BRB No. 01-0860

RAY R. FIEDLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
McLEAN CONTRACTING COMPANY	)	DATE ISSUED: July 30, 2002
	)	
and	)	
	)	
THE SCHAFFER COMPANIES, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Breit, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Brian L. Sykes (Vandeventer Black L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-LHC-0240) of Administrative Law Judge Fletcher E. Campbell, Jr., denying benefits 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).

On July 21, 1998, claimant, while working for employer on a project involving the

demolition of bridges in Chincoteague, Virginia, sustained an injury to his right shoulder. On this particular project, claimant stated that he was working as a pile driver and was also responsible for the operation of two work boats. As a pile driver, claimant stated that he set pilings, worked with leads, whirly rigs, deck winches and air tools. In addition, he testified that he worked on the platforms, helping with the cables, operated a jackhammer and worked as part of employer's crew. In operating the work boats, claimant stated that he moved barges around and moved and set up a whirly rig at various locations along the Chincoteague Inlet.

At the time of his injury, claimant was walking from on board a work boat known as a WB 29, which is described as a twin-engine push boat designed to move barges between piles and bridges, to a jack boat, which is similar to a Boston whaler and is used for transporting workers and equipment. On this day, and over the course of his entire employment with employer, claimant stated that he spent approximately 10 percent of his time operating the boat as opposed to performing other labor. While on this particular project, claimant stated that, as a whole, he spent approximately 20 percent of his time operating the boat as opposed to performing other labor. Claimant testified that he does not have a captain's license, and that he was compensated at the rate for a pile driver and not for a captain.

As for his work-related injury, claimant received treatment from Dr. Wardell who recommended, and subsequently performed, arthroscopic surgery on his right shoulder on March 11, 1999. Between the time of his accident and the surgery, claimant continued to work for employer on a work boat and at its home office in Chesapeake, Virginia. Following the surgery, Dr. Wardell opined that claimant was capable of returning to light duty work on April 20, 1999. Claimant however did not return to work for employer, as it had no work to offer within his restrictions. Subsequently, claimant worked briefly as a truck driver, and in several other positions, before obtaining regular and continued employment with Hampton Sheet Metal in January 2001.

Claimant has not received any workers' compensation benefits since the time of his surgery. He pursued a Jones Act claim against employer, and that case was settled for a net of $8,000. Claimant also filed a claim under the Longshore Act seeking temporary total and permanent partial disability benefits for his work-related right shoulder injury commencing March 7, 1999, the date he last worked for employer. Employer controverted the claim, on the ground that claimant is not covered under the Longshore Act.

In his decision, the administrative law judge found that claimant was a member of a crew and thus excluded from coverage under the Longshore Act. *See* 33 U.S.C. §902(3)(G). Specifically, he determined that claimant's duties aboard employer's work boats contributed to the function of these vessels, and that claimant, who the administrative law judge found

was working 56 percent of his time aboard employer's boats at the Chincoteague worksite, had a substantial connection to employer's vessels. Thus, the administrative law judge denied benefits under the Longshore Act.

On appeal, claimant challenges the administrative law judge's finding that he is a member of the crew and thus excluded from coverage under the Longshore Act. Employer responds, urging affirmance.

Claimant initially argues that the administrative law judge misapplied the holding in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), in finding that claimant had a substantial connection to a vessel in navigation. First, claimant asserts that the administrative law judge erred in considering only where the injury occurred rather than the overall nature of his work as a pile driver for employer. Claimant maintains that he is a land-based maritime worker entitled to coverage under the Longshore Act. Second, claimant contends that simply because there is testimony that he spent 56 percent of his work days on a ship does not necessarily preclude coverage under the Longshore Act, particularly since his own testimony establishes that he only spent 20 percent of his time on board boats, he did not have a captain's license, he was paid at the hourly rate for pile drivers, and employer admitted that it did not know exactly what claimant's day-to-day job duties were. In this regard, claimant argues that the administrative law judge improperly credited the testimony of claimant's supervisor, Mr. White.

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 a "member of a crew" under the Longshore Act is the same as a "seaman" under the Jones Act. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991); *see also Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). An employee is a member of a crew if: his connection to a vessel in navigation is substantial in nature and duration, and 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). "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's connection to a vessel must be 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 the instant case, the administrative law judge first determined that claimant's duties for employer contributed to the function of the vessel and the accomplishments of its mission. Specifically, the administrative law judge found, based on claimant's testimony that

he was actually running a boat on the day of his injury, that claimant served as both captain of the boat and as the only person aboard. This is supported by claimant's deposition testimony in the Jones Act case, that: his formal job title for the Chincoteague job site was as a "Tug Boat Captain;" Claimant's Exhibit (CX) 14 at 34, *see also* Hearing Transcript (HT) at 37; and that on the date of the injury he had been "running the tug boat that day." HT at 39; CX 26. In addition, Mr. White testified that claimant's main reason for being assigned to the Chincoteague job site was to operate boats. HT at 71.

With regard to the second prong, the administrative law judge concluded that claimant's working 56 percent of his time on board ship was substantial within the meaning of *Chandris*. In making this finding, the administrative law judge credited the testimony of claimant's supervisor, Tom White, over claimant's statements because it more nearly accorded with employer's work boat logs, and because claimant's credibility is somewhat lower in light of a history of occasionally inconsistent testimony. Mr. White testified that: claimant's position was a combination of boat captain, boat deck hand and pile driver, HT at 75-76; that claimant could work on any of the boats in employer's fleet depending upon the job; that he was assigned to the Chincoteague project specifically to be a boat operator, HT at 77; that claimant spent about 60 to 70 percent of his time on board a boat, HT at 77; and that when a boat operator is not actually moving something, he is supposed to be servicing and maintaining the boat, HT at 77. In addition, the administrative law judge found no reason to question the accuracy of employer's work boat logs, as they were contemporaneously prepared without this litigation in mind.[1] He further acknowledged that while these records show that claimant hardly spent any time on board a boat prior to May 20, 1998, they do indicate that during the pertinent time period, *i.e.*, the time of claimant's injury, claimant was spending more than half of his work days on board a boat.[2]

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[1]The work boat logs contain entries beginning in March 1991 and ending in March 1999. EX 5. These records do not contain a detailed account of claimant's work, or the exact time spent by claimant aboard employer's boats. Thus, they do not support an inference that claimant was on boats all day and thus, the administrative law judge's calculation that claimant spent 56 percent of his time for employer on its boats is not entirely accurate. Nevertheless, the fact that claimant filled out the daily vessel logs a majority of the days during the two months he worked on the Chincoteague project, between May 20, 1998, through July 21, 1998, (*i.e.*, 23 days of the presumably 32 days or about 72 percent of the days during this eight week period (claimant worked 4 days a week at this location, HT at 73), EX 5, at 67-89, demonstrates a substantial connection to employer's work boats. *See Chandris*, 515 U.S. at 371.

[2]In his decision, the administrative law judge repeatedly discussed claimant's employment in terms of what he was doing on the date of injury. Decision and Order at 9. If the administrative law judge had relied exclusively on claimant's activities on the date of his injury, his decision would rest on an improper basis; however, we do not believe his

consideration of claimant's duties is so limited. In *Chandris*, the Supreme Court held that "[i]f 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. As found by the administrative law judge in the instant case, claimant's essential duties were changed when he began his work for employer on the Chincoteague project. Considering this in the context of the administrative law judge's entire discussion of the second prong of the *Chandris* test, *i.e.*, whether the employee had a substantial connection to a vessel in terms of duration and nature, claimant's duties on the date of injury reasonably represent his duties whenever he was on employer's boat during the course of his work for employer on the Chincoteague project. *See* Decision and Order at 9, *citing Chandris*, 515 U.S. at 372; *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Hansen v. Caldwell Diving Co.*, 33 BRBS 129 (1999), *aff'd*, 243 F.3d 537 (4th Cir. 2001)(table). Thus, these duties support the administrative law judge finding that claimant had a substantial connection to employer's vessels. *Id*.

Furthermore, claimant's contentions regarding the administrative law judge's weighing of the evidence lack merit. First, the fact that claimant may have called himself a pile driver does not automatically confer coverage under the Longshore Act, for as the Supreme Court observed in *Wilander*, "it is not the employee's particular job that is determinative [of seaman status], but the employee's connection to a vessel."[3] *Wilander*, 498 U.S. at 354, 26 BRBS at 83(CRT); *see also Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 33 BRBS 31(CRT) (3d Cir. 1998), *cert. denied*, 119 U.S. 1142 (1999); *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000)(the appropriate inquiry regarding the claimant's duties is the employee's *basic job assignment* at the time of injury). In addition, contrary to claimant's assertion, the administrative law judge did, in fact, consider the relevant facts of this case. While the administrative law judge concluded that claimant's testimony was not credible, he was nevertheless aware of claimant's testimony regarding his work activities. He rationally elected to accord it diminished weight, finding Mr. White's testimony to be more credible as it is more consistent with the boat logs.[4] *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

The question of status as a member of a crew is a mixed question of law and fact. *Wilander*, 498 U.S. at 356, 26 BRBS at 84(CRT). In a Jones Act case, therefore, where "reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury." *Id.* In a Longshore Act case, the role of the fact-finder is performed by the administrative law judge. Here, the administrative law judge applied the correct legal standard and weighed the relevant facts. Thus, while claimant may have performed work as a pile driver, the administrative law judge

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[3]Claimant cites several cases, *Olson v. Healy Tibbits Constr. Co.*, 22 BRBS 221 (1989); *Presley v. Healy Tibbits Constr. Co.*, 646 F. Supp 203 (1989), and *Dixon v. Oosting*, 238 F. Supp 25 (E.D.Va. 1965), for the proposition that pile drivers injured while working on navigable waters are covered under the Longshore Act. Claimant's contention lacks merit as coverage under the Longshore Act in these cases was not based solely on claimant's job title but rather based on their overall duties and the connection or lack thereof between their work and a vessel in navigation. *See Olson*, 22 BRBS at 224; *Presley*, 646 F. Supp. at 205; *Dixon*, 238 F.Supp. at 28; *see also Stephenson v. McLean Contracting Co., Inc.*, 863 F.2d 340 (4th Cir. 1989)(court holds that a worker whose duties included welding, cutting off piling, construction on framework for bridge across river, riding concrete buckets, and assisting in the pouring of concrete was not a seaman, even though he considered himself a deckhand and seaman).

[4]For example, during his direct examination at the hearing claimant stated that his job title for employer was a pile driver, HT at 19, yet in his deposition testimony claimant stated that his job during the Chincoteague project was a tug boat captain. HT at 37; CX 14 at 34.

found that claimant's work for employer primarily involved piloting a boat. In so finding, the administrative law judge considered and weighed a significant portion of the total circumstances of claimant's employment and found, based on his rational credibility determinations, that claimant's duties contributed to the vessels' function or operation. In light of this, and as claimant has not demonstrated any reversible error in the administrative law judge's evaluation of the evidence or legal analysis, we affirm the administrative law judge's finding that claimant is a "member of a crew," excluded from coverage under Section 2(3)(G) of the Longshore Act. Accordingly, the denial of benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge