BRB No. 93-1033

WELDON M. GREEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C.J. LANGENFELDER & SON, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of George A. Fath, Administrative Law Judge, United States Department of Labor.

Alan Hilliard Legum, Annapolis, Maryland, for claimant.

William H. Kable and James A. Johnson (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-1716) of Administrative Law Judge George A. Fath 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 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).

Claimant, a barge loader aboard employer's oyster harvesting dredge the LARUNO, suffered a work-related injury to his shoulder on August 3, 1990, when he attempted to fix a conveyor belt that had malfunctioned. This incident caused a tear in claimant's left rotator cuff which required surgery on September 25, 1990. Claimant filed a claim for benefits under the Act; additionally, claimant filed an action against employer under the Jones Act. On April 30, 1991, claimant and employer entered into a settlement of the Jones Act action for $20,888.

The only issue addressed by the administrative law judge was whether claimant was a

"member of a crew" of a vessel and therefore excluded from coverage under the Act pursuant to Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G). In his Decision and Order, the administrative law judge applied the United States Supreme Court's decision in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT)(1991), and found that claimant was permanently attached to the LARUNO, that he was involved in the performance of the ship's work, and that, therefore, claimant had an employment-related connection to the LARUNO. The administrative law judge then found that the LARUNO, which was on the navigable waters of the Chesapeake Bay at the time of claimant's injury, was engaged as an instrument of commerce and was thus "in navigation." Relying on the decision of the United States Court of Appeals for the Fourth Circuit in *Hill v. B.F. Diamond*, 311 F.2d 789 (4th Cir. 1962), which listed "dredges" as examples of "vessels" within the meaning of the Jones Act, the administrative law judge next found that the LARUNO was a "vessel" in navigation. Accordingly, the administrative law judge determined that claimant was a "member of a crew" pursuant to Section 2(3)(G) of the Act, and therefore excluded from coverage under the Act.

Claimant appeals, contending that the administrative law judge erred in determining that the LARUNO was a vessel in navigation. Specifically, claimant asserts that since the LARUNO remained moored during its six-month cycle with no navigational abilities outside of being manually pulled by mooring lines, it should have been considered a work platform, not a vessel. Additionally, claimant argues that since the LARUNO was merely a floating platform, and as such was not an instrument of transportation or commerce, it was not "in navigation." Employer responds, urging affirmance of the administrative law judge's Decision and Order. In the alternative, employer argues that even if claimant were not a member of a crew under Section 2(3)(G) of the Act, he would still be excluded from longshore coverage pursuant to Section 2(3)(E) of the Act, 33 U.S.C. §902(3)(E), which excludes aquaculture workers from coverage. *See also* 20 C.F.R. §701.301(a)(12)(iii)(E).

Section 2(3)(G) of the Act excludes from coverage "a master or member of a crew of any vessel." 33 U.S.C. §902(3)(G). In considering whether claimant is excluded from coverage under the Act as a "member of a crew" of a vessel, or a seaman,[1] the threshold issue presented by this appeal is whether the LARUNO is in fact a vessel in navigation. The United States Supreme Court has held that in determining seaman status, the key is whether the employee had an employment-related connection to the vessel; specifically, the Court stated that "[i]t 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."[2] *Wilander*, 498 U.S. at 355, 26 BRBS at 83 (CRT).

---

[1]A "seaman" under the Jones Act is defined as a "member of a crew" of a vessel as stated in the Act. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT)(1991).

[2]The Supreme Court thus adopted the United States Court of Appeals for the Fifth Circuit's two-part test for seaman status: (1) whether the employee was permanently assigned to or did a significant portion of his work on a vessel (or an identifiable fleet of vessels); and (2) whether his duties contributed to the vessel's function or operation. *See Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

Subsequent Supreme Court decisions have further defined seaman status under the Jones Act. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44 (CRT) (1991) (maritime worker not necessarily precluded from Jones Act coverage where job title fits within one of enumerated occupations covered by the Longshore Act). In *Chandris, Inc. v. Latsis*, U.S. , 115 S.Ct. 2172 (1995), the Court concluded that the inquiry under the Jones Act is fundamentally status based: land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore. In *Latsis*, the Court noted that a vessel does not cease to be "in navigation" merely because it is taken to a drydock or a shipyard to undergo repairs; the question of whether repairs are sufficiently significant so that the vessel can no longer be considered to be in navigation is a question of fact for a jury to decide. *Id.*, 115 S.Ct. at 2193.

The term "vessel in navigation" has yet to be specifically defined by the Supreme Court. Similarly, since the Court's decision in *Wilander*, the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, has not addressed this term. In the instant case, relying on the Fourth Circuit's decision in *Hill*, the administrative law judge found that the LARUNO was a vessel in navigation. In *Hill*, the Fourth Circuit stated, in *dicta*, that "[i]t is well established that many special purpose craft, such as dredges, floating derricks and barges equipped for special purposes or operations are vessels within the meaning of the Jones Act."[3] *Hill*, 311 F.2d at 791 (footnotes omitted). In support of this statement, the Fourth Circuit cited, *inter alia*, the Supreme Court's decision in *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), wherein the Court held that a handyman assigned to a dredge could be a member of the dredge's crew, and thus covered under the Jones Act. Significantly, however, the Court in *Senko* stated in a footnote that the question of whether the dredge constituted a "vessel" was not raised in any of the proceedings below, and thus, was not considered. *Id.*, 352 U.S. at 371 n.1.[4]

In view of more recent decisions of the Supreme Court and United States Courts of Appeals, the administrative law judge's summary conclusion based solely on *Hill* and *Senko* in determining that employer's dredge is a "vessel in navigation" cannot be affirmed. The development of case law subsequent to *Hill* regarding the jurisdictional status of seamen undermines a conclusory label that all dredges in all circumstances are vessels in navigation. Recent cases demonstrate that some floating structures may not be vessels but work platforms, even though they could also be termed

---

[3]The structure at issue in *Hill* was not a dredge. In that case, the plaintiffs were construction workers injured on a tubular section destined to become part of a tunnel. The Fourth Circuit ruled that the tunnel section was not a vessel in navigation within the meaning of the Jones Act.

[4]In a pre-*Wilander* decision, the Court held that a barge is a vessel within the meaning of the Act "even when it has no motive power of its own, since it is a means of transportation." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944). The Fourth Circuit cited this case in *Lewis v. Roland E. Trego & Sons*, 501 F.2d 372, 374 (4th Cir. 1974), wherein the court concluded that an employee doing a seaman's work on a vessel in navigation, in that case a barge, can recover for injuries caused by unseaworthiness, although he is not a member of a crew.

barges or other craft. Thus, in determining whether crafts were considered vessels in navigation, two federal district courts within the Fourth Circuit did not rely upon *Hill*. *Taylor v. Cooper River Constructions,* 830 F.Supp. 300 (D.S.C. 1993); *Presley v. Healy Tibbits Constr. Co.*, 646 F.Supp. 203 (D.Md. 1986). Rather, the courts looked to the decisions of other United States Courts of Appeals for guidance, specifically to those of the United States Court of Appeals for the Fifth Circuit, which has more recently addressed this issue.

In *Bernard v. Binnings Constr. Co., Inc.*, 741 F.2d 824 (5th Cir. 1984), the plaintiff was injured while working on a raft or "work punt." The Fifth Circuit affirmed the district court's ruling that the plaintiff was not a seaman, since he was not injured on a vessel within the meaning of the Jones Act. In so holding, the court considered three factors used in determining whether a floating work platform is a vessel: (1) if the structure involved was constructed and used primarily as a work platform; (2) if the structure was moored or otherwise secured at the time of the accident; and (3) if the structure was capable of movement across navigable waters in the course of normal operations, was this transportation merely incidental to its primary purpose of serving as a work platform. *Id.* at 831. The court concluded that the work punt was not designed for navigation, was not engaged in navigation, and was not actually in navigation at the time of the injury.[5] *Bernard*, 741 F.2d at 832. The Fifth Circuit recently applied the *Bernard* factors and reversed a lower court's summary decision, holding that the question of whether a spud barge was a vessel or a work platform should have been left for a jury to decide. *See Ducote v. Keeler & Co., Inc.*, 953 F.2d 1000 (5th Cir. 1992).

The Fifth Circuit's approach in *Bernard* was essentially adopted by the United States Court of Appeals for the Second Circuit in *Tonnesen v. Yonkers Contracting Co., Inc.*, No. 95-7439 (2d Cir. April 19, 1996). In *Tonnesen*, the court reversed the district court's summary decision that a stationary barge was not a "vessel in navigation." The court commented that the factors applied by the Fifth Circuit in *Bernard* were consistent with the Supreme Court's insistence on the preservation of a jury trial on reasonably disputed elements of Jones Act claims. While the Second Circuit determined that the second and third *Bernard* factors must be applied, the court disagreed with regard to the first factor, namely, the Fifth Circuit's focus on the original purpose for the structure. Rather, the court held that the first prong of the test should focus on the present purpose of the floating structure. *Tonnesen*, slip op. at 7.

In two cases arising within the Fourth Circuit, district courts applied the factors espoused in *Bernard* and *Ducote*. In *Taylor*, 830 F.Supp. at 300, a spud barge moved from place to place only with the aid of tug boats and was neither registered nor licensed with the United States Coast Guard. The district court distinguished the facts in *Ducote*, noting that in that case, the job of the spud barge called for it to be moved five miles downriver; in contrast, once the spud barge in *Taylor* was brought to the work site, it was moved by tug boat only several yards for repositioning. *Taylor*, 830

[5]The Fifth Circuit observed that the "term vessel has generally been defined broadly and, in its traditional sense, refers to structures designed or utilized for transportation of passengers, cargo or equipment from place to place across navigable waters." *Bernard*, 741 F.2d at 828-829.

F.Supp. at 303 n.8. Moreover, in holding that the spud barge was not a "vessel in navigation," the district court found that the purpose of the spud barge was not to transport people or articles of commerce, but rather, to serve as a base for constructing a bridge. *Id.* at 304. In its decision, the district court cited decisions from other circuits which found that barges used as work platforms were not "vessels in navigation" for purposes of the Jones Act. *See, e.g., DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir.)(*en banc*), *cert. denied*, U.S. , 113 S.Ct. 87 (1992); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990). In both *DiGiovanni* and *Hurst*, the circuit courts, applying Fifth Circuit law, looked to the primary purpose of the barges and whether their movement was incidental to that purpose. *See DiGiovanni*, 959 F.2d at 1123; *Hurst*, 896 F.2d at 506.

In *Presley*, 646 F.Supp. at 203, a case decided prior to *Wilander*, the district court determined that a pile driver injured while working on a barge had a cause of action under the Longshore Act, as he was not a seaman under the Jones Act. Citing *Bernard*, the court found that since the purpose of the barge was to be used as a situs for construction work and not to transport people or articles of commerce, the barge was not "in navigation."[6] *Id.* at 206.

[6]As this case was decided prior to *Wilander*, the district court also found that the injured worker was not a seaman as he did not aid in navigation. *Presley*, 646 F.Supp. at 205-206.

In the instant case, it appears uncontroverted that the function of the LARUNO was to excavate oyster shells from the bottom of the Chesapeake Bay and load them onto barges, working in six-month cycles. The record indicates that the LARUNO was moored to virtually the same position throughout the six-month period. The crew would be picked up on shore by boat at the beginning of their shift and taken to the LARUNO, then returned to shore by boat afterwards. *See* Emp. Ex. 15, Green Dep. at 38-39. While the LARUNO had a kitchen, shower and locker facilities, the crew would bring their own meals aboard, and no one slept aboard the LARUNO. *Id.* at 41-45. The LARUNO had no engine and no navigational capabilities except for pull lines; during bad weather, for example, it had to be moved by tugboat to a safe harbor. *See* Tr. at 28, 34. When the LARUNO was performing its excavating function, it was anchored to the bottom of the bay, and whenever its location needed to be shifted, it was moved along anchor lines. *Id.* at 33-34. While employer contends that the LARUNO was certified by the United States Coast Guard, the record contains no evidence as to whether the LARUNO was certified, registered or licensed with the Coast Guard.[7]

As case law developed in recent years establishes that determining whether a particular craft is a "vessel in navigation" requires analysis of factors relating to the characteristics of the craft involved, we vacate the administrative law judge's conclusion that the LARUNO was a vessel in navigation, and remand the case for further findings consistent with the approach taken by the Fifth Circuit in *Bernard* and *Ducote*, and recently utilized by the district courts in *Taylor* and *Presley*.[8] On remand, the administrative law judge must consider the totality of the evidence regarding the use of the LARUNO prior to claimant's injury, including whether it was moored or otherwise secured at the time of the injury and whether any transportation capabilities of the LARUNO were incidental to its primary purpose.

Finally, in its response to claimant's appeal, employer contends that even if claimant were not a seaman covered under the Jones Act, he would still be excluded from longshore coverage under Section 2(3)(E) of the Act, 33 U.S.C. §902(3)(E), since he is an aquaculture worker. The implementing regulations provide the following definition:

> Aquaculture workers, meaning those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including cleaning, processing or canning of fish and fish products,

[7]It is noted that the LARUNO was larger than a typical barge; it had multiple decks, a pilot house, navigational lights, and a bunk room. *See* Emp. Ex. 1.

[8]The administrative law judge's findings that claimant had a permanent attachment to the LARUNO and contributed to its mission is unchallenged on appeal. Under the standard for seaman status established by *Wilander*, if the LARUNO is found not to be a "vessel in navigation," claimant would not be a seaman, or a member of a crew, and thus would be covered by the Longshore Act.

the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species . . .

20 C.F.R. §701.301(a)(12)(iii)(E); *see generally Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160 (CRT)(4th Cir. 1991). In his Decision and Order, the administrative law judge did not address this contention, which was raised by employer in the proceedings below. On remand, if the administrative law judge finds that claimant is not excluded from coverage under Section 2(3)(G), he must address employer's contentions regarding Section 2(3)(E).

Accordingly, the Decision and Order of the administrative law judge is vacated, and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge