BRB No. 04-0302

GILBERT J. GOLDMAN, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HALLIBURTON ENERGY SERVICES	)	DATE ISSUED:Sept. 28, 2004
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision and the Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joseph L. Waitz (Waitz & Downer), Houma, Louisiana, for claimant.

William J. Sommers, Jr. (Duncan, Courington & Rydberg, L.L.C.), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer's Motion for Summary Decision and the Decision on Motion for Reconsideration (2003-LHC-1824) of Administrative Law Judge C. Richard Avery 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).

This case came before the administrative law judge on cross-motions for summary decision on the issue of whether claimant was a maritime employee pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3). Claimant was injured on March 23, 2001, while employed by employer as a "mud engineer;" this work was done in connection with employer's offshore oil and gas exploration activities. On the date of injury, claimant was working aboard the Falcon Inland Barge 63 in state waters. The barge is partially submergible, and is intentionally sunk to the "ocean" floor as part of the exploration process. The barge is not affixed to the seabed, but is sunk in mud. Part of the vessel remains above the water. Claimant was injured when the barge capsized as it was being refloated from the seabed; the barge is refloated when it is moved for exploration of another area. Claimant had worked on this barge for 1½ years prior to his injury. Employer contended that claimant is precluded from recovery under the Longshore Act on alternate grounds: (1) if the barge is not a fixed structure, claimant is excluded from coverage as a member of the barge's crew, 33 U.S.C. §902(3)(G); or (2) if the barge is a fixed structure, claimant is limited to a recovery under the Louisiana workers' compensation statute because he is not a "maritime employee" pursuant to Section 2(3). Claimant contended he is entitled to judgment under the Longshore Act as a matter of law because employer voluntarily paid benefits under the Act and intervened in claimant's third-party suit to recover benefits paid. Claimant also contended that employer conceded claimant's status as a longshoreman by virtue of its LS-202 form, first report of injury.

In denying claimant's motion for summary decision, the administrative law judge found that employer is not estopped from asserting a coverage defense. The administrative law judge granted employer's motion for summary decision, finding that claimant's employment as a mud engineer is not maritime in nature as it is done in furtherance of oil and gas exploration. The administrative law judge did not cite any cases in his decision. The administrative law judge denied claimant's subsequent motion for reconsideration.

On appeal, claimant contends he is covered by the Act because his injury occurred on navigable waters in the course of his employment, pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). Claimant also contends that employer is estopped from contending claimant is not covered under the Act. Employer responds that the administrative law judge's decision should be affirmed, because, pursuant to *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), claimant was not engaged in maritime employment.[1] Employer alternatively

[1] In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), the Supreme Court held that an oil production worker is not a "maritime employee" pursuant to Section 2(3) of the Act if he was injured on a fixed platform in state waters.

contends that claimant is excluded from coverage as a member of the crew of the Falcon Barge 63.

We first reject claimant's contention that employer is estopped from contesting coverage under the Act by virtue of the forms it filed and benefits it paid. Employer checked the box on its first report of injury form indicating that the injury was under the Longshore Act and that the injury occurred aboard a vessel or over navigable waters. This is not a legally binding admission of coverage, as employer is required to file this form in every case involving a time-lost injury. 33 U.S.C. §930(a). Moreover, employer is free to oppose a claim while voluntarily paying benefits.[2] *See generally Mellin v. Marine World-Wide Services*, 32 BRBS 271 (1998), *aff'd mem.*, No. 00-2463 (4th Cir. Aug. 14, 2001); 33 U.S.C. §914.

Claimant next contends that he is covered under the Act pursuant to the Supreme Court's decision in *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), wherein the Supreme Court held that a claimant who is injured on actual navigable waters while in the course of his employment on those waters is a maritime employee under Section 2(3) unless he is specifically excluded from coverage by another statutory provision. *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT); *see e.g., Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1998); *Center v. R & D Watson, Inc.*, 25 BRBS 137 (1991). In *Perini*, the Court, after addressing the legislative history of the 1972 Amendments to the Act, stated:

> There is nothing in these comments, or anywhere else in the legislative reports, to suggest, as Perini claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered.

Perini, 459 U.S. at 318-319, 15 BRBS at 76(CRT). Thus, if claimant was injured on navigable waters in the course of his employment, claimant is not required to also establish that he performed duties related to loading, unloading, building or repairing a vessel in order to be covered by Section 2(3). *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*); *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 24 BRBS 81(CRT) (5th Cir. 1991). In *Bienvenu*, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, held that a worker injured upon

[2] Given our resolution of this issue, it is immaterial whether employer was paying benefits to claimant pursuant to the state or federal statute.

navigable waters in the course of employment "meets the status test only if his presence on the water at the time of injury was neither transient nor fortuitous." *Bienvenu*, 164 F.3d at 908, 32 BRBS at 223(CRT).

The purpose of the summary decision mechanism is to dispose of cases in which there is no genuine dispute as to any material facts. *See, e.g., Hall v. Newport News Shipbuilding & Dry Dock Co.,* 24 BRBS 1 (1990); 29 C.F.R. §18.40. Neither party contends that there are issues of fact to be resolved; each contends it is entitled to judgment as a matter of law. Therefore, we may rely on the facts asserted in the parties' pleadings to the administrative law judge to address the legal issues presented in this appeal. It is clear from the facts asserted that claimant was not "transiently and/or fortuitously" on the water at the time of his injury. The barge had been claimant's usual place of employment for one and one-half years prior to the injury. Thus, the *Bienvenu* caveat to the holding in *Perini* is not applicable as claimant was not transiently or fortuitously on navigable waters. *See Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003); *see also Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003). Moreover, in an attempt to have the administrative law judge find that claimant was a "member of a crew," employer asserted that the Falcon Barge 63 is a "vessel" within the meaning of the Jones Act. While "vessel" status under the Jones Act is not necessary for a claimant on a floating structure to be upon on navigable waters, *see Morganti,* 37 BRBS at 130, such status does establish that claimant was not injured on a fixed platform; moreover, a fixed platform must be permanently affixed to the ocean floor. *Id.* at 131-132. Thus, contrary to employer's contention, as claimant was not on a fixed platform, coverage under the Act is not precluded pursuant to *Herb's Welding*, and the administrative law judge erred in focusing on claimant's job duties as a mud engineer, as separate findings regarding the maritime nature of claimant's work are not required for coverage where claimant is injured on navigable waters. *Bienvenu*, 164 F.3d at 906-907, 32 BRBS at 221-222(CRT). If Falcon Barge 63, the site of claimant's injury, was in navigable waters, the Act's coverage provisions are satisfied pursuant to *Perini*.

In an affidavit attached to claimant's motion in opposition to employer's motion for summary decision, claimant averred that the barge was in the Gulf of Mexico in state waters at the time of injury. *See* Cl.'s Affidavit dated Nov. 12, 2003; *see also* Cl.'s LS-18 pre-hearing statement. This is consistent with claimant's deposition testimony that the barge was sunk to the "ocean" floor. Dep. at 6. The Gulf of Mexico is a navigable body of water. *See generally Ward v. Director, OWCP,* 684 F.2d 1114, 15 BRBS 7(CRT) (5th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983); *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 14 BRBS 1013 (5th Cir. 1982) (*en banc*), *cert. denied,* 459 U.S. 1170 (1983). In the absence of any contrary facts posited by employer, we hold that the barge was on navigable waters. Thus, as claimant was injured on navigable waters in the course of his employment on those waters he is covered under the Act pursuant to *Perini* unless he is excluded by another provision of the Act. *Walker v. PCL*

Hardaway/Interbeton, 34 BRBS 176 (2000); *Dobey v. Johnson Controls,* 33 BRBS 63 (1999).

We next address employer's contention, raised in its response brief, that claimant is excluded as a member of a crew, as it provides an alternative method of affirming the administrative law judge's decision.[3] *See Dalle-Tezze v. Director, OWCP,* 814 F.2d 129 (3d Cir. 1987); *Reed v. Bath Iron Works Corp.,* 38 BRBS 1 (2004); *Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 283, *modifying in part,* 32 BRBS 118 (1998). 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." 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. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). "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." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991).

We remand this case to the administrative law judge to address in the first instance the issue of claimant's status as a member of a crew, as additional findings of fact are required.[4] *See Ducote v. V. Keeler & Co., Inc.*, 953 F.2d 1000 (5th Cir. 1992); *see generally Lacy v. Southern California Ship Services,* 38 BRBS 12 (2004). The administrative law judge must determine if claimant had a substantial connection to a vessel in navigation and contributed to the vessel's operation, in accordance with applicable law. *See, e.g., Roberts v. Cardinal Services, Inc.,* 266 F.3d 368 (5th Cir. 2001), *cert. denied,* 535 U.S. 954 (2002); *In Re Endeavor Marine, Inc.,* 234 F.3d 287 (5th Cir. 2000); *Fields v. Pool Offshore, Inc*., 182 F.3d 353, 33 BRBS 106(CRT) (5th Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000); *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998).

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision and the Decision on Motion for Reconsideration denying benefits are vacated. We hold that as claimant was injured on actual navigable waters in the course of his employment, he is covered by Section 2(3) of the Act unless excluded under Section 2(3)(G). The case is remanded for the

[3] Employer did not contend that any other of the Act's exclusions from coverage applies in this case.

[4] If necessary, the administrative law judge may hold a hearing or otherwise obtain additional evidence from the parties.

administrative law judge to address whether claimant is excluded from coverage as a member of crew and any issues concerning the merits of the claim, if necessary.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge