BRB No. 96-0598

ALVIN J. BANG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DANOS & CUROLE MARINE	)	DATE ISSUED:
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
LABOR SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	
	)	
Employers/Carriers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Danos & Curole Marine and Reliable Insurance Company.

Dean A. Sutherland, New Orleans, Louisiana, for Labor Services, Incorporated and Wausau Insurance Company.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Order Denying Motion for Reconsideration (93-LHC-1677) of Administrative Law Judge Lee J. Romero, Jr., 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 findings of fact and the conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed in 1975 by a company called Labor Crews as a roustabout on Romere Pass, an oil and gas producing facility located on a 200 to 300 foot island off the coast of the Gulf of Mexico. Claimant's job duties included general maintenance tasks such as cleaning offices, warehouses, pumps and generators, cutting grass, and pulling weeds. Tr. at 31. At that time, a portion of claimant's employment also entailed unloading cane from small boats known as Jo-boats. Tr. at 32. Claimant testified that in 1976 he sustained a back and leg injury when he fell off a Jo-Boat into a foot of water and mud, but that he did not report the incident to a supervisor, and did not seek medical attention or miss any work. Tr. at 38 - 39.

In 1980, after Labor Crews was purchased by Labor Services, claimant continued his employment without a change in his work duties. Tr. at 39. Claimant testified that during this period, he was required to load and unload groceries and supplies off boats for use by the employees on the island. Tr. at 42. In 1984, claimant alleged that he began experiencing pain in his lower back, right leg and toes, although he did not remember a specific traumatic injury occurring at the time. Claimant did not miss any work during this period, but sought treatment from a chiropractor. Tr. at 41.

In 1986, Labor Services was purchased by Danos & Curole Marine (Danos). Claimant alleged that he experienced worsening back pain as a result of unloading and carrying groceries and chemical drums during the fifteen days he worked for Danos prior to being laid off because he was unable to pass a company physical. Tr. at 79 - 80. Claimant did not seek medical attention during this period and did not miss any time from work.

Claimant sought temporary total disability compensation under the Act from the date of his termination by Danos, July 8, 1986, until June 10, 1992, and permanent total disability compensation thereafter, alleging that his initial back and leg injury occurred on navigable waters in 1976, and that he subsequently aggravated this condition while engaged in regular and routine duties of unloading vessels while working for Labor Services in 1984 and for Danos in 1986.

In his Decision and Order, the administrative law judge found that it was unnecessary for him to discuss the alleged 1976 injury, as claimant's employer at the time, Labor Crews, had not been joined as a party to the proceedings.[1] The administrative law judge further determined that even if claimant established a work-related injury within the meaning of Section 2(2) of the Act, 33 U.S.C. §902(2), Danos was not liable for any compensation because the evidence established that claimant did not sustain any aggravating injury during the fifteen-day period he worked for Danos. The administrative law judge also determined that as claimant failed to establish that the other injuries he alleged occurred over navigable waters, and claimant's loading and unloading duties were not directly connected to the commerce carried on by a ship or a vessel but rather were undertaken to keep employer's gas and/or oil facility operational, pursuant to *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103 (CRT) (5th Cir. 1993), *reh'g denied*, 8 F.3d 24 (5th Cir. 1994), *cert. denied*, 114 S.Ct. 1839 (1994), claimant was not engaged in maritime employment sufficient to meet the status requirement of Section 2(3) of the Act, 33 U.S.C. §902(3). The administrative law judge also concluded that claimant's loading duties were at most an insubstantial part of his overall duties.

In an Order Denying Motion for Reconsideration dated January 12, 1996, the administrative law judge rejected claimant's contention that the Section 20(a) presumption, 33 U.S.C. §920(a), is applicable to the issues of status and situs under the Act. In addition, the administrative law judge upheld his previous finding that as claimant was not involved in duties integral to maritime commerce, he was not a maritime employee under Section 2(3).

Claimant appeals the denial of benefits, contending that the administrative law judge erred in failing to apply the Section 20(a) presumption in analyzing the status and situs issues and in finding that the work he performed loading and unloading vessels did not constitute maritime employment. Danos and Wausau Insurance Company, the carrier for Labor Services, respond, urging affirmance of the decisions below. In the event, however, that the Board reverses the administrative law judge's findings regarding coverage, Wausau asserts that the administrative law judge's finding that Danos cannot be held responsible for any benefits should also be reversed because it is irrational and not

[1]No party has challenged this determination.

supported by substantial evidence.

The Director, Office of Workers' Compensation Programs (the Director), also responds, expressing agreement with claimant's argument that the administrative law judge erred in failing to apply the Section 20(a) presumption in analyzing the facts relevant to the coverage issues presented and in finding that claimant, who regularly unloaded supplies from a vessel, was not a maritime employee within the meaning of the Act.

We initially hold that, regardless of the resolution of the coverage issues presented, the administrative law judge properly determined that Danos is relieved of liability as a potential responsible employer because claimant failed to establish that he sustained an aggravating injury during his fifteen-day tenure of employment with Danos in 1986. In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, claimant sustains an aggravation of the original injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

In this case, the only evidence sufficient to establish that claimant suffered an aggravating injury while employed by Danos was claimant's own testimony that he re-injured his back while manually carrying groceries and chemical drums up flights of stairs in a warehouse due to the malfunctioning of an electronic hoist. Tr. at 73, 78. The administrative law judge, however, acted within his discretionary authority as trier-of-fact in finding that claimant's testimony in this regard was outweighed by the medical opinion of Dr. Howell, who testified that claimant's fifteen days of employment with Danos did not aggravate or exacerbate his prior back condition. EX-5 at 24, 25, 36. Furthermore, the administrative law judge found that Dr. Howell's opinion was buttressed by claimant's actions during his employment with Danos; claimant did not report any injury or seek medical treatment during this period, and reported to Danos's physician, Dr. Azhar, during the company's physical that he had no history of back injury, and did not demonstrate symptoms of back pain. EX-6. Moreover, the administrative law judge noted that claimant failed to testify in his deposition taken prior to the hearing "that he had ever unloaded supplies during the two week period, much less that he ever experienced pain while doing so." Decision and Order at 8-9. Inasmuch as this evidence provides substantial evidence to support the administrative law judge's finding that claimant did not sustain an aggravating injury while working for Danos, we affirm the administrative law judge's finding that Danos cannot be held liable as responsible employer for any benefits which might be awarded in connection with this claim. *Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992).

With respect to the coverage issues presented, we initially reject the contention that the administrative law judge erred in analyzing the evidence without regard to the Section 20(a)

presumption. Claimant and the Director cite language from various cases, including *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 515, 12 BRBS 719, 726 (5th Cir. 1980)(*en banc*), *cert. denied*, 452 U.S. 905 (1981), and *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), in support of their contention that the Section 20(a) presumption is applicable to the coverage issues presented in this case. Although the Director acknowledges that Section 20(a) does not apply to the legal interpretation of the coverage provisions of the Act, *see, e.g., Pittston Stevedoring Co. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), he asserts that it does apply to "coverage-determinative *facts*." Dir. Brief at 6 (emphasis in original).

The Board has held Section 20(a) inapplicable in cases involving the coverage provisions of the Act, relying on the reasoning of *Dellaventura* and similar cases stating that it does not apply to issues of legal interpretation. *See Coyne v. Refined Sugars, Inc.*, 28 BRBS 372, 373-374 (1994); *George v. Lucas Marine Construction*, 28 BRBS 230, 233 (1994) *aff'd mem. sub nom.*, No. 94-70660 (9th Cir. May 30, 1996); *Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989); *Sedmak v. Perini North River Assoc.*, 9 BRBS 378 (Miller, J., dissenting), *aff'd sub nom. Fusco v. Perini North River Assoc.*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). *See also Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977). While the Director cites language supporting the application of the presumption to facts relevant to coverage, none of the cited cases actually applies Section 20(a) in analyzing the coverage issue presented, nor was it determinative of the outcome in any case. For example, in *Winchester*, the court addressed the situs requirement of Section 3(a), 33 U.S.C. §903(a), noting that the determination of whether a site is covered is one for the administrative law judge. The court then stated that "[t]he administrative law judge is guided in his factual determination by the section stating that in the absence of substantial evidence to the contrary, LHWCA coverage is presumed. 33 U.S.C. §920(a)." *Id.*, 632 F.2d at 515, 12 BRBS at 726 (citations omitted). The Director quotes this language in urging us to apply Section 20(a). However, the decision continues with the statement that if the situs determination is supported by substantial evidence, it must be affirmed, and a discussion of the administrative law judge's factual findings regarding the site. Section 20(a) is not mentioned again in the *Winchester* decision.[2]

In the present case, the administrative law judge has made factual findings regarding

[2]More recent decisions have also failed to define a clear role for Section 20(a) in coverage cases. In *Munguia*, the Fifth Circuit stated that a worker must establish coverage by showing "that at the approximate time he incurred disability or death, he was `engaged in maritime employment'... and that his injury `occurred upon the navigable waters of the United States.'" 999 F.2d at 810, 27 BRBS at 104 (CRT). In an accompanying footnote, the court stated that while the administrative law judge and the Board have phrased "this two-part inquiry in terms of jurisdiction rather than coverage, it should be noted that jurisdiction is presumed under the Act." *Id.*, 999 F.2d at 810 n. 2, 27 BRBS at 104 n. 2 (CRT). In context, this language suggests that the presumption does not apply to "coverage," as claimant must establish status and situs, but that it would apply to "jurisdiction."

claimant's duties at work, and no one argues that these findings are not supported by substantial evidence. The issue presented is one of legal interpretation, *i.e.*, whether the duties performed by claimant place him within the coverage of Section 2(3) under the caselaw interpreting that provision. We therefore affirm the administrative law judge's determination that the Section 20(a) presumption does not affect this case, which turns on the legal interpretation of the status requirement of the Act.

We affirm the administrative law judge's conclusion that claimant's duties did not involve maritime employment covered under the Act. In order to satisfy the "status" requirement of Section 2(3) of the Act, a claimant must be a "maritime employee," which is an occupational test turning on the nature of the employee's duties. In *Munguia*, 999 F.2d at 811, 27 BRBS at 105 (CRT), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, stated that under the caselaw which has developed, this test presents a dual inquiry: where an employee is injured while on actual navigable waters in the course of his employment he is engaged in maritime employment and satisfies the status test under *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983). Where the employee is not over navigable waters at the time of injury, however, then the employee is engaged in "maritime employment" only if his work is directly connected to the commerce carried on by a ship or vessel under *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT) (1985). *See also Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1130, 24 BRBS 81 (CRT) (5th Cir. 1991).

In the present case, the administrative law judge initially found that neither of the injuries claimed in 1984 or in 1986 occurred on navigable water. This determination is not challenged on appeal, and it is supported by claimant's testimony. Claimant stated that he did not remember any particular incident causing his low back pain and limp in 1984, Deposition at 26-27, and that he remembered one occasion in 1984 when he spent twenty-two days on the island during which time he experienced pain when he had to carry supplies unloaded from the supply boat up stairs in the warehouse. Tr. at 42-44. As claimant's testimony provides substantial evidence to support the administrative law judge's finding that the claimed 1984 injury did not occur over navigable waters, we affirm this determination. *See generally Silva v. Hydro-Dredge Corp.*, 23 BRBS 123, 125 (1989). Moreover, as claimant testified that the alleged 1986 injury occurred when he felt additional pain in his back while carrying groceries and supplies up a flight of stairs in the warehouse located on the Romere Pass island, Tr. at 73-74, we also affirm the administrative law judge's determination that the alleged 1986 injury occurred on land as it is supported by substantial evidence.

Accordingly, claimant's status under the Act is contingent on whether the nature of his work duties was maritime. *See 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). Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which involves loading, unloading, constructing, or repairing vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96 (CRT) (1989); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). Moreover, to satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Howard v. Rebel Well Service*, 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980); *Simonds v. Pittman Mechanical*

Contractors, Inc., 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994).

In the present case, the administrative law judge found that the Romere Pass site where claimant worked during the period in question is an island used in the production of oil and gas. He found that claimant performed general maintenance tasks for the most part. He discussed claimant's testimony that he unloaded supplies several times per week and that he transported and unloaded his own tools to repair flow lines.[3] The administrative law judge determined, however, that claimant's unloading activities were not undertaken for a maritime purpose. With regard to claimant's testimony regarding unloading his own tools, he found that pursuant to *Munguia* and *Herb's Welding*, 470 U.S. at 414, 17 BRBS at 78 (CRT), the unloading of one's own tools on oil-related repair missions is not considered maritime activity. Moreover, the administrative law judge found that any contact claimant had with food or chemical supplies was fleeting, and unrelated to maritime commerce, and questioned whether groceries for meal provisions could even be considered "cargo" for purposes of the loading or unloading test. Finally, the administrative law judge determined that claimant's overall duties were maintenance duties related to keeping the Romere Pass facility operational to produce gas and oil, activities which were not inherently maritime, and that claimant's duties involved little if any loading and unloading of "cargo" from boats.

Claimant and the Director argue on appeal that because claimant was regularly involved in unloading vessels as part of his duties, the administrative law judge erred in concluding that he was not performing maritime employment. We reject these arguments and affirm the administrative law judge's finding that claimant was not engaged in maritime employment. In *Herb's Welding*, the Supreme Court held that a welder on a fixed oil platform is not a maritime employee under Section 2(3) as there is nothing inherently maritime about offshore oil drilling. Thus, claimant cannot be covered based on his maintenance tasks at Romere Pass, as that facility is engaged in work related to oil production, rather than loading, unloading, building or repairing vessels.

In their effort to bring this claim within the coverage of the Act, claimant and Director rely on the evidence that claimant unloaded food and chemical supplies from vessels.[4] This argument

[3]Claimant testified at his deposition that his work duties consisted of general maintenance duties on the Romere Pass island: carrying tools, fixing broken flow lines, repairing generators, pipefitting, sweeping the warehouse, and cleaning compressors. Deposition at 14 - 109. At the hearing, however, claimant testified that a regular portion of his duties consisted of unloading groceries, tools and chemical drums off boats for one and one-half hours per shift, two to three times per week. Tr. at 31 - 36, 42, 73.

[4]In evaluating this issue, the administrative law judge found that whatever unloading claimant performed was an insubstantial part of his overall duties, relying on claimant's failure to mention this work at his deposition and his hearing testimony which established that a large part of his work day

cannot succeed, given the controlling precedent provided by *Munguia*, 999 F.2d at 808, 27 BRBS at 103 (CRT). In that case, the court held that a pumper-gauger who serviced and maintained fixed platform wells was not a maritime employee despite the fact that he also unloaded supplies and tools necessary for this work from a small boat as this work was performed in furtherance of the non-maritime purpose of maintaining the wells. *Munguia*, 999 F.2d at 813, 27 BRBS at 107 (CRT). In *Munguia*, the court rejected the argument that claimant performed loading tasks sufficient to constitute maritime employment, holding that it is only where such tasks are performed to enable a ship to engage in maritime commerce that claimant's loading and unloading activities constitute maritime employment. *Id.*, 999 F.2d at 813, 27 BRBS at 107 (CRT).

Given the holding in *Munguia*, the Director's attempt to distinguish the present case on the basis that claimant was required to unload food and chemical drums for general use at Romere Pass while the claimant in *Munguia* was only required to unload his own tools and equipment is rejected. In this case, the record evidence supports the administrative law judge's finding that claimant's loading and unloading duties were performed to further the non-maritime purpose of servicing and maintaining an oil and gas production facility on land; groceries were unloaded for consumption of workers on the island while tools and chemical drums were unloaded to further the oil and gas production itself. As claimant's unloading duties were conducted solely to facilitate the operation of an oil and gas production facility, which is not an inherently maritime operation under *Herb's Welding*, and it is undisputed that the remainder of claimant's work duties do not constitute maritime employment, we affirm the administrative law judge's finding that claimant did not satisfy the Act's status requirement under Section 2(3).[5]

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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was spent performing maintenance work on the island and that he would perform unloading activities only one to one and one-half hours twice a week. The Director also contends that the administrative law judge erred in relying on a "substantial portion" test to deny coverage, as such a conclusion is contrary to law. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Any error by the administrative law judge in this regard is harmless, as the amount of time claimant performed unloading work is not dispositive in this case.

[5]Inasmuch as we affirm the administrative law judge's finding that claimant has not met the status requirements of Section 2(3) of the Act, we do not reach the issue of whether claimant's injury occurred on a covered situs.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge