

BRB No. 05-0798

THEODORE HENDERSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PENROD DRILLING COMPANY)	DATE ISSUED: 05/31/2006
)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Ruling and Order [on] Motion for Summary Decision and Dismissal of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Theodore Henderson, Toxey, Alabama, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Ruling and Order [on] Motion for Summary Decision and Dismissal (2004-LHC-1642) of Administrative Law Judge Patrick M. Rosenow 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). In an appeal by a *pro se* claimant, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant claimed he was exposed to asbestos during the course of his employment for employer between 1976 and 1983, and, in particular, on March 12, 1981. Employer filed a motion for summary decision contending that the claim is not covered by the Act because Penrod Rig 55, upon which claimant was working when he was injured, is a vessel, and claimant is a member of that vessel's crew excluded from coverage under the Act, 33 U.S.C. §902(3). Claimant did not respond to the motion, nor did he respond to

the administrative law judge's subsequent show cause order.¹ The administrative law judge, citing 29 C.F.R. §18.6(d)(2)(ii),² found adversely to claimant and dismissed the claim. Order at 2.³ Claimant appeals the order denying his claim. Employer has not responded to the appeal.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, __ BRBS __, BRB No. 05-512 (March 8, 2006); *see also Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a). The party opposing a motion for summary judgment, in this instance, claimant, must "set forth specific facts showing that there is a genuine issue of fact for the hearing" in order to defeat the motion. *Buck v. General Dynamics Corp./Electric Boat Div.*, 37 BRBS 53 (2003); 29 C.F.R. §18.40(c). To support its assertion that Rig 55 is a vessel and claimant is a member of a crew and is not covered by the Act, employer attached to its motion an affidavit from its claims manager stating that claimant was working as a roustabout on Rig 55, which was a jack-up drilling vessel. Employer also attached an extract from the ODS-Petrodata Mobile Rig Register which established that Rig 55 was classified as a jack-up rig. Claimant did not file any documents establishing an issue of fact for a hearing. Thus, there was no genuine issue

¹Claimant was represented by counsel, but when counsel learned that claimant worked on a "jack-up rig," he opted not to respond to employer's motion. *See* Letter to claimant dated June 27, 2005.

²Section 18.6(d)(2)(ii) provides that if a party fails to comply with an order of the administrative law judge, the administrative law judge may, "for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure," rule adversely against the non-complying party on that matter.

³The administrative law judge set forth employer's assertions in its motion and then stated:

In this case, Claimant not only failed to respond to Employer's motion within the required time, but has not responded at all. Claimant similarly failed to comply with the show cause order. Given the background of the case and the evidence on the motion submitted by Employer, I find it in the interests of justice to rule that the matters concerning the motion for summary decision should be taken as established adversely to Claimant.

of material fact before the administrative law judge.⁴ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-323 (1986); *National Ass’n of Gov’t Employees v. City Pub. Serv. Bd.*, 40 F.3d 698 (5th Cir. 1994); *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994) (*en banc*). However, employer must also be entitled to summary decision as a matter of law, and in this case, the administrative law judge did not make any legal findings establishing that employer is entitled to summary decision in its favor. Therefore, we must vacate the administrative law judge’s Order.

Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), excludes from coverage “a master or member of a crew of any vessel.” The term “member of a crew” is synonymous with the term “seaman” under the Jones Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991). 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 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 term “vessel,” for purposes of both the Jones Act and the Longshore Act, is defined in Section 3 of the Rules of Construction Act, 1 U.S.C. §3 (previously codified at the Revised Statutes of

⁴To the extent the administrative law judge relied on Section 18.6(d)(ii) to support his decision to find adversely to claimant due to claimant’s failure to comply with the Show Cause Order, the administrative law judge’s reliance is misplaced. The procedural rules of the Office of Administrative Law Judges (OALJ), which apply to proceedings before the OALJ, do not apply “[t]o the extent that [they] may be inconsistent with a rule of special application as provided by statute. . . .” 29 C.F.R. §18.1(a). Section 27(b) of the Act, 33 U.S.C. §927(b), is such a rule of “special application” and is applicable when a party fails to comply with a lawful order of an administrative law judge. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003). Pursuant to Section 27(b), the administrative law judge may certify the facts to the district court regarding the party’s failure to comply with the order and the district court is empowered to implement appropriate sanctions. *Id.*, 37 BRBS at 7. Thus, Section 18.6(d)(ii) is inapplicable as a sanction for claimant’s failure to respond to the administrative law judge’s show cause order.

1873, 18 Stat. pt.1, p.1).⁵ *Stewart v. Dutra Constr. Co., Inc.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005); *Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441, 39 BRBS 67(CRT) (5th Cir. 2006).

On remand, therefore, the administrative law judge must apply this law to the established facts of this case to determine if claimant was a member of a crew excluded from coverage under the Act. 33 U.S.C. §902(3)(G); *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), *aff'd*, 418 F.3d 138, 39 BRBS 47(CRT) (2^d Cir. 2005); *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997); *Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992). If so, employer is entitled to summary decision as a matter of law.

Accordingly, the administrative law judge's Order is vacated, and the case is remanded for consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵1 U.S.C. §3 states:

The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.