BRB No. 03-0381

CLIFFORD N. LACY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN CALIFORNIA SHIP SERVICES	)	DATE ISSUED: Feb. 23, 2004
	)	
and	)	
	)	
AIG CLAIMS SERVICES	)	
	)	
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.

Marilyn S. Green (Cantrell, Green, Pekich, Cruz & McCort, P.C.), Long Beach, California, for claimant.

Michael D. Doran (Samuelsen, Gonzalez, Valenzuela & Brown), San Pedro, 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 (2001-LHC-3218) 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 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 worked for employer as a rigger and a deckhand for approximately one year before he was injured. On January 9, 2001, claimant was in the process of loading cargo from one of employer's boats, the *Nicholas L*, onto a ship anchored outside the breakwaters of the Los Angeles/Long Beach Harbor when a swinging pallet hit him and caused injury to his back. Tr. at 39-40. Employer's Jones Act carrier, Commercial Insurance Company, initially made payments for damages but no payments have been made since May 2002. The only issue before the administrative law judge was whether claimant was a member of a crew and thereby excluded from the Act's coverage.

After discussing the relevant law, as well as employer's primary business and claimant's duties, the administrative law judge determined that both sides of the argument have merit but that "the facts supporting Claimant's position are more probative than those supporting Employer's position and substantially outweigh them." Thus, he found that while claimant "did other tasks," his was "mostly a longshore job." Decision and Order at 6. He concluded that claimant is not excluded from the Act's coverage as a member of a crew and is entitled to the stipulated temporary total disability benefits at the maximum rate. *Id.* at 7.[1]

Employer appeals the finding that claimant is covered by the Act and contends he is a member of a crew who should be excluded from longshore coverage. Employer contends the administrative law judge did not properly apply the law for determining whether an employee is a member of a crew. Specifically, employer argues that claimant satisfies both elements of the test for being a seaman set forth in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and that the inquiry should have ended once the administrative law judge found that claimant's job took him to sea. It argues that, by incorrectly interpreting two cases arising in the United States Court of Appeals for the Ninth Circuit as requiring additional inquiries, the administrative law judge improperly considered whether claimant's various job duties were "inherently vessel-related" or "primarily sea-based" and created a "details of the job duties" exception to the standards set forth in *Chandris* and reiterated in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997). Claimant responds, arguing that the administrative law judge correctly applied the law and drew the rational conclusion that he is not excluded from coverage.

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

[1]Nearly one month after the issuance of this decision, the parties submitted stipulations to the administrative law judge pertaining to the applicable compensation rate, accrued benefits, credits, and amounts to be withheld pending final resolution of the case. The administrative law judge accepted these stipulations and, on March 6, 2003, he issued an Amended Decision and Order Based on Stipulations of the Parties. The Amended Decision and Order has not been appealed.

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*, 515 U.S. 347; *Papai*, 520 U.S. 548, 31 BRBS 34(CRT). 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). Thus, the inquiry must concentrate on whether the nature of the employee's work takes him to sea. *Papai*, 520 U.S. at 555, 31 BRBS at 37(CRT). 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; *Cabral*, 128 F.3d at 1293.

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 to the fact-finder if the finding has a reasonable basis. *Id.*; *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996); *Griffin v. Louisiana Ins. Guaranty Ass'n*, 25 BRBS 196 (1991); *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Smith*, 30 BRBS at 89. In this case, the administrative law judge found that employer's primary business is to provide water taxi and supply service to vessels at anchor in the Los Angeles/Long Beach Harbor or off the coast of Southern California. Employer transports a ship's personnel from ship to shore and back, delivers supplies (or "stores") and retrieves and disposes of a ship's garbage. Additionally, employer cleans up oil spills and services the rocket launch in the harbor. Decision and Order at 2. Employer maintains a fleet of seven vessels, ranging from 100 feet long to 30 feet or smaller. *Id.*; Tr. at 49, 63. Employer employs "operators" to captain the vessels, "deckhands" to perform necessary crew and dock work, and "dockside only" employees

who do not work on the vessels. Decision and Order at 2; Tr. at 50. Claimant was a "deckhand" who performed duties both on land and aboard the vessels. Decision and Order at 3; Tr. at 22-26, 53-54.

During his employment, claimant was on call and would average over 40 hours of work per week. The dispatcher would give him his assignment, and it could be either to work a vessel for a stores run or to work a land-based job. Decision and Order at 3; Tr. at 22-26, 53-54. If claimant was assigned to a vessel, he and another deckhand would prepare the cargo nets and pallets for loading, including getting them from the storage area, using forklifts to load them onto the nets, and using a crane to load them onto the vessels. Claimant would handle the dock lines upon leaving and returning to the dock, and he would ride in the vessel to deliver the supplies or passengers to the ship. His main duty in transport was to be sure the supplies were secure, and he typically would have time to drink coffee during the ride. Claimant sometimes received training from the captains regarding steering the vessel or emergency or other procedures. Once the vessel arrived at the ship, claimant would assist in loading the supplies onto the ship, or help transfer passengers to/from the ship. Decision and Order at 3; Tr. at 26, 29-32, 63-64.

Claimant estimated he spent 35 percent of his work time on vessels and 65 percent of his time on land. This 65 percent included time preparing cargo and vessels to be launched as well as disposal and clean up after docking. Decision and Order at 4; Tr. at 27-29, 33. Mr. Malin, claimant's dispatcher, estimated claimant worked on the vessels approximately 50 percent of the time.[2] Tr. at 56. Claimant testified that only approximately five to 10 percent of his time on the boats was spent in maintenance or steering. On the return trips, claimant approximated that 15 percent of his time was needed to prepare the boat for docking. Decision and Order at 3-4; Tr. at 31-32.

The administrative law judge found that claimant's title of "deckhand" is not determinative of his status as a member of a crew. He then found that, under the first prong of the *Chandris* test, claimant's duties of loading the boats, handling the lines, unloading the supplies to the ships, helping passengers to and from the ships and removing garbage from the ships "unquestionably contributed to the function" of employer's vessels in navigation and to the accomplishment of their mission. Decision and Order at 5. No party disputes this finding. The case, as the administrative law judge concluded, turns on the second prong of the test: does claimant have a substantial

[2]The administrative law judge credited claimant's estimate and stated that Mr. Malin's testimony corroborated it. Claimant said he spent 35 percent of his time "on the boats," whereas Mr. Malin testified that claimant spent approximately 50 percent of his time "on assignments on the vessels." Tr. at 28-29, 55-56. Based on the inference that the on-shore vessel preparation time is included in Mr. Malin's estimate, the administrative law judge's conclusion is rational.

connection to a vessel or fleet of vessels? The administrative law judge found that claimant has an employment-related connection to employer's fleet of vessels, Decision and Order at 5, so he proceeded to address the question of whether the connection was "substantial." *Id.*

After setting forth the parties' arguments, the administrative law judge acknowledged that both parties made cogent arguments, so he identified factors in support of each position, and he concluded that claimant does not have a connection to the fleet of vessels that is substantial in nature. Decision and Order at 6. While he recognized that claimant's estimated time on the boats, 35 percent, exceeded the 30 percent rule of thumb set forth by the United States Court of Appeals for the Fifth Circuit in *Barrett v. Chevron USA, Inc.*, 781 F.2d 1067, 1076 (5th Cir. 1986), and approved by the Supreme Court in *Chandris*, 515 U.S. at 371, the administrative law judge stated that time, alone, does not satisfy the inquiry. Rather, the connection must also be substantial in nature, and he found that claimant's on-board work was not "primarily sea-based" work. That is, the administrative law judge concluded that while claimant knew emergency procedures, he spent most of his time aboard the vessel drinking coffee and only five to 10 percent of his time there performing "seaman" tasks such as maintenance or steering. The administrative law judge also did not give dispositive weight to the handling of lines when casting off or docking. Consequently, the administrative law judge determined that claimant's "vessel-related" duties were "secondary and minor compared to his regular occupation as a loader and unloader" and these longshore duties are "neither primarily sea-based nor inherently vessel related." Decision and Order at 6-7.

Initially, we hold that the administrative law judge erred in segregating claimant's duties into steering/maintenance duties and loading/unloading duties. In *Wilander*, the Court held that the employee need not "aid in navigation" in order to have a substantial connection with the vessel: the key is the connection, not the employee's particular job. *Wilander*, 498 U.S. at 353-354, 26 BRBS at 82-83(CRT).[3] To the extent the administrative law judge's decision in the current case can be interpreted to have found that claimant's work is not "primarily sea-based" solely because he spends so little time

[3]In *Wilander*, a jury found that a paint foreman assigned to a paint boat serving oil drilling platforms in the Persian Gulf was a seaman and awarded damages under the Jones Act. The case came before the Supreme Court on the narrow question of whether Wilander should be precluded from seaman status because he did not perform transportation-related functions aboard the boat. The Court held that he should not be so precluded merely because his work did not "aid in navigation." Rather, it stated that the proper concern is whether an employee's duties "contribute to the function of the vessel or to the accomplishment of its mission[;]" that is, he must be "doing the ship's work." *Wilander*, 498 U.S. at 355, 26 BRBS at 83-84(CRT).

steering or maintaining the boat, the decision is erroneous. However, the error is harmless in this case and does not warrant overturning the administrative law judge's decision.

The inquiry into whether an employee's connection to a vessel is "substantial" addresses how much time the employee spent on the vessel as well as the total circumstances of his overall employment with the employer. *Chandris*, 515 U.S. at 349-350, 370. The Court later explained:

> For the substantial connection requirement to serve its purpose, 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. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Papai, 520 U.S. at 555, 31 BRBS at 37(CRT).

Following *Chandris* and *Papai*, the Ninth Circuit, in *Cabral*, addressed the issue of whether a crane operator aboard a crane barge was a seaman under the Jones Act. The court stated that, for its purposes, those cases "dictate that when we determine whether the nature of [an employee's] connection to [the barge] is substantial, we should focus on whether [his] duties were primarily sea-based activities." *Cabral*, 128 F.3d at 1293, 32 BRBS at 44(CRT). This is because, in both *Chandris* and *Papai*, the Supreme Court stressed that land-based workers must be separated from sea-based workers, as only the sea-based workers face the "perils of the sea." *Cabral*, 128 F.3d at 1293, 32 BRBS at 44(CRT). The Ninth Circuit concluded that Cabral was not a seaman, as he was a land-based crane operator who happened to be assigned to work on a barge for a particular project. *Id.* In *Delange*, the Ninth Circuit stated that a "maritime worker's connection to [a] vessel in navigation is substantial if his duties are inherently vessel-related and thus 'take him to sea.'" *Delange*, 183 F.3d at 920, 33 BRBS at 57(CRT) (quoting *Papai*, 520 U.S. at 555, 31 BRBS at 37(CRT)). As Delange testified that he spent 80 percent of his time on the barge and that a large part of his job was to act as cargo stower, lookout, line handler and occasional pilot, the court held that he had presented sufficient evidence to allow a jury to address this issue of material fact. *Id.*

Thus, in attempting to define "substantial connection," the Ninth Circuit used the phrases "inherently vessel-related" and "primarily sea-based." Employer contends the Ninth Circuit improperly created additional criteria, beyond those set forth by the Supreme Court, which the administrative law judge applied, when the inquiry should have stopped once the administrative law judge found that claimant's duties "take him to sea." We reject this assertion. The Supreme Court, in its decision in *Chandris*,

specifically stated that "[s]eaman status is not coextensive with seamen's risks." *Chandris*, 515 U.S. at 361. The Fifth Circuit interpreted this statement to mean that exposure to the perils of the sea, alone, is not dispositive of seaman status.[4] *St. Romain v. Industrial Fabrication & Repair Service, Inc.*, 203 F.3d 376 (5th Cir.), *cert. denied*, 531 U.S. 816 (2000) (quoting *Chandris*, 515 U.S. at 361). Indeed, this interpretation is supported by those cases holding that a land-based employee does not become a seaman merely by virtue of his work on a vessel. *Becker v. Tidewater, Inc. et al.*, 335 F.3d 376, 393 (5th Cir. 2003) (land-based summer intern assigned to temporarily crew a vessel is not a seaman); *St. Romain*, 203 F.3d at 380 (employee who decommissioned oil wells under offshore platforms, who occasionally worked from lifeboats, not a seaman); *Cabral*, 128 F.3d at 1293, 32 BRBS at 44(CRT) (crane operator working on barge not a seaman).

As the inquiry must naturally proceed beyond whether claimant was "taken to sea," the administrative law judge needed some basis for determining whether a claimant's connection to a vessel is "substantial." Consequently, he looked to the Ninth Circuit for guidance and found helpful language in *Cabral* and *Delange*. Whether the Ninth Circuit rephrased the Supreme Court paradigm or created additional measures for assessing whether a claimant has a substantial connection to a vessel in navigation is a question for the Ninth Circuit and not the Board. We need only address whether the administrative law judge rationally relied upon that language to ascertain whether claimant's connection to employer's fleet was substantial. In assessing whether claimant's duties were "sea-based" or "vessel-related," the administrative law judge determined that the bulk of claimant's job required him to perform land-based loading, unloading, storing and disposing of items transported by employer's vessels. Decision and Order at 6. As this work is performed on land, the administrative law judge rationally concluded it was not "sea-based." Moreover, the administrative law judge found that claimant did not sleep on the vessels, was more often assigned to land jobs because of his skills, and did not get paid per vessel trip but was a regular hourly employee. *Id.* Thus, in ascertaining whether claimant's connection to employer's fleet was substantial in nature, it was rational for the administrative law judge to rely on Ninth Circuit language and to conclude that the connection was not substantial in nature. *See Cabral*, 128 F.3d at 1293, 32 BRBS at 44(CRT); *see generally Becker*, 335 F.3d at 391-392; *Heise*, 79 F.3d at 907; *McCaskie*, 34 BRBS at 11; *Smith*, 30 BRBS at 89.

[4]The fact that an employee's duties do not literally carry him out to sea does not dispositively deprive him of seaman status. *In re: Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001) (employee permanently assigned and substantially connected to a vessel on the Mississippi River is Jones Act seaman).

The Ninth Circuit has held that if the facts of a case are sufficient to present the question of an employee's seaman status to the jury, then the jury, as fact-finder, must be given an opportunity to decide the question and a summary judgment ruling cannot stand. *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385 (9th Cir. 1990), *aff'd*, 502 U.S. 81, 26 BRBS 44(CRT) (1991). In *Gizoni*, the Ninth Circuit overturned the district court's summary judgment and held that there were questions of fact for the jury to answer, such as whether floating platforms were vessels in navigation, whether Gizoni's relationship with those platforms was permanent, and whether he aided in their navigation. *Gizoni*, 909 F.2d at 388-389 (decided before *Wilander*). The Supreme Court affirmed the holding, agreeing that there were disputed facts on these issues which prohibited a summary judgment. Specifically, the Court stated: "If 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." *Gizoni*, 502 U.S. at 92, 26 BRBS at 49(CRT) (quoting *Wilander*, 498 U.S. at 356, 26 BRBS at 84(CRT)).

In this case, claimant's duties incorporated stereotypical tasks of both longshoremen and seamen. After acknowledging the merits of both claimant's and employer's positions, the fact-finder, here the administrative law judge, listed and weighed factors he found supportive of each side, ultimately giving greater weight to the facts supporting claimant's status as a longshoreman. 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. As this is a case where reasonable minds, applying the proper law, could disagree on the outcome, we cannot, as a matter of law, hold that it was unreasonable for the administrative law judge to conclude that claimant was a longshoreman and not a member of a crew. The administrative law judge's resolution controls, and we affirm his finding that claimant is covered by the Act. *McCaskie*, 34 BRBS at 11-12; *Wilson*, 30 BRBS at 202-203; *Smith*, 30 BRBS at 89; *Griffin*, 25 BRBS at 201.

Accordingly, the administrative law judge's Decision and Order 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

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BETTY JEAN HALL
Administrative Appeals Judge