

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street - Suite 4-800  
San Francisco, CA 941103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



**Issue Date: 14 August 2008**

CASE NO.: 2007-LHC-00316

OWCP: NO.: 15-049311

*In the Matter of*

**M.B.,**

Claimant,

v.

**AMERICAN MARINE CORPORATION,**

Employer,

and

**AMERICAN HOME ASSURANCE / AIG CLAIMS SERVICES, INC.**

Carrier/Adjuster.

**Appearances:**

Patrick B. Streb, Esq.

For the Claimant

Marguerite S. Nozaki, Esq.

For the Employer/Adjuster/Carrier

**Before:**

**GERALD M. ETCHINGHAM**

Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

**INTRODUCTION**

This claim arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act" or "LHWCA"). A formal hearing was held in Honolulu, Hawaii, on November 27, 2007. The parties called witnesses, offered documentary evidence and submitted oral arguments. Claimant's exhibits ("CX") 3, pages 43-76, and CX 4-14 were admitted into evidence. Employer American Marine's ("Employer's") exhibit ("EX") 1-3, 6-9, and 12-13 were admitted into evidence. Administrative law judge exhibits ("ALJX") 1-

10 were also admitted into evidence. CX 15 and 16, and EX 19 were submitted following the formal hearing, as these deposition transcripts were unavailable for submission at the time of the hearing. TR at 279-81. On February 22, 2008, the parties submitted closing briefs, with ALJX 11 and 12 referring to the closing briefs of Claimant and Employer, respectively. These closing briefs included Claimant's post trial brief exhibits of CX 1-2, CX 3, pages 1-10, and Employer's EX A which are summaries that attempt to clarify discrepancies between the testimony and Employer's dive logs.

On May 21, 2008, Employer's new counsel joined Claimant's counsel in requesting that I hold off on issuing my decision in this case so the parties could attend mediation on June 13, 2008, to attempt to settle the matter. On June 17, 2008, Claimant's counsel informed me that a written decision was again requested, as Employer apparently decided not to participate in the mediation. On June 23, 2008, Employer submitted a motion to file a supplemental post-trial brief. On June 24, 2008, Claimant filed his opposition to Employer's motion. On June 25, 2008, I denied Employer's motion to file a supplemental post-hearing brief, finding that Employer/Carrier had not shown good cause for re-opening the record for further briefing.

#### STIPULATIONS

The parties have stipulated that:

1. At the time of the alleged injury, an employer-employee relationship existed between the Claimant and Employer. Transcript ("TR") at 15.
2. The Claimant did suffer injuries on May 31, 2006. *Id.*
3. The alleged injuries arose out of, and in the course of, the Claimant's employment. *Id.*
4. The claim was timely noticed and filed. *Id.*
5. The Employer is currently providing medical benefits under the maritime doctrine of cure. TR at 15-16.
6. The Employer is currently providing Claimant with maintenance payments of \$35 per day. TR at 17.
7. Claimant has not reached maximum medical improvement. TR at 15.
8. There are no outstanding medical bills. *Id.*
9. Claimant is not currently working and is not able to do any work at this time. *Id.*
10. This claim involves both an unscheduled claim for low back injury and a scheduled claim for the right knee injury. TR at 16.

11. The temporary total disability period sought is from June 1, 2006, through the present and continuing. *Id.*

Because there is substantial evidence in the record to support the foregoing stipulations, I accept them and find that Claimant has presented sufficient testimony and medical evidence to apply the presumption of compensability of section 920(a) of the Act to his claim of injuries to his low back and right knee on May 31, 2006.

### ISSUES FOR DETERMINATION

The following issues remain for determination:

1. Should Claimant be excluded from coverage as a “member of a crew of any vessel” under section 902(3)(G) of the Act? Stated differently, did Claimant have a substantial connection both in duration and in nature to Employer’s fleet of vessels in navigation while his duties contributed to the accomplishment of the fleet’s mission?
2. What was Claimant’s pre-injury average weekly wage as calculated under section 10(c) of the Act?

### FURTHER FACTUAL FINDINGS

#### A. Claimant’s Employment and Duties with Employer

Claimant, is a 32 year-old diver having been born on February 15, 1976. TR at 162. Claimant is certified in commercial diving and scuba. TR at 48. Claimant was hired in 1997 as a full-time diver for Seaward Marine, and as a part-time, on-call diver for Employer. TR at 44. In 1998, Claimant was hired as a full-time diver for Employer and maintained a part-time, on-call position with Seaward Marine. TR at 45. Claimant was generally offered 40 hours of work per week with Employer, and worked for Seaward Marine on an on-call, as-needed basis. TR 45-46. Claimant’s actual hours worked per week fluctuated greatly, since depending upon job availability and supervisor’s permission, Claimant could choose to forego work at Employer for work at Seaward. TR at 163.

Claimant was injured on May 31, 2006, when he was working for Employer at the Chevron off-shore mooring facility, located 1-2 miles offshore from Kapolei, Hawaii. EX 19 at 7-9.

Claimant’s job title with Employer as a diver never changed throughout his employment with Employer. TR at 163-163. However, Claimant’s work duties with Employer included a mix of diving and non-diving duties. TR at 59. Claimant testified that he spent approximately 20% of his time diving from a vessel or working on a boat off-shore, and 80% of his time working onshore, inland or on a pier. TR at 75-76.

Claimant's diving duties included working on the contract Employer held with Chevron. This contract required Employer to perform a monthly inspection of the buoys at Chevron's off-shore mooring facility and to perform a biannual replacement of the hoses at that facility. TR at 49. Claimant's duties in this respect were to inspect the buoys, hoses and pipelines, and to replace and repair damage to the buoys, hoses and dip section chain links holding the buoys to the ocean floor. *Id.* The majority of this work required Claimant to dive. TR at 50. Diving performed for the Chevron contract was done using an Employer vessel as a diving platform. TR at 38 and 189. When the water conditions were too rough either the entire mission was aborted and no diving would occur or if a dive took place, the dive would get cut short due to rough conditions and the crew would return to the shop for most of the day. TR at 97-8; CX 15 at 29-30; CX 16 at 23-4.

In addition to the Chevron contract, Claimant performed other dives off of Employer's vessels. TR at 59. Claimant also performed diving duties using the pier as a platform. TR at 56. These dives were done for the purpose of vessel inspections, repairing damage to those vessels, and inspecting the pier itself. TR at 56-57. Pier inspection also included "top side" inspections which did not require diving. TR at 57. While Claimant infrequently would inspect a vessel underwater, the majority of the inspections, about 90 percent, were done onshore from the dock because the current is too strong in the middle of the ocean to do the inspection. EX 19 at 41-42. He further estimated that approximately 10 percent of the vessel inspections were done diving from the docked boat rather than from the pier. EX 19 at 42. Claimant would also occasionally dive in non-navigable reservoirs and lagoons as part of his diving duties. TR at 57-59.

Dive logs were prepared for all dives performed, whether from a vessel or pier. CX 13 and 14. These logs indicated the names of the divers, tenders, and timekeeper, in addition to the times that the diver leaves and reaches the surface and leaves and reaches the bottom. *Id.* The logs also list the vessel the diving took place on and the captain of that vessel; when diving from the pier, the vessel is listed as "N/A" and the captain is listed as the particular pier. *Id.* and CX 16 at 61.

Claimant's non-diving duties are generally categorized as Pier 14 shop maintenance, which took place primarily at Pier 14. TR at 60 and 178. These duties included loading and off-loading barges, pier and shop clean-up, welding work, construction work and equipment maintenance. TR at 56-61; Claimant's Post-Trial CX 5. Claimant would sometimes clean and repair rudders, hatch covers, and transducer holders, which are necessary parts of a vessel. TR at 175-177. Claimant would mobilize ("MOB") and demobilize ("DEMOB") barges or vessels, which consisted of loading or off-loading gear and equipment from the vessel. TR at 60; Claimant's Post-Trial CX 5. Loading and off-loading vessels would require Claimant to operate machinery such as fork lifts, trucks and occasionally a tractor. TR at 212; Claimant's Post-Trial CX 5. Claimant would also dive off vessels not owned by Employer and travel to jobs by plane from time to time. TR at 58, 187-88. Claimant and his diving crew did so much loading and unloading work at the dock that they became known as divedores or stevedivers. TR at 262-63

Claimant's shop work included welding work, cleaning/sweeping piers, driving a forklift, maintaining the forklift, painting, rigging locker inventory or boxes, staging, repairing and cleaning diving equipment. TR at 179. Dive equipment was typically cleaned after being used on a dive and general maintenance was performed on the equipment as needed, but not necessarily in preparation for a particular dive. TR at 195; Claimant's Post-Trial CX 5. Claimant credibly testified that approximately 10-20% of his "shop maintenance" duties consisted of cleaning or repairing diving equipment. *Id*; see also Claimant's Post-Trial CX 5. Claimant's supervisor, James Santo, however, testified that 75% of Claimant's "shop maintenance" duties consisted of cleaning and repairing diving equipment or equipment related to diving. TR at 215.

To determine the distribution of Claimant's diving and non-diving work duties, Employer presented Claimant's counsel with two spreadsheets titled "[Claimant's] Work Assignments and Hours," one for January 1, 2005 through December 31, 2005, and one for January 1, 2006 through May 31, 2006. CX 11 and 12. These spreadsheets were compiled by Rusty Nall, the vice president of Employer, based solely upon the personal diving diary of Mr. Santo.<sup>1</sup> CX 15 at 5, 15. These spreadsheets listed every date worked, a description of that work and the location of that work. CX 11 and 12. The spreadsheets also separated the hours worked into one of two columns: "JA" for work that fell under the Jones Act and "WC" for work that allegedly fell under the LHWCA. CX 11, 12 and 15 at 15. Employer's spreadsheets claim that 35-36% of Claimant's work hours fell under the Jones Act and 65% of his work hours fell under the LHWCA. CX 11 at 149; CX 12 at 152.

As the spreadsheets presented by Employer were based entirely on the personal diving diary of Claimant's supervisor's work hours, Claimant's counsel altered these spreadsheets to include what Claimant believes is a more accurate distribution of his work hours to correct inaccuracies and account for dates that Mr. Santo did not work. Claimant's Post-Trial exhibit CX 3 at 1-10. Claimant's spreadsheets covered the same 1 ½ year time period presented by Employer. *Id*. Claimant compiled his data by cross-referencing the hours presented by Employer with Claimant's paystubs to determine which days and what hours he actually worked, with the dive logs, to determine which days Claimant was either diving or present on a vessel as a standby diver, and with the testimony of Claimant and Santo in depositions and at the formal hearing. *Id*. Paystubs for the following dates were missing: 2/20/2005-2/26/2005; 3/13/2005-3/19/2005; 3/27/2005-4/2/2005; 4/17/2005-4/23/2005; 7/3/2005-7/9/2005; 11/6/2005-11/12/2005. Claimant's Post-Trial exhibit CX 2. The bulk of these dates fall in the first half of 2005. *Id*. Since paystubs for these dates were missing, Claimant's exhibit retained the hours listed in Employer's original spreadsheets. ALJX 11 at 10; Claimant's Post-Trial exhibit CX 3 at 1-10.

On Claimant's spreadsheet, hours listed under the "JA" column represent those hours spent diving from a vessel and the time spent in the vessel travelling to and from the diving site. TR at 83. Claimant determined time spent diving by extrapolating that data from the diving logs, and determined time spent travelling on the vessel by calculating the approximate time it takes

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<sup>1</sup> Claimant credibly testified that he maintained a more detailed personal dive log that he kept in his locker at Employer but that when he returned to the locker after his injuries the diary was missing and the lock had been changed. TR at 55-56.

Employer's different vessels to reach the off-shore diving sites. *Id.* All other work hours were listed in the "WC" or the LHWCA column. Claimant's Post-Trial exhibit CX 3 at 1-10. Claimant contends that in 2005, 21.5% of his hours fell under the Jones Act and 78.5% fell under the LHWCA, and that in 2006, 18.9% of his hours fell under the Jones Act and 81.1% of his hours fell under LHWCA. *Id.*

Following the formal hearing, Employer filed an amended spreadsheet representing their amended distribution of Claimant's hours, taking into account information on his paystubs. EX A. Employer represented Claimant as working zero hours during those weeks that his paystubs are missing. *Id.* For their amended spreadsheet, Employer listed Claimant's hours in one of three columns: "Diving/Tending," "Other," and "N/A." *Id.* Under "Diving/Tending" Employer lists all hours Claimant worked as a diver or a tender, whether off a vessel or a pier. ALJX 12 at 10. Under "Other," Employer lists all hours spent cleaning and repairing dive equipment and hours spent MOB/DEMOB-ing a vessel. *Id.* at 11. And under "N/A," Employer lists all hours that did not fall under one of the first two columns. *Id.* For the entire 1½ year period, Employer's percentages for these columns, respectively, are as follows: 29%, 39% and 32%. *Id.*

The accuracy of data representing the distribution of Claimant's work hours is of utmost importance in this case, and both Claimant's and Employer's data is necessarily skewed by the missing paystubs. Given that the bulk of the missing paystubs are from the beginning of 2005, I find that it is proper to base the evidence of Claimant's work duties on the one year period prior to his injury, and not a 1½ year period. Consequently, more of the data can be verified by the Claimant's paystubs and thus, is more reliable. Therefore, I will evaluate the distribution of Claimant's work hours during the period from June 1, 2005 through May 31, 2006.

Adjusting Claimant's data for this one-year period results in 21.3% of his hours falling under the Jones Act column, and 78.7% of his hours falling under the WC or LHWCA column. Adjusting Employer's data for this one-year period results in 23.6% of Claimant's hours falling under the "Diving/Tender" column, 39.5% falling under the "Other" column, and 36.9% falling under the "N/A" column.

*B. Claimant's Injury and Medical Treatment*

Claimant was injured on May 31, 2006, while performing maintenance at the Chevron off-shore mooring facility. TR at 62. Claimant dove from Employer's vessel, the American Contender, for the purpose of replacing a section of chain holding a buoy to the ocean floor. *Id.* at 61. In the process of changing out that section of chain, an ocean swell lifted up the buoy, stretching out and shifting the chain so it landed on Claimant's right knee. *Id.* at 62. The sections of chain weighed well over 100 pounds. CX 4 at 77. When the chain landed on Claimant's knee, he felt pain in his back, which was compounded by the fact that the vessel had no dive ladder and thus, Claimant was pulled onboard by several men over the gunnel of the boat. TR at 63.

Claimant immediately reported the injury to his diving supervisor, Mr. Santo, via communication with the "top-side" of the vessel. TR at 62. Once brought back onboard, the vessel returned to Barge Harbor in Kapolei, Hawaii, a trip that took several hours. TR at 64.

Once in Barge Harbor, Claimant then went to Concentra Medical Center to receive initial medical treatment. *Id.* Claimant was initially prescribed Motrin and Vicodin, in addition to icing and resting his leg. CX 4 at 77-78. Claimant received medical treatment from Concentra Medical Center through June 12, 2006, including physical therapy. CX 4 at 80-87.

Claimant then began receiving medical treatment from Dr. Bernard Portner, after the doctor was recommended to him by a co-worker. TR at 66. Dr. Portner is an orthopedist who does not perform surgery. TR at 27. Dr. Portner treats Claimant's back with epidural injections, which have been relatively effective for his back pain. TR at 67; CX 5 at 93.

For Claimant's knee, Dr. Portner recommended physical therapy and an MRI, and prescribed Lodine and Vicodin for anti-inflammation and pain management, respectively. CX 5 at 89. At the end of June 2006, Dr. Portner did a knee injection on Claimant, to remove fluid and inject cortisone to relieve inflammation. *Id.* at 90. When Claimant's condition was unresponsive to this treatment, Dr. Portner referred Claimant to Dr. Niel Katz for a second opinion regarding the knee pain. *Id.* at 91.

Claimant was seen by Dr. Katz on August 2, 2006. CX 6 at 113. Dr. Katz diagnosed a contusion, a sprain at MCL, tightness and myositis of the quadriceps. *Id.* at 115. Dr. Katz recommended a long period of physical therapy to increase the range of motion before considering surgical options. *Id.* at 116. Dr. Katz did state that if Claimant failed to make progress with physical therapy, surgery should be considered. *Id.*

Claimant continued to see Dr. Portner for physical therapy. TR at 70. When this extended physical therapy was ineffective, Claimant was referred to Dr. Jay Marumoto for a consultation on his knee on March 12, 2007. CX 7 at 118. Dr. Marumoto diagnosed a patellofemoral dysfunction with an aggravated joint contracture, and recommended that Claimant be referred to Dr. Sydney Smith, who is an orthopedic sports medicine specialist with a particular interest in problems with the patellofemoral joint. CX 7 at 119.

On July 5, 2007, Dr. Sydney Smith performed surgery on Claimant's right knee. The first stage of the surgery was to perform a manipulation of the knee under anesthesia, which was ineffective. CX 8 at 127. The second stage was to scope the knee, but this did not increase the range of motion. *Id.* The last stage was to perform medial and lateral releases of the knee, which also were ineffective and did not increase the range of motion. *Id.* Dr. Smith then terminated the surgery, as he feared further manipulation would rupture the patellar tendon. *Id.* Claimant continues to see Dr. Smith for treatment of his knee and Dr. Portner for treatment of his back. TR at 67 and 70. Claimant has been unable to work since May 31, 2006, the date of his injury. CX 4 at 77-87; CX 5 at 106-112.

Claimant continues to undergo physical therapy. TR at 74. His physical therapist focuses on increasing range of motion and Claimant focuses on strength training in his personal time. *Id.* Claimant testifies that he is currently unable to run, surf, dive or do some walking. EX 19 at 45. Claimant is able to perform some household chores, swimming, and lifting weights for physical therapy. *Id.* at 45-46.

C. Claimant's Earnings and Employment History

Claimant received several different pay rates depending upon the job he performed. TR at 196. These included a flat rate for a day of travel, and hourly rates for dive pay, operator pay, tender pay, shop pay and rigger's pay. TR at 196-199. Dive pay and tender pay were further divided up into Union and non-Union pay rates. TR at 198. Claimant testified that he believed his travel rate was \$120 per day, his non-Union dive pay rate was \$30 per hour and his Union dive pay rate was between \$50-\$58 per hour. TR at 197-198. The exact value of each pay rate is not made clear in the record, although Claimant's pay stubs indicate a range of base pay to be from \$20.21 per hour to \$53.60. CX 3 at 43-76. Claimant also received considerable overtime and double-time, for which he was paid a higher rate than his base hourly rate. *Id.*

In 2005, Claimant earned a total of \$74,368.51 between his work at Employer and Seaward Marine. CX 9 at 133. In 2006, the year of his injury, Claimant earned a total of \$25,982.60 between his work at Employer and Seward Marine. CX 9 at 134. In 2006, Claimant worked from the week beginning January 1, 2006 through the date of his injuries, May 31, 2006, a total of 22 weeks. CX 3 at 43-53.

CONCLUSIONS OF LAW

A. Credibility

The findings of fact and conclusions of law which follow are based upon my observation of the appearance and demeanor of the witnesses, and upon my analysis of the entire record, including all the documentary evidence, in light of the arguments of the parties, and the provisions and holdings of the applicable statutes, regulations, and precedents. In arriving at a decision in this matter, I am entitled to determine the credibility of the witnesses, weigh the evidence, and draw my own inferences from it. *Banks v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Todd v. Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989).

1. Claimant

I observed Claimant at hearing to be very credible and forthright in his testimony about the nature and extent of his injuries, his job duties, and his rates of pay. Claimant not only testified to events that supported his position for jurisdiction under the LHWCA but also filled in some missing time entries that supported Employer's version of the facts. *See* TR at 75-161. Claimant was very believable when he testified that he also maintained a more detailed personal dive log for himself that he kept in his locker at work. TR at 55-56. He appeared earnest and honest when he described returning to his locker after his injuries only to find his dive log missing and the locks changed to his locker. TR at 55-56, 268-69. I find Claimant's pay stubs are more accurate than Employer's dive logs. CX 11 and 12; EX 6 and 7.<sup>2</sup> Claimant's testimony, pay stubs, and revised work summary (Post-Trial exhibit CX 3 at 1-10) demonstrated

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<sup>2</sup> CX 11 and 12 and EX 4 and 5 are duplicative exhibits that are used interchangeably in this decision.

errors in Employer's prepared dive and work records and the less credible testimony of Mr. Santo as discussed below.

For these reasons, I give Claimant's testimony great weight.

2. James Santo

I also observed Claimant's immediate supervisor James Santo testify at trial and found his testimony much less credible than Claimant's as the dive logs he used in this case were his own and Claimant's counsel impeached their accuracy numerous times including days when the dive logs showed Claimant working at sea when his pay stubs prove Claimant did not work either that day or at sea, dates where hours were incorrectly longer for sea work than they actually were, dates omitted from Mr. Santos dive log due to his own vacation when Claimant actually worked at the shop performing Longshore work, dates when Chevron work was aborted yet Mr. Santo's dive log indicated work went forward at sea, and other missing dates when Claimant worked on the docks. *See* TR at 75-161, 269-70. Mr. Santo's testimony was unreliable as he was unsure which jobs required diving and which ones did not and had no answer as to why there were no dive logs on days that presumably involved diving. TR at 259-62, 266-67. On numerous occasions, Mr. Santo was asked leading questions by his counsel before finally being admonished against any further leading questions. I find the use of leading questions diminished Mr. Santo's credibility even further. *See* TR at 211-12, 216, and 227-28. Mr. Santo admitted that the Employer's divers, including Claimant, did so much dock work that they had a collective nickname for themselves as divadores or stevedivers because of how much loading and discharging they did. TR at 262-63.

As a result, I give Mr. Santo's testimony little weight where it conflicts with Claimant's testimony particularly on estimates of Claimant's work at sea and in the shop cleaning diving equipment. *See* TR at 75-76, 195-96, 216, and 263.

3. Roger Nall

Employer's other witness, Roger Nall, testified at deposition in November 2007 as Employer's vice president in charge of maintaining health and safety programs but not in Claimant's chain of command. CX 15 at 5-8.

Mr. Nall testified that he prepared EX 4 and 5, Claimant's purported work assignments in 2005 and 2006, based exclusively on Mr. Santo's documents (EXs 6 and 7), Mr. Nall's familiarity with the company's business, and conversations with Mr. Santo, but not reviewing any actual dive logs. CX 15 at 16 and 23-24, 27. Mr. Nall admitted preparing EXs 4 and 5 on his own suggestion for the Carrier in this case and the insurance carrier providing Jones Act coverage to answer the jurisdictional question as to the responsible carrier. *Id.* at 12-14. He wasn't exactly sure when he prepared EXs 4 and 5 but estimated that it was approximately November 2006 in response to when the jurisdictional issue arose. *Id.* at 17-18. Mr. Nall further testified that he intended that the documents he prepared, EXs 4 and 5 would persuade the insurance carriers or me about the jurisdictional issue. *Id.* at 18.

Mr. Nall did not recall ever being on any of Employer's boats with Claimant. *Id.* at 10. He also never took any steps to determine whether or not Claimant actually worked on the same days listed in EXs 4 and 5. *Id.* at 18-19. Moreover, Mr. Nall admitted that he did not cross reference dive logs to see whether Claimant actually worked on the same jobs that Mr. Santo worked on. *Id.* at 19. Nor did Mr. Nall ever check Employer's payroll records to determine whether or not Claimant was actually working on all the days taken from Mr. Santo's own dive logs. *Id.* at 19. Mr. Nall admitted making errors in the preparation of EXs 4 and 5. *Id.* at 25-28.

Mr. Nall confirmed that when water conditions were too rough, there would be no diving or if divers went out of the boat and conditions were too rough, there might have been a short dive and an entry on the dive log with the divers being brought back to work at the shop. *Id.* at 29-30. In addition, Mr. Nall testified that after returning from a dive, the divers would do cleanup work at the Pier 14 shop if there was time left over at the end of the day. *Id.* at 30. Mr. Nall further explained that Mr. Santo's work recap (EX 6 and 7) may have omitted cleanup work at V-4 or Claimant could have gone back to the Pier 14 shop and Mr. Nall believed that he did not put in such an entry in his document for April 11, 2006. *Id.* at 30-31.

I reject Mr. Nall's testimony as untrustworthy as it is based exclusively on Mr. Santo's documents which I previously rejected as unreliable. In addition, Claimant has proven and Mr. Nall also admits that his EXs 4 and 5 contain errors and that they were prepared for use by the insurance carriers in this case rather than as an objective compilation created at or near the time of Claimant's May 31, 2006 injuries. Mr. Nall is also less credible because he lacks hands-on experience. I also find him biased for Employer because he is Employer's vice-president and Jones Act coverage costs less than LHWCA coverage for an injured worker in Claimant's circumstances.

## *B. Analysis*

### *1. The Crew Member Exclusion*

Claimant was injured on May 31, 2006 at sea while diving at the Chevron off-shore mooring facility, 1-2 miles offshore from Kapolei, Hawaii. EX 19 at 7-9. I find that at all relevant times, Employer conducted maritime work and Claimant's employment was maritime in nature. I also find that Claimant performed his work and was injured on a maritime situs, within the Act, including the navigable waters surrounding the Chevron off-shore mooring facility. As a result, I find that Claimant's May 31, 2006 injury fell within the general coverage requirements of sections 902(3) and 903(a) of the Act.

Therefore, the determinative issue in this matter is whether Claimant should be barred from coverage by the "crew member" exclusion as set forth in subsection 902(3)(G) of the Act. After weighing all the evidence and considering the arguments of the parties, I find that Employer has not met its burden in establishing the crew member exclusion.

The Jones Act and the Longshore Act are mutually exclusive such that the "Jones Act provides tort remedies to *sea*-based workers, while the [Longshore Act] provides workers' compensation to *land*-based maritime employees." *Stewart v. Dutra Construction Co.*, 543 U.S.

481, 488 (2005). The term “crew member” under the Longshore Act is synonymous with the term “seaman” under the Jones Act. *Id.* Thus, if a worker is found to be a “seaman” covered by the Jones Act, he is excluded from coverage as a “crew member” under the Longshore Act.

The determination concerning Claimant’s seaman status is fact-specific, and will depend on both “the nature of the vessel, and the employee’s precise relationship to it.” *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991). The outcome of that fact-specific inquiry turns on a two-part analysis. *Chandris v. Latsis*, 515 U.S. 347, 368 (1995). Before a claimant can be deemed a seaman, (1) his or her duties must contribute to the function of a vessel or to the accomplishment of its mission, and (2) he or she must have an employment-related connection to a vessel, or an identifiable group of vessels, that is substantial in both nature and duration. *Id.* See also *Jarrett v. Director, OWCP*, 2007 U.S. App. LEXIS 15071 \*3 (9<sup>th</sup> Cir. 2007)(Unpublished).

Employer argues that the proper test for me to apply is the three-prong test presented by the district court in *Ramos v. Universal Dredging Company*, 547 F.Supp 661 (D.Hawaii 1982). ALJX 12 at 5-9. In determining if the claimant was a “seaman,” the court in *Ramos* applied the following test: “(i) the vessel on which the claimant is employed must be in navigation, (ii) there must be a more or less permanent connection with the vessel, and (iii) the claimant must be aboard primarily to aid in navigation.” *Ramos v. Universal Dredging Company*, 547 F.Supp 661, 664 (D.Hawaii 1982). Employer further argues that this case should be read to state that seaman status is determined at the time of the accident, and not in the context of his entire employment. ALJX 12 at 7.

I find that the *Chandris* test, not the *Ramos* test, is the appropriate analysis for determining seaman status. *Chandris* is a Supreme Court decision decided over ten years after *Ramos*, a district court decision. *Chandris*, 515 U.S. 337; *Ramos*, 547 F.Supp 661. During that time, the Court further developed and refined the test for “seaman” status. See *Chandris*, 515 U.S. 347; *Wilander*, 498 U.S. 337. Furthermore, *Chandris* explicitly rejected a “voyage test” where the worker’s activities at the time of injury would be controlling; the Court accepted instead a fundamentally status-based inquiry that focuses on the context of claimant’s entire employment. 515 U.S. at 361. Accordingly, I reject Employer’s argument to apply the *Ramos* test and base my inquiry on the analysis outlined in *Chandris*. Applying this analysis, as discussed below, I conclude that Claimant was a land-based harbor worker, not a sea-based crew member.

(a) *Duties must contribute to the function or mission of a vessel*

(i) *A vessel, or an identifiable fleet of vessels, in navigation*

In *Stewart v. Dutra Construction*, the Supreme Court defined a “vessel” as “any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment.” 543 U.S. at 497. Thus, “a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside.” *Chandris*, 515 U.S. at 373. Similarly, “the ‘in navigation’ requirement is used in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel.” *Johnson v. John F. Beasley Const.*

Co., 742 F.2d 1054, 1063 (7th Cir. 1984); *see gen.* 2 Norris, *The Law of Seamen* (4th ed.) § 30:13.

Here, Claimant used 25-foot guardian whalers and various tugs owned by Employer for his off-shore diving that required a vessel for a diving platform. They were used to transport workers and equipment to the work sites, and functioned as diving platforms for off-shore diving duties. As these whalers and tugs are capable of maritime transportation, I find that the whalers and tugs that Claimant used during his employment at Employer comprised an “identifiable fleet of vessels in navigation.”

(ii) *Contribution to the function of the vessel or the accomplishment of its mission.*

The contribution requirement “is very broad” in that “[a]ll who work at sea in the service of a ship” are eligible for seaman status. *Chandris*, 515 U.S. at 368. The contribution requirement reaches “almost any workman sustaining almost any injury while employed on almost any structure that once floated or is capable of floating on navigable water.” *Offshore Co. v. Robison*, 266 F.2d 769, 771 (5th Cir. 1959).

Here, the function or mission of Employer’s vessels was to transport divers and diving equipment to the worksite and to serve as a diving platform to enable the divers to perform their duties. Claimant contributed to this mission by being transported as a passenger on the vessels to the worksite and using the vessels as a platform to dive from once at the worksite. In doing these activities, I find that Claimant contributed to the function and the accomplishment of the mission of Employer’s vessels.

Claimant therefore satisfies the first requirement of the two-part seaman test, and thus, his seaman status remains dependent on the second, or “substantial connection,” requirement.

(b) *Connection Must be Substantial in Both in Duration and Nature*

The main focus of the second prong of the seaman test is whether the employee’s duties take him or her to sea. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 555 (1997). Such a focus, the *Papai* Court noted, “will give substance to the inquiry both as to the duration and nature of the employee’s connection to the vessel and be helpful in distinguishing land-based from sea-based employees. *Id.* In *Chandris*, the Court enunciated the policy behind this test, stating: “The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.” 515 U.S. at 368.

(i) Nature

Following the Supreme Court's rulings in *Papai* and *Chandris*, the Ninth Circuit stated, "when we determine whether the nature of [a plaintiff's] connection to [the vessel] is substantial, we should focus on whether [the plaintiff's] duties were primarily sea-based activities. In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks." *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1293 (9th Cir. 1997) (citing *Papai*, 117 S. Ct. at 1540; *Chandris*, 515 U.S. at 368). Thus, the nature of Claimant's connection to the vessel or fleet depends upon two factors: whether his duties take him to the sea and whether he faces the risks and perils of the sea.

Under Ninth Circuit precedent, a worker's duties take him or her to sea if they are "inherently vessel related" or "primarily sea-based activities." *Delange v. Dutra Constr. Co.*, 183 F.3d 916, 920 (9th Cir. 1999); *Cabral*, 128 F.3d at 1293. While an employee who assists in the navigation of a vessel is more likely to be characterized as a seaman, an employee need not assist in navigation to be considered a seaman. *Wilander*, 498 U.S. 337. Furthermore, the employee's job title does not control. The Supreme Court has held that a worker whose occupation is one of those enumerated in the mutually exclusive LHWCA may nevertheless be a seaman if his or her duties satisfy the substantial connection requirement. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 88-89 (1991). Thus, the current inquiry concerns whether Claimant's job duties were sea-based or vessel-related.

Here, Claimant's diving and tending duties were inherently sea-based. They required Claimant to travel on the sea several miles offshore and to perform work duties under the sea. Claimant faced the risks and perils of the sea by performing these diving duties, as he was exposed to the open waters and had to perform his work duties a great distance below the surface, using compressed air as his only means of breathing. Accordingly, I find that Claimant's diving duties established a connection to Employer's vessels that was substantial in nature.

Claimant also performed duties consisting of cleaning and repairing diving equipment and mobilizing and demobilizing vessels. Employer argues these duties should be considered in determining Claimant's time spent as a seaman because these duties aid in the function and purpose of the ship. ALJX 12 at 11. However, Employer's argument has already been addressed by the "very broad" first prong of the *Chandris* test. The inquiry here involves the narrower second prong, which concerns whether these duties establish a connection to the vessels that is substantial in nature. As discussed above, the analysis turns on whether these duties take him to sea and whether they expose him to the risks and perils of the sea.

Claimant's duties of cleaning and repairing diving equipment were performed on land, at the shop on Pier 14. CX 11 and 12; TR 179. Claimant did not perform these duties onboard a vessel. *Id.* Performing these duties did not take Claimant to sea, rather, they were inherently land-based duties. These duties were also not vessel-related duties, as the diving equipment was not a component part of a vessel. TR 179. Rather, the diving equipment was stored at Pier 14 and loaded onto the various vessels on an as-needed basis. TR 172. Claimant's duties of

cleaning and repairing this equipment were not related to any particular vessel, but to the equipment itself. TR 179. Additionally, the cleaning and repairing duties were not done in preparation for a particular diving job or for use on a particular vessel, rather, they were done in such a manner to ensure proper maintenance of the equipment. *Id.* Additionally, Claimant was not exposed to the risks and perils of the sea by cleaning and repairing the diving equipment. He performed these duties on land, safe from the special hazards particular to seaman's work. For these reasons, I find that the nature of Claimant's duties of cleaning and repairing diving equipment did not establish a substantial connection to Employer's vessels.

Claimant's duties of mobilizing and demobilizing vessels entailed the loading and unloading of a vessel. TR at 60. Demobilizing involved taking gear off the vessel onto the pier and storing it where it needed to be stored, such as on the truck, at the shop. *Id.* Mobilizing was the reverse process, taking gear out of storage and loading the vessels. *Id.* These duties were performed on the vessel, on the pier and on land, as the equipment was either loaded from land onto the vessel, or from the vessel onto land. The vessel was docked at the pier while being loaded and unloaded, thus Claimant did not venture beyond the breakwater through the course of these duties. It cannot be said that these duties were sea-based, rather, Claimant was a land-based worker with only a "transitory or sporadic connection" to the vessels that he is loading and unloading. *Chandris*, 515 U.S. at 368. The duties of loading and unloading were not vessel-related either, as they related directly to moving equipment and goods on and off the vessel, not to the vessel itself.

Additionally, Claimant did not become a member of the crew of the ships he loaded after these duties were completed. Furthermore, the record fails to establish that because of these duties, Claimant faced "regular exposure to the perils of the sea." *Papai*, 520 U.S. at 560. Working on the pier or the docked ship may have exposed Claimant to a risk of drowning, and loading equipment may have exposed Claimant to a risk of heavy equipment falling on him, however, these risks are not particular to seaman's work. Longshoremen and other land-based maritime employees commonly face the risk of drowning or being thrown off balance by a swell or a rising tide, but facing such risks does not transform these workers into Jones Act seamen, nor should it have this effect on Claimant. Claimant slept ashore at his home at night except for the brief period of late July-early August 2005. He had no seaman's papers. His trips to sea while infrequent were short in duration. Combined with these findings is the widely held understanding that loading and off-loading vessels are the quintessential duties of a longshoreman. In fact, Claimant's fellow workers referred to themselves as stevedivers or dividers because they performed so much Longshore work. TR at 262-63. Accordingly, I find that Claimant's duties of loading and off-loading vessels do not establish a connection that is substantial in nature to Employer's vessels.

In sum, Claimant's only connection to Employer's vessels that I find to be substantial in nature were his duties involving diving off vessels, tending and time spent as a passenger on a vessel travelling to and from a worksite. The next requirement of the *Chandris* test is to determine if this connection is also substantial in duration.

(ii) Duration

When determining whether a connection is substantial in duration, “an appropriate rule of thumb for the ordinary case [is that] a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act,” while “[a] maritime worker who spends only a fraction of his time working on board a vessel is fundamentally land-based and therefore not a member of the vessel’s crew, regardless of what his [or her] duties are.” *Chandris*, 515 U.S. at 371. The 30 percent rule of thumb refers to actual work aboard vessels and not to loading/unloading vessels, maintaining equipment, etc. See *Barrett v. Chevron*, 781 F.2d 1067 (5th Cir. 1986). In sum, whether the duration of a connection is substantial depends largely on the percentage of working time spent on vessels for the employer in question. See *Papai*, 520 U.S. at 556-57; *Chandris*, 515 U.S. at 371-72.

Here, Claimant spent approximately 21.3 – 23.6 percent of his time diving, tending or being transported on Employer’s vessels. Applying the 30 percent rule, Claimant’s time spent in the service of a vessel in navigation was well below the 30 percent rule of thumb. Thus, Claimant’s connection to Employer’s vessels was not substantial in duration.

Employer argues that the 39.5 percent of Claimant’s time spent cleaning and repairing diving equipment and mobilizing and demobilizing the vessels for a job should be included in this calculation, resulting in 63.1 percent of Claimant’s time being in the service of a vessel in navigation. ALJX 12 at 11. However, the second prong of the *Chandris* test requires the connection to be substantial in *both* duration *and* nature. *Chandris*, 515 U.S. at 368. Since these duties did not establish a connection that is substantial in nature, as discussed above, they cannot be included in the substantial in duration calculation. As Claimant’s time spent in the service of a vessel does not reach 30 percent, I find that Claimant’s connection to Employer’s vessels was not substantial in duration.

Consequently, I find that Employer has failed to establish a crew member defense because Claimant did not perform a substantial portion of his work aboard a vessel or fleet of vessels. Therefore, I further find that Claimant is covered under the Longshore Act. As a result, Employer has failed to present sufficient evidence to rebut the section 920(a) presumption that Claimant’s compensable right knee and back injuries on May 31, 2006 fell within the jurisdiction of the Act.

2. Average Weekly Wage

I find that section 10(c) is the correct method for calculating Claimant’s pre-injury average weekly wage (“AWW”). Section 10(c) may be applied when it would be unreasonable or unfair to calculate the claimant’s AWW under sections 10(a) or 10(b). 33 U.S.C. § 910(c); *Matulic v. Director, Office of Workers Compensation Programs*, 154 F.3d 1052, 1057 (9th Cir. 1998). Here, section 10(a) cannot be applied because the record is incomplete as to Claimant’s earnings in the 52 weeks preceding his injury, he was paid a number of different pay rates depending on his work, and because I am unable to determine from the record whether Claimant is a five or six day worker. 33 U.S.C. § 910(a). Section 10(b) also cannot be applied because

there is no evidence regarding the wages of other employees. *Id.* at 910(b). Thus, section 10(c) must be applied.

Section 10(c) requires the ALJ to determine a sum that “shall reasonably represent the annual earning capacity” of the claimant at the time of injury. 33 U.S.C. 910(c). That figure is then divided by 52, as required by section 10(d), to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

In determining the Claimant’s annual earning capacity, subsection 10(c) provides that the ALJ may consider 1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury, 2) the previous earnings of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or 3) other employment of such employee, including the reasonable value of the services, if engaged in self-employment. 33 U.S.C. 910(c); *Palacios v. Campbell Industries*, 633 F.2d 840, 842 (9th Cir. 1980); *National Steel Shipbuilding v. Bonner*, 600 F.2d 1288, 1291 (9th Cir. 1979).

Here, the record contains the Claimant’s paystub records for Employer for January 2005 through the end of May 2006, however, these records are incomplete as many paystubs are missing. No paystubs were presented for Claimant’s work at Seaward Marine. Claimant worked for these two companies continuously from 1997 until his injury in May 2006. The record only contains Claimant’s W-2’s for years 2005 and 2006. CX 9. In 2005, Claimant earned \$59,070.26 for Employer and \$15,298.25 for Seaward Marine, totaling \$74,368.51. CX 9 at 133. In 2006, the year of his injury, Claimant earned \$23,600.22 for Employer and \$2,382.38 for Seaward Marine, totaling \$25,982.60. CX 9 at 134. As Claimant was injured May 31, 2006, he only worked 22 weeks in 2006. CX 3 at 43-53.

Claimant argues that his average weekly wage should be calculated by combining all earnings from 2005 and 2006 (\$100,351.11) and dividing by 515, the number of days between January 1, 2005 and May 31, 2006. ALJX 11 at 15. This calculation yields a result of an average daily wage of \$194.86. *Id.* Claimant argues that this average daily wage should be multiplied by seven to obtain an average weekly wage of \$1,364.00. *Id.* Employer does not set forth any argument or figure for average weekly wage. ALJX 12.

Claimant’s calculation of his average weekly wage necessarily suffers from the limitations of minimal evidence being present in the record regarding Claimant’s earnings. Although Claimant’s calculation appears simple and precise given these limitations, it does not follow the language set forth in Section 10(c), which “provides a method for determining average *annual* earnings. The administrative law judge should thus arrive at a figure approximating an entire year of work. This figure is then divided by 52.” *Brien*, 23 BRBS 207, 211 (1990) (Emphasis added). The figure set forth by Claimant, \$100,351.11, represents Claimant’s average earning capacity over a 515 day period, not a one-year period.

To determine Claimant's average annual earnings, I must combine his earnings from the 22 weeks he worked in 2006 prior to his injury with his average earning capacity in the final 30 weeks of 2005, collectively amounting to 52 weeks of earnings. Claimant's earnings for the 22 weeks prior to his injury are known, as evidenced by his W-2's for 2006. CX 9 at 134. These earnings amount to \$25,982.60. *Id.* It is necessary to look at Claimant's earnings in 2005 to determine his earning capacity for the remaining 30 weeks prior to his injury. Dividing Claimant's 2005 earnings, \$74,368.51, by 52 yields an average weekly wage for 2005 of \$1430.16. Multiplying this number by 30 best approximates Claimant's average earning capacity for the final 30 weeks of 2005, the result of which is \$42,904.80. Combining these two totals, Claimant's actual earnings for 22 weeks in 2006 and Claimant's approximate earnings for 30 weeks in 2005 (\$25,982.60 + \$42,904.80), yields a result of Claimant's average annual earnings of \$68,887.40.

I estimate Claimant's average annual earning capacity to be \$68,887.40. Under section 10(d), I must divide this amount by 52 weeks, which results in an average weekly wage of \$1,324.76. Claimant's compensation rate is therefore \$883.17 per week, which is reached by multiplying the average weekly wage by 66 2/3 percent.

### **ORDER**

Based on the foregoing approved stipulations, findings of fact, and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer American Marine shall pay Claimant compensation for temporary total disability for the period from June 1, 2006, to the present and continuing, at a compensation rate of \$883.17 per week.
2. American Marine shall continue to pay all reasonable and necessary medical expenses related to Claimant's low back and right knee injuries of May 31, 2006.
3. American Marine shall pay interest on each unpaid installment of compensation from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. §1961.
4. American Marine shall receive credit for all compensation paid to Claimant, if any.
5. The District Director shall make all calculations necessary to carry out this order.
6. Within 20 days after this Decision and Order *becomes final*, counsel for Claimant shall submit a fully supported application for costs and fees to the undersigned administrative law judge and to the counsel for Employer. Within 15 days thereafter, Employer's counsel shall provide Claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with Employer's counsel. If counsel agree on an appropriate award of fees and costs they shall file written notification

within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if counsel disagree on any of the proposed fees and costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of the fees that have been settled and that portion, if any of the fees and/or costs in dispute and his or her position regarding such fees and costs. Employer's counsel shall have 15 days from the date of service of such application in which to respond. No reply to that response will be permitted unless specifically authorized in advance by this administrative law judge.

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GERALD M. ETCHINGHAM  
Administrative Law Judge

*San Francisco, California*