BRB No. 91-1242

BARBARA J. BUNDENS (Widow of HOWARD E. BUNDENS) Claimant-Respondent v. J.E. BRENNEMAN COMPANY and TRAVELERS INSURANCE COMPANY Employer/Carrier- Petitioners	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Upon Remand from the Benefits Review Board Granting Benefits, the Decision on Motion for Reconsideration and Petition for Further Consideration, and the Decision and Order Denying Supplemental Petition Following Denial Upon Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Morris M. Shuster and William D. Marvin (Shuster & Marvin), Bala Cynwyd, Pennsylvania, for claimant.

E. Alfred Smith and Gabriel D. Cieri (Krusen, Evans & Byrne), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Upon Remand from the Benefits Review Board Granting Benefits, the Decision on Motion for Reconsideration and Petition for Further Consideration, and the Decision and Order Denying Supplemental Petition Following Denial Upon Reconsideration (84-LHC-3071) of Administrative Law Judge Ainsworth H. Brown 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 Longshore 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).

This case is before the Board for the second time. On August 29, 1978, claimant's husband

(decedent), a diver and dock-builder for employer, was killed when he was struck by a line he was pulling to secure a barge. The parties stipulated that the barge on which the accident occurred was a vessel. On July 2, 1981, claimant brought an action under the Jones Act, 48 U.S.C. §688, against employer and in tort (negligence and strict liability) against several other third parties in federal court in Pennsylvania. A settlement in the amount of one million dollars was agreed upon by the parties and approved by the court on July 26, 1983. Claimant also sought benefits under the Longshore Act.

In the original Decision and Order, Administrative Law Judge Freeman C. Murray, found that the weight of the evidence supported a finding that decedent was a seaman or member of a crew and therefore not eligible for benefits under the Longshore Act. The administrative law judge thus found it unnecessary to determine whether the tort settlement extinguished the right of claimant and her son to obtain compensation under the Longshore Act.

On appeal, the Board vacated the administrative law judge's finding that claimant was on board the vessel primarily to aid in navigation and, thus, reversed the administrative law judge's finding that decedent was not covered by the Longshore Act. *See Bundens v. J.E. Brenneman Co.*, BRB No. 86-404 (Sept. 28, 1989)(unpublished). The Board remanded the case for the administrative law judge to reconsider whether decedent's duties, which included pier repair, were duties covered under the Longshore Act. The Board also instructed the administrative law judge that if he should determine on remand that claimant is entitled to benefits under the Longshore Act, he must consider whether employer is entitled to a credit for its payments under the tort settlement agreement pursuant to Section 3(e), 33 U.S.C. §903(e)(1988).

On remand, the case was assigned to Administrative Law Judge Ainsworth H. Brown as Administrative Law Judge Freeman C. Murray was no longer available. Judge Brown found that claimant satisfied the situs requirement of the Longshore Act as he was injured on navigable waters. Decision and Order at 3. He found that decedent's duties, which included diving, dock-building and pier repair, satisfied the status requirement of Section 2(3), 33 U.S.C. §902(3). Decision and Order at 4. Thus, the administrative law judge concluded that as decedent was a covered employee, claimant, his widow, was entitled to death benefits under the Longshore Act. Finally, the administrative law judge found that because the payment made to claimant in her tort suit was made in settlement of the Section 5(b), 33 U.S.C. §905(b), negligence claim against the vessel rather than in settlement of the Jones Act claim, employer was not entitled to a credit under Section 3(e).

In a Decision on Motion for Reconsideration and Petition for Further Consideration, the administrative law judge denied employer's motion for reconsideration and awarded claimant benefits based on an average weekly wage of $552.04, reimbursement for funeral expenses, interest, and a Section 14(e), 33 U.S.C. §914(e), penalty. In a Decision and Order Denying Supplemental Petition Following Denial Upon Reconsideration, the administrative law judge noted that although it is no longer necessary that an employee "aid in navigation" to be considered a seaman under *McDermott International, Inc. v. Wilander*, U.S. , 111 S.Ct. 807, 26 BRBS 75 (CRT)(1991), and this finding was critical to the Board's overturning of Judge Murray's finding of seaman status,

decedent was not a member of a crew and was thus covered under the Longshore Act because his primary duties related to construction work as a dock-builder and the barge on which he was injured was not "in navigation."

On appeal, employer contends that the administrative law judge erred in finding that decedent was a covered employee under the Longshore Act. In addition, employer contends that the administrative law judge erred in denying it a credit pursuant to Section 3(e) for the third-party settlement. Finally, employer contends that because claimant failed to obtain its compensation carrier's prior written approval of the third-party settlement, claimant forfeited her right to further benefits pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g). Claimant responds, urging that the administrative law judge's determination that she is entitled to benefits under the Longshore Act be affirmed.

Initially, we reject employer's contention that the administrative law judge erred in finding that decedent was a longshoreman covered under the Longshore Act rather than a seaman covered under the Jones Act. Employer argues that since decedent was killed while performing a task directly related to the ship's work and since it is no longer necessary for a worker to aid in navigation to be considered a member of the crew, the administrative law judge erred in finding coverage under the Longshore Act, since Section 2(3) of the Longshore Act explicitly excludes from its coverage "a master or member of a crew of any vessel." 33 U.S.C. §902(3). The United States Supreme Court has held that the Longshore Act and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is the same as a "master or member of a crew of any vessel" under the Longshore Act. *Wilander*, U.S. , 111 S.Ct. at 807, 26 BRBS at 75 (CRT). The issue of whether a worker is a member of a crew is primarily a question of fact, and the Board will defer to the administrative law judge's determination of crew member status if it has a reasonable basis. *Thompson v. Potashnik Construction*, 21 BRBS 59 (1988), *on recon.*, 21 BRBS 63 (1988).

An employee is a member of a crew if: (1) he was permanently assigned or performed a substantial part of his work on a vessel or fleet of vessels; and (2) his duties contributed to the vessel's function or operation. *See Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992); *Griffin v. T. Smith & Sons, Inc.*, 25 BRBS 196 (1992). Furthermore, the Board has held that the two-part test is not to be applied mechanically, but rather is to be used as a guide to determine whether the total circumstances of a claimant's employment could reasonably support the conclusion that claimant is a member of a crew. *Perrin*, 26 BRBS at 78; *Griffin*, 25 BRBS at 200. 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*, U.S. , 111 S.Ct. at 813, 26 BRBS at 83 (CRT).

In the present case, two of employer's superintendents testified that although decedent was hired primarily as a diver, he performed dock-builder duties most of the time. As a dock-builder, he performed mostly construction work and occasionally performed some demolition and salvage work. As a diver, decedent performed salvage and repair work and some inspection work, and he did his diving off a boat or barge which maintained his life support system. Claimant testified that decedent kept his diving equipment at home, that he would commute to work every day and receive his assignments on shore, and that he never ate or slept on the vessel. Tr. at 126, 143.[1] His work was performed on piers and docks as well as floating barges and if he finished his assignment as a diver, he would be moved elsewhere as needed.[2] Moreover, during the last 3 years of his employment, decedent was a member of the Wharf and Dockbuilders and Pile Drivers Union and spent one-third of his time diving and two-thirds of his time dock-building.

In his Decision and Order Upon Remand, after consideration of the aforementioned factors, the administrative law judge found that decedent's job on the date of his death was as a wharf and dock-builder. In so concluding, the administrative law judge noted that on the date of the accident the barge *Conqueror* was being used to remove concrete from the mooring dolphin. Considering claimant's employment as a whole, the administrative law judge determined that as decedent's duties included diving, dockbuilding and pier repair, he was a "harbor worker" covered under the Act. In his Decision and Order Denying Supplemental Petition following reconsideration, the administrative law judge rejected employer's argument that decedent was a seaman because he was performing the work of the barge *Conqueror* at the time of his injury. The administrative law judge found that decedent was engaged in the traditional longshore activity of repairing a dock or a pier at the time of his death, and that although he maintained some connection with vessels, and with the *Conqueror* in particular, his primary duties were related to construction work as a dock-builder.

The administrative law judge's determination that decedent was not a seaman in the instant case is reasonable, supported by the evidence in record, and in accordance with law. Based on the testimony of claimant and decedent's superintendent, the administrative law judge rationally concluded that although decedent was sometimes called upon to perform acts of seamanship on the barge such as tying the lines, these ancillary duties were not sufficient to confer seaman status. Because his primary work duties related to construction work, the administrative law judge properly determined that he was a dock builder, *i.e.*, a "harbor worker," covered under Section 2(3) of the Act. *See Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307 (5th Cir. 1984). The facts that decedent did not eat or sleep on the vessel, that he returned home after his shift, and that he received his assignments on shore also weigh against a finding of seaman status. *See also South Chicago Coal & Dock Co. v. Basset*, 309 U.S. 251 (1941); *Fazio v. Lykes Bros. Steamship Co., Inc.*, 567 F.2d 301 (5th Cir. 1978); *see also Griffin*, 25 BRBS at 201.

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[1]When decedent worked on a job away from home, he would stay overnight in a motel. Tr. at 143.

[2]Decedent's former supervisor testified that the barge *Conqueror* was only used on special occasions for heavy lifting. Tr. at 148.

Moreover, the fact that decedent's dock building duties remained the same whether he was working on land or on the barges, and that the barges were used only to repair structures located in the middle of the river, provide further indicia of decedent's status as a land-based harbor worker. *See Griffin*, 25 BRBS at 201; *Fematt v. Nedlloyd Lines*, 191 F. Supp. 907 (S.D. Cal 1961). Inasmuch as the administrative law judge reasonably concluded that decedent did not have the more or less permanent connection with a vessel sufficient to confer seaman status based on a fact specific inquiry and the evidence before him, his finding that decedent was not excluded from coverage under the Act is affirmed. *Southwest Marine, Inc. v. Gizoni*, U.S. , 112 S.Ct. 486 (1991), *aff'g Southwest, Inc. v. Gizoni*, 909 F.2d 385 (9th Cir. 1990). As we affirm the administrative law judge's finding that the decedent's duties were covered under the Act, we need not address employer's contention that the administrative law judge erred in finding that the barge was not "in navigation.

We agree with employer, however, that the administrative law judge erred in finding that it was not entitled to a Section 3(e) credit for the $1,000,000 which claimant received in settlement of her Jones Act claim against employer and three separate actions against five other defendants based on common law negligence and strict product liability. Section 3(e) provides a statutory credit for state workers' compensation benefits or Jones Act benefits received by employees. 33 U.S.C. §903(e). Under Section 3(e), employer is entitled to a credit for any amounts paid to an employee for the same injury, disability or death for which benefits are claimed under the Longshore Act in order to avoid double recovery. *See generally Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990). The amount of the credit is the net recovered by the employee excluding fees and costs. *See Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part, modified in part*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

The record in the present case indicates that claimant filed suit against employer in federal court pursuant to general maritime law or the Jones Act, 48 U.S.C. §688, alleging that decedent was a member of the crew of the barge *Conqueror*. Cl. Ex. 6A. Alternatively, claimant alleged that employer, as owner of the vessel, was liable in negligence under Section 5(b) of the Act. *See* Cl. Ex. H. The parties (claimant, employer and the other third party defendants) settled "all claims in excess of all sums due or to become due from Brenneman to [claimant] and her son under the LHWCA." The record contains a Motion for Approval of Settlement,[3] Cl. Ex. H; a Release Agreement, Cl. Ex. G; an Indemnity Agreement; and a Settlement Agreement and Mutual Release, Emp. Ex. 11. The Motion for Settlement noted the outstanding third-party claims, including the claim against employer under Section 5(b), and provided for the payment of $1,000,000 in settlement of all claims in excess of all sums due or to become due from Brenneman to claimant and her son under the Act,[4] of which employer was liable for $861,600 of the settlement, and $400,000 was set aside to indemnity employer against possible litigation on claimant's compensation claim.

[3]The Motion for Approval of Settlement was approved by order dated July 26, 1983.

[4]The District Court judge denied Travelers' Insurance Company's petition to intervene in the federal case as he found that Traveler's right to defend the claim under the Act in the forum provided for it remained unimpaired by the proposed settlement. Cl. Ex. I.

The administrative law judge found that as the issue of claimant's status as a seaman had not been resolved prior to settlement of the case in federal court, the money employer paid to claimant was in settlement of the Section 5(b) tort action against the vessel and not the Jones Act claim. He accordingly determined that as this was money paid under the Longshore Act, Section 3(e) did not apply. On appeal, employer contends that as the original Jones Act complaint was never amended to include a Section 5(b), 33 U.S.C. §905(b), action against employer as vessel owner, and as there is no evidence in the record to support the administrative law judge's conclusion that the money was paid to settle the Section 5(b) action, the administrative law judge erred in failing to award it a Section 3(e) credit in connection with the settlement of the Jones Act claim.

We agree with employer that the administrative law judge erred in finding that the money paid to claimant was in settlement of the Section 5(b) claim rather than the Jones Act claim. The settlement documents of record indicate that the Jones Act claim was among the claims which were being settled, but do not delineate how the settlement money was apportioned among the different claims. While the administrative law judge relied on the fact that the decedent's status as a seaman had not been adjudicated at the time of the settlement to conclude that the money had been paid in settlement of the Section 5(b) claim, his reliance on this factor is misplaced as settlements are intended to obviate the need for adjudication. Amounts received as a result of the settlement of a Jones Act claim are properly included in a Section 3(e) credit and where, as here, the record is unclear as to how the settlement amount is apportioned among the various claims being settled, employer is entitled to offset the entire net amount against its liability under the Longshore Act. *Ponder*, 24 BRBS at 56. Accordingly, we reverse the administrative law judge's determination that employer is not entitled to a Section 3(e) credit in connection with the settlement of the Jones Act claim.

We further note that even if employer were not entitled to a Section 3(e) credit, employer would still be entitled to a credit under Section 33(f) of the Act, 33 U.S.C. §933(f).[5] Section 33(f) provides a credit for employer where claimant recovers an amount in a suit against a third party. Section 33 applies where a claimant determines that a person other than employer is liable in damages on account of disability or death for which compensation is payable under the Act. Under Section 33(f), as claimant filed suit and recovered against third parties, employer is entitled to offset benefits due under the Act against the net amount of the third party recovery. *Mobley v. Bethlehem*

[5]Section 33(f), 33 U.S.C. §933(f)(1988), provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

Steel Corp., 20 BRBS 239, 245 (1988), *aff'd*, 920 F.2d. 558, 24 BRBS 49 (CRT)(9th Cir. 1990). In conclusion the administrative law judge's decision is modified to allow employer a credit for the net amount of the settlement.

Finally, employer asserts that claimant's right to benefits under the Act is barred pursuant to Section 33(g)(1), because of her failure to obtain its compensation carrier's prior written approval of the third party settlement.[6] We need not address employer's specific arguments, as the prior written approval requirement of Section 33(g)(1) does not apply where the amount of the settlement exceeds employer's liability under the Act. *Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992). In this case, the amount of benefits for the widow, who remarried, and her minor dependent son through the age of 18 and thereafter for 4 years as a student is a fixed amount, $335,753.57. Attachment to Decision and Order on Reconsideration. Since this sum is less than the net settlement recovery, Section 33(g)(1) does not apply. Under such circumstances, Section 33(g)(2) is applicable, *id.*, and it requires that employer receive notification of the third party settlement. As employer was a party in the third party settlement, the Section 33(g)(2) notification requirement was clearly satisfied in this case. Accordingly, we reject employer's argument that claimant's right to compensation under the Act is barred pursuant to Section 33(g).

Accordingly, the administrative law judge's finding that employer is not entitled to a credit for the net amount of the settlement is reversed in accordance with this opinion. In all other respects, the Decision and Order Upon Remand from the Benefits Review Board Granting Benefits, Decision on Motion for Reconsideration and Petition for Further Consideration, and Decision and Order Denying Supplemental Petition Following Denial Upon Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

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[6]Section 33(g) of the Act, 33 U.S.C. §933(g) (1988), provides:

(1) If the person entitled to compensation . . . enters into a settlement with a third person referred to in subsection (a) of this section for *an amount less than the compensation to which the person . . . would be entitled under this chapter*, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed . . . .

(2) if no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge