BRB No. 93-1449

WENDY SMITH (Widow of CRAIG M. SMITH) Claimant-Respondent v. ALTER BARGE LINE, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Earl A. Payson and Richard A. Larsen, Davenport, Iowa, for claimant.

Mark A. Woollums (Betty, Neuman & McMahon), Davenport, Iowa, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (87-LHC-361) of Administrative Law Judge Edward J. Murty, 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 if they 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).

Employer operated a barge repair facility in Buffalo, Iowa, where decedent, claimant's late husband, began his employment as a welder/fitter on March 15, 1976. In September 1981, employer acquired two tugboats, which it subsequently operated 24 hours a day, seven days a week. Decedent began to alternate working as a welder repairing barges and as a mate trainee/deckhand aboard the vessels. While working aboard one of the vessels on the night of December 2, 1982, decedent fell off the vessel into the Mississippi River and drowned. Employer and claimant subsequently entered into a settlement agreement whereby claimant collected $75,000 for herself and her minor son, as survivors, under the Jones Act, 46 U.S.C. §688. Claimant also filed a claim for death benefits under the Longshore Act.

In his initial Decision and Order, the administrative law judge found that decedent had two distinct jobs with employer -- one as a welder and one as a deckhand -- and that decedent was a member of the crew under the Jones Act in that he had a continuing relationship with employer's tugboats. The administrative law judge therefore denied claimant benefits under the Longshore Act. *See* 33 U.S.C. §902(3)(1982). Claimant appealed, contending that the administrative law judge erred in determining that decedent was a member of a crew.

In *Smith v. Alter Barge Line, Inc.*, BRB No. 89-3717 (April 30, 1992)(unpublished), the Board held that the administrative law judge did not consider an essential criterion for member of the crew status, *i.e.*, whether the employee performed a "substantial part" of his work on a vessel, and therefore remanded the case for the administrative law judge to make this finding consistent with the Supreme Court's decision in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT) (1991). The Board stated that since decedent's overall employment included work as a mate/deckhand and work as a welder, the administrative law judge must make explicit findings as to whether a "substantial part" of decedent's work was as a mate/deckhand.

On remand, in a short decision, the administrative law judge reversed his finding that decedent's employment was not covered under the Act. The administrative law judge found that the Board set aside his factual finding that decedent had two separate employments in favor of a finding of a continuous employment. The administrative law judge found that it is "clear by far" that the major part of decedent's total working time was spent as a welder in employer's barge repair facility, and therefore his overall employment is covered under the Act. The administrative law judge therefore ordered employer to pay claimant and her son death benefits, and to pay funeral expenses. 33 U.S.C. §909.

On appeal, employer contends that the administrative law judge correctly found in the original decision that decedent was a member of the crew based on his having a continuing relationship with employer's tugboats. Employer contends that the relevant time period is between September 1981, when employer first acquired the tugboats, and the time of death in December 1982. Employer contends that decedent was a "seaman/crew member" during this time period. Claimant responds, urging affirmance of the administrative law judge's decision on remand.

Section 2(3) of the Act excludes from coverage "a member of a crew of any vessel." 33

U.S.C. §902(3)(1982). The terms "member of a crew" under the Longshore Act and "seaman" under the Jones Act are synonymous. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44 (CRT) (1991). In the time since employer filed its brief on appeal, the Supreme Court again addressed the essential requirements for seaman status. They are: 1) an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission, and 2) the employee must have a connection to a vessel that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, U.S. , 115 S.Ct. 2172, 2190 (1995); *see also Wilander*, 498 U.S. at 337, 26 BRBS at 75 (CRT); *Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995); *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995). Quoting 1B A. Jenner, *Benedict on Admiralty* (7th ed. 1994), the Court held that seaman status will be conferred if it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity. *Chandris*, 115 S.Ct. at 2190.[1] The Court also stated there was no reason to limit the seaman status inquiry exclusively to an examination of the overall course of a worker's service with a particular employer. *Id.* at 2191. The Court stated that when a maritime worker's basic assignment changes, his seaman status may change as well. *Id.*; *see also Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986)(*en banc*).

In the instant case, the administrative law judge's finding that most of decedent's work was as a welder, and that decedent is therefore covered by the Longshore Act, is supported by substantial evidence of record and consistent with the Court's holding in *Chandris*. Employer's personnel records show that in the period from September 1981 through December 2, 1982, decedent was classified as a welder for twelve months and as a mate trainee/deckhand for two months. Emp. Ex. 1 at 22-25, 29. Therefore, decedent spent most of his time working as a welder.[2] Further, the testimony of Tom Rich, a crew member, Terry Tague, a former deckhand, and Dennis Johnson, a dock foreman, all of whom worked with decedent, as well as that of claimant, supports the administrative law judge's finding that decedent worked as a welder. *See Smith*, slip op. at 3 (April 30, 1992).

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[1]The Court stated the fundamental purpose of this "substantial connection" is to distinguish between sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation. *Chandris*, 115 S.Ct. at 2190. The Court stated that although the traditional test for seaman status required a "more or less permanent connection" to the vessel and the *Robison* [*i.e., Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959)] formulation calls for "substantial" work aboard a vessel, the general requirement varies, little, if at all, from one jurisdiction to another, and "[t]he courts have repeatedly held that the relationship creating seaman status must be substantial in point of time and work, and not merely sporadic." *Chandris*, 115 S.Ct. at 2189; *see Miller v. Patton-Tully Transportation Co., Inc.*, 851 F.2d 202 (8th Cir. 1988).

[2]Although employer's personnel records show decedent's status was changed as of November 29, 1982 to mate trainee, and decedent had that status at the time of his death, the administrative law judge found in his initial decision that this change was made posthumously to facilitate receipt of higher insurance proceeds.

While the Court in *Chandris* held that an employee would qualify as a seaman if he had undergone a permanent change in status at the time of his injury, in this case the administrative law judge specifically found that decedent's classification as a mate trainee at the time of his death occurred posthumously, and did not reflect decedent's actual work status when he died. Rather, the administrative law judge found that decedent's actual work from April 22, 1982 through the time of his death was consistent with his classification as a welder. Moreover, contrary to employer's assertion, the fact claimant collected life insurance benefits which correlated to decedent's status as a mate trainee/deckhand rather than as a welder does not negate the administrative law judge's finding that decedent's work was predominantly welding, and that decedent is entitled to Longshore Act coverage. We therefore affirm the administrative law judge's award of death benefits.[3]

We next address the petitions for an attorney's fee of claimant's counsel. During the course of litigation of this claim, claimant has had two attorneys. Both attorneys submitted attorney's fee petitions to the Board for work performed in the first appeal, BRB No. 89-3717, and in the present appeal, BRB No. 93-1449. Claimant's first attorney, Richard A. Larsen, submitted a fee petition for services performed from February 7, 1983, through July 30, 1993 for $18,237, representing 121.58 hours at $150 an hour. Claimant's second attorney, Earl A. Payson, submitted a fee petition for services performed from January 10, 1988 through July 30, 1993, for $18,870 representing 125.80 hours at an hourly rate of $150. Employer filed an objection, contending only that the requested hourly rate of $150 is excessive.

Claimant is entitled to an attorney's fee payable by employer for successfully prosecuting his claim in BRB No. 89-3717 and defending against employer's appeal in BRB No. 93-1449. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). We find that the hourly rate of $150 requested by counsel is reasonable in this case. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97-98 (1995). The fee petitions for both appeals, however, include services rendered before the Board as well as before the Office of Administrative Law Judges and the District Director. The Board can award an attorney's fee only for services rendered before it. *See Dygert v. Manufacturer's Packaging Co.*, 10 BRBS 1036 (1979); 20 C.F.R. §802.203(d). The administrative law judge's first decision was filed on October 3, 1989, and the Board's decision was issued on April 30, 1992. The administrative law judge's decision on remand was filed on April 15, 1993. Attorney Larsen's fee petition for the first appeal itemizes 6.75 hours of work performed from October 18, 1989 through April 3, 1991. We find this work reasonably commensurate with the necessary work performed and at $150 per hour, this totals $1,012.50 payable by employer. Mr. Larsen's fee petition for the second appeal, from April 13, 1991 through June 17, 1993, itemizes 4 hours of work performed before the Board at $150 an hour for a total of $600.[4] His total fee award is $1,612.50. Attorney Payson's fee

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[3]Employer, however, is entitled to a credit under Section 3(e), 33 U.S.C. §903(e), for the amount of the Jones Act settlement paid to claimant.

[4]Entries included were April 13, 1993, April 28, 1993, May 6, 1993, May 10, 1993, June 11,

petition itemizes 37.55 hours for work performed before the Board in the two appeals. We find this work reasonably commensurate with the necessary work performed and at $150 per hour, his fee totals $5632.50 payable by employer.[5]

1993, June 14, 1993 and June 17, 1993. The Board finds that the remaining entries during the relevant time period were not for work performed before the Board in defense of the award of benefits.

[5]Entries included were from October 18, 1989 through June 30, 1993, except for entries dated January 30, 1990, February 5, 1990, February 7, 1990, August 14, 1992, January 13, 1993, January 27, 1993, April 1, 1993, April 22, 1993, April 23, 1993, April 26, 1993, May 12, 1993, June 10, 1993, and June 17, 1993, as these were not services provided for work before the Board. Further, we disallow one hour of 3.5 hours requested on October 18, 1989, for a letter to the district director, and two hours on April 28, 1993 of four hours requested for research and drafting a letter to an economist. The time requested for services on July 30, 1993, is disallowed. *See generally Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981).

Accordingly, the Decision and Order on Remand is affirmed. Mr. Larsen is entitled to an attorney's fee for 10.75 hours for work performed before the Board at an hourly rate of $150 for a total of $1,612.50, payable directly to counsel by employer. Mr. Payson is entitled to an attorney's fee for 37.55 hours at an hourly rate of $150 for work performed before the Board for a total of $5,632.50, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge