BRB No. 97-567

CHARLES FOSTER, III	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DAVISON SAND & GRAVEL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
U.S. FIDELITY AND GUARANTEE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Daniel K. Bricmont (Caroselli, Spagnolli & Beachler), Pittsburgh, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (96-LHC-916) of Administrative Law Judge Daniel L. Leland 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 began working as a welder for employer in the latter part of 1987, on the dredge Allegheny II. On February 16, 1988, claimant fell backwards six feet off of scaffolding on to some metal angles. He was treated for a back injury and underwent surgery on a lower disc at L-5/S-1. He continues treatment for pain in his lower back and right leg. Employer voluntarily paid temporary total disability benefits from the date of injury until August 8, 1994, when employer averred claimant had been released to return to work by Dr. Mitchell. On January 25, 1995, claimant filed a claim for benefits under the Act for the injury to his back.

The administrative law judge found that the dredge on which claimant was injured is a vessel in navigation, that claimant was assigned permanently to the dredge, and that all of his work entailed welding and maintenance to keep the dredge operational. Thus, the administrative law judge found that claimant is a "member of a crew" and thus is not entitled to benefits under the Longshore Act.

On appeal, claimant contends that employer should be estopped from contesting jurisdiction after it paid benefits under the Longshore Act for a number of years. In addition, claimant contends that the administrative law judge erred in finding that he had a connection to a vessel in navigation that was substantial in either its duration or nature. Finally, claimant contends that he continues to suffer a work-related disability which precludes his return to work as a welder. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Initially, we reject claimant's contention that the administrative law judge erred in finding that employer did not waive the right to contest coverage by paying benefits under the Act. We note first that employer's payments may not be viewed as a stipulation of coverage as the parties may not stipulate to coverage under the Act. *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985); *Mire v. The Mayronne Co.*, 13 BRBS 990 (1982). Moreover, there is no support for claimant's contention that employer's voluntary payments under the Act constitute a waiver of the coverage issue. Section 14 of the Act provides the system whereby the employer must make voluntary payments of compensation or give timely notice that the right to compensation is controverted. 33 U.S.C. §914. Section 14(a) provides that compensation shall be paid periodically, promptly, and directly to the employee, without an award, except where the employer controverts its liability. 33 U.S.C. §914(a); 20 C.F.R. §702.331. Section 14(d) sets out the procedure which must be followed to timely controvert the right to compensation. 33 U.S.C. §914(d). Where employer pays compensation voluntarily within 14 days after it becomes due but subsequently suspends payments, employer will be liable for additional compensation under Section 14(e) unless it files a notice of controversion within 14 days after a controversy between the parties arises. *See generally Garner v. Olin Corp.*, 11 BRBS 502 (1979); 33 U.S.C. §914(e). As the Act specifically provides for voluntary payments by employer, without requiring employer to waive its ability to contest issues in the future, we reject claimant's contention that employer waived its right to raise the issue of status under the Act, and affirm the administrative law judge's finding to this effect.

Claimant also contends that the administrative law judge erred in finding that he was a seaman, and thus excluded from coverage under the Longshore Act. 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). 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. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT)(1991)*; see also Chandris v. Latsis*, 515 U.S. 347 (1995). 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 Harbor Tug & Barge Co. v. Papai,* 117 S.Ct. 1535, 31 BRBS 34 (CRT)(1997); *Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992); *Griffin v. T. Smith & Sons, Inc.*, 25 BRBS 196 (1992). "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." *Wilander*, 498 U.S. at 354, 26 BRBS at 83 (CRT). The employee must have a connection to a vessel that is substantial in terms of both its nature and duration in order to separate sea-based workers entitled to coverage under the Jones Act from land-based workers with only a transitory or sporadic connection to a vessel in navigation. *Chandris,* 515 U.S. at 368; *see also Smith v. Alter Barge Line, Inc.,* 30 BRBS 87 (1996).

There is no contention that the Allegheny II is not a vessel.[1] There also is no contention that claimant was not permanently assigned to the Allegheny II.[2] Rather, claimant contends that he lacked a connection to a vessel in navigation that was "substantial in terms of both its duration and its nature," citing *Chandris*. Claimant's premise is that because the Allegheny II was docked during the entirety of his employment, he was not exposed to the "perils of the sea," and thus was a land-based worker entitled to coverage under the Act. The administrative law judge found that "claimant was assigned

[1]Employer's safety manager, George Hospodar, described the dredge as a complete sand and gravel processing plant on a barge, and stated that the function of the vessel was to dredge sand and gravel from the river bottom along the Allegheny River. Dep. at 5, 13. Mr. Hospodar also testified that while the Allegheny II is in the landing the crew worked only one shift, during daylight hours, but when the dredge was out in the river, the maintenance crew worked three shifts in order to maintain the dredge at all hours. Dep. at 15-16. The record does not indicate whether the crew slept on the dredge, or where they went between shifts.

[2]Claimant's duties as a welder included repairing whatever needed repairing, and required him to lift and carry steel plates weighing one hundred pounds or more, and to carry acetylene oxygen bottles of up to one hundred pounds up steps or where the supplies were needed. Tr. at 14. Although claimant's duties may be similar to that of a ship repairman, this does not preclude the administrative law judge from finding that claimant is a member of a crew. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44 (CRT) (1991).

permanently to the Allegheny II and that all of his work entailed welding and maintenance on the dredge." Decision and Order at 7. He also found that claimant's job would have required him to perform the same maintenance while the vessel was in the river or tied at the landing, and he cited law recognizing that employment on a docked vessel does not preclude one from being a member of the ship's crew. In addition, the administrative law judge found that claimant's duties contributed to the function of the vessel as his welding tasks kept the dredge operational. Thus, he concluded that claimant is a seaman excluded from the Act's coverage.

Prior to its decision in *Wilander*, the Supreme Court considered a case in which the petitioner was employed as a handyman to assist with dredging operations being conducted in the Mississippi River. *Senko v. La Cross Dredging Corp.*, 352 U.S. 370 (1957). The dredge was anchored to the shore at the time of petitioner's injury and during all the time petitioner worked for respondent. The injury occurred in a shed on land. The Supreme Court held the fact that petitioner's injury occurred on land is not material as "coverage of the Jones Act depends only on a finding that the injured was 'an employee of the vessel, engaged in the course of his employment' at the time of his injury," and stated that "there can be no doubt that a member of [the vessel's] crew would be covered by the Jones Act ... even though the ship was never in transit during [the] employment." The court concluded that "the duties of a man during a vessel's travel are relevant in determining whether he is a 'member of a crew' while the vessel is anchored." *Senko*, 352 U.S. at 372. Thus, the Court upheld a jury verdict in the employee's favor. In *Chandris*, the Supreme Court cited *Senko,* and further held that, for purposes of coverage under the Jones Act, a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside, and is "in navigation," although moored to a dock, if it remains in readiness for another voyage. *Chandris*, 515 U.S. at 374,[3] The Court noted, however, that extensive and prolonged repair work might take a ship out of navigation. *Id*. at 374.

The United States Court of Appeals for the Third Circuit, in whose jurisdiction the present case arises, held that the "in navigation" requirement of the Jones Act "is used in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of commerce or transportation on navigable waters." *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d

[3]In two other pre-*Wilander* cases, the Supreme Court held that Jones Act jurisdiction does not depend on the place of injury, but on the nature of the seaman's service, his status as a member of the vessel, his relationship to the vessel and its operation in navigable waters. *See Swanson v. Marra Bros*., *Inc.*, 328 U.S. 1, 4 (1946); *O'Donnell v. Great Lakes Dredge & Dry Dock Co.*, 318 U.S. 36 (1943).

31, 37 (1975)(this portion of the decision was not affected by *Wilander*'s elimination of the "aid in navigation" requirement). The court noted that "a vessel is 'in navigation' although moored to a pier, in a repair yard for periodic repairs, or while temporarily attached to some object." *Id.* Although, as in *Senko*, the Allegheny II had not been untied from its mooring from the beginning of claimant's employment until the time of injury, this was due to the fact that the vessel "wintered over" at the side of the river, and returned to the river in the spring. Employer's representative, George Hospodar, testified that the dredge could be returned as early as mid-March and work until the end of December. Hospodar Dep. at 6. As the foregoing discussion demonstrates, the fact that the dredge was docked at the time of injury, and for the duration of claimant's employment, does not preclude a finding that claimant was a "member of a crew."

Moreover, in the present case, it is not disputed that claimant was permanently and exclusively assigned to the vessel. The administrative law judge additionally found that claimant's duties contributed to the function of the vessel as they were essential welding tasks that kept the dredge operational. These duties were to continue after the vessel returned to the middle of the river in the spring. Hospodar Dep. at 9. Claimant did not have duties at any of employer's other land or river-based locations, and thus the administrative law judge found that claimant owed his allegiance to the Allegheny II. Claimant does not contend that the dredge would not be leaving the landing as scheduled, *i.e.*, that it was permanently moored and no longer in navigation, or that he would not accompany the dredge when it went out into the river. *Cf. Cabral v. Healy Tibbit Builders, Inc.,* 118 F.3d 1363, 31 BRBS 67 (CRT)(9th Cir. 1987)(crane operator on board barge for a single project is not seaman). Therefore, as the administrative law judge's findings of fact are supported by substantial evidence, and as he properly applied the Supreme Court's decisions in *Wilander* and *Chandris*, the administrative law judge's finding that claimant is a "seaman" under the Jones Act and thus excluded from coverage under the Longshore Act is affirmed.[4]

[4]As we affirm the administrative law judge's finding that claimant is not covered under the Longshore Act, we need not address claimant's contentions regarding the extent and nature of his disability.

Accordingly, the Decision and Order of the administrative law judge denying benefits under the Act is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge