

TED W. ANTHONY)
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 Claimant-Petitioner)
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 v.)
)
 T.T.C. ILLINOIS,)
 INCORPORATED/CRANE OPERATORS)
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 and)
)
 CREDIT GENERAL INSURANCE) DATE ISSUED: May 18, 2004
 COMPANY)
)
 and)
)
 LOUISIANA INSURANCE GUARANTY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents)
)
 LOGISTIC SERVICES, INCORPORATED)
)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order Granting Summary Judgment and Dismissing Claim for Lack of Jurisdiction of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Frischhertz & Associates), New Orleans, Louisiana, for claimant.

Henry G. Terhoeve (Guglielmo, Marks, Schutte, Terhoeve & Love), Baton Rouge, Louisiana, for Louisiana Insurance Guaranty Association.

Thomas J. Wagner (Wagner & Bagot, L.L.P.), New Orleans, Louisiana, for Logistic Services, Incorporated.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Judgment and Dismissing Claim for Lack of Jurisdiction (2002-LHC-435) of Administrative Law Judge C. Richard Avery 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a crane operator, was working aboard the derrick crane barge *Frank L* on November 11, 1996, when he injured his back while performing general maintenance on the crane. The barge transported a crane that was used to unload cargo vessels on the Mississippi River. In November 1999, claimant filed a lawsuit in the Civil District Court for the Parish of Orleans against numerous potential defendants.¹ Claimant also sought benefits under the Longshore Act. Carrier voluntarily paid benefits for three years until its insolvency, when Louisiana Insurance Guaranty Association (LIGA) controverted the claim. LIGA filed a motion for summary decision with the administrative law judge, seeking a finding that claimant is excluded from the Act's coverage as a "member of a crew." 33 U.S.C. §902(3)(G).

In his decision, the administrative law judge found that the *Frank L* is a vessel in navigation and that claimant's duties contributed to the function of the *Frank L*. The administrative law judge also found that claimant's connection to the *Frank L* was substantial in nature and duration and that claimant's employment on the *Frank L* exposed him to the perils of the sea. Thus, the administrative law judge concluded that claimant was a "member of a crew" excluded from coverage under the Act, and he granted LIGA's motion for summary decision.

On appeal, claimant contends that the administrative law judge erred in granting the motion for summary decision as there are issues of fact that need to be developed at a formal hearing, including the employment time frame to be considered and whether the *Frank L* was a vessel in navigation at the time of claimant's injury. LIGA responds,

¹ In the state court proceeding, claimant filed a Motion for Summary Judgment seeking to establish, as a matter of law, his status as a seaman under the Jones Act. This case remains pending.

urging affirmance of the administrative law judge's granting of summary decision as claimant did not raised any genuine issues of material fact. In addition, LIGA urges affirmance of the administrative law judge's decision that claimant was a "member of a crew" as it is supported by substantial evidence and in accordance with the law. Logistic Services, Inc., a potentially responsible employer, responds, urging affirmance of the administrative law judge's decision.

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules),² any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. 29 C.F.R. ' 18.40(a). Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. *Id.* When a motion for summary decision is supported by affidavits, "a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. ' 18.40(c). If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary decision for either party. 29 C.F.R. ' ' 18.40(d), 18.41(a).

Section 18.40 of the OALJ Rules is analogous to Rule 56 of the Federal Rules of Civil Procedure. The purpose of the summary judgment procedure under FRCP 56 is to promptly dispose of actions in which there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Beeler v. Rounsavall*, 328 F.3d 813 (5th Cir.), *cert. denied*, 124 S.Ct. 820 (2003). In determining if summary judgment is appropriate, the court must look at the record in the light most favorable to the party opposing the motion, and must draw all inferences in favor of the party opposing the motion. *See Williams v. Time Warner Operation, Inc.*, 98 F.3d 179 (5th Cir. 1996); *see also O'Hara v. Weeks Marine*, 294 F.3d 55 (2^d Cir. 2002). To defeat a motion for summary judgment, the party opposing the motion must establish the existence of an issue of fact which is both material and genuine; it is material if it affects the outcome of the litigation and it is genuine if there is sufficient evidence to support the alleged factual dispute. *Id.*

We reject claimant's contention that the administrative law judge erred in granting employer's motion for summary decision. Contrary to claimant's contention, he did not raise before the administrative law judge the existence of "material and genuine" issues of fact pertaining to the question of whether claimant was a "member of a crew" which

² The OALJ Rules apply to this issue, as they are not inconsistent with a rule of special application as provided by statute or regulation. 29 C.F.R. ' 18.1; *see Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

would require the administrative law judge to hold an evidentiary hearing. Although claimant averred that factual issues remained, in actuality the issues raised, specifically whether the *Frank L* was a vessel and the relevant time frame of claimant's employment, were legal issues for the administrative law judge's resolution based on the facts already adduced. See *Manuel v. P.A.W. Drilling & Well Services, Inc.*, 135 F.3d 344 (5th Cir. 1998) (whether a given craft is a vessel is ordinarily a question of law); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003). Thus, we hold that the administrative law judge did not err in deciding this case on the pleadings presented. *Id.*; *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990).

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 connection to a vessel in navigation is substantial in nature and duration; and (2) his duties contributed to the vessel's function or operation. See *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) "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." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991). The legal tests for determining whether claimant is a "member of a crew" or a "seaman" are the same. *Id.*

Claimant contends that the administrative law judge erred in finding the *Frank L* to be a "vessel." Claimant contends that the *Frank L* is a work platform and not a "vessel" within the meaning of the Jones Act. The administrative law judge considered the test set forth by United States Court of Appeals for the Fifth Circuit in *Manuel v. P.A.W. Drilling & Well Services, Inc.*, 135 F.3d 344 (5th Cir. 1998), in determining whether the *Frank L* is a vessel. The court stated therein that in determining what is a vessel, it must be determined for what purpose the craft is constructed and the business in which it is engaged. *Manuel*, 135 F.3d at 350, citing *The Robert W. Parsons*, 191 U.S. 17 (1903). The court stated that "[i]f a primary purpose of the craft is to transport passengers, cargo, or equipment from place to place across navigable waters, then that structure is a vessel." *Manuel*, 135 F.3d at 348. The court also stated that "unconventional craft [such] as submersible drilling barges and floating dredges which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction and retain such status even while moored, dry-docked, or otherwise immobilized and secured to land." *Id.*, quoting *Cook v. Belden Concrete Prods., Inc.*, 472 F.2d 999 (5th Cir. 1973). The court emphasized that the importance of the transportation function is the key to vessel status, even if the craft also serves as a work platform. *Manuel*, 135 F.3d at 351.

In the instant case, the administrative law judge found that the derrick barge *Frank L* was designed and utilized for the special purpose of transporting equipment, specifically a crane, from place to place across navigable waters, and thus is a “vessel.” Decision and Order at 7. The administrative law judge found that the function of the barge was to transport the crane to sites adjoining docked vessels that could not be reached by land-based cranes. As the purpose of the *Frank L* was to transport the crane to sites alongside vessels in the Mississippi River, the administrative law judge properly found that it is a vessel pursuant to applicable law. *Manuel*, 135 F.3d at 348. Contrary to claimant’s assertion, it is not relevant that the barge was moored at the time of claimant’s injury. *Id.*; see also *Chandris*, 515 U.S. at 374; *Senko v. La Cross Dredging Co.*, 352 U.S. 370 (1957); *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997). Thus, we affirm the administrative law judge’s finding that *Frank L* was a vessel in navigation.³

Claimant next contends that the administrative law judge erred in finding that claimant’s connection to the *Frank L* was substantial in duration and nature. Contrary to claimant’s contention, the appropriate inquiry regarding the claimant’s duties is the employee’s basic job assignment at the time of injury, and does not encompass consideration of his prior work history. *Papai*, 520 U.S. at 560, 31 BRBS at 39(CRT); *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 33 BRBS 31(CRT) (3^d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Hansen v. Caldwell Diving Co.*, 33 BRBS 129 (1999), *aff’d*, 3 Fed.Appx. 102 (4th Cir. 2001) (Board affirmed administrative law judge’s finding that claimant, a commercial diver aboard a vessel for four weeks, was a “member of a crew”). It is not disputed that claimant was assigned permanently to the *Frank L* at the time of his injury and that he had worked at this assignment for nine months. Thus, we affirm the administrative law judge’s finding that claimant’s connection to the barge was substantial in duration.

With regard to the “substantial in nature” inquiry, the administrative law judge relied on the decision of the Fifth Circuit in *In Re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000), *reh’g en banc denied*, 250 F.3d 745 (5th Cir. 2001), which involved the claim of a co-worker of claimant on the *Frank L*. The court held as a matter of law that Kevin Baye had a substantial connection to the *Frank L* as he was permanently assigned to the *Frank L*, his primary responsibility was to operate the cranes on board the vessel whose sole purpose was to load and unload cargo vessels, and he was exposed to the perils of the sea in the course of his employment. *Endeavor Marine*, 234 F.3d at 291. The administrative law judge reviewed the documents presented with LIGA’s motion for

³ The administrative law judge properly observed that the Fifth Circuit did not address this issue in *In Re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000), *reh’g en banc denied*, 250 F.3d 745 (5th Cir. 2001), as the parties therein stipulated to the fact that the *Frank L* was a vessel in navigation. See discussion, *infra*.

summary decision regarding claimant's employment duties aboard the *Frank L* and concluded that they are similar in all relevant aspects with the claimant in *Endeavor Marine*.⁴ Decision and Order at 3, 5-6. Specifically, claimant operated the crane that unloaded vessels. When he was not operating the crane, he would tie the barge to the cargo vessels, properly position the crane, and perform maintenance on the crane. The administrative law judge found that claimant was "doing the ship's work." *Wilander*, 498 U.S. at 355, 26 BRBS at 83(CRT). As the administrative law judge thoroughly reviewed the documents submitted with LIGA's motion for summary decision in light of applicable law, and claimant has raised no reversible error on appeal, we affirm the administrative law judge's finding that claimant's connection to the *Frank L* was substantial in nature as it is rational and supported by the evidence. *Endeavor Marine*, 234 F.3d at 291. Thus, as the administrative law judge's finding that claimant was a member of a crew is rational, supported by substantial evidence and in accordance with law, it is affirmed. See *Chandris*, 515 U.S. 347; *Endeavor Marine*, 234 F.3d 287; *Manuel*, 135 F.3d 344; *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003).

Accordingly, the administrative law judge's Decision and Order Granting Summary Judgment and Dismissing Claim for Lack of Jurisdiction is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ Contrary to claimant's contention, the Fifth Circuit in *Endeavor Marine* did not rely on the *Frank L*'s transportation of workers or passengers or on the claimant's eating or sleeping aboard the vessel to hold that his connection to the vessel was substantial. Therefore, any distinguishing facts in the instant case on these issues do not mandate a different result.