BRB No. 05-0925

ROBERT ELLIOTT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONNOLLY PACIFIC COMPANY	)	DATE ISSUED: 07/25/2006
	)	
and	)	
	)	
FREMONT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Longshore Act Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Robert Mark Baker, Long Beach, California, for claimant.

Richard C. Wootton (Cox, Wootton, Griffin, Hansen & Poulos, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Longshore Act Benefits (2004-LHC-01623) of Administrative Law Judge Paul A. Mapes 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).

Claimant was employed by employer to work on three derrick barges for approximately 21 months. The function of the derrick barges was to unload rocks weighing three to 22 tons from freight barges. The rock was used to construct a

perimeter wall within the harbor of the Port of Los Angeles. The water inside the perimeter wall was subsequently filled with dirt accumulated from the dredging of a deeper shipping channel, and the resulting land inside the perimeter was projected to support the development of a container terminal. Claimant alleged that during the course of his employment for employer constructing the perimeter wall he sustained cumulative trauma injuries to his back, neck, legs, and right foot. The only issue before the administrative law judge was whether claimant was a member of a crew and therefore excluded from the Act's coverage.

The administrative law judge found the parties agreed that claimant's job duties contributed to the mission of the derrick barges to unload rock from freight barges, and that derrick barges are vessels in navigation. The administrative law judge determined that the only remaining issue is whether claimant's connection to the derrick barges was substantial in duration and nature. After discussing the relevant law, as well as claimant's specific duties on the derrick barge, the administrative law judge found that claimant's connection to the vessels on which he worked was substantial in both duration and nature, that claimant was a member of crew, and that he is therefore excluded from the Act's coverage. Decision and Order at 10.

Claimant appeals the finding that he is a member of a crew who is excluded from coverage under the Act. Employer responds, urging affirmance.

Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), excludes from coverage "a master or member of a crew of any vessel." The term "member of a crew" is synonymous with the term "seaman" under the Jones Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991). An employee is a "member of a crew" if: (1) his duties contributed to the vessel's function or to the accomplishment of its mission, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991), and (2) he had a connection to a vessel in navigation, or to a fleet of vessels, that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); *see also Stewart v. Dutra Constr. Co., Inc.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005). In *Chandris*, the Supreme 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." *Chandris*, 515 U.S. at 370. The Court further 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.* The second prong of the *Chandris* inquiry, therefore, is necessary 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 whose employment does not regularly expose them to the perils of the sea. *Chandris*, 515 U.S. at 368; *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). The Ninth Circuit, within

whose jurisdiction this case arises, has applied the *Chandris* formula in a number of cases. *Delange v. Dutra Constr. Co., Inc.*, 183 F.3d 916, 33 BRBS 55(CRT) (9th Cir. 1999); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 32 BRBS 41(CRT) (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998); *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996); *Boy Scouts of America v. Graham*, 76 F.3d 1045 (9th Cir. 1996). In *Delange* and *Cabral*, the Ninth Circuit explained that a worker's duties "take him to sea" if they are "inherently vessel-related" or "primarily sea-based." *Delange*, 183 F.3d at 920, 33 BRBS at 57(CRT); *Cabral*, 128 F.3d at 1293, 32 BRBS at 44(CRT).

The issue of whether a worker is a seaman/member of a crew is a mixed question of law and fact. *Papai*, 520 U.S. at 554, 31 BRBS at 37(CRT); *In re: Endeavor Marine, Inc.*, 234 F.3d 287, 290 (5th Cir. 2000), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001). Generally, it is inappropriate to take the question from the fact-finder, and deference is due his findings if they have a reasonable basis in the record. *Id.*; *Lacy v. Southern California Ship Services*, 38 BRBS 12 (2004); *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997); *see also Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), *aff'd*, 418 F.3d 138, 39 BRBS 47 (2d Cir. 2005). In this case, the administrative law judge provided six bases for his conclusion that claimant is a member of a crew. The administrative law judge found that claimant's connection to the derrick barges was substantial in duration inasmuch as claimant admitted he spent at least 75 to 80 percent of his work day aboard the barges, and as claimant's attorney conceded that claimant's connection to the barges was substantial in duration.[1] *See* Tr. at 33, 83-84, 125. Secondly, while the barges were usually secured by anchors, claimant often moved with these vessels when they were repositioned. *See* Tr. at 140-141, 163, 164. The administrative law judge further reasoned that claimant was almost constantly exposed to dangers that can only be characterized as hazards of the sea. The administrative law judge also found that, while claimant's formal job classification was a pile driver, his actual job duties were consistent with those of a deckhand. Moreover, the administrative law judge found that even if claimant's job duties were of a type solely associated with harbor construction or longshore work, claimant is a member of a crew if his job duties substantially contribute to the mission of the vessel. Finally, the administrative law judge found the fact that marine construction workers may be entitled to coverage under the Act is not dispositive inasmuch as establishing that one is a member of a crew precludes coverage under the Act. Decision and Order at 10-12.

Claimant argues that he is a harbor worker entitled to coverage under the Act, *see* 33 U.S.C. §902(3),[2] inasmuch as 90 percent of his job duties were undertaken inside Los

[1] Claimant concedes that his connection to employer's derrick barges was substantial in duration. Claimant's Petition for Review at 18.

[2] Section 2(3) of the Act states:

Angeles harbor and were directly related to unloading rock from freight barges to aid in the construction of the perimeter wall; therefore, his duties were neither "primarily sea-based" nor "inherently vessel-related" as those phrases were described in *Delange*, 183 F.3d 916, 33 BRBS 55(CRT) and *Cabral*, 128 F.3d 1289, 32 BRBS 41(CRT). It is well established that claimant's duties need not aid in navigation in order for him to have a substantial connection to a vessel; the key is the connection to the vessel, not the particular job. *See Wilander*, 498 U.S. at 353-354, 26 BRBS at 82-83(CRT); *see also Lacy*, 38 BRBS 12. Accordingly, the administrative law judge properly found that claimant may be a member of a crew even if claimant engaged in duties associated with harbor workers or longshoremen. Decision and Order at 12; *see also In re: Endeavor Marine, Inc.*, 234 F.3d 287; *Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252 (3d Cir. 1998).

Moreover, in addition to his work involved with the unloading of rock from the freight barges, the administrative law judge found that claimant's job duties included traditional crew member duties such as rinsing the deck, painting, maintaining onboard cargo gear, placing lights on anchor buoys, setting spar buoys, securing the anchor buoys when the derrick barges were moved, using a sounding line to make sure the derrick barges did not run aground, securing freight barges to the derrick barges using breasting lines, and piloting a skiff to transport anchors and other crew members. Decision and Order at 11; *see* Tr. at 95-96, 100-108, 119-122, 135-140, 230-231, 240. The administrative law judge also found it significant that claimant moved with the barges when they were repositioned.[3] *See* Tr. at 140-141, 163-164. The administrative law judge discussed *Cabral*, 128 F.3d 1289, 32 BRBS 41(CRT), but found it distinguishable from this case. In *Cabral*, the claimant was a crane operator hired to work aboard a barge during the replacement of mooring dolphins in Pearl Harbor. The barge was docked at all times during claimant's employment and his services were not required when the barge moved to another job during one of the weekends preceding claimant's accident. The court held that the claimant was a land-based worker with only a transitory connection to

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> The term "employee" means 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, but such term does not include-
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>
> (G) a master or member of any vessel; . . .

[3] Inasmuch as this finding is supported by the evidence of record, we reject claimant's contention to the contrary.

the barge. In contrast, in *Delange*, 183 F.3d 916, 33 BRBS 55(CRT), the Ninth Circuit held that the district court erred in granting the employer's motion for summary decision. The claimant did welding work, carpentry and occasional pile driving from barges. He testified that he also performed deck hand duties. The court held that the jury should decide if the claimant was a seaman, and remanded the case.

The administrative law judge found that these Ninth Circuit cases suggest that a construction worker who works on a vessel that is anchored or secured to a pier and who performs essentially land-based work, and is never on board the vessel when it moves to another location is not a seaman. In contrast, the administrative law judge found that a worker, such as claimant, who works aboard construction barges during periods when they are being moved and performs some duties traditionally associated with deckhands may appropriately be classified as a member of the vessel's crew. Decision and Order at 9-10. As the administrative law judge discussed the cases claimant cites as supportive of his decision, and rationally found they support his finding that claimant was a member of a crew, we reject claimant's contention of error in this regard.

Claimant further argues that the administrative law judge erred by finding that he was exposed to the perils of the sea. The administrative law judge found that claimant was regularly exposed to the hazards of the sea. Specifically, the administrative law judge found that claimant was in danger of being struck by broken cables or lines, slipping into the gaps between the moving freight and derrick barges, falling overboard while operating the skiff, suffering injuries as a result of grounding or collision with another vessel, being trapped on a burning vessel, or injured while fighting an onboard fire. Decision and Order at 11; *see* Tr. at 95-96, 104-106, 135-136, 201-204, 230-244. The administrative law judge found that, although land-based workers may be subject to similar risks, they are of lesser degree because the ships on which they work are secured to a pier and are far less likely to be moved by waves, swells, and currents. *See* Tr. at 467-480. The administrative law judge found irrelevant that the hazards faced by claimant within the harbor at the Port of Los Angeles arguably are less serious than the perils on the open seas. *See generally Latsis*, 515 U.S. at 355; *Papai*, 520 U.S. at 559, 31 BRBS at 38-39(CRT); *In re: Endeavor Marine, Inc.*, 234 F.3d at 291-292 (Mississippi River subjects claimant to "perils of the sea"). Moreover, the administrative law judge found that, in some respects, claimant faced greater dangers working on a harbor vessel, which is more likely than an ocean-going vessel to run aground or be involved in a collision.

In this case, claimant's job duties on the derrick barges involved unloading rock from freight barges and additional duties which the administrative law judge reasonably characterized as those of a deckhand. Moreover, the administrative law judge rationally found that claimant's work on the derrick barges exposed him to the perils of the sea. Based on these findings, the administrative law judge found that claimant's connection to

the derrick barges was substantial in nature, and, consequently, that claimant worked as a member of a crew. It is within the administrative law judge's discretion to do so, and the Board may not reweigh the evidence, but may only inquire into the existence of substantial evidence to support the findings. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). Here, there is substantial evidence to support the administrative law judge's determination, and, we cannot, as a matter of law, hold that it was unreasonable for the administrative law judge to conclude that claimant was a member of a crew. Thus, we affirm his finding that claimant is not entitled to coverage under the Act.[4] *See Uzdavines*, 37 BRBS at 50-52; *Foster*, 31 BRBS at 193-194.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

[4] We reject claimant's contention that, inasmuch as he has no remedy under the Jones Act for his work injuries caused by cumulative trauma, coverage should be afforded under the Act. Section 2(3)(G) provides that a member of a crew is excluded from the Act's coverage. *But see* 33 U.S.C. §903(e) (providing a credit to employer for Jones Act benefits received by claimant). Moreover, the Supreme Court held in the context of reviewing entitlement to coverage under the Jones Act, that a member of a crew is not also entitled to coverage under the Act. *See Gizoni*, 502 U.S. at 86-87, 26 BRBS at 46-47(CRT) (1991); *Wilander*, 498 U.S. at 347, 26 BRBS at 79-80(CRT). We note, however, that the courts' expansive reading of the Jones Act may have had the unintended consequence of narrowing coverage under the Longshore Act, and thereby of depriving claimants of a no-fault compensation remedy.

REGINA C. McGRANERY
Administrative Appeals Judge