

BRB Nos. 06-0242
and 06-0242A

OSCAR CONTRERAS)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 MANSON CONSTRUCTION) DATE ISSUED: 11/29/2006
)
 and)
)
 SEABRIGHT INSURANCE COMPANY)
)
 Employer/Carrier-Respondents)
 Cross-Petitioners) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Attorney Fees and the Order Denying Claimant's Motion for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Robert W. Nizich, San Pedro, California, for claimant.

Joseph N. Mirkovich (Russell, Mirkovich & Morrow), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits and Attorney Fees and the Order Denying Claimant's Motion for Reconsideration (2005-LHC-00761) of Administrative Law Judge Gerald M. 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 for employer as a “false work” crew member on a pier project in the Los Angeles Harbor when he was injured on August 30, 2004. “False work” holds up a pier before concrete is poured; it acts as a temporary form for pouring concrete and is removed after the concrete is set. This work was performed using two skiffs and six floating platforms. Neither the skiffs nor the work platforms have eating facilities, restrooms, weather protection, sleeping facilities, a steering wheel, or running lights. H.Tr. at 60-61, 62. Claimant sustained an injury to his lower back when a stack of collars fell on his leg causing him to “twist in an unusual manner.” Claimant sought temporary total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant’s work was maritime in nature and was performed on a covered situs. In addition, the administrative law judge found that claimant was not excluded from coverage as he was not a “member of a crew.” The administrative law judge found that although claimant was working for an identifiable fleet of vessels in navigation, he contributed to the function of the “vessels,” and he had a connection to the vessels that was substantial in duration, claimant’s connection with the vessels was not substantial in nature, and thus, claimant was not a member of a crew. In determining claimant’s average weekly wage, the administrative law judge found that Section 10(c), 33 U.S.C. §910(c), applies. The administrative law judge found that claimant worked an average of 42.5 weeks in the two years prior to the injury, and that he worked an average of 40 hours per week, for a total of 1,700 hours per year. The administrative law judge then multiplied this figure by claimant’s hourly wage at the time of injury, \$30.17, to determine that he had an annual earning capacity of \$51,697, which, divided by 52 weeks, results in an average weekly wage of \$994.17. The administrative law judge awarded claimant temporary total disability benefits commencing November 2, 2004. The administrative law judge summarily denied claimant’s motion for reconsideration of the average weekly wage issue.

On appeal, claimant contends the administrative law judge erred in his determination of claimant’s average weekly wage as he did not incorporate into his calculation the overtime hours for which claimant was paid an additional 50 percent of his hourly wage. Claimant contends that with overtime factored in, his base hourly rate was \$34.93, not \$30.41, which amounts to an average weekly wage of \$1,141.94. Employer responds, urging affirmance of the administrative law judge’s decision on this issue. On cross-appeal, employer contends that the administrative law judge erred in finding that claimant was not excluded from coverage, averring that the evidence

establishes that claimant was employed as a member of a crew.¹ Claimant responds, urging affirmance of the administrative law judge's decision on this issue.

Initially, we will address employer's contentions on cross-appeal regarding whether claimant is a member of a crew, and thus excluded from coverage under the Act. Employer contends that, contrary to the administrative law judge's finding, claimant's connection to employer's fleet of vessels was substantial in nature.

Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), excludes from coverage "a master or member of crew of any vessel." 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 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); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); see also *Stewart v. Dutra Constr. Co., Inc.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005). 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). The Ninth Circuit, within whose jurisdiction this case arises, has applied the *Chandris* formula in a number of cases. *Delange v. Dutra Construction 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

¹ Employer has filed a motion for modification before the administrative law judge on the issue of the nature of claimant's disability. Consequently, employer also has filed a motion to bifurcate the issues on appeal from those raised in its motion for modification. Claimant responds, urging the Board to bifurcate the issues and issue a decision on the issues on appeal. As the resolution of employer's appeal regarding coverage is a threshold issue, and the resolution of claimant's appeal regarding average weekly wage will not affect the administrative law judge's consideration of whether claimant has reached maximum medical improvement, we will address the issues on appeal prior to remanding the case on the petition for modification.

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). The issue of whether a worker is a seaman/member of a crew is a mixed question of law and fact. *Papai*, 520 U.S. at 554, 31 BRBS at 37(CRT); *In re: Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001). Generally, it is inappropriate to take the question from the fact-finder, and deference is due his findings if they have a reasonable basis in the record. *Id.*; *Lacy v. Southern California Ship Services*, 38 BRBS 12 (2004); *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997); *see also Uzdevines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), *aff'd*, 418 F.3d 138, 39 BRBS 47 (2^d Cir. 2005).

In the present case, the administrative law judge found that claimant's duties were those of a land-based construction worker, and that claimant was hired as a false-work team member, not as a crew member. The false-work team performed its duties on land and on floating work platforms. The team also had the use of two skiffs for transportation and to gather false-work materials that were floating in the water. H. Tr. at 61. The administrative law judge noted that claimant never ventured beyond the breakwater and was not going to continue working on the vessels after the construction project was complete. The administrative law judge concluded that claimant was "a pile driver, heavy timber construction worker, and false work team member who happened to be assigned to a project in which the work was done on and under a pier." Decision and Order at 10. Additionally, the administrative law judge found that there was no evidence that claimant had vessel-related duties and that he did not eat or sleep on the skiffs or work platforms. Although claimant testified that he sometimes operated the skiffs, he also stated that he was "mainly a passenger." Lastly, the administrative law judge concluded that the evidence does not establish that claimant was regularly exposed to the "perils of the sea." He noted that while claimant did face the risk of drowning, and thus wore a life-jacket, the shoreside workers also faced the risk of falling in the water and drowning. The administrative law judge concluded that most of claimant's risks were associated with construction, such as being struck by heavy objects falling on him or stepping on nails. Thus, the administrative law judge concluded that claimant was not a member of a crew and is not excluded from coverage under the Act.

The administrative law judge found the facts in this case analogous to those in *Cabral* in concluding that claimant did not have a connection to the vessels that was substantial in nature. In *Cabral*, the claimant was working as a crane operator for a construction project, which involved removing and replacing "mooring dolphins" at a ferry terminal. *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 claimant was assigned to operate

a crane aboard a barge, and he spent approximately 90 percent of his time aboard the barge operating the vessel's crane. The court held that in order to determine whether a claimant's connection to a group of vessels is substantial in nature, the focus should be on whether his duties were primarily sea-based activities and whether he was exposed to the special hazards and disadvantages of going "down to the sea." *Cabral*, 128 F.3d at 1293, 32 BRBS at 44(CRT). The court affirmed the district court's finding that the claimant was a land-based worker who had only a transitory or sporadic connection with the barge. The court based this conclusion on the fact that the claimant was hired to work as a crane operator and not as a crew member and the fact that the claimant was never aboard the barge when it was anywhere but at the ferry project. Moreover, the court noted that claimant would likely not have continued working aboard the barge after the project was completed. Thus, the court affirmed the district court's finding that the claimant was a land-based worker and not a member of a crew. *Id.* In *Delange*, the claimant did welding work, carpentry and pile-driving from barges. He also testified that he performed some deck hand duties. The Ninth Circuit held that the district court erred in granting summary judgment to employer, emphasizing that if reasonable persons could differ as to whether an employee was a "member of a crew," it is a question for the factfinder. *Delange*, 183 F.3d at 920, 33 BRBS at 57(CRT).

In this case, the administrative law judge reviewed all of claimant's duties and rationally concluded that claimant was primarily a land-based construction worker rather than a sea-based member of a crew. *See Lacy*, 38 BRBS at 15-17. Specifically, the administrative law judge found that claimant loaded and unloaded tools and materials, and erected these materials into false-work to build a pier. He found that claimant's duties were not essentially vessel-related. Moreover, as in *Cabral*, once the pier project was over, claimant would no longer be associated with the group of vessels; therefore his connection to the vessels was transitory in nature. As the administrative law judge's finding that claimant did not have a connection with the vessels that was substantial in nature is rational, supported by substantial evidence, and in accordance with law, we affirm it. *Lacy*, 38 BRBS at 17.

We next address claimant's contention regarding the administrative law judge's determination of claimant's average weekly wage. Claimant contends that the administrative law judge erred in his calculation of claimant's average weekly wage as he did not consider the amount of overtime claimant earned prior to his injury. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), can be reasonably and fairly applied. *See Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of the injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Duhagon v.*

Metropolitan Stevedore Co., 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The parties stipulated and the administrative law judge found that Section 10(c) applies in the instant case. The administrative law judge multiplied claimant's hourly wage rate at the time of injury (\$30.41) by the average number of hours claimant worked in 2001 and 2002. The administrative law judge found that claimant worked 46 weeks in 2001 and 39 weeks in 2002.² He averaged these two years to find claimant worked an average of 42.5 weeks, which the administrative law judge found was consistent with claimant's testimony that his longest period of unemployment was 3 months. The administrative law judge also found that claimant worked an average of 40 hours per week which results in 1,700 hours per year. Thus, the administrative law judge found that claimant's earning capacity at the time of injury was \$51,697 (1,700 x \$30.41), which divided by 52 weeks results in an average weekly wage of \$994.17. On reconsideration, the administrative law judge stated only that his calculation represents a fair and reasonable approximation of claimant's earning capacity at the time of injury.

On appeal, claimant contends that the administrative law judge's calculations do not account for the number of overtime hours he worked prior to his injury. Claimant contends that although he did not work every week in the years preceding the injury, the record reflects that he worked overtime in the weeks he did work, and that he earned time and a half (or \$45.61 per hour) for the overtime hours. Claimant contends that the base pay and overtime pay should be averaged to yield a multiplier of \$34.93, which more accurately reflects the amount of overtime worked. Claimant notes that in the year 2001, his base rate of pay was \$26.88 to \$27.88 per hour, but that when his annual earnings for that year are divided by the number of hours worked, the average rate of pay is \$31.63. Likewise, in 2002, the base rate of pay was \$27.88 to \$29.13, but when the gross earnings for the year are divided by 1,525, the average hourly rate of pay is \$32.51.³

In computing average weekly wage under Section 10(c), overtime should be included, if it is a regular and normal part of claimant's employment. *Brown v. Newport*

² The administrative law judge also found that claimant took time off from work to care for his family, including his mother, father and brother, in 2003, which was a non-recurring event.

³ Stated another way, claimant notes that the number of hours worked in 2001 multiplied only by his base rate of pay yields annual earnings of \$51,856.80, or \$6,969.20 less than his actual earnings. Likewise, the number of hours worked in 2002 multiplied only by his base rate of pay yields annual earnings of \$44,423.25, or \$5,168.75 less than his actual earnings.

News Shipbuilding & Dry Dock Co., 23 BRBS 110 (1989); *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981). The administrative law judge did not address claimant's contentions regarding pre-injury overtime work. Therefore, we vacate the administrative law judge's determination of claimant's average weekly wage. As the administrative law judge has broad discretion in calculating claimant's average weekly wage under Section 10(c), we decline to adopt claimant's proposed calculation. We remand the case to the administrative law judge for him to address in the first instance the evidence concerning claimant's overtime wages prior to the injury and to calculate an average weekly wage accounting for these wages, if appropriate. *See generally Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006).

Accordingly, the administrative law judge's determination of claimant's average weekly wage is vacated, and the case is remanded for further findings consistent with this opinion. In all other respects, the administrative law judge's decision awarding benefits is affirmed. The case also is remanded for consideration of employer's modification petition. 33 U.S.C. §922; 20 C.F.R. §802.301(c).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge