BRB No. 98-0166

GEORGE P. SHANO	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: Sept. 21, 1998
	)	
v.	)	
	)	
RENE CROSS CONSTRUCTION	)	
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Lawrence A. Arcell (Barker, Boudreaux, Lamy and Foley), New Orleans, Louisiana, for claimant.

J. Michael Stiltner (Egan, Johnson, Stiltner & Patterson), Baton Rouge, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-233) of Administrative Law Judge Clement J. Kennington 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 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 suffered a work-related back injury on January 2, 1995, while working for Cypress Cove Marina, Incorporated (CCM) when he slipped and fell on a back-down ramp. Both CCM and employer herein are owned by Rene Cross and Julius Eirich.[1] Prior to working for CCM, claimant worked for employer where his duties contributed to the construction of the Cypress Cove Marina, located on a site owned by the Louisiana Fruit Company. Due to a work-related back injury claimant sustained while employed by employer in 1991, claimant was offered a less strenuous position with CCM; claimant accepted this offer and began working for CCM in September 1994. While employed by CCM, claimant's responsibilities included operating a forklift used to launch and store recreational vessels, cutting grass, picking up trash around the marina, collecting money from customers, stocking the marina store, and filling potholes on the marina road. Following claimant's January 2, 1995 injury, claimant received temporary total disability compensation under the state worker's compensation statute from January 2, 1995, and continuing. Claimant subsequently sought temporary total disability compensation under the Act.

The only issue before the administrative law judge was whether claimant satisfied the status and situs requirements for jurisdiction under the Act. In resolving the status issue, the administrative law judge determined that claimant is excluded from coverage under Section 2(3)(C) of the Act, 33 U.S.C. §902(3)(C)(1994). Specifically, the administrative law judge found that regardless of whether employer and CCM were separate entities or a single enterprise, claimant was employed as a marina worker at the time of his January 2, 1995, work injury, and that his job duties at that time did not engage him in construction, replacement or expansion of the Cypress Cove Marina. Thus, by operation of Section 2(3)(C) of the Act, the administrative law judge concluded that claimant failed to establish the status element for jurisdiction, and denied claimant's claim for benefits.

On appeal, claimant challenges the administrative law judge's denial of his claim for benefits. Employer responds, urging affirmance.

[1]Employer and CCM maintain the same workers' compensation insurance policy under employer's name, *see* Tr. at 135-136; it is for this reason that the name of employer, and not CCM, is used in the caption of the instant case.

Section 2(3) of the Act defines the term "employee" as "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), with some delineated exceptions if such excepted employees are covered under a state workers' compensation law.[2] *See* 33 U.S.C. §902(3)(A)-(F) (1994). Relevant to the instant case is the exception enumerated by Congress at Section 2(3)(C), wherein the Act states that the term "employee" does not include "individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance)." 33 U.S.C. §902(3)(C) (1994). The legislative history with regard to the addition of Section 2(3)(C) in the 1984 Amendments to the Act provides insight into the issue presented before us. Congress provided several examples of individuals who would and would not be covered by operation of this provision. Of pertinence to the instant case, Congress recognized that:

> The employees of a recreational marina who are engaged in taking reservations, servicing boats, preparing and serving food, and other such activities would be excluded from the definition of "employee" and thus, from the Act's coverage. But, a marina may employ workers to drive piles and construct additional piers and docking spaces over the water. This latter category of worker would not come within the exemption, and accordingly, would remain within Longshore Act coverage.
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> H.R. Rep. No. 570, 98th Cong., 2d Sess., pt. 1, at 5 (1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2738.

On appeal, claimant initially contends that the administrative law judge erred in determining that claimant was solely an employee of CCM at the time of his January 2, 1995, work accident. Specifically, claimant asserts that since employer and CCM are so closely aligned, they must be treated as a single employer and, therefore, all of claimant's job duties while working for employer and CCM must be considered when addressing the issue of whether claimant satisfied the status requirement. Claimant's contention of error lacks merit. Initially, we note that, contrary to claimant's statement, the administrative law judge specifically found that a determination of the status of employer and CCM is unnecessary since the controlling issue is the nature of claimant's employment with CCM. We agree with

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[2]In the case at bar, it is uncontroverted that claimant is covered under the Louisiana state workers' compensation scheme.

the administrative law judge's analysis of this issue, as a determination of whether employer and CCM were a single corporate entity is not material to claimant's status inquiry, since the Act focuses on a claimant's occupation. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Thus, in order to satisfy the Act's status requirement, a claimant must "spend at least some of [his] time in indisputedly longshoring operations." *See Caputo*, 432 U.S. at 273, 6 BRBS at 165. The Board and the courts have held that in making the *Caputo* determination, the key factor is the nature of the employee's regularly assigned duties as a whole at the time of injury; thus, activities performed infrequently but as a regular part of the employee's overall job may confer coverage. *See Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 23 (CRT)(1st Cir. 1984); *Kilburn v. Colonial Sugars*, 32 BRBS 3 (1998); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). Consistent with this principle, the Board has further held that where an employer has an employee engaged in covered maritime employment, the employer is a statutory employer under Section 2(4) of the Act, 33 U.S.C. §902(4)(1994). *See Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991); *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). It is therefore well-established that in determining whether a claimant is a covered maritime employee under the Act, the inquiry centers on the claimant's assignable duties at the time of his injury, not the corporate purpose or structure of the employer. Accordingly, we reject claimant's allegation of error on this issue, and we hold that the administrative law judge committed no error in declining to dtermine the relationship between employer and CCM.

Claimant next contends that the administrative law judge erred in determining that he is specifically excluded from coverage under the Act by Section 2(3)(C). In addressing claimant's employment duties subsequent to accepting his new job with CCM in September 1994, the administrative law judge, based on his review of the record, found that after claimant accepted his new position with CCM in September 1994, he no longer performed any of his former duties with employer, there was no potential that claimant would alternate back and forth between the two positions, and that there was no suggestion that claimant would ever perform any duties for employer in the future. Next, the administrative law judge examined claimant's new job and duties with CCM. In this regard, the issue as to whether claimant was "engaged in construction, replacement, or expansion" of the Cypress Cove Marina, and thus not subject to the exemption contained in Section 2(3)(C), is largely a question of fact to be resolved by the administrative law judge. *See Keating v. City of Titusville*, 31 BRBS 187 (1997).

In the instant case, the administrative law judge, in examining claimant's specific job responsibilities while working for CCM as of September 1994, found that claimant's primary duty was the launching and storage of boats, with the additional duties of collecting money, fueling boats, cutting grass, picking up trash and stocking the marina store. Relying on the testimony of Rene Cross, Julius Eirich and James Woodward, the office manager for Louisiana Fruit Company, the administrative law judge found that claimant's employment duties while working for CCM did not include participating in the construction of the marina firewalls, as this construction had been completed prior to claimant's transfer to CCM in September 1994.[3] The administrative law judge noted that while claimant offered various accounts as to when he worked on the marina firewalls, his testimony that the firewall construction was completed in September 1994, *see* Tr. at 153-154, corroborated the credited evidence on this issue.[4] Lastly, the administrative law judge found that the task of filling potholes in the marina access road by claimant constituted routine maintenance of the marina, and was therefore not an activity intended by Congress to fall outside the exclusion to coverage contained in Section 2(3)(C).[5] Based upon

[3]The administrative law judge found that the testimony of Messrs. Cross, Eirich and Woodward was supported by the work invoices of Sidney Triche Enterprises, the sub-contractor that supplied workers for the firewalls project subsequent to employer's work on the project. *See* Emp. Ex. 3. The administrative law judge credited Mr. Woodward's testimony that the invoices containing dates in October 1994 were typographical errors. *See* Decision and Order at 10 n.5; Tr. at 115.

[4]On appeal, claimant asserts that he was also involved in the construction of the back-down ramp and parking lot at Cypress Cove Marina. Our review of the record does not support such an assertion. The transcript pages cited by claimant on brief refer to the testimony of Julius Eirich, who stated that the back-down ramp and parking lot may not have been completed by September 1994. Mr Eirich further stated that he had no recollection of claimant ever being involved in these construction activities. *See* Tr. at 147-149. In this regard, claimant specifically testified that he was not involved in the construction of the parking lot, as that project had been completed by the time he was transferred to CCM, and that the back-down ramp and firewalls had also been completed prior to his transfer to CCM. *See* Tr. at 152-156.

[5]The legislative history indicates that under Section 2(3)(C), "routine maintenance" would "be limited to tasks such as sweeping and cleaning, trash removal, housekeeping and small repairs. At the other end of the spectrum, and clearly not included in 'routine maintenance' is such work as construction of new buildings or additions to existing structures, excavation, and work which involves the

these findings, the administrative law judge concluded that claimant, after his transfer to CCM, was a marina worker and, as such, was specifically excluded from coverage under the Act by Section 2(3)(C). It is well-established that the administrative law judge as fact-finder is entitled to evaluate the evidence and testimony of record, and that the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge's factual determinations regarding claimant's duties are rational and supported by substantial evidence. We therefore affirm the administrative law judge's conclusion that claimant is excluded from coverage under the Act pursuant to Section 2(3)(C) of the Act. *See, e.g., Keating*, 31 BRBS at 190.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

use of heavy equipment." H.R. Rep. No. 570, 98th Cong., 2d Sess., pt. 1, at 4 (1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2737.