BRB No. 92-2554

ROBERT V. BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARATHON LETOURNEAU COMPANY	)	DATE ISSUED:_____
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision and Order Denying Motion for Reconsideration of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Kay S. Beene and David M. Sessums (Varner, Parker, Sessums & Akin), Vicksburg, Mississippi, for claimant.

William G. Beanland (Wheeless, Beanland, Shappley & Bailess), Vicksburg, Mississippi, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Decision and Order Denying Motion for Reconsideration (92-LHC-332) of Administrative Law Judge Ben H. Walley 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

Claimant worked as a mechanic assembling and servicing gear boxes and other machinery on and for floating offshore drilling rigs. He was assigned to service rigs in the Gulf of Mexico and the North Sea, as well as off the coasts of Canada, Alaska, Saudi Arabia, and Africa. Tr. at 17-18, 79. In November 1986, the last rig to be constructed by employer, the *Gorilla IV*, was completed and delivered to Belle Chasse, Louisiana. Thereafter, in the midst of many layoffs, claimant was transferred from the electrical-mechanical department, which was disbanded, to the clean-and-paint department, which was responsible for disassembling, cleaning, and reassembling beams and structural girders for steel fabricated bridges. Tr. at 79, 61-82, 94-96. Despite the transfer, claimant retained his title as a mechanic and continued to make service trips to the floating rig as necessary. Tr. at 83, 107. Three days after returning from a service trip to the *Gorilla IV* in the Gulf of Mexico, on December 12, 1986, claimant injured his leg. He was bolting a gusset to a bridge beam and the gusset fell on his right leg. Claimant fractured his leg in 17 places, tore cartilage in his knee, and sustained vessel and nerve damage in his ankle. Tr. at 21, 25-26, 29, 97.

Employer voluntarily paid temporary total disability benefits through September 12, 1988, and permanent partial disability benefits for a 30 percent impairment of the right leg from September 13, 1988 through June 1, 1990. Decision and Order at 3; Jt. Ex. 1; Tr. at 10-11. Employer thereafter contested claimant's entitlement to further benefits, and claimant filed a claim for permanent total disability benefits.

At the hearing, the parties disputed whether claimant was engaged in maritime employment at the time of his injury and the extent of claimant's disability. The administrative law judge determined that claimant was not engaged in maritime employment at the time of his injury and that claimant has a 30 percent permanent partial disability for which he has been fully compensated.[1] Decision and Order at 2, 4, 8. Consequently, the administrative law judge denied benefits. *Id.* at 9. He then denied claimant's motion for reconsideration. Decision and Order Denying Recon. Claimant appeals the denial of benefits, and employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in finding that he did not meet the Section 2(3), 33 U.S.C. §902(3), status requirement. He argues that, although he was not engaged in maritime activity at the exact moment of his injury, a sufficient amount of his time was spent in maritime activity; therefore, he argues he is covered under the Act.[2] Employer responds, arguing that claimant is a bridge builder and as such is not covered under the Act. Additionally, employer argues that the "moment of injury" test is an alternative method of determining status and that

[1]The administrative law judge also summarily denied claimant's contention that employer is estopped from denying coverage because it voluntarily paid benefits under the Act. Decision and Order at 5.

[2]The Director of Sales and Service at employer's facility, Mr. Cross, testified that there was a one-year service contract on the *Gorilla IV*, which was completed in November 1986, and that there have been several service calls made since claimant was injured. Tr. at 83-84. Claimant maintains that, had he not been injured, he would have been called upon to service that rig.

claimant's offshore service work was so momentary or episodic that it does not suffice to confer status.

To be covered under the Act, a claimant must satisfy the "status" requirement of Section 2(3), and the "situs" requirement of Section 3(a), 33 U.S.C. §903(a).[3] *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 2(3) provides that an "employee" is "any person engaged in maritime employment. . . ." Thus, to be covered under the Act, an employee must spend some time in work which is integral to the overall process of loading and unloading vessels, or constructing or maintaining vessels or harbor facilities. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989); *Caputo*, 432 U.S. at 271, 6 BRBS at 165; *Howard v. Rebel Well Service*, 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980); *Simonds v. Pittman Mechanical Contractor, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, F.3d , No. 93-2096 (4th Cir. Sept. 13, 1994). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit which recently stated that the test for status is a dual inquiry and that an employee may be covered under the Act if he is engaged in maritime employment over navigable waters at the time of his injury or, if not over navigable waters at the time of injury, if his work is directly related to ship/vessel commerce. *Munguia v. Chevron, USA*, 999 F.2d 808, 811, 27 BRBS 103, 105 (CRT), *reh'g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1839 (1994).

In this case, the administrative law judge discussed claimant's activities on the date of injury, and he acknowledged that claimant had been constructing offshore oil drilling rigs for many years. Decision and Order at 6. He correctly noted that the floating offshore rigs, known as "jack-up rigs" are considered "vessels" under the Act, pursuant to *McCullough v. Marathon LeTourneau Co.*, 22 BRBS 359 (1989). *See also Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76, 78 n.1 (1992); *cf. Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT) (1985) (fixed platforms are not vessels). The administrative law judge stated that claimant's work as a mechanic on the drilling rigs is covered employment, but that, "due to circumstances beyond his control," claimant is not covered under the Act. Decision and Order at 6. The administrative law judge relied heavily on the fact that, once the *Gorilla IV* was delivered to its owner, claimant was transferred to the clean-and-paint department and was responsible for building bridges. He acknowledged claimant's maintenance and repair work as something that happened "from time to time" and noted that there was a one-year service contract on the rig, but he concluded that, because claimant's service trips were "infrequent and were usually of short duration[,]" claimant "was not engaged in maritime employment at the time of his injury." *Id.* at 7-8.

We reverse the administrative law judge's conclusion that claimant has not met the Section 2(3) status requirement. The law clearly requires a claimant to spend only "some" time in maritime

[3]There is no dispute that claimant was injured on a covered situs, as the accident occurred approximately 400 or 500 feet from the Mississippi River at the same site where the floating offshore rigs had been built. Tr. at 104, 109; *see also* Decision and Order at 6.

activities. *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *see also P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82, 11 BRBS 320, 328 (1979) (the "crucial factor is the nature of the activity to which a worker *may be* assigned"). Although claimant was transferred to a department where he performed bridge construction work,[4] the evidence of record establishes that part of claimant's duties as a mechanic included performing maintenance on the cranes and other mechanisms on the completed jack-up rigs. Given that claimant was one of three mechanics retained after the layoffs, and that he specialized in constructing and repairing gear boxes, Tr. at 58, 79, servicing the rig was part of claimant's regular duties and was not merely a momentary or episodic activity.[5] *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994). The jack-up rigs, moveable drilling platforms, are considered "vessels" under Section 2(21) of the Act, 33 U.S.C. §902(21). *See McCullough*, 22 BRBS at 364. In servicing the jack-up rigs, claimant performed a duty which constitutes the repair of a vessel, and consequently, it is maritime work. *Id.* at 364-365; *see also Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir.), *modified on other grounds on reh'g*, 657 F.2d 665, 13 BRBS 851 (1981); *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

Further, we reject employer's argument that claimant is not covered because he was not performing maritime work at the moment he was injured. Under the Supreme Court's decision in *Caputo*, an employee may not be excluded from coverage merely because he was not engaged in maritime employment at the time of his injury if he regularly spends some of his time in covered activities. *See Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989). Thus, although claimant was engaged in bridge construction work when he injured his leg, his regular duties included assignments to perform maintenance work on moveable offshore oil rigs. That is all that is necessary for him to be covered under the Act.[6] *See Ford*, 444 U.S. at 82, 11 BRBS at 328. As the administrative law judge erred in finding that claimant did not satisfy the status requirement, we reverse his finding and hold that claimant is covered under the Act.

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[4]The issue of whether claimant's bridge work constitutes maritime employment has not been raised in this case.

[5]We reject employer's argument that claimant spent only 0.5 percent of his time in maritime work after he was transferred to the clean-and-paint department. Employer appears to have divided the number of days claimant spent on service trips by 260 days. This calculation is flawed in that prior to the November 1986 transfer, claimant spent all his time in maritime employment; thus, the number of days claimant spent servicing the floating rigs prior to November 1986 is irrelevant to this inquiry.

[6]Contrary to employer's argument, the "moment of injury" test does not restrict coverage; it expands coverage. *See generally Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Henry v. Gentry Plumbing & Heating Co.*, 18 BRBS 95 (1986).

Claimant also contends the administrative law judge erred in finding that he has a permanent partial, rather than a permanent total, disability. He argues that, given his age, education, work experience, and physical condition, he is totally disabled from working. Employer contends the record supports the administrative law judge's findings that claimant has a 30 percent impairment and has been fully compensated for it under the Act.

In this case, claimant worked for employer for over 20 years as a mechanic. After his injury, Dr. Dare diagnosed him as having a fractured tibia and fibula, as well as torn cartilage in the knee and post-traumatic tarsal tunnel syndrome in the ankle. Cl. Ex. 1 at 4, 9, 11; Tr. at 17. Dr. Dare set the breaks, operated on the knee and ankle, and determined that claimant cannot return to his usual work for employer. Cl. Ex. 1 at 16. He prohibited claimant from lifting over 25 pounds and from squatting, crawling, and climbing ladders. *Id.* at 15. He concluded that claimant has a 30 percent permanent partial disability to his lower extremity and that he could work elsewhere if the job description met the limitations. *Id.* at 17, 21. Claimant testified that he applied for two jobs as a gasoline truck driver and one as a security guard, but he was not hired for them. He also stated that he registered with the Mississippi Employment Security Commission. Tr. at 39-41. Additionally, the record indicates that a vocational counselor from Crawford Rehabilitation worked with claimant for three or four months, unsuccessfully trying to find him a position where he could work from 11 a.m. to 7 p.m.[7] Tr. at 41-42. Claimant has not worked since his December 1986 injury and contends he is permanently totally disabled. *See* Tr. at 51-52.

Claimant has the burden of establishing the nature and extent of his disability. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). To establish a *prima facie* case of total disability, a claimant must show that he is unable to return to his usual employment due to his work-related disability. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Once a claimant makes such a showing, an employer must establish the general availability of other jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In this case, the administrative law judge noted Dr. Dare's opinion that claimant was unable to return to his regular work, but he relied on Dr. Dare's opinion that claimant has a 30 percent permanent partial disability to his right leg to conclude that claimant is not totally disabled and that employer fully compensated claimant for his 30 percent impairment. Decision and Order at 4-5.

In this case, it is undisputed based on Dr. Dare's opinion that claimant cannot return to his usual work with employer. Thus, claimant has established a *prima facie* case of total disability, and the burden shifts to employer to establish suitable alternate employment. *See P & M Crane*, 930 F.2d at 424, 24 BRBS at 116 (CRT); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). The record contains no evidence concerning post-injury employment, other than claimant's own testimony about his lack of success in finding a position; therefore, employer has not satisfied its burden of showing that jobs exist which claimant can perform given his condition, age, and experience. *Hite v. Dresser*

[7]Claimant was taking medication which made him groggy until 9 or 10 a.m. Tr. at 42.

Guiberson Pumping, 22 BRBS 87 (1989); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Thus, although Dr. Dare rated claimant as having a 30 percent impairment, the administrative law judge erred in relying solely on this medical evidence to determine the extent of claimant's disability. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975). Therefore, in light of the absence of evidence regarding the availability of suitable alternate employment, we reverse the finding that claimant is partially disabled and hold that he is totally disabled. *See Hite*, 22 BRBS at 91. Consequently, he is entitled to permanent total disability benefits from September 13, 1988, and continuing. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, No. 91-70743 (9th Cir. September 17, 1993); Decision and Order at 4-5. The administrative law judge's Decision and Order is therefore modified to award these benefits.

Accordingly, the administrative law judge's finding that claimant is not an employee under Section 2(3) of the Act is reversed. The award of permanent partial disability benefits is vacated, and the award is modified to provide permanent total disability benefits from September 13, 1988, and continuing.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge