BRB Nos. 03-0264
and 03-0264A

ANTHONY P. CALVERT	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
TRAYLOR BROTHERS, INCORPORATED	)	DATE ISSUED: Dec. 12, 2003
	)	
and	)	
	)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order-Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

David L. Yewell, Owensboro, Kentucky, for claimant.

Jane Ann Pancake and James G. Fogle (Ferreri & Fogle), Louisville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order-Award of Benefits (2001-LHC-2021) 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 findings of fact and conclusions of law of the administrative law judge which 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).

Claimant, a general laborer on a barge, injured his back at work on August 3, 1998, and has not returned to work. Employer asserts that it voluntarily paid claimant continuing temporary total disability benefits from August 28, 1998. The administrative law judge found that claimant was covered under the Act since his injury occurred on navigable waters. The administrative law judge concluded that claimant's injury is work-related, that claimant established his *prima facie* case of total disability, and that employer did not establish the availability of suitable alternate employment. The parties stipulated that claimant reached maximum medical improvement on November 28, 2001. Thus, the administrative law judge awarded claimant permanent total disability benefits from November 28, 2001, and continuing.[1] The administrative law judge excluded from evidence the depositions and reports of Drs. Wood and Haas because they were received after the imposed deadline set at the hearing and were not accompanied by a motion for late submission and a letter from opposing counsel stating whether the motion was opposed or unopposed.

On appeal, employer challenges the administrative law judge's award of benefits, contending that the administrative law judge erred in concluding that claimant is covered under the Act and in excluding from evidence the depositions and reports of Drs. Wood and Haas. Claimant cross-appeals, challenging the administrative law judge's recitation of Stipulation Number 10 regarding the type and amount of benefits employer voluntarily paid claimant.

Coverage

Employer contends that the administrative law judge erred in concluding that claimant is covered under the Act based on his finding that claimant's injury occurred on navigable waters. Employer asserts that, although claimant was cleaning a barge at the time of his injury, this task was not a part of his regular work on a daily basis. Employer also asserts that claimant is not a maritime employee because he was assigned as a laborer to a bridge project.

Claimant began his work with employer in March 1998, five months prior to the injury. Tr. at 14. Where claimant performed his work varied from day to day, but at the time of his work injury, he testified he was mainly working on the barges and the pier in the Ohio River off the Indiana shore, a few miles upstream from Owensboro, Kentucky. *Id*. at 15. He was working on the William Natcher Bridge Project; the bridge was being built to connect Kentucky and Indiana. *Id.* Claimant worked on the bridge project for his entire employment with employer. On the date of claimant's injury, he was cleaning a barge as instructed by his employer. He was attempting to change the rigging on a crane of the headache ball hook. The crane was positioned on a man-made trestle that had been built from the bank out into the river and came within 30 feet of the bridge pier, which

[1] The administrative law judge also awarded medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

claimant was involved in building. The barge was tied to the pier; the crane was positioned on the trestle that was next to the barge and extended over the barge. *Id.* at 16-17. The trestle was located out in the river about 1,000 feet, and the barge, which claimant was on, was next to it. The headache ball of the crane fell, and its cable nudged claimant on the shoulder. *Id*. at 18-21. Claimant testified that he worked as a laborer for employer and performed any type of work that needed to be done. His work for employer could take place on the road in a pickup truck, or out on a barge or tugboat. On the day of his work injury, claimant was cleaning a barge which involved moving "stuff" by hand and by crane. The "stuff" was being moved to different locations on the barge in order to tidy it up and make it safe. Tr. at 48-49.

Before the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, an employee had to establish that his injury occurred "upon the navigable waters of the United States (including any dry dock). . . ." 33 U.S.C. §903(a)(1970)(amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of Section 2(3), 33 U.S.C. §902(3), and to expand the sites covered under Section 3(a) landward. In *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT)(1983), the Supreme Court held that in making these changes to expand coverage, Congress did not intend to withdraw the coverage of the Act from workers injured on navigable water who would have been covered by the Act before 1972. *Id.*, 459 U.S. at 315-316, 15 BRBS 76-77(CRT). Accordingly, the court held that when a worker is injured on actual navigable waters in the course of his employment on those waters, such an employee satisfies both the situs and status requirements, 33 U.S.C. §§902(3), 903(a), and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT). The administrative law judge discussed the holding in *Perini*, and concluded that claimant was covered under the Act. *See* Decision and Order at 7-8. The administrative law judge stated that although claimant was employed to build a bridge, and he did not load or unload the barge, he was required to work on a barge on the Ohio River, which is a navigable waterway.[2] Pursuant to *Perini*, the administrative law judge found claimant covered under the Act.

Upon consideration of the evidence and employer's contention, we affirm the administrative law judge's conclusion that claimant is covered under the Act as he was injured during the course of his employment on a barge on navigable waters. The facts of this case are similar to other cases in which coverage rests on an injury occurring on navigable waters not withstanding the claimants' work on a project which otherwise is

[2] Employer does not contend that the Ohio River is not navigable. *See Cefaratti v. Mike Fink, Inc.*, 17 BRBS 95, 97 n. 3 (1985), *aff'd sub nom. Mike Fink, Inc. v. Benefits Review Board*, 785 F.2d 309 (6th Cir. 1986)(table); *see also Huff v. Mike Fink Restaurant*, 33 BRBS 179 (1999).

not "maritime."[3] In *Perini*, the claimant was injured while working on a barge during a project to build a sewage treatment plant in the Hudson River. *Cf. Fusco v. Perini North River Associates,* 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied,* 449 U.S. 1131 (1981)(worker injured on the sewage treatment plant in the river not covered). In *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1998), claimant, a mechanic, was injured on a barge in navigable water. The barge was mostly stationary and attached to a pier, and was used as an electricity generating plant. However, the barge was capable of being disconnected and transported to dry docks for maintenance. The Board held that claimant was covered because he was injured on a barge which was not permanently connected to land and was afloat on actual navigable water.

In *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000), the Board held claimant covered as he was injured on a barge afloat on navigable water. As in the instant case, the claimant in *Walker* was working on a bridge project. The barge had jack-up legs which allowed it to float. Thus, the barge was not an artificial island or fixed platform. As claimant was injured on navigable waters, in the course of his employment, the fact that claimant was working on a bridge project did not prevent a finding of coverage. In *Morganti v. Lockheed Martin Corp.,* BRBS , BRB No. 03-0149 (Oct. 20, 2003), the Board recently held that the decedent, a test engineer of sonar transducers was covered under the Act as his death occurred on navigable waters. In that case, decedent spent 30 percent of his time on Cayuga Lake, a navigable waterway, performing his work on a barge anchored on the lake and he drowned when he fell off the vessel that transported him to the barge. The Board rejected, *inter alia,* the administrative law judge's conclusion that decedent was injured on a fixed work platform, as the barge was fully capable of being moved should such movement be required. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985) (worker on fixed offshore oil platform not covered).

As in these cases, claimant in the instant case was injured in the course of his employment on a barge afloat on navigable waters. Claimant was cleaning a barge tied to a pier in the Ohio River at the time of injury, and much like the claimant in *Perini* was injured while assisting in the maneuvering of a crane to perform his work. Moreover, that claimant was not assigned to work on the barge on a daily basis does not support employer's position that claimant is not covered under the Act. Claimant testified that his work could take him to several work sites, the barge among them. As work on the barge was required of claimant's employment, and was not episodic, momentary, discretionary or extraordinary, claimant is covered under the Act by virtue of his injury on navigable waters. *See Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953); *Parker*

[3] Generally, bridge builders are not covered by the Act, unless their injuries occurred on actual navigable waters. *See Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000); *Cf. LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S.. 1177 (1983)(covered because bridge was being built to improve river's navigability).

v. Motor Boat Sales, 314 U.S. 244 (1941), *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Lewis v. Sunnen Crane Serv., Inc.*, 31 BRBS 34 (1997). Thus, the administrative law judge's conclusion that claimant is covered under the Act is affirmed as it is supported by substantial evidence and in accordance with law. *Perini*, 459 U.S. 297, 15 BRBS 62(CRT); *Walker*, 34 BRBS 176.

Exclusion of Evidence

Employer next contends that the administrative law judge erred in excluding the depositions and reports of Drs. Wood and Haas which were submitted to the administrative law judge on October 28, 2002, seven months after the deadline for their submission on March 4, 2002. Dr. Wood is a medical expert. Dr. Haas is a vocational expert. An administrative law judge has great discretion concerning the admission of evidence, and any decisions regarding the admission or exclusion of evidence are reversible only if they are established to be arbitrary, capricious, or an abuse of discretion. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

In his decision, the administrative law judge excluded the depositions and reports because they were received seven months after their due date, and were unaccompanied by a motion for late submission with a statement from opposing counsel. Decision and Order at 7; Tr. at 51-52. The administrative law judge relied on his pre-hearing order and the Rules of Practice and Procedure of the Office of Administrative Law Judges. 29 C.F.R. §§18.54(a), 18.55; Decision and Order at 7; ALJ Ex. 1b at 4.

After consideration of employer's argument and the depositions and reports of Drs. Wood and Haas, we hold that any error in the administrative law judge's exclusion of this evidence is harmless. The opinion of Dr. Wood is cumulative of other medical evidence of record, and Dr. Haas's opinion is insufficient to establish the availability of suitable alternate employment as a matter of law. The testimony of Dr. Wood that claimant is able to return to light work merely reiterates the opinion of Dr. Dimar, who also examined claimant at employer's request.[4] Dr. Wood's Dep. at 6; Dr. Wood's November 28, 2001, Report at 11; Cl. Ex. 1 at 4, 5, 9. Based on Dr. Wood's opinion that claimant can return to light work, Dr. Haas identified occupations in marketing and sales, administrative support, manufacturing/production, transportation/material moving machine operators, service, and paraprofessional as suitable for claimant. Dr. Haas's December 18, 2001 Report at 5-6; Dr. Haas's Dep. at 9-13. While Dr. Haas identifies specific occupations allegedly suitable for claimant, he does not identify any actual

[4] The administrative law judge credited the opinion of employer's doctor, Dr. Dimar, with probative weight because it is well-reasoned and well-documented, and relied on it, in addition to claimant's description of his job, to conclude that claimant established his *prima facie* case of total disability. Decision and Order at 12.

available job opportunities for claimant. *Id.* Thus, Dr. Haas's opinion is legally insufficient to establish the availability of suitable alternate employment. *See Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987); *see generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997). Therefore, we reject employer's contention that the administrative law judge erred in excluding these opinions from the evidentiary record.

Stipulation Number 10

We next address claimant's cross-appeal. Claimant challenges the administrative law judge's recitation of Stipulation Number 10 regarding the type and amount of benefits employer voluntarily paid claimant. Claimant asserts that Stipulation Number 10 on page 3 of the administrative law judge's decision differs from Attachment A to counsel's stipulations admitted as Joint Exhibit 1.

On September 12, 2002, after the hearing, but prior to the issuance of the administrative law judge's decision, claimant attempted by motion to obtain an order from the administrative law judge requiring employer to certify the type and amount of benefits employer voluntarily paid claimant. On September 17, 2002, employer's counsel, Ms. Pancake, apparently responded to the administrative law judge's inquiry regarding this matter by faxing him a copy of a letter dated November 19, 2001. This letter states the type and amount of benefits employer asserted it paid claimant. The administrative law judge's decision incorporated this letter as Stipulation Number 10.[5] The administrative law judge also cited to Joint Exhibit 1 in support of the stipulation. *See* Decision and Order at 2. The record, however, contains two versions of Joint Exhibit 1, one from claimant's counsel and one from employer's counsel. The administrative law judge had ordered counsel's stipulations to be submitted post-hearing as a joint document but this was not done due to scheduling conflicts and time constraints of counsel.

Claimant's Joint Exhibit 1 states that claimant cannot certify that employer paid him temporary total disability benefits totaling over $88,000, but that claimant acknowledges that he received compensation checks in the amount of $422.17 per week from shortly after the date of injury on August 3, 1998, until the spring of 1999, when

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[5] The administrative law judge's decision states that,

> Employer paid Claimant temporary total disability [benefits] from August 28, 1998, through September 12, 2000, at the weekly rate of $422.17. Benefits were terminated from September 12, 2000, through March 27, 2001. Claimant was issued a check for $11,000.00 for benefits due, but not paid for the period of September 12, 2000 through March 27, 2001. Claimant continues to receive the weekly rate of $422.17.

Decision and Order at 3, Stipulation Number 10.

benefits were terminated. Claimant also states that benefits were reinstated in October 1999, and continued until September 2000, when they again were terminated. On March 19, 2001, claimant's benefits were apparently reinstated. Cl. Jt. Ex. 1 at Att. A. Claimant requested that the administrative law judge issue an order requiring employer to submit a sworn affidavit stating the actual payments made to claimant, and he filed a motion before the administrative law judge to that effect. No order or any response to claimant's motion or request by the administrative law judge followed other than the administrative law judge's recitation of Stipulation Number 10 in his decision. Employer's Joint Exhibit 1 merely states that employer paid claimant temporary total disability benefits from August 28, 1998, to the present at the rate of $422.17 per week for 210.43 weeks for a total of $88,837.23.

The administrative law judge's recitation of Stipulation Number 10 attempts to resolve claimant's motion concerning the type and amount of benefits employer voluntarily paid him. It is apparent, however, that claimant's counsel did not agree with employer's position on this issue as he requested additional information on September 12, 2002, after having received employer's November 19, 2001, letter a year earlier. A stipulation must reflect an agreement of the parties. In this case, however, "joint exhibit" 1 of each of the parties differs and the administrative law judge did not explain the basis for his selection of employer's assertion that all temporary total disability benefits owing were paid. Because there was no meeting of the minds on this issue, we must remand the case to the administrative law judge. The administrative law judge should afford the parties the opportunity to submit evidence in support of their positions, and he should make findings of fact regarding the type and amount of benefit of benefits paid by employer and those due claimant. Specifically, the administrative law judge should delineate all benefits due claimant from the date of injury, and award employer a credit pursuant to Section 14(j) for its advance payments of compensation. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT)(5th Cir. 1998).

Accordingly, the administrative law judge's award of permanent total disability benefits commencing November 28, 2001, is affirmed. The case is remanded for the administrative law judge to address the issue regarding the type and amount of benefits employer voluntarily paid claimant and to ascertain if claimant was fully paid for all relevant time periods.

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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PETER A. GABAUER, Jr.
Administrative Appeals Judge