BRB No. 01-0383

RICHARD RUEHLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MORRISON KNUDSEN COMPANY	)	DATE ISSUED: Dec. 26, 2001
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

John R. Hillsman (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Judith A. Leichtnam (Law Offices of Bruyneel & Leichtnam), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (99-LHC-2082) of Administrative Law Judge Alexander Karst 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, an operating engineer, was employed by Morrison-Knudsen, as part of its

joint venture with Traylor Brothers and Weeks Marine, or MKTW (employer), which contracted with the California Department of Transportation to reinforce against future earthquakes that portion of the San Mateo-Hayward Bridge spanning the San Francisco Bay above a 50 foot deep commercial shipping channel. Tr. at 61-62. Claimant worked on this project during two discrete periods; the period at issue in this case is between October 27, 1998, and February 27, 1999. Tr. at 161. Claimant's dispatch for this job read "deck engineer," but he was paid as a 100-ton crane operator, a higher rate of pay. Tr. at 161-162. In order to accomplish its work, employer used several different vessels to perform construction operations, haul supplies, move personnel, and move barges. Much of that work was performed from the decks of crane barges, spud barges, flexi-floats and tugs. Tr. at 35, 61. Employer owned some of the vessels and subcontracted the day-to-day diving and long-haul tugboat work to West Star, which employed Coast Guard licensed personnel and workers from the Masters, Mates & Pilots Union and the Inland Boatman's Union. Claimant belonged to the Operating Engineers Union.

Claimant deposed that initially when he worked on the retrofitting project during the period at issue, he worked the day shift for a few weeks going from rig to rig to learn how to operate all the machines and running cranes and winches on the barges. EX 4 (claimant's deposition) at 31-37. He was then transferred to the night shift, where he ran the hydraulic cranes on all the rigs, picking objects off a barge and placing them onto the work boat, fixed the bucket used for digging when it broke, moved barges, worked as the deckhand on the tug, the *Hustler,* and on the barges when they were taken off the rigs and moved out to the moors, pulled the rope line with a grappling hook on the barge so the barge could hang on the mooring, and placed booms to pour concrete at night. The night shift consisted of three workers, only one of whom was licenced to pilot the tug. According to the night shift superintendent, the responsibilities of the night shift were to finish whatever work the day shift was unable to complete and to watch over the equipment during the hours when it was idle. Tr. at 140. Claimant's supervisor testified that he assigned claimant to the night shift as a "floater," not assigned to any particular barge, vessel or tug, and that claimant was expected to perform any task required, because he was versatile, knew how to weld and operate a crane, and knew his way around the other equipment. Tr. at 51-52, 73, 76. According to the project's marine superintendent, Mike Green, the mission of the *Hustler* was to move barges and anchors, and to assist with the transportation of the workers during the day if the crewboat was busy. At night, the tug crew checked the lights on moored barges, mooring lines, and the mooring and anchor buoys. Tr. at 48-49.

Claimant's time card designated him an "operator," a category for crane operators, pile drivers and deck engineers supplied by the Operating Engineers Union. Tr. at 92. The *Prowler*, a West Star tug, ferried day shift workers to their job sites and among them. Tr. at 73. According to Coast Guard rules, the *Hustler* could not be operated without a skipper and at least one crew member, and claimant was not allowed to pilot the tug. When the weather

was rough but not severe enough to suspend work, a bigger West Star tug performed the usual work of the *Hustler*. Claimant injured his back on the night of February 27, 1999, when he fell into a sinkhole while crossing a tidal mud flat near the San Mateo shore during low tide in order to attach cable wire to concrete pilings which were to be pulled up in the morning by a crane mounted on a spud barge. Claimant filed a claim under the Act on March 10, 1999.[1] EX 1.

The parties agreed that claimant satisfied the situs and status requirements to confer coverage under the Act. 33 U.S.C. §§902(3), 903(a). In his decision, the administrative law judge rejected employer's contention that claimant is nonetheless excluded from coverage under the Act as a member of a crew pursuant to Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G). On appeal, employer contends that the administrative law judge erred in finding that claimant was not a member of a crew. Claimant responds, urging affirmance of the administrative law judge's finding. Employer replies, reiterating its arguments.

Section 2(3)(G) of the Act excludes from coverage "a master or member of a crew of any vessel." 33 U.S.C. §902(3)(G). The United States Supreme Court has held that a "member of a crew" under the Longshore Act is the same as a "seaman" under the Jones Act. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991); *see also Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). An employee is a member of a crew if: (1) his connection to a vessel in navigation is substantial in nature and duration; and (2) his duties contributed to the vessel's function or operation. *See Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997). "The key to seaman status is an employment-related connection to a vessel in navigation . . . . It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Wilander*, 498 U.S. at 354, 26 BRBS at 83(CRT). The employee's connection to a vessel must be substantial in terms of both its nature and duration in order to separate sea-based workers entitled to coverage under the Jones Act from land-based workers with only a transitory or sporadic connection to a vessel in navigation. *Chandris*, 515 U.S. at 368; *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

[1]Claimant also filed a Jones Act suit for the same injury in San Francisco Superior Court. CX 3. The record does not reveal the disposition of this case.

The administrative law judge found, and claimant concedes, that he spent more than 30 percent of his time working on tugs and barges, and that therefore his connection to these vessels was substantial in duration.[2] *See Chandris*, 515 U.S. 347. Thus, the only issue to be considered is whether claimant's connection to the vessel is substantial in nature.

In analyzing this issue, the administrative law judge relied on the Supreme Court's statement in *Papai* that "the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." *Papai*, 520 U.S. at 555, 31 BRBS at 37(CRT). The administrative law judge concluded that claimant's duties did not regularly expose him to the perils of the sea. He was persuaded by claimant's argument that, unlike seamen who cannot flee the perils of the sea, claimant was a harbor worker in shallow waters who merely had to face risks ordinarily faced by all who work in or near water and that he was exposed to the same hazards faced by others covered under the Longshore Act. He noted that in rough weather claimant, along with all or most MKTW direct employees, was brought ashore. The *Hustler* was replaced by a West Star tug crewed by seamen whenever the "perils of the sea" arose. The administrative law judge stated that he was struck by the testimony of Mr. Green, employer's superintendent, who testified that claimant was assigned to the night shift because of his ability to perform a variety of skills, including welding, crane operation and machinery repair, none of which are skills generally required of seamen. The administrative law judge noted that claimant did not have any seaman's skills other than handling lines, and that skill as well as those associated with construction on or near water, are also performed by longshoremen. The administrative law judge further found that while claimant handled lines and inspected moorings, those duties were incidental to his primary work. Decision and Order at 5-6.

The administrative law judge concluded by stating that the "review of all the evidence in this case left me with the overall impression that Mr. Ruehle was a bridge construction worker hired out of a union hall of land based construction workers." Decision and Order at 5. He noted that claimant had no qualifications or the necessary papers to be a seaman. The administrative law judge further relied on the following: claimant performed work attendant to refitting the bridge from special water craft, but was assigned to tasks which called for land-based skills, and needed only general familiarity with work around water; claimant neither ate or slept on the vessels, and he was not on board any of the water craft primarily to aid in their navigation; claimant spent the bulk of his time on barges, and the overwhelming majority of the work that occurred on these barges occurred while they were fixed and

[2]No one disputes that claimant was injured while in the service of a vessel or that claimant's duties contributed to the accomplishment of the mission of the tug.

stationary. Decision and Order at 6; Tr. at 62. The administrative law judge stated that there was no evidence that claimant would be attached to any of the craft once this project ended, and therefore his connection to the various craft on which he was working was sporadic and transitory. Decision and Order at 6.

Employer argues that the factors upon which the administrative law judge relied in finding that claimant was not a seaman have not been held to be dispositive in post-*Chandris* cases and asserts that the administrative law judge construed the test for seaman status too narrowly. Employer contends that claimant in this case must be considered a seaman because the mission of the *Hustler* was to move barges, people and supplies, that the night shift on the *Hustler* performed safety checks on the barges, boats, anchors and moorings used on the construction projects, and that claimant clearly aided in the mission of the *Hustler* by assisting with the safety checks and barge moves, handling the lines, moving equipment on and off the *Hustler,* and performing routine maintenance on the tug. Employer argues that claimant was hired as a deck engineer and performed deck hand work. Employer also maintains that claimant was exposed to the "perils of the sea," albeit in the navigable waters of San Francisco Bay.

We agree with employer that the case law does not require that claimant actually go to sea in order to be considered a seaman. The United States Court of Appeals for the Fifth Circuit has rejected a finding that a claimant's connection was not substantial in nature because "it did not take him to sea" where his work brought him aboard the barge only after the vessel was moored or in the process of mooring in the Mississippi River. The court held that the Supreme Court's decision in *Papai* did not require that a claimant go to sea, but stated only that it was "helpful" in determining whether he has the requisite connection to the vessel. Thus, the Fifth Circuit held that "the district court incorrectly concluded that [the claimant] is not a Jones Act seaman merely because his duties do not literally carry him to sea." *In re Endeavor Marine Inc.*, 234 F.3d 287 (5th Cir. 2000). Moreover, the fact that claimant does not have seaman papers does not preclude his being a member of a crew. *See Noble Drilling Corp. v. Smith,* 412 F.2d 952 (5th Cir. 1969).

Nevertheless, under the facts of this case, there is substantial evidence to support the administrative law judge's conclusion that claimant is not a seaman and is therefore not precluded from receiving benefits under the Longshore Act. In its opinion in *Chandris,* the Supreme Court stated 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 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.* In interpreting the relevant opinions of the Supreme Court, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the instant case arises, has stated with regard to

the "substantial connection" test that, "*Papai* and *[Chandris]* dictate that when we determine whether the nature of [claimant's] connection to [a vessel] is substantial, we should focus on whether [claimant's] duties were primarily sea-based activities." *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1293, 32 BRBS 41, 44 (CRT) (9th Cir. 1997). Thus, in *Cabral*, the court held that a crane operator working aboard a crane barge did not satisfy the substantial connection test because his work was not primarily sea based: he was hired as a crane operator, rather than as a crew member, worked on the barge only when it was stationary, and failed to show that he would continue to work on the barge after the project was completed. *Cabral,* 128 F.3d at 1293, 32 BRBS at 44(CRT).

In *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000), the Board held that the claimant, sent aboard a crude oil tanker to repair boilers, was not a member of a crew even though he was injured while the ship sailed from Aruba via Boston to England, Italy, Libya, the Baltic and France. Although claimant was aboard for two and one-half months, and was assigned to remain with the vessel for the duration of its three month voyage, he was nonetheless a land-based worker entitled to coverage under the Longshore Act because his connection to the ship was limited in nature. The Board held that the administrative law judge properly found that claimant was not usually an employee of the vessel, but was a land-based worker placed on board only for the duration of the specific repair job. The Board stated that the appropriate inquiry regarding the claimant's duties is the employee's basic job assignment at the time of injury, citing *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 33 BRBS 31(CRT) (3d Cir. 1998), *cert. denied,* 119 U.S. 1142 (1999). *McCaskie,* 34 BRBS at 11.

The cases employer cites in support of its position are distinguishable. In *Foulk v. Donjon Marine Co., Inc*., 144 F.3d 252 (3d Cir. 1998), a case which concerned a commercial diver hired for 10 days to work on a crane barge used for the construction of an artificial reef, the United States Court of Appeals for the Third Circuit remanded for further findings on whether the employee's connection to the vessel was substantial in nature. The court held that work for only 10 days does not mandate a finding that the connection was not substantial. Recognizing that the employee's work was necessary for the successful completion of the vessel's mission, the court held that commercial divers are protected by the Jones Act as they are regularly exposed to the perils of the sea. *Id.*, 144 F.3d at 258-259. In *Hansen v. Caldwell Diving Co.*, 33 BRBS 129 (1999), *aff'd mem.*, 243 F.3d 537 (4th Cir. 2001) (table), the Board reviewed a case where the claimant's work as a commercial diver required him to work aboard a vessel for approximately four weeks for the purpose of installing underwater cable, which was the vessel's mission. The Board affirmed the administrative law judge's finding the claimant's connection to a vessel was substantial in nature and duration, and thus, affirmed the administrative law judge's conclusion that claimant was a "member of a crew" of a vessel under Section 2(3)(G), and excluded from coverage under the Act. *Hansen,* 33 BRBS at 132. In *Foulk* and *Hansen* claimants were

primarily or solely divers. Although employer argues that neither claimant had "seaman's skills," the cases stressed that diving is an occupation which embodies exposure to the perils of the sea. *Foulk*, 144 F.3d at 258-259; *Hansen*, 33 BRBS at 132. And in *Delange v. Dutra Constr. Co., Inc.*, 183 F.3d 916, 33 BRBS 55(CRT) (9th Cir. 1999), the Ninth Circuit merely reversed the district court's conclusion that claimant was excluded from Jones Act coverage as a matter of law, and held that where more than 80 percent of his time involved clearly seaman's duties, claimant raised a triable issue of fact. *Id.*, 183 F.3d at 920, 33 BRBS at 57 (CRT).

The question of status as a member of a crew is a mixed question of law and fact. *Wilander*, 498 U.S. at 356, 26 BRBS at 84(CRT). In a Jones Act case, therefore, where "reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury." *Id.* In a Longshore Act case, the role of the fact-finder is performed by the administrative law judge. Here, the administrative law judge applied the correct legal standard and weighed all of the relevant facts. While claimant performed some duties of a seaman, the administrative law judge found claimant was a bridge construction worker hired based on his skills in this land-based employment. As employer has demonstrated no reversible error in his evaluation of the evidence or legal analysis, we affirm the administrative law judge's finding that claimant is not a "member of a crew." Therefore, claimant is not excluded from coverage under Section 2(3)(G) of the Act.

In his response brief, claimant's counsel requested an attorney's fee of $5,362.50, representing 19.5 hours of services at $275 per hour, for defending his award against employer's appeal before the Board. Claimant subsequently requested an additional attorney's fee of $618.75 for 2.25 hours of services performed thereafter. Employer has not filed objections. As claimant successfully defended his award, his attorney is entitled to a fee for work performed before the Board. *Smith*, 30 BRBS at 89. We find, however, that the hourly rate requested, $275, is excessive and not commensurate with the rate the Board has previously awarded in the geographic region of San Francisco in similar cases. Therefore, we reduce the hourly rate to $200, and thus award claimant's counsel a fee in the amount of $4,350, representing 21.75 hours of legal services at the hourly rate of $200. 33 U.S.C. §928; 20 C.F.R. §802.203; *see generally Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995).

Accordingly, the decision of the administrative law judge finding that claimant is not a member of a crew is affirmed. Consequently, the administrative law judge's awards of disability and medical benefits are affirmed. Claimant's counsel is awarded an attorney's fee of $4,350 for work performed before the Board, to be paid directly to counsel by employer.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge