BRB Nos. 95-1554
and 96-0607

GARY L. WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CROWLEY MARITIME	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Denying Motion for Summary Judgment of Samuel J. Smith, Administrative Law Judge, United States Department of Labor and the Decision and Order Awarding Benefits of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Michael F. Pozzi, Seattle, Washington, for claimant.

Michael A. Barcott (Faulkner, Banfield, Doogan & Holmes), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Motion for Summary Judgment of Administrative Law Judge Samuel J. Smith and the Decision and Order Awarding Benefits of Administrative Law Judge Alfred Lindeman (92-LHC-2465) 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 if they 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, an operations manager for employer's barge and terminal operations in Portland, Oregon, suffered a work-related injury to his back on August 15, 1989, when he slipped while descending a ladder from the dock to a barge. Claimant's injury was initially diagnosed as a sacroiliac sprain and later as a disc bulge at L5-S1. Claimant was advised to discontinue his operations manager position and seek less strenuous work, which prompted claimant to stop working for employer in February 1990. At this time, employer voluntarily began paying temporary total disability benefits to claimant.

Dr. Raaf examined claimant on March 15, 1990, and opined that claimant had a mild to moderate bulging disc at L5-S1, that the condition was stationary, and that claimant had a disability rating of twenty percent loss in his lower back. In addition, Dr. Raaf imposed limitations on lifting and carrying, as well as a total preclusion on climbing and crawling. Dr. Raaf, therefore, concluded that claimant could not return to his job as an operations manager with employer.

Claimant underwent vocational analysis provided by employer and the Department of Labor (DOL). Employer's vocational counselors each concluded that claimant could perform sedentary work as a dispatcher and identified a wide range of salaries available for such jobs, from $700 to $2,300 per month. At the urging of Gary Jesky, a vocational counselor with DOL, claimant enrolled in courses, first at Clark College and then at Highline Community College, which resulted in his obtaining an Associate of Art (AA) degree in business.[1] Upon completion of his AA degree, claimant briefly sought work in the Seattle area without success, before moving back to his hometown of Vancouver, Washington. Meanwhile, employer hired another vocational rehabilitation counselor, William Skilling, who after evaluating claimant's situation, identified a number of jobs deemed suitable and available to claimant in both the Seattle and Vancouver areas.

Claimant procured employment in August 1993 with the G. Loomis Company, a manufacturer of high quality fishing rods, located twenty miles north of Vancouver. Claimant began working as a cellophane-operator and was promoted to the rod shop where, at the time of the hearing, he was earning $6.98 per hour. Employer terminated its voluntary payment of temporary total disability compensation on January 21, 1992, based upon the assessment of Dr. Burns that claimant's condition had reached "pre-injury status" as of that date. Claimant subsequently sought an extension of disability benefits.

On December 3, 1993, employer filed a motion for summary decision, asserting that claimant is excluded from coverage under the Act since claimant's employment falls within the "member of a crew" provision of Section 2(3)(G), 33 U.S.C. §902(3)(G)(1988), and/or that claimant's actions regarding a potential third-party suit preclude recovery on his claim pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g). Administrative Law Judge Samuel J. Smith bifurcated the case and held a hearing limited to the issues raised in employer's motion for summary judgment

[1] Claimant switched colleges after he moved for personal reasons from Vancouver, Washington, to Seattle, Washington. The record reflects that claimant moved to Seattle to be with his future wife after she obtained employment in that region.

on March 24, 1994. By letter dated April 5, 1994, Judge Smith notified the parties of his intent to deny employer's motion but defer writing an opinion until after a hearing on the merits of this case. Prior to holding the second hearing, the case was reassigned to Administrative Law Judge Alfred Lindeman (the administrative law judge).

In his Decision and Order, the administrative law judge initially determined that as a result of his August 1989 back injury, claimant was temporarily totally disabled from February 1, 1990 until March 15, 1990, that he was permanently totally disabled from March 15, 1990, through the date he commenced work with G. Loomis Company in August 1993, and that thereafter claimant is entitled to permanent partial disability benefits based on his actual post-injury wages.[2] 33 U.S.C. §908(c)(21), (h). The administrative law judge additionally denied employer's request for relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

In his ensuing Decision and Order Denying Motion for Summary Judgment, Judge Smith applied the United States Supreme Court's decisions in *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337, 26 BRBS 75 (CRT) (1991), and *Chandris, Inc. v. Latsis*, 115 U.S. 2172 (1995), and found that although claimant's work for employer contributed to the function of employer's barges, claimant was not a "seaman" under the Jones Act. Additionally, Judge Smith rejected employer's contention that the instant claim should be denied through the operation of Section 33(g). Consequently, employer's motion for summary judgment was denied.

Employer filed appeals of the administrative law judge's Decision and Order Awarding Benefits, his Supplemental Decision and Order Awarding Attorney's Fees and Judge Smith's Decision and Order Denying Motion for Summary Judgment. Claimant filed a cross-appeal of the administrative law judge's Decision and Order Awarding Benefits. On February 15, 1996, the Board issued an Order acknowledging the parties' appeals at which time employer's appeals were consolidated. In an Order dated August 9, 1996, the Board dismissed employer's appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees as well as claimant's cross-appeal of the administrative law judge's Decision and Order Awarding Benefits, since the responsible party in each instance failed to file the requisite Petition for Review and brief. The Board further acknowledged that employer's appeal of the administrative law judge's Decision and Order Awarding Benefits, BRB No. 95-1554, and employer's appeal of Judge Smith's Decision and Order Denying Motion for Summary Judgment, BRB No. 96-0607, were fully briefed, and thus, it is those appeals which are presently before the Board.[3]

The Decision and Order Denying Motion for Summary Judgment

Employer contends that Judge Smith's findings in concluding that claimant is not excluded

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[2]The administrative law judge found that claimant's job with G. Loomis Company would have paid $252.80 per week at the time of claimant's injury in 1989.

[3]Inasmuch as employer's appeals are consolidated, the Board considers the date of the later appeal to be the operative date for purposes of the one-year period referenced in Public Law No. 104-134.

from coverage under the Act by operation of Section 2(3)(G) do not comport with the Supreme Court's decision in *Latsis*. First, employer argues that Judge Smith erred by not considering the Supreme Court's directive that, as a rule of thumb, an individual who spends more than thirty percent of his time in the service of a vessel in navigation should be considered a Jones Act seaman. Secondly, employer avers that the "perils of the sea" test, employed as the exclusive and decisive factor by Judge Smith in determining claimant's status, is not the rule laid down by the Supreme Court in *Latsis*.

Section 2(3)(G) of the Act excludes from coverage "a member of a crew of any vessel." 33 U.S.C. §902(3)(G)(1988). The terms "member of a crew" under the Longshore Act and "seaman" under the Jones Act are synonymous. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44 (CRT) (1991). In *Wilander* and *Latsis*, the Supreme Court addressed the essential requirements for seaman status. They are: 1) an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission, and 2) the employee must have a connection to a vessel in navigation that is substantial in terms of both its duration and its nature. *Latsis*, 115 S.Ct. at 2172; *Wilander*, 498 U.S. at 337, 26 BRBS at 75 (CRT). In its opinion in *Latsis*, the 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." *Latsis*, 115 S.Ct. at 2190. The Court further declared that "[t]he 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." *Latsis*, 115 S.Ct. at 2191. The United States Court of Appeals for the Ninth Circuit, which has appellate jurisdiction in the instant case, has applied the *Latsis* formula in several recent cases. *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); *Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203, 29 BRBS 129 (CRT)(9th Cir. 1995), *pet. for cert. granted*, 117 S.Ct. 36 (1996)(No. 95-1621). In *Papai*, the Ninth Circuit explicitly recognized that all of the circumstances surrounding the work performed by claimant for employer preceding (and after, if any) the accident should be considered when making a determination as to an individual's seaman/member of a crew status. *Papai*, 67 F.3d at 203, 29 BRBS at 129 (CRT).

The issue of whether a worker is a seaman/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. *Griffin v. Louisiana Insurance Guaranty Ass'n*, 25 BRBS 196 (1991). In the instant case, Judge Smith's finding that claimant was, in effect, a land-based employee, and thus, covered by the Longshore Act, is supported by substantial evidence of record and consistent with the Court's holding in *Latsis*. In addressing the relevant evidence pursuant to the standard set out in *Latsis*, Judge Smith initially found that although claimant spent seventy-five percent of his time aboard employer's barges, the barges were tied to the dock for loading during these periods.[4] Judge Smith next determined that claimant's job duties as a Cargo Operations Manager consisted of preparing for and supervising the loading of employer's barges and that claimant's duties ceased upon the completion of this task. In this respect, claimant's duties with employer are those traditionally associated with longshoremen. 33 U.S.C. §902(3); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *see generally Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995). Moreover, Judge Smith determined that claimant was a land-based employee in that he lived on shore, had a shore-based office, and except for a few occasions, in emergency situations, claimant never went to sea with the barges.[5] Thus, Judge Smith concluded that claimant was never subjected to the perils of the sea.[6] In fact, Judge Smith noted that during the voyage on the open seas, the barges were unmanned and completely under the control of the tugboat crew. Consequently, since Judge Smith examined the total circumstances of claimant's work with employer in concluding that claimant is a land-based worker and not a "seaman/member of a crew," his finding is affirmed. *Latsis*, 115 S.Ct. at 2172; *Papai*, 67 F.3d at 203, 29 BRBS at 129 (CRT). We therefore affirm Judge Smith's Decision and Order Denying Motion for Summary Judgment.

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[4]In *Latsis*, the Supreme Court acknowledged the Fifth Circuit's rule of thumb that "a worker who spends *less* than about thirty percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act [emphasis added]." *Latsis*, 115 S.Ct. at 2191. However, the Court cautioned that "seaman status is not merely a temporal concept" but rather time is only one element to be considered. *Id.* The Court specifically recognized that the thirty percent figure "serves as no more than a guideline established by years of experience," and that "departure from it will certainly be justified in appropriate cases." *Id.* Additionally, the Ninth Circuit has noted that "the duration of time aboard a vessel is not enough, standing alone, to determine status as a seaman under the Jones Act." *Boy Scouts of America v. Graham*, 76 F.3d 1045 (9th Cir. 1996). Accordingly, employer's contention that under the *Latsis* rule, claimant, who spent seventy-five percent of his time aboard employer's barges, is a seaman/member of a crew, is without merit.

[5]Claimant's presence on board in these emergency situations was very brief and occurred only in order to complete the lashing of cargo.

[6]While Judge Smith's analysis incorporates a "perils of the sea" test, he did not, as employer suggests, exclusively rely on this standard. Rather, Judge Smith rationally examined such additional factors as claimant's job duties, including the nature of his work, the duration of time claimant spent aboard the barges, as well as the location of the barges during the work.

The Decision and Order Awarding Benefits

Where, as in the instant case, it is uncontroverted that claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *see also Hairston*, 849 F.2d at 1194, 21 BRBS at 122 (CRT). In considering whether employer has established the availability of suitable alternate employment, the administrative law judge must determine whether claimant is physically capable of performing the positions identified by employer. *Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196 (1984). In this case, it is not contested that claimant obtained suitable post-injury employment at G. Loomis Company, and the administrative law judge awarded permanent partial disability base on his earnings in this job. 33 U.S.C. §908(c)(21), (h). Employer sought to establish that claimant has a higher wage-earning capacity than these earnings and introduced vocational evidence in support of its position.

Employer contends that the administrative law judge erred in calculating claimant's permanent partial disability compensation because claimant is fully capable of earning more than his current weekly wage at G. Loomis Company, as demonstrated by the positions identified in its labor market survey. First, employer argues that the administrative law judge erred by limiting the relevant geographic area for consideration of suitable alternate employment to Portland/Vancouver, and thus, improperly precluded several positions identified by employer's vocational expert in the Seattle/Tacoma area. Employer specifically maintains that while the administrative law judge correctly cited *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT)(4th Cir. 1994), as authority on this issue, he failed to explicitly consider all of the relevant factors enumerated therein.

In *See*, the United States Court of Appeals for the Fourth Circuit held that where claimant relocates following an injury, the administrative law judge should determine the relevant labor market after considering such factors as claimant's residence at the time he files for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in that community as opposed to those in his former residence and the degree of undue prejudice to employer in proving suitable alternate employment in a new location. *See*, 36 F.3d at 375, 28 BRBS at 96 (CRT).

Citing *See*, the administrative law judge determined that Portland/Vancouver is the relevant labor market because that is where claimant's 1989 injury occurred and where claimant, after a brief stay in Seattle, Washington, returned to live in 1993. The administrative law judge's finding is

supported by the evidence of record and consideration of the relevant factors. As the administrative law judge found, the injury occurred in Portland/Vancouver, but claimant relocated to Seattle, Washington. Although claimant moved to Seattle for a legitimate personal reason, to marry and reside with his fiance, who had found employment there, his stay in Seattle was brief, *i.e.,* approximately sixteen months. As such his ties to that community were limited, particularly when contrasted with Vancouver where claimant was born and raised. Moreover, claimant testified that he returned to Portland/Vancouver due to the dissolution of his marriage, his failure to obtain employment, and his financial hardship. In *See*, the Fourth Circuit found the most persuasive definition of the relevant labor market to be the "community in which [claimant] lives," which in the instant case, with the exception of claimant's brief residence in Seattle, is the Portland/Vancouver area. *See*, 36 F.3d at 375, 28 BRBS at 96 (CRT). We therefore affirm the administrative law judge's determination that the Portland/Vancouver area is the relevant labor market in the instant case.

Employer next contends that even if the Portland/Vancouver area is the relevant region, the administrative law judge applied an incorrect standard of law in finding that employer did not establish the availability of suitable alternate employment through its vocational efforts. Employer maintains that the proper standard only requires that it demonstrate the availability of suitable alternate employment and not, as the administrative law judge's decision suggests, ultimately place claimant in other employment.

Employer's contentions lack merit. Relying on the credible testimony of claimant and vocational expert Timothy Condon, who testified that claimant could not perform any of the jobs listed in employer's labor market survey, the administrative law judge rationally concluded that none of the jobs identified by employer's vocational counselor constitute suitable alternate employment because claimant did not have the requisite skills or experience, the jobs required physical activities inconsistent with claimant's limitations,[7] and/or the specific jobs were not available at the time claimant contacted the potential employers.[8] *See generally Canty v. S.E.L. Maduro*, 20 BRBS 147

[7]Claimant's physical limitations, as set out by Dr. Raaf, included a lifting and carrying restriction of ten pounds frequently, twenty-four pounds occasionally, and never more than twenty-four pounds, a limitation on pushing and pulling activities, both seated and standing, as well as bending and squatting, to occasionally, and a total restriction on crawling or climbing in a work environment.

[8]The administrative law judge specifically determined that the position as an airport specialist was not suitable alternate employment because there is no record of what that job paid in 1989 and because claimant's credible testimony establishes that at the time the prospective employer was contacted no applications were being taken. The administrative law judge next rejected other jobs involving operations, inside sales and customer service, and as boarding agent, freight solicitor and forwarder because claimant's testimony, supported by vocational expert Timothy Condon, establishes that he did not have the requisite experience in either dispatching or office/computer skills, and that at the time he contacted these possible employers claimant learned either that these jobs were already filled or involved physical activities, such as boarding ships, that are inconsistent with his physical limitations.

(1992). Moreover, contrary to employer's contention, the administrative law judge's findings are consistent with the applicable standard, in that given claimant's physical restrictions, education and work experience, none of the positions set forth in employer's labor market survey is realistically available within the relevant Portland/Vancouver area. *Edwards*, 999 F.2d at 1375, 27 BRBS at 82 (CRT); *see also Hairston*, 849 F.2d at 1194, 21 BRBS at 122 (CRT). We thus affirm the administrative law judge's finding that employer has failed to establish the availability of suitable alternate employment in the Portland/Vancouver area. Consequently, the administrative law judge's award of permanent partial disability benefits based on claimant's actual post-injury earnings with G. Loomis Company is affirmed.

Accordingly, Judge Smith's Decision and Order Denying Motion for Summary Judgment and Judge Lindeman's Decision and Order Awarding Benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge