West*, 361 U.S. at 122; *McKinley*, 980 F.2d at 570-

[7] The Ninth Circuit described the vessel in *McKinley* as "undergoing more than even 'major' repair." *McKinley*, 980 F.2d at 570-571 ($451,000 hull of an oil drill ship was converted to a seagoing fish and crab processing ship over 17 months at expense of $14,082,000). It did not establish that conversion of a ship for alternate use is a threshold requirement for "extensive repairs."

[8] The *Chandris* Court remanded the case for further consideration by the fact-finder. *Chandris*, 515 U.S. at 375.

[9] As the work done on the *Pacific Glacier* was extensive, we reject, as moot, employer's assertion that it maintained operational control of the ship throughout the repairs. *McKinley*, 980 F.2d at 571 (control of a vessel during repair period is not dispositive of its navigation status where the work done is extensive).

[10] The assertion that none of the repairs undertaken were "required" to make the *Pacific Glacier* seaworthy is irrelevant in light of the administrative law judge's finding that the undertaking of those repairs affected the ship's ability to navigate.

572. Therefore, as it is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that claimant was not a "member of a crew" from the date of his hire through May 19, 2009, when post-renovation sea trials ended.[11] *West*, 361 U.S. at 122; *Chandris*, 515 U.S. at 373-375. Employer does not otherwise challenge the administrative law judge's finding that claimant is covered by the Act or the award of benefits. Consequently, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[11] As claimant was not a "member of a crew" when he sustained his injury, we need not address employer's argument that claimant's employment-related connection to the *Pacific Glacier* was substantial in nature and duration.