BRB No. 02-0837

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| DONALD R. DANIELS | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| THE M OPERATING COMPANY, INCORPORATED | ) | DATE ISSUED: 08/26/2003 |
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| and | ) | |
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| AMERICAN INTERSTATE INSURANCE COMPANY | ) | |
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| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Joseph P. Milton and Michael P. Milton (Milton, Leach, Whitman, D'Andrea, Charek & Milton, P.A.), Jacksonville, Florida, for claimant.

James M. Hess (Langston, Hess, Bolton, Znosko, Helm & Allen, P.A.), Maitland, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-2404, 2001-LHC-1514) of Administrative Law Judge Richard K. Malamphy awarding benefits on claims 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 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 sustained injuries to his right knee and lower extremities on April 20, 1999, while working for employer aboard the *Dredge Stuart*, which, at the time of injury, was situated in the St. John's River, a navigable body of water linked with the Port of Jacksonville, Florida. Employer voluntarily paid disability and medical benefits related to claimant's work injuries until February 8, 2000. At that time, claimant's treating physician, Dr. Tandron, opined that claimant reached maximum medical improvement with regard to the work injuries sustained as a result of the April 20, 1999, work accident, he assigned permanent restrictions,[1] and he stated that claimant could return to modified work within his restrictions. Claimant subsequently filed a claim seeking permanent total disability benefits as a result of the work-related injuries. At the same time, claimant also filed a claim for compensation for a work-related bilateral hearing loss which resulted from his 15 years of work, primarily as an engineer, with employer. Employer controverted both claims on the ground that claimant is a member of a crew excluded from coverage under the Act, and alternatively as the claims are barred by the statute of limitations provisions of the Act.

In his decision, the administrative law judge initially determined that claimant met both the status and situs requirements for coverage under the Act, and that claimant's claims were timely filed pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a). The administrative law judge determined that claimant sustained a work-related 41.67 percent binaural hearing loss. He then determined that claimant could not return to his usual employment as a result of his work injuries and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded temporary total disability benefits from April 21, 1999, until February 8, 2000, permanent total disability benefits thereafter, and all medical benefits.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance.

**Member of a Crew**

Employer first contends that the administrative law judge erred in finding that claimant is not excluded from the Act's coverage as a member of a crew. Employer asserts that the administrative law judge's finding that the *Dredge Stuart* is not a "vessel in navigation" is erroneous as it is based upon his misstatement of the law that dredges and spud barges are "routinely" found not to be vessels under the Jones Act. In addition, employer maintains that the administrative law judge did not apply the proper legal test to determine

[1] The permanent restrictions set by Dr. Tandron for claimant are: no prolonged standing or walking, and no climbing. Claimant's Exhibits (CX) 6, 7.

whether the *Dredge Stuart* is a vessel for purposes of the Jones Act. Specifically, employer asserts that the administrative law judge did not apply the line of cases wherein the United States Court of Appeals for the Fifth Circuit discusses the distinction between special purpose vessels and work platforms. Employer avers that based on the decisions in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998), and *Brunet v. Boh Brothers Constr.*, 715 F.2d 196 (5th Cir. 1983), the *Dredge Stuart* must be considered a special purpose structure and thus, is a vessel in navigation for purposes of determining whether claimant is a member of a crew.

In his decision, the administrative law judge herein initially stated that "it has been routinely held that structures such as dredges and spud barges are not Jones Act vessels." Decision and Order at 3. With regard to the *Dredge Stuart*, the administrative law judge observed that it "had no means of self-propulsion," and that it "was moved through the use of tugs or painstakingly moved only several feet every few hours through the use of anchors which were dropped overboard and winched in to allow the dredge to crawl sideways in the river." Decision and Order at 2. Based on these facts, the administrative law judge determined that "any movement of the dredge was clearly incidental to its primary function of removing sediment from the river bed (*i.e.*, construction)." Decision and Order at 3. He then briefly set out the parties' contentions, and after stating he had "reviewed numerous cases including those cited by the parties," Decision and Order at 3, concluded that the *Dredge Stuart* is not a vessel in navigation. Decision and Order at 4.

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 United States Supreme Court has held that the Longshore Act and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is the same as a "master or 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). An employee is a member of a crew if: (1) his connection to a vessel in navigation is substantial in nature and duration; and (2) his duties contributed to the vessel's function or operation. *See Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997). Based on the parties' concessions that claimant was permanently assigned to and performed a substantial part of his work aboard the dredge, the seminal issue presented herein is whether the *Dredge Stuart* is a "vessel in navigation."

The United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, has not specifically addressed the issue of whether a dredge is a vessel in navigation. The Eleventh Circuit has, however, in *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990), addressed whether special purpose structures are "vessels" within the meaning of the Jones Act. In that case, claimant, a diver, sought recovery under the Jones Act for an injury sustained while he attempted to climb out of the water onto his employer's

spud barge. Citing Fifth Circuit case law, including *Bernard v. Binnings Constr. Co., Inc.*, 741 F.2d 824 (5th Cir. 1984),[2] as precedent, the Eleventh Circuit observed that the critical inquiry is the purpose for which the craft was constructed and the business in which it is engaged. *Hurst*, 896 F.2d at 506. The Eleventh Circuit thus held that the spud barge upon which the claimant was injured was not a "vessel in navigation" under the Jones Act, since it was constructed for the purpose of serving as a work platform, it was engaged as a work platform at time of injury, and its only transportation function was incidental to its primary purpose of serving as a work platform. *Id.*

In the instant case, the administrative law judge's determination that the *Dredge Stuart* is not a vessel in navigation cannot be affirmed, as his analysis is not in accordance with the appropriate test applied by the Eleventh Circuit in *Hurst*, 896 F.2d at 506. First, in contrast to the administrative law judge's statement, it has not been routinely held that special purpose structures such as dredges fall beyond the scope of the phrase "vessel in navigation" as intended under the Jones Act. There are numerous cases on both sides of this issue. *See, e.g., Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, *reh'g denied*, 353 U.S. 931 (1957)(Jones Act applicable to a deckhand notwithstanding that the dredge was anchored to the shore at the time of the injury and during the entire duration of the deckhand's employment with the dredging company and that the dredge, like most dredges, was not frequently in transit); *Manuel*, 135 F.3d 344 (work-over rig is vessel in navigation as it was constructed to transport equipment to various places across navigable waters); *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30 (2d 1996) (court reversed the district court's decision granting summary judgment on the basis that a stationary barge was not a "vessel in navigation"); *Estate of Wenzel v. Seaward Marine Service, Inc.*, 709 F.2d 1326 (9th Cir. 1983) (a submerged cleaning and maintenance platform could be considered a vessel in navigation); *Brunet v. Boh Brothers Constr.*, 715 F.2d 196 (5th Cir. 1983) (moored pile-driving barge used to transport and carry a 150 pound crane may be considered vessel in

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[2] The Eleventh Circuit's reference to *Bernard* is as follows:

> The Fifth Circuit has defined several factors common to floating work platforms which are not vessels: (1) the structures were constructed and are used primarily as work platforms; (2) they were moored or otherwise secured at the time of the injury; and (3) although the structures are capable of movement and have been moved across navigable waters in the course of normal operations, any transport function they perform is merely incidental to their primary purpose of serving as work platforms. *Bernard*, 741 F.2d at 831.

*Hurst*, 896 F.2d at 506.

navigation); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) (non-mobile barge utilized on a river to transfer coal from one area to another is properly considered a vessel in navigation for purposes of the Jones Act); *Gallop v. Pittsburg Sand & Gravel, Inc.*, 696 F. Supp. 1061 (WD Pa 1988) (dredging platform on which crane was located was vessel in navigation within meaning of Jones Act); *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003) (Board affirms determination that dredge is a vessel in navigation); *Foster v. Davison Sand & Gravel*, 31 BRBS 191 (1997)(finding that dredge, operated as a complete sand and gravel processing plant on a barge, whose function was to dredge sand and gravel from bottom of the Allegheny River, is vessel in navigation, affirmed). *But see Stewart v. Dutra Constr. Co., Inc.*, 230 F.3d 461 (1st Cir. 2000) (as a matter of law, dredge used for tunnel construction is not a vessel in navigation within purview of the Jones Act); *Delange v. Dutra Constr. Co., Inc.*, 153 F.3d 1055, 32 BRBS 157 (CRT) (9th Cir. 1998)(holding that barge used as a construction platform is not a vessel in navigation); *Burchett v. Cargill, Inc.*, 48 F.3d 173 (5th Cir. 1995)(holding that floating platform constructed and used primarily as a work platform is not a vessel in navigation); *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir.)(*en banc*), *cert. denied*, 506 U.S. 827 (1992) (supply barge not vessel in navigation); *Ellender v. Kiva Constr. & Eng'g Inc.*, 909 F.2d 803 (5th Cir. 1990) (single construction barges, or several barges strapped together to form floating construction platform do not, as matter of law, constitute "vessels" under Jones Act as they have no independent means of navigation); *Hurst*, 896 F.2d 504 (spud barge used as work platform not a vessel in navigation); *Ducrepont v. Baton Rouge Marine Eng'g, Inc.*, 877 F.2d 393 (5th Cir. 1989) (barge moored to shore and used as a stationary work platform was not a vessel in navigation); *Bernard*, 741 F.2d 824 (5th Cir. 1984)(small work platform without independent means of propulsion was not a vessel in navigation); *Taylor v. Cooper River Constructions*, 830 F.Supp. 300 (D.S.C. 1993) (spud barge used as a work platform for bridge construction not a vessel in navigation); *Presley v. Healy Tibbits Constr. Co.*, 646 F.Supp. 203 (D.Md. 1986) (barge used as work platform at a construction site not a vessel in navigation). These cases, perhaps, best exemplify that the "vessel in navigation" issue is one which must be decided on the specific facts of each case following a consideration of the primary purpose and use of the water craft in question, an analysis the administrative law judge did not fully undertake in this case.[3] Rather, his summary

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[3]Moreover, these cases indicate, as recognized by the Fifth Circuit in *Manuel*, 135 F.3d at 347, that two divergent lines of cases have emerged regarding special purpose crafts: one wherein structures such as jack-up rigs, mobile, submersible drilling barges, derrick barges, spud barges, and others are vessels as a matter of law, even though they also served, in part, as work platforms; and a second, wherein a variety of structures utilized predominately as work platforms are not vessels. This is a distinction which the administrative law judge did not explicitly consider. Nevertheless, the underlying query is premised upon a determination

conclusion on this issue, Decision and Order at 4, lacks a sufficient explanation as to why, based on the record evidence, he believes that the *Dredge Stuart* is a work platform rather than a "vessel in navigation" and his mere citation to several cases, absent a thorough comparison of the relevant facts,[4] as well as his incorrect statement of the law, represents an incomplete and incorrect analysis of the pertinent issue. Nevertheless, these decisions repeatedly emphasize the factual nature of the inquiry regarding whether a floating structure is a "vessel in navigation." *See, e.g., Chandris, Inc. v. Latsis*, 515 U.S. 347, 349 (1995); *Tonnesen*, 82 F.3d at 33; *Hurst*, 896 F.2d at 506; *Bernard*, 741 F.2d at 827-28; *Brunet*, 715 F.2d at 199; *see also Uzdavine*s, 37 BRBS 45. Thus, the issue of whether the *Dredge Stuart* is a vessel in navigation is primarily a question of fact for the administrative law judge to resolve, and we shall defer to his determination if it has a reasonable basis. *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996); *Griffin v. Louisiana Ins. Guaranty Ass'n*, 25 BRBS 196 (1991). However, as we have delineated above, the administrative law judge did not fully apply the proper test for determining whether a special purpose structure, like the *Dredge Stuart*, is a "vessel in navigation." *See Hurst*, 896 F.2d at 506. Consequently, we must vacate the administrative law judge's determination in this case and remand for a more thorough analysis and discussion of the "vessel in navigation" issue. On remand, the administrative law judge must specifically consider the facts in this case pursuant to the two factors applied by the Eleventh Circuit in *Hurst*, *i.e.*, "the purpose for which the craft was constructed" and "the business in which it was engaged," and provide a complete rationale for his findings.

**Average Weekly Wage**

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as to "the purpose for which the craft is constructed and the business in which it is engaged." *Id.*

[4]The administrative law judge's cursory discussion of *Stewart* and *Hurst* does not state the test employed by those courts, or the entire rationale for those decisions. For instance, in *Stewart*, 230 F.3d 461, and *Ellender*, 909 F.2d 803, another case cited by the administrative law judge in support of his decision, the courts determined that the purpose of the structures in question was to serve *exclusively* as a work platform, and thus, that they could not be categorized as vessels in navigation under the Jones Act. Specifically, in *Stewart*, 230 F.3d 461, the court found significant the facts that the purpose of the dredging in that case was primarily related to the construction of a tunnel, and thus served as an instrument of construction, rather than navigation or transportation, and that the dredge, itself, was being used primarily as an extension of land for purpose of securing heavy equipment to construct a passage across sea. Similarly, in *Ellender*, 909 F.2d 803, the court determined that as the barge was built primarily to serve as a work platform for construction of a new platform to hold oil production equipment, it had no independent means of navigation, and its assembly was securely anchored in calm waters at the time of the accident.

Employer asserts that the administrative law judge erred by including fringe benefits in the calculation of claimant's average weekly wage. In particular, employer argues that the administrative law judge improperly included into the calculation of claimant's average weekly wage the $1.73 per hour claimant received, as required by the United States Army Corps of Engineers (USACOE), for retirement and group insurance, as well as $3,500 per year claimant received in subsistence while he was out of town for employer.

Section 2(13) of the Act defines "wages" as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C. A. ' 3101 *et seq*.](relating to employment taxes). *The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement*, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit *plan* for the employee=s or dependent=s benefit, or any other employee=s dependent entitlement.

33 U.S.C. §902(13) (emphasis added). Where the language of a statute has a plain and unambiguous meaning with regard to the particular dispute in a case, no further inquiry is necessary. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). The plain language of the Act excludes employer=s contributions to a *retirement plan* from the definition of "wages." *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155(CRT) (1983).

The record indicates that claimant received from employer "fringe benefits" in the amount of $4,924.46 for tax year 1998, and $1,460.99 for tax year 1999, which the administrative law judge included in the calculation of claimant's pre-injury average weekly wage. Claimant's testimony, as corroborated by that of Margaret Light, who formerly worked for employer administering its payroll, indicates that this payment was required by the USACOE. Hearing Transcript (HT) at 27-28, 143-144. Ms. Light specifically stated that the USACOE required "extra compensation" in the form of a direct payment to employer's workers of $1.73 per hour since most of those workers "elected not to have retirement and group insurance." *Id.* In further describing this payment, Ms. Light stated that the employees "preferred to receive [it] in cash, rather than the coverage it would give them," HT at 150 and that this money was paid directly to the employees in their weekly paychecks, HT at 143. *See generally Morrison-Knudsen*, 461 U.S. 624, 15 BRBS 155(CRT). Moreover, as evidenced by employer's W-2 Wage Summary, EX 2, these amounts were received in lieu of

a retirement plan, and were included in claimant's taxable income. *Id.* As the evidence establishes that this sum was not an employer contribution to a retirement plan, but was included in claimant's taxable income, it is not excluded from claimant's wages under Section 2(13). Rather, it represents part of the "money rate at which the service rendered by [claimant] is compensated by [employer] under the contract of hiring in force at the time of injury." 33 U.S.C. §902(13); *Morrison-Knudsen*, 461 U.S. 624, 15 BRBS 155(CRT). Consequently, the administrative law judge properly included these amounts in the calculation of claimant's average weekly wage.

With regard to the subsistence claimant received, the administrative law judge's inclusion of those amounts in his calculation of claimant's average weekly wage is likewise affirmed as the record establishes, as indicated by the testimony of claimant and Ms. Light as well as claimant's W-2s,[5] that they were subject to withholding under the Internal Revenue Code. *See generally Roberts v. Custom Ship Interiors*, 35 BRBS 65 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002). As these payments were subject to withholding under the IRS Code, in contrast to employer's assertions, the holdings in *H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000), *McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir.1998), and *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), are not applicable to the instant case. Consequently, as it is consistent with the goal of arriving at a sum which reasonably represents claimant's average weekly wage at the time of his injury, we affirm administrative law judge's calculation of claimant's average weekly wage in this case. *See generally Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

**Suitable Alternate Employment**

Employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment in this case. Employer asserts that it identified a number of viable positions, approved by claimant's treating physician, Dr.

[5] Claimant stated that employer "always paid [the subsistence] if [he] was working in town or not. . . . [employer] always paid it." HT at 28. Ms. Light stated that claimant received this money "in his check every week." HT at 144. Moreover, the W-2 records indicate that this amount was included in claimant's taxable income. CX 15.

Tandron, in the three labor market surveys submitted into the record, and that the administrative law judge's rejection of all of the positions is not supported by the record in this case.

Where, as in the instant case, claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Roger=s Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In order to meet this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing given his age, education, work experience and physical restrictions and which he could realistically secure if he diligently tried. *Id.*

In his decision, the administrative law judge considered, but rejected, each of the jobs listed in employer's three labor market surveys as evidence as to the availability of suitable alternate employment. First, he generally rejected all of the jobs which required some use of the telephone because claimant testified that he has considerable difficulty in his day-to-day life because of his hearing loss, HT at 32-33, and because Lisa Hillyer, a vocational rehabilitation consultant, stated that claimant's fourth grade reading level would lead her to rule out any jobs that would require communication on the telephone.[6] HT at 183-184. In addition, the administrative law judge accorded diminished weight to Dr. Tandron's approval of several other jobs because that approval did not reflect any consideration of the deleterious effect of claimant's work-related hearing loss. He next rejected a position as a trailer attendant for the Vietnam Veterans of America (VVA) based on the hearing testimony of Ms. Hillyer that she contacted the VVA and learned that the position no longer exists. HT at 183. Additionally, Ms. Hillyer testified that that position would otherwise not be appropriate for claimant since, based on her experience, such positions normally require considerable lifting in helping customers unload merchandise which would go beyond claimant's physical restrictions. HT at 183-84. The administrative law judge further rejected jobs as a cashier and as a badge checker because they would require discourse with a customer, which would be difficult given claimant's limited communication skills and 41.67 percent binaural hearing loss.

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[6] Ms. Hillyer also testified that taking into consideration the entirety of claimant's situation, she did not think that claimant "could do any job that's been identified" in employer's labor market surveys. HT at 187.

The administrative law judge further rejected several parking lot attendant positions at the airport and in downtown Jacksonville because of "the uncertainty as to walking requirements." Decision and Order at 8. Specifically, the administrative law judge found that in the job descriptions "no mention was made of how far one would have to walk to the job site or the distance to a bathroom facility." *Id.* Given this, and Dr. Tandron's restrictions of no prolonged walking or standing, the administrative law judge concluded that these positions were beyond claimant's physical ability and thus did not constitute evidence of suitable alternate employment.

It is well-established that employer must produce evidence of jobs which claimant is capable of performing given his educational capabilities, as well as his physical restrictions. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). In the instant case, we affirm the administrative law judge's finding that the availability of suitable alternate employment was not established, as he rationally determined, based upon consideration of the credited testimony provided by claimant and Ms. Hillyer, as well as the physical restrictions imposed by Dr. Tandron, that claimant could not perform any of the jobs listed in employer's labor market surveys. *See generally Calbeck v. Strachan Shipping Co.*, 360 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Specifically, he found that claimant lacked the requisite skills for some jobs, and that other jobs required activities inconsistent with claimant's restrictions. *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). As he fully considered the relevant evidence, and his conclusions are supported by substantial evidence, they are affirmed.

Accordingly, the administrative law judge's finding that the *Dredge Stuart* is not a "vessel in navigation" is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order is affirmed.

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