BRB No. 04-0444

IAN JARRETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVATEK, LTD. & PACIFIC MARINE SUPPLY COMPANY	)	DATE ISSUED: FEB 4, 2005
	)	
and	)	
	)	
CAP INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Robert C. Kessner and Sylvia K. Higashi (Kessner Duca Umebay Ashi Bain & Matsunaga), Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-2032) of Administrative Law Judge C. Richard Avery 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 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 was hired as an engine maintenance worker in 1996 by employer, a company that operates recreational vessels. He performed preventative maintenance on

engines as well as on other ship systems shoreside; he did not go offshore on vessels. In 1997, employer took delivery of the vessel *Foilcat*, which was to be used as an intra-Hawaiian island ferry. For the first year, claimant only performed maintenance on the *Foilcat* while it was docked at the pier, but subsequently he was involved in the overhaul and refurbishment of the *Foilcat*. Claimant worked under the engineer to prepare the *Foilcat* for sea trials beginning in August 1998. During the sea trials, claimant would primarily watch and monitor the machinery; he denied performing deckhand duties such as preparing lines, cleaning windows, checking life jackets, *etc*. However, on October 8, 1999, the *Foilcat* began taking passengers. In order to operate as a ferry service, the Coast Guard required that the *Foilcat* have licensed captains, a licensed engineer, an able-bodied seaman, and two unlicensed deckhand/stewards. After October 8, 1999, claimant was still responsible for maintaining the engines, both while underway and while docked, but his duties also included counting the passengers, collecting tickets and selling refreshments. Claimant also was given a position to man in the event of an emergency while the ferry was underway. He had completed 30 days of time onboard the vessel and had passed a Coast Guard examination, earning a rating certificate which qualified him for the status of an unlicensed steward. H. Tr. at 83. On December 17, 1999, while claimant was restocking refreshments dockside, he twisted his back as he ascended the gang plank. Thereafter, claimant sought benefits under the Act.[1]

In his decision, the administrative law judge found that from October 8, 1999, when the *Foilcat* began taking on passengers, to the date of his injury, December 23, 1999, claimant was aboard the vessel as a member of its crew every day except one. He found that claimant's duties on the *Foilcat* contributed to the function of the vessel and to the accomplishment of its mission. The administrative law judge found that claimant spent 70 to 80 percent of his work time aboard the vessel, and that his duties included assisting with passengers and assisting the engineer with any mechanical problems. Moreover, claimant performed routine maintenance on the *Foilcat* and restocked the concession stand. The administrative law judge also found that claimant had been with the vessel since its acquisition and was committed to staying on indefinitely. Thus, the administrative law judge concluded that claimant's connection to the vessel was

[1] Claimant, without representation, settled a claim under the Jones Act for his injury. In *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995), the United States Court of Appeals for the Ninth Circuit held that an employee in an occupation enumerated in Section 2(3) may be a seaman, although double recovery is precluded. *See* 33 U.S.C. §903(e). *Contra Sharp v. Johnson Brothers Corp.*, 973 F.2d 423, 26 BRBS 59(CRT) (5th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993) (settlement of longshore claim precludes Jones Act suit); *see also Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997) (declining to reach issue of whether longshore award precludes Jones Act suit, due to holding that claimant was not a seaman).

substantial in both nature and duration, and he denied benefits under the Act as claimant was a "member of a crew."

On appeal, claimant contends that the administrative law judge erred in finding that he was a "member of a crew" as he was primarily responsible for land-based maintenance work. Employer responds, urging affirmance of the administrative law judge's finding that claimant is excluded from coverage as he was a member of the *Foilcat*'s crew.

Section 2(3)(G) of the Act excludes from coverage "a member of a crew of any vessel." 33 U.S.C. §902(3)(G). The terms "member of a crew" under the Longshore Act and "seaman" under the Jones Act are synonymous. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44 (CRT)(1991). The Supreme Court has held that the essential requirements for seaman status are that an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission and that the employee must have a connection to a vessel that is substantial in terms of both its nature and its duration. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *see also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 32 BRBS 41(CRT) (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998). The Court held that the first requirement is broad and that " '[a]ll who work at sea in the service of a ship' are *eligible* for seaman status." *Chandris*, 515 U.S. at 368 (emphasis in original) (quoting *Wilander*, 498 U.S. at 354). In considering the second requirement, the Court held that seaman status will be conferred if it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity. *Chandris*, 515 U.S. at 368. The Court stated that when a worker's basic assignment changes, his seaman status may change as well. *Id.* at 372.

Initially, the administrative law judge found it is not disputed that claimant's duties contributed to the function of the vessel or accomplishment of its mission. Claimant argues that the administrative law judge applied the incorrect test in reviewing the evidence to determine whether claimant was a seaman rather than applying a test to determine whether claimant was a longshore employee. However, if claimant is a seaman, then he is excluded from coverage under the Longshore Act as a member of a crew. *See Gizoni*, 501 U.S. 81, 26 BRBS 44(CRT).

The administrative law judge applied the correct tests in determining that claimant was a member of a crew and thus excluded from Longshore Act coverage, and his finding that claimant had a substantial connection to a vessel is supported by substantial evidence. Claimant contends that employer's workers were classified either as shoreside employees or as seamen and deckhands and that as a shoreside employee, he is entitled to longshore coverage. The shoreside employees were paid a lower hourly wage than the

seamen, but were allowed to earn overtime, which the seamen, by law, could not earn. Claimant contends that even though he was accumulating "sea time" in order to be certified by the Coast Guard as a member of a crew, he was still classified as a shoreside employee and was able to earn overtime. We reject this argument, as this distinction is not determinative of member of a crew status. Claimant's actual duties are dispositive of his status, rather than the job title or pay grade used by employer to classify its workers. *See Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); *Wilander*, 498 U.S. at 354, 26 BRBS at 83(CRT); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 260 (1940); *Lacy v. Southern California Ship Services*, 38 BRBS 12 (2004). The administrative law judge found that the facts that claimant's former duties, prior to his assignment to the *Foilcat*, were exclusively shoreside and that he retained a shoreside classification under employer's bookkeeping system were outweighed by the duties that claimant had been performing onboard the vessel prior to his injury.

In this regard, we reject claimant's contention that because he was primarily responsible for the engines while at sea, his duties are distinguishable from those of the deckhands and seaman and thus he was not a member of the crew. There is no requirement that an employee on a vessel spend all of his time performing certain functions in order to be considered a "member of the crew." The Supreme Court held in *Wilander* that "[i]t 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 355, 26 BRBS at 83(CRT). Thus, there is no basis for finding that claimant was not a member of a crew merely because he worked on the vessel's engines. Indeed, the evidence credited by the administrative law judge establishes that claimant was working in the service of the ship, as a ferry, while it was underway. In particular, the administrative law judge observed that claimant wore a uniform and assisted passengers onboard the vessel, in addition to his mechanical duties. Moreover, the administrative law judge relied on evidence of claimant's passing the Coast Guard examination to become an unlicensed steward. The administrative law judge found that claimant had been with the *Foilcat* since its acquisition in 1997 and had indicated prior to his injury that he was committed to staying on indefinitely and hoped to earn the title of seaman. H. Tr. at 91. As substantial evidence supports that administrative law judge's finding that claimant's connection to the *Foilcat* was "substantial in nature," we affirm this finding. *See generally Delange v. Dutra Constr. Co., Inc.*, 183 F.3d 916, 33 BRBS 55(CRT) (9th Cir. 1999) (in Jones Act case district court erred in granting summary judgment for employer based on finding claimant was not a seaman where plaintiff performed both piledriving and deckhand work while vessel moved); *cf. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) ("deckhand" hired only to paint vessel not a seaman); *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996) (maintenance worker hired as temporary laborer only for the duration of repairs not a seaman).

Claimant further contends that the log showing the breakdown of his work activity indicates that he worked primarily in shore-based work for seven hours on December 17, 1999, the date of his injury, and only two hours in sea-based work. The administrative law judge found that claimant worked onboard the *Foilcat* every day but one from October 7 through December 23, 1999.[2] *See* Emp. Exs. 5-6. Moreover, the complete log indicates that, in the week before his injury, claimant spent more than 30 percent of his time in sea-based work.[3] *Id.* The Supreme Court has adopted the Fifth Circuit's rule of thumb that a worker who spends more than about 30 percent of his time in the service of a vessel has a sufficient temporal relationship with that vessel. *Chandris*, 515 U.S. at 371, citing *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). The Court acknowledged that departure from this rule may be justified, where, for example, a worker's basic assignment changes before the injury. *Chandris*, 515 U.S. at 372.

In this case, claimant was in a transitional period when he was injured. He retained some of the characteristics of a shoreside employee, but recently had spent more than 30 percent of his day working on the *Foilcat* while it was underway, maintaining the engines and assisting with the passengers. In *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), the Board considered a case in which the employee worked as an oiler aboard a dredge for only three to four weeks prior to the injury, and concluded that the administrative law judge had not erred in finding that the employee's connection was not transitory or sporadic. *See also Becker v. Tidewater, Inc.*, 335 F.3d 376, 37 BRBS 49(CRT) (5th Cir. 2003) (claimant's essential land-based duties had not been altered by his temporary assignment to a vessel); *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 33 BRBS 31(CRT) (3d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999)(employee cannot use evidence of a prior assignment with the employer to establish connection to a fleet of vessels). As claimant's essential duties had changed and had become more than 30 percent sea-based prior to his injury, the administrative law judge rationally found that claimant's connection to the vessel was "substantial in duration."

The Supreme Court has held that it is generally inappropriate to take the question of whether a worker is a seaman/member of a crew from the fact-finder, and deference is

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[2] Specifically, claimant spent 60 hours on the vessel and 21.5 hours in land-based maintenance. *See* Emp. Exs. 5-6.

[3] Claimant testified that he would arrive at work at 3:30 a.m. and help make the vessel ready for the first trip. The *Foilcat* would then transport the passengers from one-point to another intra-island and finish the morning run by 9:30 a.m. Claimant would perform maintenance dockside during the interval between the morning trips and the afternoon trips. The afternoon service resumed at 2:00 p.m. H. Tr. at 104-107.

due to the fact-finder if his finding has a reasonable basis. *Papai*, 520 U.S. at 554, 31 BRBS at 37(CRT); *see also Lacy*, 38 BRBS at 16; *Uzdavines*, 37 BRBS at 51; *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000). The administrative law judge considered the total circumstances of claimant's work with employer and substantial evidence supports his finding that claimant had a connection to the *Foilcat* as a sea-going vessel that was substantial in nature and duration. Therefore, we reject claimant's contentions of error, and we affirm the administrative law judge's finding that claimant is excluded from the Act's coverage as he was a member of a crew. 33 U.S.C. §902(3)(G); *Uzdavines*, 37 BRBS at 45. Thus, we affirm the denial of benefits.

Accordingly, the Decision and Order of the administrative law judge denying benefits 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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JUDITH S. BOGGS
Administrative Appeals Judge