BRB Nos. 13-0069
and 13-0069A

ARCHIE C. MILLER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CH2M HILL ALASKA, INCORPORATED f/k/a VECO ALASKA, INCORPORATED	)	DATE ISSUED: 09/25/2013
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY (Third-Party Administrator for American Motorists Insurance Company)	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Inclinations and Order and the Decision and Order Granting Summary Judgment for Employer of William Dorsey, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and David C. Barnett (Barnett & Lerner, P.A.), Dania Beach, Florida, for claimant.

Nina M. Mitchell (Holmes Weddle & Barcott, PC), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Inclinations and Order and the Decision and Order Granting Summary Judgment for Employer (2012-LHC-00419) of Administrative Law Judge William Dorsey 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, while working as an oil recovery technician for employer in the spring/summer of 1989,[1] alleged he was exposed to volatile hydrocarbons and other dangerous chemicals. Initially, claimant worked on land as part of the "beach crew," cleaning oil off the beaches with pressure hoses. He was transported from his housing unit, the M-V Glacier Bay Explorer (GBX), a former cruise ship located on Prince William Sound, via small skiff to the shore where he would, after unpacking and setting up his equipment, commence his day's work. At some point between June 1 and June 10, 1989, employer alleges claimant's duties shifted after he was assigned to work on three small barges floating on Prince William Sound near the beaches. Claimant operated pumps on one or more of the barges and trained others on how to operate the equipment. He also set up hoses, moved equipment back and forth from the barges to the beach and ferried personnel from the GBX and other vessels to the beaches. Claimant sustained a series of injuries while working for employer, including bronchitis on May 11, 1989, a hand injury on May 16, 1989, a twisted ankle on May 23, 1989, pneumonia on June 10, 1989, and an eye injury on June 13, 1989,[2] for which he received contemporaneous medical treatment through employer. Claimant also alleged he contracted a significant and lasting respiratory condition as a result of his occupational exposures and subsequently sought the right to follow-up medical care with a free-choice physician. Employer refused authorization for this treatment.

Claimant's claim came before the administrative law judge and he ordered that the coverage issues were to be addressed before the parties devoted resources to the merits of the case. After the parties filed briefs, the administrative law judge issued an "Inclinations and Order for Further Briefing on Coverage" on October 3, 2012, in which he found that claimant's work was on a covered situs, 33 U.S.C. §903(a), but that "further

[1]CH2M Hill Alaska, Incorporated (employer), previously known as VECO Alaska Corporation, was subcontracted by Exxon Corporation following the March 24, 1989 Exxon Valdez environmental accident to conduct clean-up of the oil spill in Prince William Sound, Alaska.

[2]The hand and ankle injuries, and bronchitis occurred in the course of claimant's work with the "beach crew," while the pneumonia and eye injury were incurred during claimant's work aboard the skiffs.

argument" was needed regarding the status requirement, 33 U.S.C. §902(3), to determine whether claimant's claim is covered under the Act. The administrative law judge thus granted the parties 14 days to file supplemental briefs addressing that issue. In his subsequent decision, the administrative law judge found that claimant did not meet the status test because he offered no proof that his work -- cleaning oil from beaches -- involved the loading, unloading, constructing and/or repairing of a vessel. The administrative law judge, therefore, granted summary decision for employer and dismissed claimant's claim.

On appeal, claimant challenges the administrative law judge's finding that he did not meet the status test. Employer responds, urging affirmance of the administrative law judge's conclusion that claimant was not engaged in maritime employment and thus that claimant's claim is not covered by the Act. In its cross-appeal, employer challenges the administrative law judge's finding that claimant satisfied the situs test for coverage under the Act. Employer also contends that the administrative law judge erred in finding that claimant was not a member of a crew excluded from the Act's coverage.

In determining whether to grant summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether a party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a). For the reasons that follow, we vacate the administrative law judge's grant of summary decision because employer is not entitled to a decision in its favor as a matter of law and it appears that there are contested issues of material fact relating to claimant's work for employer which were not addressed by the administrative law judge. *See Walker v. Todd Pacific Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.* 46 BRBS 57 (2012); *Morgan*, 40 BRBS at 13 (citing *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

Claimant contends he was exposed to harmful stimuli throughout the course of his work for employer, including that performed aboard vessels. Claimant thus contends the administrative law judge erred in failing to discuss whether claimant is covered by the Act pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). Employer agrees that the administrative law judge misstated the holding in *Perini*, but it contends that claimant's work on navigable waters was as a member of a crew, and thus, excluded from coverage pursuant to Section 2(3)(G), 33 U.S.C. §902(3)(G).

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, or that it occurred on a landward area covered by Section 3(a), and that his work is maritime in nature pursuant to Section 2(3) and is not specifically excluded by any provision in the Act. 33 U.S.C. §§902(3), 903(a); *Perini*, 459 U.S. 297, 15 BRBS 62(CRT); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Prior to the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, claimant had to establish that his injury occurred upon the navigable waters of the United States, including any dry dock. *See* 33 U.S.C. §903(a) (1970)(amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of Section 2(3) and to expand the sites covered under Section 3(a) landward. In *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), the United States Supreme Court determined that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage under the Act from workers injured on navigable waters who would have been covered by the Act before 1972. *Id.*, 459 U.S. at 315-316, 15 BRBS at 76-77(CRT). Thus, the Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3). Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Id.*, 459 U.S. at 323, 15 BRBS at 80-81(CRT). If the injury did not occur on navigable waters, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *See, e.g., McGray Constr. Co. v. Hurston*, 181 F.3d 1008, 33 BRBS 8(CRT) (9th Cir. 1999).

As the parties correctly aver, the administrative law judge did not fully address whether claimant is covered under the Act pursuant to *Perini*.[3] Claimant alleged injuries arising from injurious exposures during the entirety of his work for employer. The parties offered evidence in their pleadings that aspects of claimant's work occurred on actual navigable waters.[4] Thus, the administrative law judge should have considered

[3]The administrative law judge stated that claimant was more than "transiently and fortuitously on navigable waters," but then inconsistently stated that *Perini* "has relatively little to offer that is directly applicable here." Inclinations and Order at 2. The Fifth Circuit has held that if an employee is "transiently or fortuitously" on navigable waters, then *Perini* is not applicable. *See Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*). The administrative law judge did not further address whether claimant was covered pursuant to *Perini.*

[4]Employer concedes that claimant's testimony establishes that "some of his work was conducted over actual navigable waters as he worked aboard barges operating pumping machinery necessary to [its] cleanup mission and operated vessels ferrying

whether claimant was within the Act's coverage pursuant to *Perini*. As employer is not entitled to summary decision as a matter of law, we vacate the administrative law judge's dismissal of the claim for lack of status and we remand the case for consideration of this issue.[5] *See, e.g., Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000); *Center v. R & D Watson, Inc.*, 25 BRBS 137 (1991).

We also must vacate the administrative law judge's finding that claimant's work on navigable waters was not as a "member of a crew" excluded from coverage, as his decision does not adequately address the entirety of employer's contentions in terms of applicable law. *See Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991). 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." 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, *Wilander*, 498 U.S. 337, 26 BRBS 75(CRT); and (2) he had a connection to a vessel in navigation, or to an identifiable group of vessels, that is substantial in terms of both its duration and its nature. *Papai*, 520 U.S. 548, 31 BRBS 34(CRT); *Chandris*, 515 U.S. 347. 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.* A worker who spends less than 30 percent of his time in the service of a vessel in navigation ordinarily will not qualify as a member of a crew.[6] *Id.* at 371. The

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people and supplies crucial to [its] cleanup mission." Employer's Petition for Review Brief at 17. Employer, however, contends that the entirety of this work was performed while claimant was a member of a crew, and thus excluded from coverage. *See*, discussion, *infra*.

[5]On remand, the administrative law judge should also address if necessary whether claimant was exposed to injurious stimuli while in the course of his employment on actual navigable waters.

[6]In *Chandris*, the Supreme Court noted the guideline established by the United States Court of Appeals for the Fifth Circuit that workers who spend less than 30 percent of their work time in the service of a vessel in navigation cannot ordinarily be considered seamen; however, the Court emphasized that such a percentage was "no more than a guideline." *Chandris*, 515 U.S. at 371; *see Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986). The Court also declared that "[a] maritime worker who spends only

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).

The administrative law judge found that employer's evidence is insufficient to persuade him that claimant was sufficiently attached to any vessel to be considered a crew member. The administrative law judge found that claimant was not hired as a hand on any ship's crew, the boats he operated were very small, claimant "was in [the vessels] for less than 10% of the total time he worked,"[7] and his attachment was not to the vessels but rather "to the crude oil cleanup operation." Inclination and Order at 1-2. The administrative law judge thus found that the 90 percent of claimant's time spent cleaning up the oil spill controls whether his employment is covered by the Act. Decision and Order at 2. In light of these findings, the administrative law judge rejected employer's contention that claimant was a member of a crew excluded from coverage. *Id.*

Employer contends that the administrative law judge did not sufficiently address its contentions. We agree that the administrative law judge's brief discussion of the member of the crew issue did not fully address the facts pursuant to law, as the administrative law judge did not cite any case precedent. *See* Inclinations and Order at 1-2. Employer alleged that claimant's employment records and deposition testimony establish that he worked primarily on an identifiable group of barges and operating boats from June 10, 1989 until he left Prince William Sound on June 24, 1989, and not only on small skiffs. Employer also contended that, on June 1, 1989, the nature of claimant's job duties changed such that he spent approximately 50 percent of his time during 2.5 of the total 6.86 weeks he worked for employer in the service of vessels such that his connection was substantial in nature and duration. The administrative law judge also did not fully address all of the parties' evidence regarding claimant's job duties and his relationship to the vessels. In this respect, the administrative law judge did not resolve conflicts between the evidence cited by each party regarding the extent and nature of claimant's work on vessels. Consequently, we must vacate the administrative law

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a fraction of his working time on board a vessel is fundamentally land based and therefore not a member of a vessel's crew, regardless of what his duties are." *Chandris*, 515 U.S. at 371. The Court did not devise a rigid mechanical test, but directed the fact-finder to consider the totality of the employment, and stated that "[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of the crew,' it is a question for the [fact-finder]" and not a question to be decided as a matter of law. *Id*. at 369 [internal citations omitted]. The Court also stated that if a worker's basic assignment changes, his seaman status may change also. *Id*. at 371-372.

[7]The administrative law judge also observed that the GBX merely "served as [claimant's] hotel." Inclinations and Order at 2.

judge's finding that claimant was not a member of a crew and remand the case for further consideration. *See, e.g., Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013); *Cabral v. Healy Tibbitts Builders*, 128 F.3d 1289, 32 BRBS 41(CRT) (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998). The administrative law judge should discuss the evidence in view of applicable law and fully explain the basis for his findings of fact and conclusions of law.[8] *See generally Delange v. Dutra Constr. Co., Inc.*, 183 F.3d 916, 33 BRBS 55(CRT) (9th Cir. 1999).

We next address claimant's contention that the administrative law judge erred in ruling that claimant's work loading and unloading machinery and equipment aboard and from vessels was not "maritime" based on his finding that those "cargoes" were not in maritime commerce. Claimant avers that while the administrative law judge's reasoning in reaching this finding "is not inconsistent" with the Board's decision in *Smith v. Labor Finders, Inc.*, 46 BRBS 35 (2012), that decision is inapplicable to this case as it is based solely on Fifth Circuit rather than Ninth Circuit precedent. Claimant also contends that this case is distinguishable from *Smith* by virtue of the extent and nature of the "maritime" activities performed by the two claimants. In this regard, claimant asserts that the articles which Smith was required to bring ashore did not extend beyond his "personal tools," whereas, in this case, as the administrative law judge found, claimant was required to load and unload not only his own hand tools but also machinery and supplies.

Section 2(3) of the Act specifically provides:

> The term "employee" means any *person engaged in maritime employment*, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker …

33 U.S.C. §902(3) (emphasis added). Congress did not define "maritime employment" but the Supreme Court has held that the Act "cover[s] all those on the situs involved in the essential or integral elements of the loading or unloading process." *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96, 98(CRT) (1989). To satisfy this requirement, a claimant need only "spend at least some of [his] time in indisputably [covered] operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977).

[8]Employer cited to the administrative law judge, the decision in *Kahue v. Pacific Environmental Corp.*, 834 F.Supp. 2d 1039 (D. Haw. 2011), *recon. denied*, 2012 WL 292658 (D. Haw. 2012), as supporting its position that claimant's work on vessels in support of an oil clean-up operation could be as a member of a crew.

As the administrative law judge observed, the facts in this case are akin to those in *Smith*, 46 BRBS 35. In *Smith*, claimant worked as a beach-walker in an oil-spill clean-up project. During the course of the work day, the claimant and his co-workers would gather their supplies (lunch, water, ice, etc.) and tools ("HazMat" clothes, scoop, shovel, etc.) and load them on the transport vessel that would take them to the worksite, a narrow island off the coast of Mississippi in the Gulf of Mexico. Once there, the claimant and his co-workers would unload their gear, be taken to the particular worksite for the day, and proceed with their work, i.e., collecting oil residue, oil balls, and other contaminants and pollutants into bags or buckets for removal and disposal. At the end of the day, the workers would load their gear and board the transport vessel to return to the mainland. During one of these return trips, the claimant sustained an injury to his back and shoulders as a result of an accident. Employer sought summary denial of the claim, arguing that the claimant satisfied neither the status nor situs requirement of the Act.

The administrative law judge granted employer's motion for summary decision and dismissed claimant's claim, finding there was no genuine issue of material fact and that claimant did not satisfy either the status or situs requirement. On appeal, the Board rejected the claimant's arguments that his picking up oil debris from the beach and water's edge, loading and unloading his supplies and tools to and from the transport vessel, driving a "Gator" to shuttle workers around the island, and occasional loading of waste onto the debris vessel conferred coverage. *Smith*, 46 BRBS at 37-39. The Board thus affirmed the administrative law judge's findings that these activities were either not part of the claimant's regular duties and/or were not maritime in nature and did not constitute a step in the loading process. Accordingly, the Board concluded that the claimant did not establish an essential element of his claim for benefits, and it affirmed the administrative law judge's order granting the employer's motion for summary decision and denying the claim. *Id.*

Pertinent to the contention raised by claimant in this case was Smith's argument that his loading and unloading of tools and supplies from the crew boat were covered activities. The Board, relying on *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), and noting factual similarities with *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994), affirmed the administrative law judge's finding that this work was not necessary to a loading or unloading operation. Specifically, the Board stated that the items loaded and unloaded by claimant were for the purpose of enabling him to pick up oil detritus from the beaches, and were "not items that enable a vessel to engage in maritime commerce." Thus, the Board held that their loading and unloading does not confer coverage. *Smith*, 46 BRBS at 37.

In this case, the administrative law judge observed that, in *Smith*, the Board emphasized that to be covered under Section 2(3) of the Act, a worker must be a "person engaged in maritime employment," a phrase the Act uses but nowhere defines. Decision

and Order at 3. Noting that an employee participates in maritime commerce that satisfies the Act's "status" requirement when "engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels," the administrative law judge found that claimant did not offer any evidence that he was involved in any of those activities. In particular, the administrative law judge found that claimant's unloading of the small barges that brought the power cleaning equipment (pumps, high pressure hoses and cleaning nozzles) from the hotel ship to the beach did not constitute maritime commerce. The administrative law judge found that while claimant loaded and unloaded barges with cleanup equipment, items such as wands, pressure hoses, pumps and HazMat oil removal gear, none of these items were in maritime commerce, as they were not "being shipped elsewhere, or being stored in an intermediate state to being shipped later in the stream of commerce." Decision and Order at 4. Rather, "they were supplies or equipment used as an integral part of the crude oil cleanup." *Id.*

Contrary to claimant's assertion, there is no significant distinction to be drawn between this case and *Smith*, as both cases involved, as the administrative law judge found, the removal of various tools and supplies used in the oil cleanup but which were not integral to maritime commerce.[9] The administrative law judge's application of *Smith*, in finding that claimant's beach cleanup work on land and removal and replacement of equipment from the transport vessel are not covered under the Act is rational, supported by substantial evidence, and in accordance with law. *See, e.g., Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011); *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003). We, therefore, affirm the administrative law judge's finding that claimant's work in this regard is insufficient to meet the status requirement under Section 2(3).[10] *Smith*, 46 BRBS 35.

[9]We reject claimant's argument that *Smith*, 46 BRBS 35, is inapplicable because it is based entirely on Fifth Circuit precedent as a reading of that decision indicates that the underlying premise for the Board's decision is the Supreme Court's decision in *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT), in which the Court held that the claimant was not covered under the Act, despite having to unload his tools from a boat, because his job as a welder on a fixed oil platform included no tasks that were "inherently maritime." Additionally, we decline to address claimant's suggestion that *Munguia*, 999 F.2d 808, 27 BRBS 103(CRT), was wrongfully decided and furthermore note that there is no basis to support claimant's assertion that the Board's holding in *Smith* is inconsistent with well-established law regarding the scope of Section 2(3) of the Act.

[10]As claimant's work on land was not "maritime employment" pursuant to Section 2(3), we need not address the parties' contentions concerning whether claimant's land-based work was on a coverd situs. *See Smith*, 46 BRBS at 40 n. 6.

Accordingly, we affirm the administrative law judge's finding that claimant's beach cleanup work on land and removal of his tools from the vessel in furtherance of that work is not covered under the Act. The administrative law judge's summary findings that *Perini* is inapplicable to this case and that claimant is not member of a crew are vacated, and the case is remanded for further consideration of these issues. If it is determined that claimant is covered by the Act, the administrative law judge must address any other issues raised by the parties regarding claimant's claim.

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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REGINA C. McGRANERY
Administrative Appeals Judge