

BRB No. 99-0289

JAMES E. LANDING	)	
	)	
Claimant-Petitioner	)	)
	)	
v.	)	
	)	
SAVANNAH MARINE SERVICES, INCORPORATED	)	DATE ISSUED: <u>Dec. 6, 1999</u>
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing the Claim of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum), Savannah, Georgia, for claimant.

Robert S. Glenn, Jr. (Hunter, Maclean, Exley & Dunn, P.C.), Savannah, Georgia, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Dismissing the Claim (97-LHC-02649) of Administrative Law Judge Robert D. Kaplan 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Employer, which owns a fleet of ocean-going tugboats, is in the business of

operating its boats and performing repairs on boats and barges owned by others. Claimant began his employment with employer on November 15, 1995, and was initially assigned to travel to Florida and then work aboard the tugboat CAPTAIN JIMMY, which was owned by employer, in order to return two other boats to employer's dock on the Savannah River. Claimant performed this task from November 16 to November 20, 1995. Through November 24, 1995, claimant continued to work on the CAPTAIN JIMMY, which performed work shifting barges in the harbor area as needed. Subsequently, claimant performed maintenance and repair tasks working aboard employer's tugboats; the parties disputed whether this work was performed on boats owned by other companies in addition to those owned by employer. Claimant further alleged that he performed land-crew maintenance work at employer's warehouse, and unloaded barges at the dock.

On January 11, 1996, claimant suffered a pulmonary injury when, while working aboard a tugboat, he used a hydraulic needle gun to remove paint and was exposed to injurious chemicals. Claimant was temporarily totally disabled from that date through February 19, 1996. Thereafter, claimant filed a claim for permanent partial disability compensation under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). Additionally, claimant filed a civil action against employer under the Jones Act, 46 U.S.C. §688; the parties agreed to a settlement of this suit in 1997.<sup>1</sup>

In his Decision and Order, the administrative law judge initially determined that the parties' settlement of the Jones Act case did not bar claimant's claim for benefits under the Act. Nevertheless, the administrative law judge found that claimant was a seaman from November 16 through November 24, 1995, as all of his work during this period related to the operation and maintenance of the CAPTAIN JIMMY, and that claimant's fleet-related work after November 24, 1995, constituted 76 percent of his total work. Consequently, the administrative law judge concluded that claimant was a "member of a crew" of a vessel under Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G)(1994), and thus excluded from coverage under the Act.

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<sup>1</sup>Claimant also filed a claim with the Georgia State Board of Workers' Compensation. However, the parties stipulated that this claim was not compensable, as claimant was a member of a crew of a vessel at the time of injury. See Emp. Ex. 3.

On appeal, claimant challenges the administrative law judge's determination that he is not entitled to benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision. In a reply brief, claimant asserts that the decision of the United States Court of Appeals for the Fifth Circuit in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217 (CRT)(5th Cir. 1999)(*en banc*), requires a reversal of the administrative law judge's determination.

The sole issue presented by this appeal is whether the administrative law judge erred in finding that claimant was a "member of a crew" of a vessel, and thus excluded from coverage under the Act. 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); *see also Chandris v. Latsis*, 515 U.S. 347 (1995). An employee is thus a member of a crew if: (1) he was permanently assigned or performed a substantial part of his work on a vessel or fleet of vessels; 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); *Hansen v. Caldwell Diving Co.*, BRBS , BRB No. 98-1596 (Sept. 7, 1999). "The key to seaman status is an employment-related connection to a vessel in navigation . . . . It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Wilander*, 498 U.S. at 354, 26 BRBS at 83 (CRT). The employee must have a connection to a vessel that is substantial in terms of both its nature and duration in order to separate sea-based workers entitled to coverage under the Jones Act from land-based workers with only a transitory or sporadic connection to a vessel in navigation. *Chandris*, 515 U.S. at 368; *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). In *Chandris*, the United States Supreme Court ruled that the seaman status inquiry is not limited to an examination of the overall course of an employee's service with an employer. Rather, where "a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." *Chandris*, 515 U.S. at 372.

Relying on *Chandris*, the administrative law judge initially determined that claimant was a seaman while working on board the CAPTAIN JIMMY from November 16 through November 24, 1995, when the vessel sailed to employer's dock from Florida and thereafter when it was used to shift barges around the harbor. The administrative law judge based this finding on employer's work logs and the

testimony of Joe van Puffelen, employer's president.<sup>2</sup> The administrative law judge next considered whether the nature of claimant's job had changed after November 24, 1995, in order to determine whether claimant was a "member of a crew" at the time of his injury in January 1996. In this regard, the administrative law judge discredited claimant's testimony as claimant gave contradictory accounts of the type of work he performed during this period. Crediting the testimony of Mr. van Puffelen and employer's records, the administrative law judge found that of the 25 days claimant worked for employer after November 24, 1995, claimant performed seaman work on employer's vessels on 19 of those days, which constituted 76 percent of his total work after November 24. Consequently, relying on the guideline espoused in *Chandris* that a worker who spends less than 30 percent of his time in the service of a vessel generally should not be considered a seaman, see *Chandris*, 515 U.S. at 371, the administrative law judge determined that since 76 percent of claimant's employment subsequent to November 24, 1995 was spent performing seaman work, claimant was a "member of a crew" under the Act, and therefore ineligible for benefits pursuant to Section 2(3)(G) of the Act.

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<sup>2</sup>In addition, claimant testified that while working on board the CAPTAIN JIMMY during this period, his duties included cooking meals, cleaning the deck, checking gauges and making repairs, see Tr. at 19, activities that contribute to the mission of the vessel pursuant to *Wilander*.

We affirm the administrative law judge's conclusion, as it is supported by substantial evidence and consistent with applicable law. As the administrative law judge found, claimant provided inconsistent testimony regarding his work for employer after November 24. Specifically, claimant testified that he spent 25 to 30 percent of his time after November 24, 1995, using a needle gun to remove paint from the tugboat JOHN PARRISH, previously called the COMPASS ROSE, which was not operable. The remainder of the time, claimant testified, was occupied by performing cleaning tasks aboard barges and maintenance work on the dock. See Tr. at 22, 26-27. However, claimant also made the conflicting assertions that he spent 85 to 90 percent working on the COMPASS ROSE, and 90 percent of his time performing land-based crew work. See Tr. at 51-55. Mr. van Puffelen, whom the administrative law judge credited, stated that claimant was hired as a deckhand, whose duties were to assist in operating and maintaining employer's tugboats. When the tugboats were not in operation, deckhands performed various maintenance duties including cleaning bilges, chipping rust and paint, painting and changing oil filters. See Tr. at 93-95. Employer's land-based workers performed repairs on employer-owned vessels and vessels owned by other companies, and were paid hourly, while employer's deckhands, including claimant, were paid by the day. *Id.* Employer's records, which the administrative law judge also credited, reveal that claimant worked on employer's vessels that were "underway," or sailing upon the water, on 12 days, and anchored "in slip" on seven days, six of which were aboard the JOHN PARRISH.<sup>3</sup> See Emp. Ex. 5; Cl. Exs. 12-13. The administrative law judge credited Mr. van Puffelen's testimony that although the JOHN PARRISH had been in dry dock for major repairs for five months prior to claimant's employment, the vessel was fully operational and sailing during claimant's employment. See Tr. at 100, 118; Decision and Order at 13.<sup>4</sup>

As the credited evidence establishes that claimant had a connection to

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<sup>3</sup>The administrative law judge discounted five days, as employer's records did not show the specific vessel on which claimant worked on these various days. See Decision and Order at 13.

<sup>4</sup>Citing *Chandris*, the administrative law judge noted that a vessel does not cease to be "in navigation" merely because it is taken to a dry dock or shipyard to undergo repairs; the question of whether repairs are sufficiently significant so that the vessel can no longer be considered to be in navigation is a question of fact for a jury to decide. See *Chandris*, 515 U.S. at 374; see also *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997). The administrative law judge found that in any event, the repairs to the JOHN PARRISH had been completed by the time claimant began working for employer. See Decision and Order at 13.

employer's fleet of vessels during his period of employment with employer that was substantial in terms of both its nature and duration, see *Papai*, 520 U.S. at 555, 31 BRBS at 37 (CRT); *Chandris*, 515 U.S. at 368; *Delange v. Dutra Construction Co. Inc.*, 183 F.3d 916, 33 BRBS 55 (CRT)(9th Cir. 1999), we affirm the administrative law judge's conclusion that claimant was a "member of a crew" and excluded from coverage under the Act.<sup>5</sup> See, e.g., *Hansen*, slip op. at 6.

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<sup>5</sup>In his reply brief, claimant contends that the decision of the Fifth Circuit in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217 (CRT)(5th Cir. 1999)(*en banc*), requires a reversal of the administrative law judge's decision. We reject this contention. In *Bienvenu*, the Fifth Circuit held that a worker injured in the course of his employment on navigable waters is engaged in covered maritime employment and meets the status test under 33 U.S.C. §902(3)(1994), only if his presence on the water at the time of injury was neither transient nor fortuitous. See *Bienvenu*, 164 F.3d at 908, 32 BRBS at 223 (CRT). As *Bienvenu* did not concern the question of whether an employee is a "member of a crew" of a vessel under Section 2(3)(G), and therefore excluded from coverage under the Act, it is distinguishable from the instant case.

Accordingly, the Decision and Order Dismissing the Claim of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge