BRB No. 08-0840

M.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERICAN MARINE CORPORATION	)	DATE ISSUED: 08/21/2009
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE/AIG CLAIMS SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Patrick Streb (Weltin Law Office), Oakland, California, for claimant.

Michael W. Thomas and Lara D. Merrigan (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-LHC-00316) of Administrative Law Judge Gerald M. Etchingham on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and

are in accordance with law. 33 U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a diver. Claimant's duties for employer also included the non-diving activities of loading and unloading barges, pier and shop clean-up, welding and construction work, and equipment maintenance. Tr. at 56-61. Claimant's diving duties entailed the monthly inspection, replacement, and repair of off-shore buoys under a contract employer held with Chevron, and vessel inspection and repair that claimant normally performed by diving from a pier. Tr. at 49-50, 56-59. Claimant alleged that he injured his knee and back on May 31, 2006, while performing buoy maintenance from Chevron's off-shore mooring facility. Employer provided medical benefits and maintenance payments under the Jones Act. Claimant sought compensation under the Longshore Act for temporary total disability and medical benefits for his knee and back conditions.

In his decision, the administrative law judge found that claimant's injury occurred on navigable waters and that claimant's injury thus falls within the coverage requirements of the Act. *See* 33 U.S.C. §§902(3), 903(a). The administrative law judge also found that claimant is not excluded from coverage as a member of a crew. 33 U.S.C. §902(3)(G). The administrative law judge found that claimant's only substantial connection to employer's vessels were his duties related to diving and time expended as a passenger traveling to and from the offshore worksites. The administrative law judge found that approximately 21.3 to 23.6 percent of claimant's time was devoted to these activities. The administrative law judge found that as claimant spent less than 30 percent of his time in the service of employer's vessels he is not excluded from the Act's coverage as a member of a crew. The administrative law judge awarded claimant ongoing compensation for temporary total disability from June 1, 2006, and medical benefits for his knee and back injuries.[1]

On appeal, employer challenges the finding that claimant is covered by the Act, contending that he is a member of a crew excluded from coverage. Employer argues that the administrative law judge erred in determining the duration of claimant's connection to employer's vessels by crediting only the time claimant's work duties took him out to sea and that a 30 percent rule need not be utilized in this case since claimant was injured while working as a commercial diver. Employer also contends that the administrative law judge erred by finding that the parties stipulated to the occurrence of a work-related back injury.

[1] The administrative law judge also determined that claimant's average weekly wage is $1,324.76 pursuant to Section 10(c). 33 U.S.C. §910(c). This finding is not challenged on appeal.

Claimant responds, urging affirmance of the administrative law judge's conclusion that he is not excluded from the Act's coverage and his award of compensation and medical benefits.

Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), excludes from the Act's coverage "a master or member of a crew of any vessel." The term "member of a crew" is synonymous with the term "seaman" under the Jones Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991). An employee is a "member of a crew" if: (1) his duties contributed to the vessel's function or to the accomplishment of its mission, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991), and (2) he had a connection to a vessel in navigation, or to a fleet of vessels, that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *see Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997). In *Chandris*, the Supreme Court stressed that "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Chandris*, 515 U.S. at 370. The Court further declared that the "ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." *Id.; Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). The issue of whether a worker is a seaman/member of a crew is a mixed question of law and fact, *Papai*, 520 U.S. at 554, 31 BRBS at 37(CRT), and deference is due to the fact-finder's determination on the issue if it has a reasonable basis on the record. *Id.*; *Lacy v. Southern California Ship Services*, 38 BRBS 12 (2004); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996); *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Smith*, 30 BRBS at 89.

In this case, the administrative law judge appropriately applied the two-prong *Chandris* inquiry to determine if claimant is excluded from the Act's coverage as a member of a crew and rejected employer's contention that he should apply a three-prong test enunciated in *Ramos v. Universal Dredging Co.*, 547 F.Supp. 661 (D. Haw. 1982), a pre-*Chandris* district court decision. Decision and Order at 11. The administrative law judge properly focused on the context of claimant's entire employment rather than only his duties at the time of injury. *Chandris*, 515 U.S. at 370. The administrative law judge found that claimant's diving duties occur with an identifiable fleet of vessels in navigation, and that claimant contributed to the function and accomplishment of the mission of employer's vessels. Decision and Order at 11-12. Therefore, the administrative law judge found that claimant satisfies the first requirement of the two-prong seaman test. *Id.*

The administrative law judge also determined that claimant's diving and tending duties were inherently sea-based in that claimant was required to travel several miles

offshore to perform work under the sea using compressed air as his only means of breathing. Thus, the administrative law judge found that claimant's diving duties establish a connection to employer's vessels that is substantial in nature. Decision and Order at 13. The administrative law judge, however, rejected employer's contention that claimant's other duties of cleaning and repairing diving equipment and mobilizing and demobilizing vessels should be considered in determining the extent of claimant's time spent as a crew member. The administrative law judge found that the analysis under the second prong of *Chandris* focuses on whether claimant's duties take him to sea where he is exposed to its risks. The administrative law judge found that the duties employer advanced as contributing to claimant's status as a member of a crew are performed on land and are inherently land-based. Diving equipment is stored on land, loaded onto employer's vessels on an as-needed basis, and not related to any particular vessel. The administrative law judge also found that claimant's cleaning and repairing duties were not done in preparation for any particular diving job and that claimant was not exposed to the perils of the sea when engaged in these activities. *Id*. at 14. The administrative law judge found that claimant's duties of mobilizing and demobilizing vessels entailed the loading and unloading of a docked vessel. The administrative law judge found that these duties are not inherently sea-based, and that the risks to which claimant was exposed while working from a pier and a docked ship are common to longshoremen and not to crew members. The administrative law judge credited testimony that claimant's fellow workers referred to themselves as "stevedivers" or "divedors" because they performed so much longshore work. *Id*.; *see* Tr. at 262-263. The administrative law judge found that claimant slept ashore at his home except for a brief period in late July-early August 2005, he had no seaman's papers, and his trips to sea were infrequent and short in duration. Therefore, the administrative law judge found that claimant's repair and cleaning of equipment and loading and unloading duties should not be included in assessing the amount of claimant's sea-based work.

The administrative law judge then found that claimant's only substantial connection to employer's vessels were his actual diving duties, tending duties, and time spent as a passenger on a vessel traveling to and from a work site. Decision and Order at 14. The administrative law judge credited claimant's testimony and pay stubs to find that claimant spent approximately 21.3 to 23.6 percent of his time engaged in these activities. The administrative law judge applied the general rule that a worker who spends less than 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. *Id*. at 15; *see Chandris*, 515 U.S. at 371. The administrative law judge found that this rule applies to actual work upon vessels and not to land-based activities in furtherance of sea-based work. Thus, the administrative law judge rejected employer's contention that the 39.5 percent of claimant's land-based time spent cleaning and repairing diving equipment and mobilizing and demobilizing vessels should be included to establish a connection substantial in duration to employer's vessels. The administrative law judge determined that since he had found that these duties did not

establish a substantial connection in nature, they do not establish a substantial connection in duration. Therefore, the administrative law judge found that the time claimant spent in service of a vessel is less than 30 percent and that claimant's connection to employer's vessels is not substantial in duration. Accordingly, the administrative law judge concluded that employer failed to establish that claimant is a member of a crew excluded from the coverage of the Act. Decision and Order at 15.

We reject employer's contention that this finding must be reversed. In *Gizoni*, the Supreme Court rejected the contention that an employee whose job is enumerated in Section 2(3), *i.e.*, a harbor-worker or ship repairman, is precluded from pursuing a Jones Act suit. *Gizoni*, 502 U.S. at 81, 26 BRBS at 44(CRT). Thus, conversely, an employee with some connection to a vessel is not precluded from contending he is not a crew member. The Court stressed that coverage under the Jones Act and by extension, exclusion under the Longshore Act, is a mixed question of law and fact, requiring factual determinations regarding the employee's relationship to the vessel. *Id.*, 502 U.S. at 92, 26 BRBS at 49(CRT). The inquiry into whether an employee's connection to a vessel is "substantial" addresses how much time the employee spent on the vessel as well as the total circumstances of his overall employment with the employer. *Chandris*, 515 U.S. at 370; *see Lacy*, 38 BRBS at 16. In *Papai*, the Court explained:

> For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Papai, 520 U.S. at 555, 31 BRBS at 37(CRT); *Delange v. Dutra Constr. Co., Inc.*, 183 F.3d 916, 33 BRBS 55(CRT) (9th Cir. 1999); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 32 BRBS 41(CRT) (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998).

In this case, the administrative law judge rationally found that claimant's job duties incorporated stereotypical tasks of both longshoremen and commercial divers. The administrative law judge rationally found that, while claimant's diving and tending duties are inherently sea-based, claimant's land-based duties of cleaning and repairing diving equipment, and mobilizing and demobilizing vessels, are not, as these duties do not expose claimant to the risks of the sea. *Lacy*, 38 BRBS at 16. The administrative law judge found that the cleaning and repair work was not done in preparation for any particular diving job or vessel, but was performed to ensure the proper maintenance of the diving equipment. *See* Tr. at 179. The administrative law judge found that the mobilizing and demobilizing vessels entailed the loading and unloading of a vessel, and

that these duties are not sea-based because the vessel is docked at a pier. Tr. at 60. The administrative law judge found that working on a pier and a docked ship exposed claimant to hazards commonly faced by longshoremen and other land-based maritime workers. Accordingly, as this work was performed on land or on a ship docked at a pier, the administrative law judge rationally concluded that it was not sea-based. *See Lacy*, 38 BRBS at 16; *see also Cabral*, 128 F.3d at 1293, 32 BRBS at 44(CRT); *see generally Becker v. Tidewater, Inc.*, 335 F.3d 376, 37 BRBS 49(CRT) (5th Cir. 2003); *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996); *McCaskie*, 34 BRBS at 11; *Wilson*, 30 BRBS at 202-203.

Moreover, the administrative law judge appropriately applied the 30 percent guideline. In *Chandris*, the Court noted and approved the guideline established by the Fifth Circuit that workers who spend less than 30 percent of their work time in the service of a vessel in navigation cannot ordinarily be considered seamen; however, the Court emphasized that such a percentage was "no more than a guideline." *Chandris*, 515 U.S. at 371; *see Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986). The Court also declared that "[a] maritime worker who spends only a fraction of his working time on board a vessel is fundamentally land based and therefore not a member of a vessel's crew, *regardless of what his duties are*." *Chandris*, 515 U.S. at 371 (emphasis added). The Court did not devise a rigid mechanical test, but directed the fact-finder to consider the totality of the employment, and stated that "[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of the crew,' it is a question for the [fact-finder]" and not a question to be decided as a matter of law. *Id*. at 369 [internal citations omitted]. In view of this guidance, we reject employer's contention that the administrative law judge was required to find that claimant was a member of a crew. The administrative law judge rationally analyzed the totality of claimant's work duties and not just the duties he was performing at the time of his injury. *Id*. at 369-370; *McCaskie*, 34 BRBS at 11-12. The administrative law judge found that claimant spent approximately 21.3 to 23.6 percent of his employment in sea-based activities of diving, tending and being transported on employer's vessels to the job site. The administrative law judge concluded that as claimant spent less than 30 percent of his time in the actual service of a vessel in navigation, claimant's connection to employer's vessels was therefore not substantial in duration.

We affirm this finding as it is rational, supported by substantial evidence, and in accordance with law. It is within the administrative law judge's discretion to reach this conclusion from the evidence presented, and the Board may not reweigh the evidence, *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). The administrative law judge gave full consideration to the nature of claimant's various duties and substantial evidence supports the finding that claimant's overall connection to employer's vessels was not substantial in nature or duration. The

administrative law judge's findings of fact are controlling, and therefore we affirm his finding that claimant is not excluded from the Act's coverage as a member of a crew. *Lacy*, 38 BRBS at 16-17; *McCaskie*, 34 BRBS at 11-12; *Wilson*, 30 BRBS at 202-203; *Smith*, 30 BRBS at 89.

Employer also contends that the administrative law judge erred by finding that the parties stipulated to a work-related back injury, and it challenges the administrative law judge's award of medical expenses to treat claimant's back condition. We reject this contention. Claimant's LS-203 Form, Claim for Compensation, lists an injury to the lower back as well as to the right knee. EX 1. Employer's LS-207 Form, Notice of Controversion, states that the sole basis for denying liability is that the claim falls under the Jones Act. EX 3. At the hearing, the administrative law judge addressed issues that could be stipulated to, including that claimant sustained a work injury, that the claim involves low back and right knee injuries, and that employer is currently providing medical benefits under the maritime doctrine of maintenance and cure.[2] Tr. at 15-16. Thereafter, the administrative law judge stated, "…you can stipulate to the facts as I read them[?]; to which claimant's and employer's counsel both replied, "[Y]es your honor." *Id*. at 17. Based on this record, the administrative law judge properly accepted the parties' stipulation that claimant sustained a work-related back injury. Decision and Order at 2, 15, 17; *see Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[2] Claimant received treatment for both his knee and his back. CXs 4-5.