BRB No. 96-1190

ALFIO A. CASTORINA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTERN MARINE	)	DATE ISSUED:
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Alfio A. Castorina, Galveston, Texas, *pro se*.

Robert S. De Lange (Royston, Rayzor, Vickery & Williams), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Denying Benefits (94-LHC-1268) 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). As claimant appeals without representation by counsel, we will review the administrative law judge's findings of fact and conclusions of law to determine whether they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220. If so, they must be affirmed.

Claimant began his employment with employer in June 1988 as a laborer, cleaning and painting barges. In November 1988, claimant began working aboard the SMIT TAK LIFT 6, a seagoing pontoon, after employer contracted to supply the SMIT TAK LIFT 6 with labor. The mission of the SMIT TAK LIFT 6 was the transportation and installation of Air

Force communication towers in the Gulf of Mexico. Claimant, whose duties aboard the SMIT TAK LIFT 6 included cleaning, painting, moving cable and lifting steel pipes, allegedly suffered an injury to his back on December 21, 1988, while pulling on a cable. Claimant did not notify employer of his injury until January 4, 1989, after he had resigned his employment in a dispute over a pay raise. Claimant thereafter filed a claim for benefits under the Act; additionally, claimant filed an action against employer under the Jones Act, which was subsequently withdrawn.

The threshold issue addressed by the administrative law judge was whether claimant was a "member of a crew" of a vessel and therefore excluded from coverage under the Act pursuant to Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G)(1988). In his Decision and Order, the administrative law judge, after first determining that the SMIT TAK LIFT 6 was a vessel in navigation within the meaning of the Act, applied the United States Supreme Court's decision in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT)(1991), in concluding that claimant was a "member of a crew" aboard the SMIT TAK LIFT 6 pursuant to Section 2(3)(G) of the Act, and therefore excluded from coverage under the Act. On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Section 2(3)(G) of the Act excludes from coverage "a member of a crew of any vessel." 33 U.S.C. §902(3)(G)(1988). In considering whether claimant is excluded from coverage under the Act as a "member of a crew" of a vessel, or a seaman, the threshold issue is whether the SMIT TAK LIFT 6 is in fact a vessel in navigation. The term "vessel in navigation" has yet to be specifically defined by the Supreme Court. However, the United States Court of Appeals for the Fifth Circuit, which has appellate jurisdiction in the instant case, considers three critical factors in determining whether a structure is a vessel: 1) if the structure involved was constructed and used primarily as a work platform; 2) if the structure was moored or otherwise secured at the time of the accident; and 3) if the structure was capable of movement across navigable waters in the course of normal operations, was this movement merely incidental to its primary purpose of serving as a work platform. *Bernard v. Binnings Constr. Co., Inc.*, 741 F.2d 824, 831 (5th Cir. 1984); *see also Tonnesen v. Yonkers Contracting Co., Inc.,* 82 F.3d 30 (2d Cir. 1996); *Ducote v. Keeler & Co., Inc.*, 953 F.2d 1000 (5th Cir. 1992). In the instant case, the administrative law judge, applying the Fifth Circuit's decision in *Bernard*, considered the following factors when determining whether the SMIT TAK LIFT 6 is a vessel in navigation: 1) the SMIT TAK LIFT 6 is self-propelled with an engine and two thrusters; 2) it is manned by a captain and chief engineer; 3) it utilized its capacity and equipment for navigation; 4) it was not moored to the bottom or shore during its operation in the Gulf of Mexico; and 5) it is listed in the Lloyd's Register as a vessel, it sails under a foreign flag, and it has anchors. *See* Tr. at 185. After next noting that the purpose of the SMIT TAK LIFT 6 was the transportation and installation of Air Force communication towers in various locations in the navigable waters of the Gulf of Mexico, the administrative law judge concluded that the SMIT TAK LIFT 6 was a vessel in navigation. We hold that the administrative law judge's finding that the SMIT TAK LIFT 6 is a vessel in navigation is rational, supported by substantial evidence, and is in accordance

with law. *See O'Keeffe*, 380 U.S. at 359; *Bernard,* 741 F.2d at 824; *see generally Green v. C.J. Langenfelder & Son, Inc.*, 30 BRBS 77 (1996). Accordingly, we affirm the administrative law judge's finding that the SMIT TAK LIFT 6 is a vessel in navigation.

We will now address the administrative law judge's finding that claimant was a "member of a crew" and thus excluded from coverage under the Act pursuant to Section (2)(3)(G). The terms "member of a crew" under the Longshore Act and "seaman" under the Jones Act are synonymous. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44 (CRT)(1991). The United States Supreme Court has addressed the essential requirements for seaman status. They are: 1) an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission, and 2) the employee must have a connection to a vessel in navigation that is substantial in terms of both its duration and nature. *Chandris, Inc. v. Latsis*, U.S. , 115 S.Ct. 2172 (1995); *Wilander*, 498 U.S. at 355, 26 BRBS at 83 (CRT). In its opinion in *Latsis*, the 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." *Latsis*, 115 S.Ct. at 2190. The Court further declared that "[t]he 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." *Latsis*, 115 S.Ct. at 2191; *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

The issue of whether a worker is a seaman/member of a crew is primarily a question of fact, and the Board will defer to the administrative law judge's determination of crew member status if it has a reasonable basis. *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996); *Griffin v. Louisiana Insurance Guaranty Ass'n*, 25 BRBS 196 (1991). In addressing the issue of whether claimant was a "member of a crew" in the case at bar, the administrative law judge found that claimant's assignment aboard the SMIT TAK LIFT 6 was for the duration of its mission, that claimant ate, slept and worked aboard the vessel, that claimant did not have the liberty to return home after each day's shift, and that claimant's duties were under the direction and control of the vessel.[1] Tr. at 91. Moreover, the administrative law judge noted that of the 62 total days of employment with employer, 44 were spent aboard the SMIT TAK LIFT 6.[2] Based upon these findings, the

[1]Employer's crew aboard the SMIT TAK LIFT 6 took its orders from the vessel's captain, engineers and bosun. Tr. at 146.

[2]In *Latsis*, the Supreme Court acknowledged the Fifth Circuit's rule of thumb that "a worker who spends less than about thirty percent of this time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Latsis*, 115 S.Ct. at 2191. However, the Court cautioned that "seaman status is not merely a temporal concept" but rather time is only one element to be considered. *Id.* The Court specifically recognized that the thirty percent figure "serves as no more than a guideline established by years of experience," and that "departure from it will certainly be justified in appropriate cases." *Id.*

administrative law judge determined that claimant was permanently assigned to the SMIT TAK LIFT 6, that he performed a substantial part of his work aboard that vessel, that his duties aboard that vessel contributed to the vessel's function or operation, and that claimant's duties were in furtherance of the primary objective of the project for which the SMIT TAK LIFT 6 was contracted and engaged; accordingly, the administrative law judge concluded that claimant was employed in the performance of work on board the SMIT TAK LIFT 6 which advanced its purpose. Thereafter, based upon these findings and relying on *Wilander* and the Fifth Circuit's decision in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), the administrative law judge concluded that claimant was a "member of a crew" of a vessel pursuant to Section 2(3)(G) of the Act. Since the administrative law judge examined the total circumstances of claimant's work with employer in concluding that claimant was a "member of a crew," and as the administrative law judge's findings in this regard are rational, supported by substantial evidence, and are in accordance with the law, we affirm the administrative law judge's finding that claimant was a "member of a crew" and his consequent determination that claimant is excluded from coverage under Section 2(3)(G) of the Act. *See Latsis*, 115 S.Ct at 2172; *Wilander,* 498 U.S. at 337, 26 BRBS at 75 (CRT); *Robison,* 266 F.2d at 769; *Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge