BRB No. 99-0547

HAL R. McCASKIE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AALBORG CISERV NORFOLK, INCORPORATED	)	DATE ISSUED: Feb. 25, 2000
	)	
and	)	
	)	
THE ZENITH INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of James Guill, Administrative Law Judge, United States Department of Labor.

Marc R. Silverstein (Silverstein & Silverstein), Miami, Florida, for claimant.

H. George Kagan and Elliot B. Kula (Miller, Kagan, Rodriguez & Silver, P.A.), West Palm Beach, Florida, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-LHC-685) of Administrative Law Judge James Guill 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 worked as a boilermaker/welder with employer, which is in the business of repairing ships and powerplants. The administrative law judge found that claimant spent 80 to 90 percent of his employment working on ships in dock or at powerplants. Claimant was injured on April 16, 1994, while working on repairing the boiler aboard a ship named *The Bertha* as the ship was sailing from Boston to England. While working on a ladder with a jackhammer, claimant fell on some rough debris which pierced his shoe and ripped his heel. In addition, the brick claimant was removing fell on his left knee and ankle. Several days after the accident, the ship arrived in France, where claimant was sent to the airport to go back to Miami, Florida, for treatment. Claimant sought treatment with Dr. Simon on May 4, 1994, who diagnosed: 1) left patellafemoral chondrosis; 2) left plantar fascitis; and 3) contusion left foot. Claimant continued treatment for his left knee and heel, and sought benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant's duties as a boilermaker/welder contributed to the function of *The Bertha*, a vessel in navigation. However, the administrative law judge found that claimant did not have a substantial connection to this vessel or to an identifiable group of vessels. Thus, he concluded claimant was not a member of a crew, and is not excluded from coverage under the Act. The administrative law judge also found that claimant's condition has not reached maximum medical improvement, that he cannot return to his former employment, and that employer did not establish the availability of suitable alternate employment after June 10, 1996, following claimant's arthroscopic surgery. The administrative law judge awarded claimant temporary partial disability benefits from April 16, 1994 through June 10, 1996, during which period claimant continued to work for various employers, and continuing temporary total disability benefits from June 11, 1996.

On appeal, employer contends that the administrative law judge erred in finding that claimant is not excluded from coverage as a member of the crew of *The Bertha* or of an identifiable fleet of vessels. In addition, employer contends that the administrative law judged erred in finding that claimant has not reached maximum medical improvement, and thus in awarding temporary disability benefits.[1] Claimant responds, urging affirmance of the administrative law judge's decision.

Initially, employer contends that the administrative law judge erred in finding that claimant is covered by the Act, maintaining he is excluded as a "member of a crew." A ship repairman is one of the covered occupations enumerated in Section

[1]Employer does not contest the administrative law judge's finding that claimant is totally disabled.

2(3) of the Act, 33 U.S.C. §902(3). 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). An employee is a member of a crew if: (1) his duties contributed to the vessel's function or to the accomplishment of its mission, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991); and (2) he had a connection to a vessel in navigation or to a fleet of vessels that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *see also Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997). The second prong of this inquiry is necessary 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 and whose employment, therefore, does not regularly expose them to the perils of the sea. *Chandris*, 515 U.S. at 368; *see also Smith v. Alter Barge Line, Inc.,* 30 BRBS 87 (1996). The Supreme Court has held, however, that a claimant employed in a position enumerated in Section 2(3) is not precluded from a Jones Act recovery "[b]ecause a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission--even one used exclusively in ship repair work--that worker may qualify as a Jones Act seaman." *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81, 26 BRBS 44(CRT) (1991). Nonetheless, such an employee must "owe [his] allegiance to a vessel and not solely to a land-based employer." *Chandris*, 515 U.S. at 359, *quoting Wilander*, 498 U.S. at 347, 26 BRBS at 83 (CRT).

Claimant was sent by employer to repair the boilers on *The Bertha* while the ship was in port in Aruba. Tr. at 50, 94. *The Bertha* is a crude oil tanker. The boilers supply heat and electricity to the ship; it is necessary that the crude oil remained heated during journeys to Europe. Tr. at 105. Claimant worked on the ship for a week in Aruba, and then sailed with it to Boston, a voyage which took three days. The ship was in port in Boston for four days taking on cargo, and then sailed for England over the next two weeks. Tr. at 94-95. Claimant maintained the boilers during the journey. Claimant was injured while the vessel was in the English Channel. The vessel was in port for two days in England. Claimant remained with the vessel as it traveled to Italy, Libya and the Baltic, until he flew back to the United States after the ship docked in France. EX E at 27-28. Claimant estimated he was with the vessel for a total of two and one-half months, and that his association with the vessel would have lasted for about three months in all had he not been injured. In this regard, claimant testified that it was anticipated that his work on the boilers would be completed prior to the end of the voyage. Tr. at 97-98.

The administrative law judge concluded that claimant's duties as a boilermaker/welder contributed to the function of *The Bertha* and to the accomplishment of its mission, crediting claimant's testimony to the effect that the boiler is critical to the operation of the ship. Decision and Order at 10; Tr. at 105. This finding is uncontested on appeal. The administrative law judge then determined

that claimant did not have a substantial connection to this vessel or to a fleet of vessels. The administrative law judge rejected the contention that claimant should be considered a member of the crew merely because he was scheduled to remain with *The Bertha* until its return to the United States, stating that the Supreme Court rejected this theory of seaman status in *Chandris*. The administrative law judge found that claimant was aboard *The Bertha* only to accomplish the specific task of repairing the boilers, that he went to sea only because he happened to be working on the boilers when the ship needed to sail, and that his connection to this vessel therefore was limited in nature.

We affirm the administrative law judge's determination that claimant did not have a connection to *The Bertha* that was substantial in duration and nature, and that claimant is a land-based worker entitled to coverage under the Act. As the administrative law judge correctly stated, the Supreme Court has rejected the notion that an employee becomes a seaman merely because he is assigned to a vessel for the duration of its voyage. *Chandris*, 515 U.S. at 361-363. The Court stated that acceptance of this theory would permit workers to oscillate between Jones Act and other remedies based on the activity engaged in at the time of injury. *Id.* Thus, claimant herein is not a member of the crew merely because he was scheduled to be on *The Bertha* for the entire three months of its journey from Aruba to Europe, via Boston, and back. Moreover, the administrative law judge properly found that claimant was not usually an employee of *The Bertha*, but was a land-based worker placed on the vessel for only the duration of a specific repair job. The appropriate inquiry regarding the claimant's duties is the employee's basic job assignment at the time of injury. *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 33 BRBS 31(CRT) (3d Cir. 1998), *cert. denied,* 119 U.S. 1142 (1999). In this regard, contrary to employer's contention, the administrative law judge rationally credited claimant's hearing testimony, that he performed 80 percent of his duties for employer on ships at dock or in powerplants, rather than on ships at sea, over claimant's converse deposition testimony. Decision and Order at 3; *see generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, claimant's overall employment establishes that he is a land-based worker who owes his allegiance to his land-based employer, and not to *The Bertha*. *Wilander*, 498 U.S. at 347, 26 BRBS at 80 (CRT). Claimant's work on *The Bertha* therefore does not confer on him the status of a member of a crew.

We also affirm the administrative law judge's finding that claimant lacked a substantial connection to a fleet of vessels. Contrary to employer's contention, a fleet of vessels must be under common ownership or control. *Papai*, 520 U.S. at 560, 31 BRBS at 39(CRT). As the administrative law judge properly found, the vessels on which claimant worked in the instant case were not under common

ownership or control; their only connection was that the vessels' owners had contracted with employer for repairs, which is insufficient to establish the vessels as an "identifiable fleet." *See Papai*, 520 U.S. at 560, 31 BRBS at 39(CRT); *Johnson v. Continental Grain Co.*, 58 F.3d 1232, 1236 (8th Cir. 1995); *Nix v. Hope Contractors, Inc.*, 25 BRBS 180 (1991). While employer contends that the ships under contract with employer were "connected," it does not allege that employer had control of these ships for the duration of the contracts, or that claimant was assigned to work on more than one vessel at a time. Thus, as claimant lacked a substantial connection to a vessel or fleet of vessels, we affirm the administrative law judge's finding that claimant is not excluded from the Act's coverage as a member of a crew.

Employer also contends that the administrative law judge erred in finding that claimant's condition is not permanent, and thus, in awarding temporary total disability benefits. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1982).

In the present case, the administrative law judge accorded greatest weight to the opinion of Dr. Lazar regarding the nature and extent of claimant's disability, as he performed claimant's knee arthroscopy and continued to treat claimant following the operation. He noted that Dr. Lazar had opined that claimant reached maximum medical improvement on November 18, 1996, but also noted that Dr. Lazar later stated that claimant needs a total knee replacement and that he would benefit from such surgery. Cl. Ex. 6. The administrative law judge also observed that Dr. Berkowitz corroborated Dr. Lazar's opinion that further knee surgery was warranted. Cl. Ex. 7. The administrative law judge thus found that claimant's condition remains temporary.

We reverse the administrative law judge's finding that claimant's condition is not permanent. In the time since Dr. Lazar initially stated claimant reached maximum medical

improvement following the arthroscopy, claimant's condition has declined and his impairment ratings have increased. *See* Cl. Exs. 1, 2. Moreover, although both Dr. Lazar and Dr. Berkowitz recommended that claimant undergo knee replacement surgery, as of February 13, 1998, claimant had decided to postpone the surgery indefinitely and to continue using his cane, Cl. Ex. 7, and he testified that Dr. Berkowitz stated his chances of improvement were "fifty/fifty." Tr. at 127. As Dr. Lazar, whom the administrative law judge credited, stated that claimant's condition is not improving, *see SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57 (CRT) (5th Cir. 1996); *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986), and as surgery is not anticipated nor is its success ensured, we hold that claimant's condition is permanent. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999); *Worthington*, 18 BRBS at 202. We therefore modify the administrative law judge's award to reflect claimant's entitlement to permanent total disability benefits as of November 18, 1996, the date Dr. Lazar first stated claimant's condition reached maximum medical improvement and provided an impairment rating. *Carlisle*, 33 BRBS at 139.

Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to permanent total disability benefits as of November 18, 1996. In all other respects, the decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge