BRB No. 04-0220

KEN BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANSON CONSTRUCTION COMPANY	)	DATE ISSUED: 11/18/2004
	)	
and	)	
	)	
EAGLE INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Case and the Decision and Order Denying Reconsideration of Gerald Etchingham, Administrative Law Judge, United States Department of Labor.

John R. Hillsman (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Richard C. Wootton and Mitchell S. Griffin (Cox, Wootton, Griffin, Hansen & Poulos, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Dismissing Case and the Decision and Order Denying Reconsideration (2003-LHC-01127) of Administrative Law Judge Gerald Etchingham 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 working as a journeyman pile driver on July 25, 2001, when he was injured at work while lofting a pile. Employer was contracted to "salvage and rebuild" the Shell Equilon Refinery wharf's "mooring dolphin" that had been damaged in a collision.[1] Because the pile driving work at Shell Equilon took place offshore, employer deployed a small fleet of special purpose construction vessels to perform it, including the derrick barge *Vasa*, the flat material barges *90* and *45*, the tug boat *Point Richmond*, the crew boat *Bub*, and several small skiffs and boats. On the morning of the accident, claimant walked along the deck of the *90* barge to check the draft marks on the pile that had just been driven. As he walked beneath the *Vasa*'s crane, a "loftsman" aboard the *Vasa* cast a large, reinforced rubber hose loose from the leads overhead, and its coupling struck claimant in the back of the neck, knocking him down to the deck. Following the accident, claimant walked 50-60 feet from the *90* barge to the *Vasa's* galley to rest. After seeking medical treatment, claimant was diagnosed as having fractured the spinus processes of his C-6 and C-7 vertebra and the right pedical of his T-2 vertebra in the accident. Subsequently, claimant sought benefits under the Act. He also filed a claim in federal district court under the Jones Act; this case was pending at the time of the administrative hearing. Employer contended before the administrative law judge that claimant is excluded from the Act's coverage as a "member of a crew."

The parties stipulated that claimant was employed and ultimately injured upon the actual navigable waters of the Carquinez Strait, that claimant worked all of the time on employer's fleet of vessels in navigation, and that claimant's duties contributed to the accomplishment of the mission of employer's fleet, which was to complete the Shell Equilon project. Decision and Order at 2. Thus, the administrative law judge concluded that claimant satisfies the first part of the test to determine whether he was a "member of a crew," which is that his "duties must contribute to the function of a vessel in navigation or to the accomplishment of its mission." The administrative law judge also found that claimant's connection to employer's fleet of vessels was substantial in duration and nature and that claimant was subject to the "perils of the sea" as a pile driver aboard employer's vessels. Therefore, the administrative law judge concluded that claimant was a "member of a crew" at the time of the accident, and thus excluded from coverage under the Act. Subsequently, the administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that he was a "member of a crew," and argues that he is a marine construction worker who is covered under the Act. Employer responds, urging affirmance of the

[1] A "dolphin" is a free-standing piling, or set of pilings, driven into the harbor bottom to support a mooring bollard. Cl. Ex. 3.

administrative law judge's decision as it is rational and supported by substantial evidence.

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."[2] 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 also 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*. The second prong of the *Chandris* inquiry, therefore, is necessary 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 whose employment does not regularly expose them to the perils of the sea. *Chandris*, 515 U.S. at 368; *Smith v. Alter Barge Line, Inc*., 30 BRBS 87 (1996). Thus, the inquiry must concentrate on whether the nature of the employee's work takes him to sea. *Papai*, 520 U.S. at 555, 31 BRBS at 37(CRT).

The Ninth Circuit, within whose jurisdiction this case arises, has applied the *Chandris* formula in a number of cases. *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); *Heise v. Fishing Co. of Alaska, Inc*., 79 F.3d 903 (9th Cir. 1996); *Boy Scouts of America v. Graham*, 76 F.3d 1045 (9th Cir. 1996). In *Delange* and *Cabral,* the Ninth Circuit explained that a worker's duties "take him to sea" if they are "inherently vessel-related" or "primarily sea-based." *Delange*, 183 F.3d at 920, 33 BRBS at 57(CRT); *Cabral*, 128 F.3d at 1293, 32 BRBS at 44(CRT). In *Cabral*, the claimant was assigned to operate a crane aboard a barge while removing and replacing "mooring dolphins" at the Ford Island Ferry in Pearl Harbor. The court noted that the claimant was hired as a crane operator and not as a crew member and that he was never aboard the barge when it was

[2] The administrative law judge found that claimant otherwise would be covered under the Act by virtue of his injury on actual navigable waters. *See Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983).

anywhere but the Ford Island Ferry project. The court also noted that there was no evidence that the claimant would continue to work aboard the barge after the ferry project was completed. Thus, the court concluded that the claimant was a land-based crane operator who happened to be assigned to a project which required him to work aboard the barge, and consequently was not a seaman under the Jones Act. *Cabral*, 128 F.3d at 1292, 32 BRBS at 44(CRT). Subsequently, in *Delange*, the court considered a case in which the claimant was hired to perform duties on a vessel which included mechanical work, welding, carpentry, supply runs and occasionally piledriving. When the barge was being moved, the claimant performed deckhand work such as securing and stowing cargo, handling lines, and serving as a lookout. The court held that on these facts, a jury could reasonably conclude that the claimant had a connection with a vessel that was substantial in nature. The court therefore reversed the district court's grant of summary judgment in employer's favor and remanded the case for findings as to whether the claimant was a seaman.[3] *Delange*, 183 F.3d at 919, 33 BRBS at 57(CRT).

The Board addressed the *Cabral* and *Delange* decisions in *Lacy v. Southern California Ship Services*, 38 BRBS 12 (2004). In *Lacy*, the employer provided water taxi and supply services to vessels anchored in ports in Southern California. Claimant worked as a deckhand, performing duties both on land and aboard the vessels; claimant estimated he worked 35 percent of time on vessels and 65 percent on land. Relevant to the instant case, the administrative law judge found that claimant's connection to employer's fleet of vessels was not substantial in nature as he found that claimant's work was not primarily sea-based work, but rather, his primary work was loading and unloading the vessels in preparation of their service to other ships. The Board affirmed the administrative law

[3] Claimant also cites the Ninth Circuit's unpublished decision in *Lorimer v. Great Lake Dredge & Dock Co.*, 36 Fed.Appx. 294, 2002 WL 1164100 (9th Cir. 2002). Lorimer's duties as a deckhand included tying up barges alongside the dredge, taking depth readings, greasing the dredge's clamshell bucket, painting, cleaning, and other general maintenance. The court affirmed the Board's decision, which had reversed the administrative law judge, that Lorimer's connection to Dredge No. 53 was substantial in nature. The court held that it was evident that Lorimer's duties were "primarily sea-based activities" given that he spent 100 percent of his working time on board the dredge while it was unmoored in the water. The court also held that this conclusion was not in conflict with the decision in *Cabral*. The court distinguished *Cabral*, summarizing "[i]n straightforward terms, while Cabral's work was somewhat sea-based, Lorimer's activities were exclusively sea-based. As such, Lorimer's situation is quite different from Cabral's." *Lorimer*, 36 Fed.Appx. at 295-296, 2002 WL 1164101 at **2. *See also* n. 4 *infra.* The Ninth Circuit's rule regarding unpublished cases is that they are not binding precedent and may not be cited except in limited circumstances generally involving actions between and among the same parties. *See* U.S. Ct. of App. 9th Cir. Rule 36-3.

judge's finding. In discussing the phrases "inherently vessel-related" and "primarily sea-based" used by the Ninth Circuit, the Board recognized that the Supreme Court, in *Chandris*, specifically stated that "[s]eaman status is not coextensive with seamen's risks." *Chandris*, 515 U.S. at 361. The United States Court of Appeals for the Fifth Circuit has interpreted this statement to mean that exposure to the perils of the sea, alone, is not dispositive of seaman status. *St. Romain v. Industrial Fabrication & Repair Service, Inc.*, 203 F.3d 376 (5th Cir.), *cert. denied*, 531 U.S. 816 (2000). *See Lacy*, 38 BRBS at 16.

In the present case, the administrative law judge found that claimant was a seaman at the time of the injury, relying heavily on a "perils of the sea" analysis. Decision and Order at 11-12. He found that claimant performed deckhand duties and was subject to perils of the sea everyday as he handled lines, rode in the crewboat, got on and off of the barges and skiff boat, and set up flashers on the outside of the *90* barge and the *Vasa*. The administrative law judge also found that claimant directly faced the perils of the sea, including fire risks that were different from land fires and the risk of collision with passing vessels. In addition, the administrative law judge found that claimant's duties as a piledriver were different on the barge than on land because claimant was subject to the movement of the vessels on the water, and the lines and slippery decks posed tripping hazards. The administrative law judge also found that the workers on the vessels were subject to the wind and waves which affected the mooring, anchor lines, moving wires and hooks. The administrative law judge concluded that claimant spent 100 percent of his working time on board a vessel, that his duties were "primarily sea-based," and that he therefore had a connection to employer's vessel that is substantial in nature.

On appeal, claimant contends that the administrative law judge erred in finding that his connection to employer's fleet of vessels was substantial in nature. We agree with claimant that the administrative law judge's analysis of this issue is incomplete and therefore we must remand this case for further findings. Specifically, while the administrative law judge appropriately noted the deckhand duties claimant performed, he did not discuss the nature of the project on which claimant worked, which was a pile driving project to salvage and rebuild a wharf's downstream "mooring dolphin." Ninth Circuit precedent interpreting *Chandris* requires an injury into whether claimant's work in support of this project was "inherently vessel-related" or "primarily sea-based" *See Cabral*, 128 F.3d at 1292, 32 BRBS at 44(CRT). In this regard, the administrative law judge also did not discuss whether the moored nature of the *Vasa* affects the inquiry into crew member status.[4] *See* Delange, 183 F.3d at 919, 33 BRBS at 57(CRT). Moreover, the administrative law judge did not discuss that claimant spent two of his eight days of

[4] The *Vasa* was towed to the worksite, without claimant aboard, and was moored during the pile driving.

employment at the Point Richmond Shipyard where the *Vasa* was moored at dock. Tr. at 429-430.

Furthermore, the administrative law judge found that *Cabral* is distinguishable from this case based on the fact that the claimant therein had duties which were performed on land. This is not an accurate reflection of the holding in that case. The Ninth Circuit specifically addressed only Cabral's period of employment on the Ford Island Ferry project.[5] *Cabral*, 128 F.3d at 1292, 32 BRBS at 42(CRT). Indeed, the Supreme Court held in *Papai*, that a trier-of-fact cannot consider discrete past assignments to determine seaman status, even if they occurred with the same employer. *Papai*, 520 U.S. at 556-57, 31 BRBS at 38(CRT). Therefore, the fact that Cabral had worked on "land-based projects" for his employer before his assignment aboard a barge could not have been dispositive in that case.[6] Rather, the proper inquiry is into the "total circumstances" of the claimant's current employment. *Heise*, 79 F.3d at 906. As the administrative law judge relied heavily on a "perils of the sea" analysis, focusing primarily on risks inherent in being aboard *any* vessel, without discussion of the nature of all claimant's actual duties aboard the vessel in furtherance of the wharf project, we vacate the administrative law judge's finding that claimant was a "member of a crew" and remand the case for further findings. On remand, the administrative law judge must address the nature of claimant's work as a pile driver and the significance, if any, of the fact that the vessel was moored at all times during claimant's assignment.[7]

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[5] The Ninth Circuit's opinion in *Lorimer*, *see* n.3, *supra*, states that the *Cabral* court relied on Cabral's land-based duties in finding he was not a seaman, but this is not borne out by the court's decision in *Cabral*. *Lorimer*, 36 Fed. Appx. at 296, 2003 WL 1164100 at **2.

[6] The administrative law judge also attempted to distinguish *Cabral* based on the fact that as a crane operator, Cabral spent most of his day safely protected in his crane cab. However, as claimant contends, working from the crane cab did not protect Cabral from the risks that the administrative law judge found were uniquely sea-based, such as movement by the wind and waves, potential vessel collisions, and fire. Indeed, Cabral's injury occurred when he slipped on the vessel's gangway. *See Cabral*, 128 F.3d at 1291, 32 BRBS at 42(CRT).

[7] The parties stipulated that employer's vessels were "vessels in navigation" as that requirement has been interpreted in the Ninth Circuit. *See Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992). We note that the Supreme Court recently held oral argument on this issue. *Stewart v. Dutra Construction Co.*, No. 03-814 (argued Nov. 1, 2004). The fact that employer's vessels are "in navigation" does not preclude claimant

from arguing that the moored nature of the *Vasa* militates against a finding of crew member status.

Accordingly, the Decision and Order of the administrative law judge denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge