

JAMES E. HUFF)	
)	
Claimant-Respondent)	
)	
v.)	
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MIKE FINK RESTAURANT, BENSON'S, INCORPORATED)	DATE ISSUED: <u>Nov. 22, 1999</u>
)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Asserting Jurisdiction of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Steven C. Schletker and Mary E. Ray (Schletker, Hornbeck & Moore), Covington, Kentucky, for claimant.

Todd M. Powers (Schroeder, Maundrell, Barbieri & Powers), Cincinnati, Ohio, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Asserting Jurisdiction (98-LHC-624) of Administrative Law Judge Thomas F. Phalen, 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 administrative law judge's findings of fact and conclusions of law which 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).

Claimant was hired as a dockhand by Benson's, Incorporated on March 6, 1987. Benson's is, in essence, a privately held holding company. *Jt. Ex. 2 at 5-7.* Among the separate subsidiary corporate entities under its aegis are BB Riverboats and Mike Fink, Incorporated. *Id.* Benson's does the payroll and accounting work for the subsidiaries, but Alan Bernstein, Vice President of Benson's (and of all the subsidiaries), testified that the employees are paid out of the account appropriate to

the subsidiary. *Id.* at 8. Claimant initially was assigned to the BB Riverboats operation as a deck hand. This company owns several river cruising passenger vessels, barges, tugboats, water taxis, and docks. *Id.* at 19; Tr. at 31. In this employment, claimant assisted vessels in and out of the dock area, and performed general maintenance work on the docks and vessels.

On May 22, 1995, claimant was permanently transferred to Mike Fink, Inc., in the position of harbor master, at his request, as the position became available. CX A at 14. The *Mike Fink* is a 160-foot paddle-wheel vessel, used as a restaurant, permanently moored to the shore of the Ohio River; it does not cruise the river and the engines have, in fact, been removed. There is 200 feet of floating dock space behind the vessel. Both the dock and the vessel float as one unit. Tr. at 42. The BB Riverboats' tugboats and crane barge tie up there if no space is available at the BB Riverboats' dock, JX 2 at 33, or if they were to do some work on the *Mike Fink* or its dock. JX 2 at 37, 39; JX 4 at 35; JX 3 at 35-36. At times, fire, police, and county rescue boats, as well as other companies' tugboats tie up at the dock. Tr. at 44. In addition, pleasure craft tie up there in the summer; the dock is used by boaters who are dining on the *Mike Fink* or when there is a river festival. Tr. at 54, 87, 101.

Claimant's responsibility as harbor master was to maintain the exterior of the property owned by Mike Fink, Inc.: the parking lot, the vessel and the dock. Mr. Bernstein testified that claimant's job was to keep the property "looking nice," JX 2 at 56, and he characterized claimant's job as a "maintenance worker at the restaurant." *Id.* Claimant testified he spent 90 percent of his time on the dock, Tr. at 67, and that the dock itself and anything moored behind the *Mike Fink* were his responsibility. Tr. at 41, 61. Claimant's duties included ensuring that vessels at the dock were properly moored, making sure that they did not take on water, and pumping them out if they did. Tr. at 72; JX 2 at 37. Claimant was charged with repairing and painting the dock as necessary, and replacing the 4 x 4's and tires on the side of the dock where the boats moored. Tr. at 65, 105-106. These needed to be replaced when they were torn off by materials drifting down the river. Claimant also testified he repaired portions of the dock surface; he took sheet metal off the BB Riverboats' tugboat or the crane barge, and would take care of any welding responsibilities himself if an employee of BB Riverboats was unavailable to do the job. Tr. at 66. He also testified that he added additional dock space onto the existing dock. *Id.*

One of claimant's primary responsibilities was to adjust the vessel and dock to the height of the river. The vessel and dock are held in place by "spuds," which are like big pipes sunk into the river bed, and "spudwells," which are welded to the vessel and dock and which slide into the spud. The spudwells are raised and

lowered by a pull chain and held in place by a pin pushed into the appropriate hole in the side of the spud. On March 16, 1997, at 2:30 a.m., claimant was injured while in the process of moving the entire floating structure, both dock and vessel/restaurant, due to high water conditions. Tr. at 49. He had adjusted the stern spudwells, and was in the process of adjusting the aft spudwells when he fell back onto some propane tanks. He was knocked unconscious for a while, and when he awoke, he realized he was stuck between the tanks and entangled in a chain. He remained there until 7:30 a.m. when a co-worker arrived at work. Claimant sustained back, shoulder, hand and leg injuries.

The sole issue before the administrative law judge was whether claimant is excluded from coverage under the Act by virtue of the “restaurant exclusion” at Section 2(3)(B), 33 U.S.C. §902(3)(B). The administrative law judge found that claimant was “employed by a restaurant,” and he extensively addressed the legislative history and limited case law discussing this provision. He determined that there are no exceptions -- all employees of a restaurant are excluded, regardless of their job duties. He concluded, however, that claimant did not work solely for Mike Fink, Inc. Rather, following an analysis of the corporate structure of Benson’s and its subsidiaries, he concluded that following his transfer to the *Mike Fink*, claimant remained an employee of the entire Benson’s enterprise that included BB Riverboats as well as Mike Fink, Inc. In this regard, the administrative law judge credited claimant’s testimony that he at times did some work on BB Riverboats’ projects and would take direction from Captain Rizzo, the general manager of BB Riverboats, as well as from Mr. Shaughnessy, the general manager of Mike Fink, Inc.¹ Thus, as claimant was not employed solely by the restaurant, and as the administrative law judge found that claimant performed covered maritime employment, he concluded that the restaurant exclusion is inapplicable, and that claimant is covered by the Act.²

¹Moreover, the administrative law judge credited claimant’s testimony that he remained a member of the Emergency Response Team after his transfer to the *Mike Fink*, although there was other testimony to the contrary.

²The administrative law judge noted that employer did not contend that claimant was

excluded under Section 2(3)(C), 33 U.S.C. §902(3)(C), as a marina worker, and stated, in a footnote, that he did not consider the dock to be a marina within the meaning of this exclusion. Decision and Order at 23 n.7.

On appeal, employer contends that the administrative law judge erred in several respects.³ First, employer contends that the administrative law judge erred by inserting the word “solely” into Section 2(3)(B) such that only those employed “solely” by a restaurant are excluded. Moreover, employer contends the administrative law judge erred in determining that Benson’s is, in essence, claimant’s employer. Employer maintains that Mike Fink, Inc. is claimant’s sole employer, and that claimant therefore is excluded from coverage pursuant to Section 2(3)(B). In this regard, employer contends the administrative law judge erred in analyzing the corporate structure of Benson’s and its subsidiaries under case law developed for other purposes in order to find claimant covered under the Act when the clear intent was to exclude such persons. Employer concludes that claimant is excluded by Section 2(3)(B) regardless of the maritime nature of his employment. Claimant responds, urging affirmance of the finding of coverage. Employer has filed a reply brief.

This case presents the first opportunity for the Board to address the exclusion from coverage contained in Section 2(3)(B).⁴ Employer concedes that claimant was injured on actual navigable waters in the course of his employment; claimant thus is covered under the Act unless he is specifically excluded by another provision of the Act. See, e.g., *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15

³We note that employer’s appeal is of an interlocutory order, in that the administrative law judge neither awarded nor denied benefits but addressed only the issue of claimant’s coverage under the Act. See Decision and Order at 2; 20 C.F.R. §702.348. In the interest of judicial economy, we will decide this appeal, but we note that piecemeal litigation is to be avoided. See *Jackson v. Straus Systems, Inc.*, 21 BRBS 266, 269 n.2 (1988).

⁴The Board previously has considered a case involving the *Mike Fink*. In *Cefaratti v. Mike Fink, Inc.*, 17 BRBS 95 (1985), *aff’d mem. sub nom. Mike Fink, Inc. v. Benefits Review Board*, 785 F.2d 309 (6th Cir. 1986)(table), an employee at the restaurant’s salad bar was leaving work via the gangplank linking the vessel and shore. She fell through a gap in the gangplank and landed in the Ohio River near the shoreline. The administrative law judge found the claimant covered pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), and the Board reluctantly affirmed, noting that the coverage provisions of the 1984 Amendments were inapplicable to the case as the injury occurred in 1979. The Board stated that the then recent Amendments remedy the “illogical results” of *Perini* that permit non-maritime workers to recover under the Longshore Act merely because they “fortuitously happen to fall in the water.” 17 BRBS at 98. In affirming the Board’s decision in an unpublished decision, the Sixth Circuit held that it was bound by *Perini*, similarly noting the inapplicability of the 1984 Amendments.

BRBS 62(CRT) (1983); *Daul v. Petroleum Communications, Inc.*, 32 BRBS 47 (1998); *Keating v. City of Titusville*, 31 BRBS 187 (1997); 33 U.S.C. §§902(3)(A)-(H), 903(b), (d). Section 2(3)(B) states:

The term "employee" means 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, but such term does not include –

* * *

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

* * *

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. §902(3)(B); see also 20 C.F.R. §701.301(a)(12)(iii)(B). There is only one case discussing Section 2(3)(B), *Green v. Vermilion Corp.*, 144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1251 (1999).⁵ In *Green*, claimant was employed at a duck camp located on marsh land near a private canal off a bayou. During the three-month duck season, the claimant worked as both a cook and watchman. During the rest of the year, he was a watchman and general maintenance worker. He lived at the camp Monday through Friday, and his mode of

⁵In *Ketzel v. Mississippi Riverboat Amusement, Ltd.*, 867 F.Supp. 1260 (S.D. Miss. 1994), *aff'd sub nom. Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995), the district court stated in a footnote that a cocktail waitress on a floating dockside casino is not covered by the Act. There is one administrative law judge decision directly implicating Section 2(3)(B). *Arnest v. Mississippi Riverboat, Ltd.*, 29 BRBS 423(ALJ) (1995). In *Arnest*, the claimant was a pit manager/floor supervisor on a dockside casino. The administrative law judge found the claimant excluded by Section 2(3)(B), stating that casinos fall within the definition of a "recreational operation," that the claimant's employment lacked a substantial nexus to maritime navigation and commerce, and that the claimant was not exposed to the hazards normally associated with longshoring, shipbuilding and harbor work. This case was not appealed to the Board.

transportation to and from the camp was by boat. He occasionally assisted in mooring and unloading supply boats that docked at the camp. Claimant was injured on the deck of a vessel while assisting in its mooring.

The claimant filed suit in district court against his employer under the Longshore Act and general maritime law. The district court granted employer's motion for summary judgment on the Longshore Act claim on the ground that the claimant was excluded under the Section 2(3)(B) "club/camp" exception, and dismissed the remainder of the claims on the ground that claimant's sole remedy was under the state workers' compensation law. The claimant appealed to the Fifth Circuit.

The United States Court of Appeals for the Fifth Circuit stated that the claimant satisfied the situs test as he was injured on navigable waters. The court assumed, *arguendo*, that claimant was engaged in "maritime employment," but concluded nonetheless that he is excluded by the club/camp exception. The claimant first contended that he was not employed by a camp, but by a corporation involved in various business ventures, including the camp. In this way he attempted to avoid the language of Section 2(3)(B): "individuals *employed by* a club, camp" are excluded. The court stated that the word "by" does not warrant such an interpretation; rather, the key to the provision is the exclusion of those who are "exclusively [furthering] an operation which comports with the plain meaning of the terms 'camp' and 'club.'" *Green*, 144 F.3d at 335, 32 BRBS at 182(CRT). As the claimant was employed exclusively and solely to render services to promote and maintain a duck camp, the Fifth Circuit held he was excluded from coverage.

The court further explored the legislative history of Section 2(3)(B) in considering whether the nature of the employing venture is dispositive of who is an excluded employee. See also discussion, *infra*. The court noted that Congress stated that businesses engaged in these types of operations may have employees who should remain covered by the Act because of the nature of their work or the hazards to which they are exposed. Concluding that the claimant's work at the duck camp as a cook, watchman, and general repairman of camp buildings did not, or only minutely, involve maritime activities, the court held that the claimant is not an employee "for which LHWCA benefits were intended."⁶ *Id.*, 144 F.3d at 335, 32

⁶The court then went on to hold that the claimant can maintain a general maritime negligence claim against the employer, citing *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979). The court stated that " 'the relationship to traditional maritime activity required for the invocation of admiralty jurisdiction' may be present though 'the threshold requirement of maritime employment

BRBS at 182(CRT).

There is a discussion of the restaurant/club/camp exclusion in the legislative history of the 1984 Amendments. The general purpose of the Amendments to Section 2(3) is to exclude:

certain categories of workers who are not engaged in maritime occupations or who are not exposed to maritime hazards even though they may be employed by maritime employers; or individuals who are employed by enterprises which are not generally viewed as maritime employers, although located on or adjacent to navigable waters, and who are not otherwise exposed to maritime hazards.

necessary to establish coverage under the LHWCA' may not be met." *Green*, 144 F.3d at 336, 32 BRBS at 183(CRT), quoting *Thibodaux*, 580 F.2d at 846. As (1) the claimant was injured in the course of his employment while performing the traditional maritime activity of mooring a vessel; (2) employer owned the vessel on which claimant fell; (3) the vessel was routinely employed on navigable waters; (4) the alleged cause of the injury was an unkept deck; and (5) claimant's injury was not uncommon in the maritime context, the *Green* court held that there was a sufficient nexus to maritime activity to permit assertion of admiralty jurisdiction. The court lastly held that the "exclusive remedy" provisions of the Louisiana workers' compensation law did not preclude the assertion of a general maritime claim.

House Rept. No. 98-570, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 *U.S.C.C.A.N.* 2734, 2736. See also 130 *Cong. Rec.* 25905, 26298 (1984). With respect to Section 2(3)(B), the report states that the exclusion is premised on the “nature of the employing enterprise, as opposed to the exclusions in paragraph 2(3)(A), which are based on the nature of the work which the employee is performing.” 1984 *U.S.C.C.A.N.* at 2737. Nevertheless, the report states the House Education and Labor Committee’s belief that some excluded enterprises may employ persons who should remain covered by the Act because of the nature of their work or the hazards to which they are exposed.⁷ *Id.* Lastly, the committee

⁷As examples, the report states the following:

sales clerks, stockroom personnel and related personnel of a retail outlet built over the navigable waterways or adjacent to such waterways would come within the exclusion of the definition of ‘employee.’ On the other hand, a worker employed by such an enterprise to build an addition to the retail outlet, or to repair the pier upon which the store is located, would not be excluded, and would remain within the Act’s coverage

1984 *U.S.C.C.A.N.* at 2737-2738. As finally enacted, Section 2(3)(C) excludes marina workers “unless engaged in construction, replacement, or expansion of such marina (except for routine maintenance).” 33 U.S.C. §902(3)(C). There is no similar limitation on the Section 2(3)(B) exclusions in the enacted version, although such a limitation was considered by the House committee drafting the legislation. See *id.* at 2737. The

report states that the amendments were not intended to either contract or expand the current coverage of the Act, and noted its concurrence with the Senate Committee that “it is obvious that a large body of decisional law relative to traditional maritime employers and harbor workers remains unchanged.” *Id.* at 2738, quoting Senate Committee on Education and Labor, Rept. No. 98-81, 98th Cong., 1st Sess., at 26. See also 130 *Cong. Rec.* 26298 (1984).

As an initial matter, we affirm the administrative law judge’s factual determinations as they are supported by substantial evidence in the record and are based on rational credibility determinations. In this regard, the administrative law judge found that claimant’s duties for Mike Fink, Inc. included both the routine maintenance and significant repair of the dock behind the *Mike Fink*, the supervision of commercial and pleasure vessels moored at the dock, and the positioning of the *Mike Fink* and its dock in relation to the height of the river, as well as routine maintenance duties on and around the *Mike Fink*, its gangway and its parking lot. The administrative law judge rejected the characterization, by employer’s witnesses, of claimant’s employment as consisting primarily of “routine maintenance,” *i.e.*, sweeping, cleaning, trash removal, small repairs. Decision and Order at 20. The administrative law judge found this depiction belied principally by claimant’s testimony regarding the scope of his duties, and by the fact that claimant was qualified for the harbor master position by virtue of his work as a deck hand for BB Riverboats. *Id.* The administrative law judge’s decision to give greater credence to claimant’s testimony is rational and within his discretion as the trier-of-fact. See *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961).

Similarly, the administrative law judge’s finding that claimant performed duties for, and in support of, the BB Riverboats operation, and in turn, Benson’s, after his transfer to Mike Fink, Inc., is supported by substantial evidence and therefore is affirmed. As noted above, the vessels owned by BB Riverboats tied up at the *Mike Fink* dock, with claimant as their overseer. Claimant also testified that he was called to assist in a BB Riverboats’ painting project, and would help load the crane barge and the tugboat with tools and

administrative law judge in the instant case found this distinction significant. See discussion, *infra* at n. 9.

supplies. If repair of the dock was necessary and no welders were available on the BB Riverboats' tug, claimant would perform some of their duties. Tr. at 64-68. This testimony was corroborated by the testimony of a contract employee, Mark Ihle, which the administrative law judge also specifically credited. Decision and Order at 8. The administrative law judge further noted that a customized tugboat, the *Beverly Wayne*, owned by a friend of Mr. Bernstein's, docked behind the *Mike Fink*. This vessel was used at times to blow drifting materials away from the dock, but also was used by other Benson's operations. Tr. at 86; JX 2 at 36. Finally, the administrative law judge credited claimant's testimony that he took directions regarding marine operations from Mr. Bernstein and Captain Rizzo. The administrative law judge noted that Mr. Shaughnessy, the general manager of Mike Fink, Inc., was claimant's administrative supervisor, but that there was no testimony adduced as to his role regarding the maintenance of the dock. Decision and Order at 34.

These findings of fact support the administrative law judge's conclusion that, in his position as a harbor master, claimant was engaged in traditional maritime employment. The Board has held that the term "harbor-worker" includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)." *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (1979), *cert. denied*, 446 U.S. 981 (1980); *see also Eckhoff v. Dog River Marina & Boat Works*, 28 BRBS 51 (1994); *Ripley v. Century Concrete Services*, 23 BRBS 336 (1990); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). Claimant herein maintained and repaired the dock, oversaw vessels moored at the dock, and adjusted the dock and the *Mike Fink* according to the level of the river. These activities are properly characterized as maritime work. *Id.* Moreover, on occasion, claimant assisted in the operations of BB Riverboats, such as painting, welding, and loading the tugboat and the crane barge with supplies necessary to their operation. This work is traditional maritime employment as well. *See Olson v. Healy Tibbits Construction Co.*, 22 BRBS 221 (1989) (Brown, J., dissenting on other grounds); *see also Browning v. B.F. Diamond Construction 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).

Thus, the next issue we must address is whether a claimant who performs maritime duties and is exposed to the hazards attendant upon such work is nonetheless excluded from coverage under Section 2(3)(B). We hold that he is not covered by the exclusion, and we therefore affirm the administrative law judge's finding to this effect. We do so, however,

on different grounds than those utilized by the administrative law judge.⁸ Initially, we disagree that *all* employees of a restaurant are excluded from coverage regardless of the duties they perform. It is apparent that Congress did not intend the coverage of a harbor master and a salad bar worker to be determined solely by whether they were both paid by a restaurant. The legislative history states that employees of excluded enterprises may well retain coverage “because of the nature of the work which they do, or the nature of the hazards to which they are exposed.”⁹ 1984 *U.S.C.C.A.N.* at 2737; see *Green*, 144 F.3d at 335, 32 BRBS at 182(CRT). Thus, as with any status inquiry under Section 2(3), the nature of the duties to which claimant is or may be assigned, see *Northeast*

⁸The administrative law judge found that although claimant would be excluded from coverage if Mike Fink, Inc. were his sole employer, claimant was in fact an employee of the entire Benson’s enterprise. The administrative law judge turned to law developed under the National Labor Relations Act, and he stated he was adopting this law for the present case. Decision and Order at 33. The relevant factors for determining whether more than one nominally separate business enterprise should be treated as a “single employer” are: (1) the inter-relationship of operations, *i.e.*, common offices, common record keeping, shared bank accounts and equipment; (2) common management, common directors and boards; (3) centralized control of labor relations and personnel; and (4) common ownership and financial control. See *Swallows v. Barnes & Noble Bookstore, Inc.*, 128 F.3d 990 (6th Cir. 1997)(applying NLRA law to ADEA and ADA case); *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985); *Browning-Ferris Industries of Pennsylvania v. NLRB*, 691 F.2d 1117 (3^d Cir. 1982). Considering the evidence in this case, the administrative law judge concluded that all of the Benson’s corporations constitute a “single employer,” such that claimant was an employee not only of Mike Fink, Inc., but of the entire Benson’s enterprise. As claimant was not employed solely by a restaurant, the administrative law judge found claimant is not excluded from the Act’s coverage. Given our disposition, we need not address employer’s precise challenge to this determination.

⁹The administrative law judge noted that the legislative history gives examples of those who would remain covered despite the exclusions at Section 2(3)(B) and (C) as those employed by an excluded enterprise to build an addition to the retail outlet, or to repair the pier upon which the store is located, or to construct new buildings or additions to existing structures, as well as excavation and work which involves the use of heavy equipment. He did not find this excepting language applicable in this case as only Section 2(3)(C) contains an excepting clause in the enacted version. We are not so troubled, as the overall intent of the 1984 Amendments was to exclude those not engaged in maritime commerce or whose duties do not expose them to maritime hazards, but whose employment nevertheless brings them on or near navigable waters. See 1984 *U.S.C.C.A.N.* at 2737.

Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977), remains relevant under Section 2(3)(B). As the Fifth Circuit explained, the inquiry is whether the claimant’s duties herein exclusively or solely further an operation which comports with the plain meaning of the term “restaurant.” *Green*, 144 F.3d at 335, 32 BRBS at 182(CRT).

In *Shano v. Rene Cross Construction*, 32 BRBS 221 (1998), the Board addressed a case involving the marina exclusion at Section 2(3)(C). The claimant was injured while working for CCM, a marina. Both CCM and Rene Cross Construction, the named employer, were owned by the same two individuals. Prior to working for CCM, the claimant worked for Rene Cross Construction. The claimant alleged that the administrative law judge erred in finding that claimant was solely an employee of CCM at the time of his injury, alleging that the two companies are a “single employer,” and that claimant’s job duties with both must be considered in determining whether he is an employee covered by the Act.

The Board rejected claimant’s contention that such an inquiry was necessary, stating that “a determination of whether [Rene Cross Construction] and CCM were a single corporate entity is not material to claimant’s status inquiry, since the Act focuses on a claimant’s occupation.” *Shano*, 32 BRBS at 223, citing *Caputo*, 432 U.S. 249, 6 BRBS 150. The Board continued, “It is therefore well-established that in determining whether a claimant is a covered maritime employee under the Act, the inquiry centers on the claimant’s assignable duties at the time of injury, not the corporate purpose or structure of the employer.” *Id.* Inasmuch as the administrative law judge’s findings that the claimant was not subject to any duties with his former employer, and that his duties with CCM were of the type to be excluded under Section 2(3)(C), were supported by substantial evidence and in accordance with law, they were affirmed.¹⁰

Applying *Shano*’s rationale in the instant case, the corporate structure of Benson’s and its subsidiary corporations is not controlling. The focus is properly on claimant’s overall job duties and whether they further the operation of a restaurant within the plain meaning of that term, or whether they are duties that further maritime commerce and expose the claimant to maritime hazards. *Green*, 144 F.3d at 335, 32 BRBS at 185(CRT). It is evident, and employer does not dispute, that claimant’s duties as a harbor master do not involve food service. Moreover, although claimant’s duties in maintaining the restaurant facility and in keeping it “looking nice” clearly further the

¹⁰The claimant’s primary responsibility was operating a forklift to launch and store recreational vessels, with the additional duties of collecting money, fueling boats, cutting grass, picking up trash and stocking the marina store. *Shano*, 32 BRBS at 223.

operation of the restaurant, it is equally evident that claimant's overall job duties, as determined by the administrative law judge, constitute the traditional maritime duties of a harbor-worker, as discussed above. Claimant's day to day activities were on the *Mike Fink* dock. In addition to the pleasure craft of restaurant patrons, commercial and law enforcement vessels moor there, and claimant was responsible for their safety while they were moored. Furthermore, claimant repaired and enlarged the dock, and ensured its safety, as well as that of the vessel/restaurant, in high water conditions. All these activities exposed claimant to traditional maritime hazards and did not result in his fortuitously being on navigable waters. See *Cefaratti v. Mike Fink, Inc.*, 17 BRBS 95 (1985), *aff'd mem. sub nom. Mike Fink, Inc. v. Benefits Review Board*, 785 F.2d 309 (6th Cir. 1986)(table). As the administrative law judge found, claimant did not perform work solely for the restaurant. When necessary, claimant loaded supplies and tools on the BB Riverboats' vessels, and assisted in projects for BB Riverboats which did not involve the *Mike Fink*. Therefore, as claimant's duties furthered maritime commerce on the Ohio River, and were not solely and exclusively in furtherance of a restaurant within the plain meaning of that term, we affirm the administrative law judge's conclusion that claimant is not excluded by Section 2(3)(B) of the Act, and his consequent finding of coverage under the Act.

Claimant's attorney has filed a fee petition for work performed before the Board. Employer has not responded to this petition. Counsel requests a fee of \$2,225, representing 1.5 hours at \$150 per hour for Attorney Schletker and 16 hours at \$125 per hour for Attorney Ray. Inasmuch as we have affirmed the administrative law judge's finding that claimant is not excluded by Section 2(3)(B) of the Act, claimant has successfully defended the finding of coverage. See *generally Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). Moreover, the fee requested is reasonable for the necessary work performed before the Board. 20 C.F.R. §802.203. We, therefore, award counsel the requested fee, contingent upon claimant's receiving benefits when the merits of the case are decided. See *generally Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997); 33 U.S.C. §928.

Accordingly, the administrative law judge's Decision and Order Asserting Jurisdiction is affirmed. Claimant's counsel is awarded an attorney's fee of \$2,225 for work performed before the Board, contingent upon claimant's receipt of benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge