BRB No. 91-1319

MICHAEL T. SIMONDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PITTMAN MECHANICAL CONTRACTORS, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Robert W. McFarland (McQuire, Woods, Battle & Boothe), Norfolk, Virginia, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-1503) of Administrative Law Richard K. Malamphy awarding benefits 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).

On November 10, 1988, claimant allegedly injured his back while working for employer as a welder. Claimant was initially diagnosed by Dr. Wright, a chiropractor, as having an acute lumbosacral sprain. An MRI performed on claimant on August 27, 1989 revealed a broad central disc herniation at L4-L5 and L5-S1. Claimant subsequently underwent a laminectomy and diskectomy on November 16, 1989, which was followed by physical therapy. After his alleged injury, claimant worked for employer through January 31, 1989, and worked for other employers as a welder through July 31, 1989, when he stopped working as a welder allegedly due to back pain. Claimant worked as a cook from mid-July 1990 until November 12, 1990 but left because his hours were reduced. At the hearing, claimant indicated that he was hoping to start another job as a cook that week.

The administrative law judge found that claimant met the status requirement of Section 2(3),

33 U.S.C. §902(3), as well as the situs requirement of Section 3(a), 33 U.S.C. §903(a), and that claimant established that his injury is work-related pursuant to Section 20(a), 33 U.S.C. §920(a). The administrative law judge therefore awarded claimant benefits for temporary total disability from August 1, 1989 through July 9, 1990, and temporary partial disability benefits thereafter. 33 U.S.C. §908(b),(e). On appeal, employer contends that the administrative law judge erred in finding that claimant's employment met the status requirement of Section 2(3), erred in finding that claimant's injury is work-related, and erred in calculating claimant's average weekly wage for his periods of disability. Claimant responds, urging affirmance.

STATUS

Employer contracted with the United States Navy to construct new fuel, steam and water pipelines on Pier 12 at the Naval Operations Base in Norfolk, Virginia. Claimant worked on this project from October 1988 through most of November. The project involved removing the old pipelines, replacing them with new pipelines, and welding each section as it was laid down. Claimant's task was to weld the pipes, which were ultimately to be used to load steam, water and jet fuel onto aircraft carriers. The pipes were about six to eight inches off the ground, and were located at the bottom of a concrete trench or trough, which ran for approximately 1000 feet on both sides of the length of the pier. The welders straddled the pipes and placed a mirror underneath in order to see the place where they were to weld. Claimant, who is 6'4" tall, worked by bending over to look into the mirror. Deems Cole, superintendent of the project in November 1988, testified that steam would run through the pipelines they were laying on Pier 12, and at a certain point pass through a pressure reduction station where a valve would take it to the ship. Mr. Cole indicated that the fuel lines operated in a similar fashion. Claimant also was involved in the installation of a vault vent system which let hot air out of the transformer rooms, located underneath the pier, which supplied electrical current to the ships.

Section 2(3) of the Act provides in pertinent part:

> 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.

33 U.S.C. §902(3)(1988). In *Chesapeake & Ohio Ry. Co. v. Schwalb,* 493 U.S. 40, 23 BRBS 96 (CRT)(1989), the Supreme Court held that three railroad employees who were injured while maintaining and repairing equipment used in loading coal from rail cars onto ships were employees covered under Section 2(3) of the Act. In so holding, the Court noted that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act as they are engaged in work which is an integral part of and essential to those overall processes. *See also Hayes v. CSX Transportation, Inc.*, 985 F.2d 137 (4th Cir. 1993); *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT)(11th Cir. 1990); *Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 61

(1990).

Section 2(3) of the Act covers not only employees who are engaged in the loading or construction of ships, but also employees who are "harbor-workers." The Board has held that the term "harbor-worker" includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves, and adjacent areas used in the loading, unloading, repair or construction of ships)." *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980). *See also Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Hawkins v. Reid Associates*, 26 BRBS 8, 10-11 (1992); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86, 90 (1989); *Olson v. Healy Tibbitts Construction Co.*, 22 BRBS 221 (1989)(Brown, J., dissenting).

In *Hawkins*, 26 BRBS at 8, the Board affirmed the administrative law judge's determination that claimant, a heavy equipment operator who worked on the premises of a nuclear submarine repair facility under construction and whose specific task was to dig trenches and pull up old pipes in preparation for the laying of the utility lines or heavy pipes underground, was an employee covered under Section 2(3) of the Act. The Board found claimant covered on two grounds: 1) he was directly involved in the construction or alteration of a harbor facility, *see Stewart*, 7 BRBS at 365, and 2) he was engaged in the maintenance of shipbuilding facilities, *see Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). The Board noted that the utility work which claimant performed was a link in the process of repairing and building ships, and that the facility being built at the naval shipyard would later be used to service nuclear submarines. *Hawkins*, 26 BRBS at 11.

In this case, relying on *Schwalb*, the administrative law judge found that claimant was an employee covered under the Act because his job maintaining or repairing the pipelines was essential to the loading and unloading process. The administrative law judge noted that the pier where claimant was working was used to dock aircraft carriers and other naval vessels. The administrative law judge further noted that when tied up to the piers, the various vessels would be loaded or unloaded in preparation for or conclusion of their naval responsibilities. The administrative law judge determined that the fuel, steam and water lines which claimant was engaged in replacing were used to load fuel, steam, and water onto the naval vessels, and that the ships required these supplies to perform their assigned duties. The administrative law judge further noted that the JP-5 fuel was used for the jets that fly missions off of the aircraft carriers, and that the steam and water was used for shore power, which was essential to the vessels when they are docked at the pier. The administrative law judge found that, consequently, if the pipelines on which claimant worked were not maintained or repaired, the loading and unloading process would be seriously impaired. The administrative law judge found that as *Schwalb* encompassed the repair and maintenance of equipment essential to the loading and unloading process, the repair and maintenance of these pipelines falls within the holding in *Schwalb*.[1]

[1] The administrative law judge noted that claimant met the situs requirement of the Act in that the

In challenging the administrative law judge's finding that claimant is covered by the Act, employer contends that claimant's work does not constitute maritime employment because claimant was not employed to repair or dismantle ships and his welding duties were not "substantially linked" with loading or unloading. Employer contends that this case is distinguishable from *Schwalb* in that the pipelines are not directly involved in loading or unloading but are simply conduits by which water and fuel traveled from the base to the dock for subsequent transfer to the ship, and that the work on the pipelines could not occur if a ship were in dock and engaged in loading or unloading. Employer notes that the products carried by the pipelines, JP-5 jet fuel and steam, are not the traditional type of "cargo." Employer also contends that claimant's job as a welder is analogous to that of claimant in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985), in that the present claimant was assigned to weld pipe regardless of its location and his regularly assigned duties had no nexus with the longshore activities of loading and unloading.

We hold that the administrative law judge properly determined that claimant satisfied the status requirement under the Longshore Act. Claimant meets the status requirement of Section 2(3) because, as the administrative law judge determined, the work he was performing encompassed the repair and maintenance of equipment which was an integral part of the overall process of loading or unloading a ship. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT). Although employer argues that claimant was not actually involved in the loading process because no loading was occurring while he worked, the fact that no loading or unloading occurred is irrelevant, since the repair and alteration work which he was performing, welding pipes used to transport steam, fuel and water onto ships, was essential to the loading process. Moreover, the fact that it was steam, fuel and water which would be transported to the ships via the pipes and not "traditional cargo" does not remove claimant from coverage under the Act where, as here, these products were needed to service the vessels and further their navigational mission. *See generally Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 783 (1991).

Although employer also avers that claimant is not covered because he was a land-based employee performing welding work which was not maritime in nature, it is immaterial that the skills used by the employee are essentially non-maritime in character if the purpose of the work is maritime. *See generally White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980). Non-maritime skills applied to a maritime project are maritime for purposes of the maritime employment test of the Act. *Hullinghorst Industries v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). Furthermore, we note that, in the present case, claimant also meets the status requirement on the alternate ground that he was a harbor-worker directly involved in the construction or alteration of a pier used in the loading and unloading of ships. *Hawkins*, 26 BRBS at 10-11; *See generally Ripley v. Century Concrete Services*, 23 BRBS 336 (1990).

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pier claimant worked on is an area customarily used by an employer in loading or unloading a vessel. This finding is not challenged on appeal.

Contrary to employer's assertions, the administrative law judge properly distinguished the facts in this case from those in *Herb's Welding*, 470 U.S. at 414, 17 BRBS at 78 (CRT). Although the claimant in *Herb's Welding* was a welder, he worked on an oil drilling platform (building and replacing pipelines and doing general maintenance work on platforms) involved in the exploration, development and transmission of oil and gas from submerged lands. As the Supreme Court stated, claimant's work in *Herb's Welding* had nothing to do with the loading or unloading process, or with the maintenance of equipment used in such tasks. In contrast, claimant's work in this case, constructing, repairing and maintaining pipelines on a pier needed to carry fuel, water and steam to the vessels docked at the Naval pier was integrally related to the loading and unloading process; without these pipes the fuel, water, electricity, and steam could not be loaded onto the ships. Thus, we affirm the administrative law judge's finding that claimant meets the status requirement of Section 2(3).

CAUSATION

To establish a *prima facie* case for invocation of the Section 20(a) presumption, claimant must establish that he has sustained a harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 95 (1991). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the potential causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

Although claimant was unable to remember the exact date, he testified that his alleged injury occurred sometime in November 1988 at approximately 2 or 2:30 p.m. when he climbed out of the trough, went to stand up straight and felt pain in his lower back. Claimant testified that he told Jim Fawlkes, a co-worker, and Daryl Higgins, the foreman of his crew, that he hurt his back at that time and later mentioned his injury to Deems Cole, his superintendent.[2] Claimant also testified that because he thought he had only pulled a muscle in his back, he did not file an accident report and did not see a doctor until 2 months later when he saw Dr. Wright, a chiropractor, on January 10, 1989.

[2]Mr. Higgins testified that it was customary to file an accident report if an injured employee sought medical attention, and, in claimant's case, because claimant did not seek medical attention, he did not file an accident report.

The administrative law judge found that as claimant suffered a harm, a back injury, and that working conditions, *i.e.*, the awkward position required to perform the welding, existed which could have caused the harm, claimant was entitled to the benefit of the Section 20(a) presumption. After considering numerous arguments made by employer, the administrative law judge determined that employer had not introduced evidence sufficient to rebut the presumed causal connection and that a causal relationship between the injury and employment accordingly was established. On appeal, employer contends that the administrative law judge erred in finding that it failed to introduce evidence sufficient to establish rebuttal and that the administrative law judge's finding that claimant's injury arose out of his employment with employer is irrational and not supported by substantial evidence.

Employer essentially maintains that claimant did not sustain an injury as he alleged due to discrepancies in the testimony and the medical evidence of record. The administrative law judge specifically addressed employer's contentions in his decision and acted within his discretion in finding the alleged discrepancies regarding the date of the incident and details surrounding it insufficient to overcome the Section 20(a) presumption. The administrative law judge found the alleged discrepancies insignificant because he found that claimant initially did not realize the severity of his condition. The administrative law judge found that Mr. Higgins had first-hand knowledge that claimant sustained some type of harm incident to his employment and that Mr. Cole testified that claimant telephoned him about his back in December 1988. Moreover, the administrative law judge credited Dr. Wright's records from January 1989 which verify a link between claimant's complaints of back pain and the conditions of his employment.[3] Inasmuch as the administrative law judge acted within his discretion in evaluating the evidence, *see Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and employer has failed to establish that the credibility determinations of the administrative law judge are irrational, we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption and that claimant's injury is work-related. *See generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

[3]Employer also contends that the fact that claimant took a higher paying welding job with Marine Hydraulic after leaving employer where he worked up to 70 hours a week is inconsistent with claimant's assertion that he suffered an injury working for employer. Although the administrative law judge did not specifically address this contention, the administrative law judge did find that the fact that claimant continued working was not determinative. Further, the fact claimant sought a higher paying job after leaving employer is insufficient to rebut the Section 20(a) presumption that claimant injured his back at work.

AVERAGE WEEKLY WAGE

In his Decision and Order, the administrative law judge determined that claimant's compensation rate for the award of temporary total disability was $489.31, which he calculated by dividing claimant's stipulated annual 1988 income of $26,109.72[4] by the 35.57 weeks he actually worked to determine his average weekly wage, *i.e.*, $734.04, and then multiplying that figure by 66 2/3 percent. *See* 33 U.S.C. §§908(b), 910; Decision and Order at 23. The administrative law judge further determined that claimant was entitled to temporary partial disability benefits commencing July 9, 1990 based on the difference between his average weekly wage at the time of injury, $734.04, and his post-injury wage earning capacity of $144.83,[5] resulting in a compensation rate of $392.77 (66 and 2/3 percent of $589.21). 33 U.S.C. §§908(e), 910; Decision and Order at 23.

On appeal, employer contends that the administrative law judge erred in calculating claimant's average weekly wage for his periods of disability in that he awarded more than claimant requested in his post-hearing brief. In his post-hearing brief, claimant argued that his average weekly wage at the time of injury was $408.32, which he supposedly calculated by dividing his stipulated 1988 annual earnings of $26,190.72 by the 35 and 4/7 weeks he worked. Claimant also asserted that the compensation rate for his temporary partial disability award was $177.80, based on two-thirds of the difference between his average weekly wage of $408.32 and his demonstrated post-injury wage earning capacity of $141.63 based on his earnings at the restaurant. Employer contends that the administrative law judge is bound by the amount of relief claimant requested. In the alternative, employer contends that the administrative law judge erred in using the figure of $26,109.72 to calculate claimant's average weekly wage because it represents inflated wages inasmuch as claimant had worked on higher paying, government scale jobs in 1988, which paid $17.07 per hour, and at the end of his employment with employer in 1989, was earning only $12.50 an hour doing non-government scale work.

Employer's contentions are rejected. The administrative law judge rationally calculated claimant's average weekly wage by dividing his stipulated annual earnings in 1988 by the 35 and 4/7 weeks he worked. *See generally Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). In awarding compensation, the administrative law judge is not limited by the calculations provided in claimant's brief. Moreover, the fact that claimant's earnings reflected a government pay scale which was no longer available to claimant after his injury is not determinative, as post-injury events generally are not relevant to a determination of average weekly wage. *See Thompson v. Northwest Eviro Services, Inc.*, 26 BRBS 53, 59 (1992); 33 U.S.C. §910. In addition, since employer stipulated to claimant's annual salary in 1988, the administrative law judge acted within his discretion in holding employer bound by its stipulation. *Id*. The administrative law judge's determination of claimant's average weekly wage for his periods of temporary total and temporary partial disability is therefore affirmed.

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[4]This figure is actually $26,190.72. Decision and Order at 2. As no one raises any error due to this discrepancy, it will not be addressed.

[5]The administrative law judge obtained this figure by dividing claimant's earnings of $2,606.95 from the restaurant by 18 weeks, which yields $144.83.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge