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| DONALD R. DANIELS | ) | BRB No. 03-0854 |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| THE M OPERATING COMPANY, INCORPORATED | ) | |
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| and | ) | |
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| AMERICAN INTERSTATE INSURANCE COMPANY | ) | |
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| Employer/Carrier-Petitioners | ) | |
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| DONALD R. DANIELS | ) | BRB No. 04-0587 |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| THE M OPERATING COMPANY, INCORPORATED | ) | |
| | ) | |
| and | ) | DATE ISSUED: Sept. 15, 2004 |
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| AMERICAN INTERSTATE INSURANCE COMPANY | ) | |
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| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeals of the Supplemental Decision and Order and the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Joseph P. Milton and Michael P. Milton (Milton, Leach, Whitman, D'Andrea, Charek & Milton, P.A.), Jacksonville, Florida, for claimant.

George W. Boring (Langston, Hess, Bolton, Znosko & Helm, P.A.), Fort Myers, Florida, and Robert M. Sharp (Moseley, Warren, Prichard & Parrish), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order, and claimant appeals the Decision and Order on Remand (2001-LHC-2404, 2001-LHC-1514) of Administrative Law Judge Richard K. Malamphy 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).

This is the second time this case has come before the Board. The facts are not in dispute. Claimant worked as an engineer on the dredge *Stuart*. On April 20, 1999, claimant sustained injuries to his right knee and lower extremities. Claimant also filed a claim for work-related hearing loss. At the time of his knee injury, claimant was aboard the dredge on the St. John's River, a navigable body of water near the port at Jacksonville, Florida. Employer voluntarily paid maintenance and cure benefits to claimant under the Jones Act until February 8, 2000.

In his initial decision, the administrative law judge found that claimant is not excluded from the Act's coverage as a member of a crew, as the *Stuart* was not a "vessel in navigation." Decision and Order at 3-4. He also found that the claims were filed in a timely manner, that claimant's average weekly wage was $890.36, and that employer failed to establish the availability of suitable alternate employment. *Id.* at 4, 6, 8. Therefore, the administrative law judge awarded claimant medical benefits and permanent total disability benefits from February 9, 2000, and continuing, granting employer a credit for benefits already paid. *Id.* at 9. Employer appealed the decision to the Board.

On appeal, the Board held that the administrative law judge did not fully analyze the issue of whether the dredge was a "vessel in navigation" under the Jones Act, pursuant to the case precedent, and, in particular, pursuant to *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990), and *Bernard v. Binnings Constr. Co., Inc.*,

741 F.2d 824 (5th Cir. 1984). The Board stated that the administrative law judge's summary conclusion lacked sufficient explanation and misstated the law. Therefore, the Board vacated the administrative law judge's decision and remanded the case. *Daniels v. The M Operating Co., Inc.*, BRB No. 02-837 (Aug. 26, 2003). The Board affirmed the administrative law judge's findings on average weekly wage and suitable alternate employment. *Id.*, slip op. at 8, 10.

On remand, after stating the Board's instructions, the administrative law judge set forth the parties' contentions, and then proceeded to discuss a more recent case issued by the United States Court of Appeals for the Fifth Circuit, *Manuel v. PAW Drilling & Well Services, Inc.*, 135 F.3d 344 (5th Cir. 1998). The administrative law judge applied the Section 20(a), 33 U.S.C. §920(a), presumption to the issue of "jurisdiction," and found that the dredge was not intended to be land-based or a fixed platform for any length of time. Thus, he concluded that the dredge *Stuart*, which was designed to operate in a channel or navigable waters, was not built to assist in construction or repair of ships or piers nor was it meant to assist in the unloading or loading of cargo, making it a "vessel in navigation." As claimant has a substantial connection to the dredge *Stuart*, the administrative law judge found that claimant is a member of a crew and is excluded from coverage under the Act. Consequently, he denied benefits. Decision and Order on Remand at 3-4. Claimant appeals this decision, and employer responds, arguing that the Board's previous decision is the law of the case and that substantial evidence supports the administrative law judge's determination. BRB No. 04-587.

Shortly after the Board issued its decision remanding the case to the administrative law judge, the administrative law judge issued a decision on claimant's petition for an attorney's fee. He awarded claimant's counsel a fee and costs in the amount of $55,000.25. Employer appeals the fee award, arguing it was improper to award a fee in light of the Board's August 26, 2003, decision remanding the case. Claimant responds, urging affirmance, but recognizing that the fee award is not yet enforceable. BRB No. 03-854.

**Coverage**

Procedural Issues

Claimant raises a number of issues pertinent to the administrative law judge's finding that he is a member of a crew and is excluded from coverage. Initially, he argues that employer did not raise exclusion from coverage as a defense until after the informal conference, which occurred approximately one year after the claim had been filed. He argues that because this defense was not raised in employer's initial LS-207 notices of controversion, employer waived the defense. In this regard, claimant argues that the Board should not have addressed the issue on appeal and thus should not have vacated the original decision awarding benefits. Claimant, therefore, asserts that the defense was waived and the original decision should be reinstated. We reject claimant's arguments.

Claimant cites Section 14(d) of the Act, 33 U.S.C. §914(d), in support of his argument that employer is prohibited from raising coverage as a defense because it failed to raise the issue in its initial notices of controversion. Section 14(d) states:

> If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and *the grounds upon which the right to compensation is controverted*.

33 U.S.C. §914(d) (emphasis added). Claimant does not argue that employer's notice of controversion was untimely, nor does he question the notice's compliance with Section 14(d). His only complaint is that the first notice of controversion did not contain the coverage defense. However, there is no provision under the Act limiting an employer to one notice of controversion or to the defenses or issues it listed on its first notice of controversion. *See Hitt v. Newport News Shipbuilding & Dry Dock Co.*, __ BRBS __, BRB No. 03-711 (July 7, 2004); *Pruner v. Ferma Corp.*, 11 BRBS 201, 209 (1979). In fact, the Board has rejected attempts by parties to preclude arguments that their opponents did not first raise before the district director. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990) (coverage); *Lewis v. Norfolk Shipbuilding & Dry Dock Corp.*, 20 BRBS 126 (1987) (Sections 13 and 33(g)); *see also Nelson v. American Dredging Co.*, 30 BRBS 205 (1996), *aff'd in pertinent part*, 143 F.3d 780, 32 BRBS 115(CRT) (3d Cir. 1998) (coverage raised in LS-18 pre-hearing gives claimant sufficient notice); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989) (modification issue raised in LS-18 pre-hearing statement gives claimant sufficient notice); 20 C.F.R. §§702.317, 702.336. Rather, the parties, or the administrative law judge, may raise new issues or expand upon the issues to be addressed at the hearing, provided there is sufficient notice and an opportunity to respond. *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984); 20 C.F.R. §§702.336(a), 702.338.

In this case, claimant argues that employer did not raise the issue of member of a crew status until after the informal conference when it filed its notice of controversion on November 22, 2000. Cl. Brief at 2. Employer, in response to claimant's statements at the hearing, asserted that it filed an LS-207 raising this issue before the informal conference.[1] Emp. Post-Hearing Brief at 10. Regardless of whether it raised the issue before or after the informal conference, if the issue was raised on November 22, 2000, as

[1]The notices of controversion are not in the record.

claimant states, then employer raised the issue over one year before the hearing was held on February 20, 2002, giving claimant more than adequate notice of the new issue. Moreover, both parties identified the coverage issue in their LS-18 pre-hearing statements.[2] Raising a coverage issue one year prior to the hearing constitutes sufficient notice that it is a disputed issue. *See Nelson*, 30 BRBS at 206; *Hall*, 24 BRBS at 1 (one month before hearing constitutes sufficient notice); *Finch*, 22 BRBS at 199; *Lewis*, 20 BRBS at 126. Therefore, we hold that coverage was properly raised and argued before the administrative law judge, as well as the Board.

Section 20(a) presumption

Claimant also argues that the administrative law judge erred in finding the Section 20(a) presumption rebutted and in concluding that this case does not fall within the provisions of the Act. Specifically, he asserts that employer did not present any evidence on remand to warrant a reversal of the administrative law judge's previous finding that he is covered by the Act.

The administrative law judge stated that claimant raised the application of Section 20(a) to the issue of "jurisdiction" and that "[i]t does appear the Fifth Circuit applies this presumption." Decision and Order on Remand at 3. Next, the administrative law judge addressed employer's argument in rebuttal that the dredge is a "special purpose craft" designed for being in the navigational channel and moving frequently rather than being tied to land as a fixed platform. He then concluded, citing several cases, "the undersigned concurs in [employer's] assessment. Thus, the Section 20(a) presumption is rebutted." *Id.* Following this finding, the administrative law judge noted the Board's citation of *Hurst*, 896 F.2d 504, but found that the instant case is more analogous to *Manuel,* 135 F.3d 344. Accordingly, citing *Manuel* and *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), he found that the dredge *Stuart* is a vessel in navigation and that claimant is a member of the crew who is excluded from the Act's coverage. Decision and Order on Remand at 4.

We reject claimant's argument that the administrative law judge's finding that Section 20(a) was rebutted constitutes reversible error. The Board has long followed the rule that the Section 20(a) presumption is not applicable to the legal interpretation of the coverage provisions of the Act. *See Southcombe v. A Mark, B Mark, C Mark Corp.*, 37 BRBS 169 (2003), *citing, inter alia, Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977); *Watkins v.*

[2]Employer's LS-18 Pre-Hearing Statement, dated February 16, 2001, raised the issue of jurisdiction. Claimant's LS-18 Pre-Hearing Statement for his hearing loss claim, dated February 5, 2001, raised the issue of whether the "claim [is] properly presented under the LHWCA." Claimant's LS-18 for his knee injury, dated May 14, 2001, raised the issue of claimant's "longshoreman status."

*Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem.*, No. 94-70660 (9th Cir. May 30, 1996); *Davis v. Doran Co. of Calif.*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989). *Cf. Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998) (presumption of coverage applies to questions of fact). As the present case involves the application of the appropriate legal test for member of a crew status to undisputed facts, the Section 20(a) presumption does not apply. Thus, any error in the administrative law judge's application of the presumption is harmless.[3] Thus, we reject claimant's argument that coverage is presumed in this case.

Vessel in Navigation

Claimant next contends the administrative law judge erred in finding the dredge *Stuart* to be a "vessel in navigation," making claimant a "member of a crew" under the Jones Act instead of a harbor worker under the Longshore Act. He argues that the administrative law judge's decision contains factual errors and does not fully discuss the pertinent facts. He further avers that the administrative law judge erred in relying on the Fifth Circuit's decision in *Manuel* when the Board advised him to use the *Hurst* decision rendered by the United States Court of Appeals for the Eleventh Circuit, as this case arises within the jurisdiction of the Eleventh Circuit,[4] and asserts that he considered the wrong factors in determining that the dredge was a "special purpose craft."

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 Supreme Court of the United States has held that 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, 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); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997). The issue of whether a worker is a seaman/member of a crew is a mixed question of law and fact. *Papai*, 520 U.S. at 554, 31 BRBS at 37(CRT); *In re: Endeavor Marine, Inc.*, 234 F.3d 287, 290 (5th Cir. 2000), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001). In this case, the decisive issue is

[3] Since the administrative law judge found Section 20(a) rebutted, it dropped from the case, placing the issue in the same posture as if the Section 20(a) presumption were not applied.

[4] Claimant's injury occurred near Jacksonville, Florida.

whether the dredge *Stuart* is a "vessel in navigation."

Claimant first argues that the administrative law judge's decision lacks facts to support his conclusion. As the Board explained in its previous decision, this is a fact-intensive inquiry and the administrative law judge, on remand, was to "specifically consider the facts in this case pursuant to the two factors applied by the Eleventh Circuit in *Hurst*, *i.e.*, 'the purpose for which the craft was constructed' and 'the business in which it was engaged,' and provide a complete rationale for his findings." *Daniels*, slip op. at 6-7. This inquiry would, therefore, involve consideration of the description of the dredge, its purpose, its business, and its ability to move.

Claimant's argument has merit. On remand, the administrative law judge did not set forth the facts of this case or apply them to the *Hurst* test. Rather, he mentioned only a few of the numerous facts in support of his conclusion, *e.g.*, that the *Stuart* has no means of self-propulsion, does not have crew quarters, and was "constantly in a navigational channel[.]" Without more, he nonetheless concluded that the *Stuart* was more similar to the rig in *Manuel*, *see* discussion *infra*, and less akin to the work platform in *Hurst*, as it was designed to operate in a channel and was not built to assist in the construction or repair of ships or piers or the loading or unloading of cargo. The administrative law judge thus concluded that the *Stuart* is a "vessel in navigation," and claimant is a "member of a crew" excluded from the Act's coverage. Decision and Order on Remand at 4. In light of the administrative law judge's incomplete analysis, we must, once again, remand this case for further consideration of the coverage issue. On remand the administrative law judge must apply the facts of this case, which are largely undisputed, to the criteria set forth in *Hurst*.

First, the description of the dredge is not disputed. The *Stuart* has a long hull with a squared off bow[5] with an indentation for the ladder which protruded approximately another 50 feet. It has two "spuds" or legs off the back that are used to steady or walk the dredge along as it digs up materials, and anchors at each end. In addition, it contains the dredging equipment: the cutter head, suction pipes, pumps and engine. Tr. at 21-23, 156. The dredge does not have engines or propellers for self-propulsion, a kitchen, or crew quarters.[6] It has its own small lifeboat, life vests for each member of its crew, and it is registered with the Coast Guard. Tr. at 22-23, 55, 57-58, 158, 160-161, 166, 168.

[5]Mr. Michellus, the president of the company, testified that the *Stuart* was 148 feet long, Tr. at 155, and claimant testified that it was 184 feet long, Tr. at 21.

[6]Employer owned four small tugboats it would use to move the *Stuart* short distances and keep the dredge operating, but it would hire a larger tugboat to move the dredge any great distance, such as between work sites. Tr. at 157.

There also appears to be no real dispute over the purpose of the dredge and the work in which it was engaged.[7] Mr. Michellus, the president of the company, testified that his company performed channel dredging in the Intracoastal Waterway, in harbors, and in ship channels. He stated that a by-product could be the building up of a beach, but the primary purpose was to deepen channels for navigation. Tr. at 153. In this regard, he testified that 90 percent of employer's contracts were with the Army Corps of Engineers and the remaining ten percent were with port authorities. Tr. at 162-163. Further, he stated that the dredge was never used as a work platform for land-based activity such as pile driving, and it was never used to load, unload, build or repair vessels. Tr. at 154. Claimant testified that the dredge typically dug in the Intracoastal Waterway, rivers or harbors, particularly in the southeastern United States to allow for greater ship passage,[8] and sometimes they pumped material onto beaches. Tr. at 55-56, 62-63.

Claimant had been working for employer on the *Stuart* since 1989, and he was an engineer for most of that time. As an engineer, claimant was responsible for keeping the dredging engine, pumps, gauges, *etc*., in working order. Tr. at 20, 52. Claimant testified that at the time of his injury in April 1999, the dredge was "spudded" down to the waterway floor, and the dredging engine was not operating. Cl. Ex. 11; Emp. Ex. 1; Tr. at 65. As claimant went downstairs to the engine room to replace a leaking valve, he tripped over a piece of metal, fell, and was injured. Cl. Ex. 11, 13; Tr. at 36-37, 65.

The administrative law judge did not discuss all the relevant facts, and thus we must remand the case. For example, although the administrative law judge found that the dredge was constantly in a navigable channel, he did not discuss whether it was moving or anchored while in that channel, and this may affect the outcome of the case. Further, the fact he highlighted – that the dredge was not used for building, repairing, loading or unloading ships – is not controlling as to whether the *Stuart* is a vessel in navigation.

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[7]As claimant noted, however, there is no evidence regarding the purpose of the structure as of the time it was constructed. Cl. Brief at 14-15. There is only evidence of the purpose for which it was being used. Tr. at 153.

[8]The dredge worked from Manteo, North Carolina, to Ft. Lauderdale, Florida, in such places as Savannah, Georgia, Charleston, South Carolina, and Jacksonville, Florida. Tr. at 55-56, 159.

Claimant next contends the administrative law judge erred in relying on *Manuel*, which is a Fifth Circuit Case, instead of relying on *Hurst*, which is an Eleventh Circuit case.[9] He argues that, in *Manuel*, the Fifth Circuit expanded the definition of "vessel" to something beyond that which the Eleventh Circuit has adopted, as it created a new "transportation element" to the test. According to claimant, merely transporting the dredging equipment in this case does not make the dredge *Stuart* "highly mobile" or establish that the movement is anything more than incidental to the dredge's work as a platform. Additionally, claimant argues that *Manuel* set forth, as a matter of law, that "special purpose structures" are vessels under the Jones Act, and that this holding is contrary to Eleventh Circuit precedent.

In *Hurst*, the claimant, a diver hired to repair a seawall, was injured when he attempted to climb out of the water onto a spud barge, and he sought recovery under the Jones Act. The Eleventh Circuit, relying on Fifth Circuit law, stated that the criteria for determining whether a structure is a "vessel in navigation" are a) the purpose for which the craft was constructed and b) the business in which it is engaged. *Hurst*, 896 F.2d at 506; *see also Bernard*, 741 F.2d at 829. Because the spud barge in *Hurst* was constructed to serve as a work platform and was engaged as a work platform next to the seawall at the time of the claimant's injury, and because its transportation function was incidental to its primary purpose, the court held that the spud barge was not a "vessel in navigation."[10] *Id.*

In *Manuel*, the claimant was injured on a workover rig ("Rig 3"). It had no motor power for propulsion, so tugboats were used to push it through the water. The rig carried equipment for drilling and performing work on wellheads. *Manuel*, 135 F.3d at 346. To ascertain whether the rig was a "vessel in navigation," the Fifth Circuit reviewed its cases, including *Bernard*, and noted that two divergent lines of cases had developed: those where the court has concluded that special purpose structures, such as jack-up rigs, submersible drilling barges, *etc.*, are vessels as a matter of law, and those where the court has held that structures predominantly used as work platforms are not. *Id.* at 347. For the former structures, the court stated:

> Despite the outward appearance of the structure at issue, if a primary purpose of the craft is to transport passengers, cargo, or equipment from

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[9] Claimant also cites a First Circuit case, *Stewart v. Dutra Constr. Co.*, 230 F.3d 461 (1st Cir. 2000), in support of his contention that the *Stuart* is not a vessel in navigation. The Supreme Court has granted *certiorari* in *Stewart*. 124 S.Ct. 1414 (No. 03-814). The case will be argued on November 1, 2004.

[10] The Eleventh Circuit specifically noted that, in *Bernard v. Binnings Constr. Co., Inc.*, 741 F.2d 824 (5th Cir. 1984), the Fifth Circuit mentioned that a structure's incidental ability to move across navigable waters is indicative of its being a work platform and not a vessel. *Hurst*, 896 F.2d at 506; *Bernard*, 741 F.2d at 829.

> place to place across navigable waters, then that structure is a vessel. In the special purpose craft cases, particularly the drilling barge cases, the transportation function of the structure was more than merely incidental to its purpose. Each craft was used as a work platform when the crew drilled for oil and gas. However, before the crew could drill, the barge was used to transport its specialized drilling equipment over water to the drilling site.

*Manuel*, 135 F.3d at 348-349 (footnote omitted). Further, according to the court, those structures used predominantly as work platforms have three common characteristics. They are: a) constructed and used primarily as work platforms; b) moored or secured at the time of the accident; and c) capable of movement, but the movement is incidental to their primary purpose as a work platform. *Id.* at 349.

In addressing the question of whether Rig 3 was a vessel, the Fifth Circuit started with the basic criteria: the purpose for which the structure was constructed and the business in which it is engaged. Because Rig 3's purpose was to transport the workover rig across navigable waters to service wells and it was engaged in this business, the court determined that Rig 3 is a vessel as a matter of law. *Id.* at 351. Thus, it stated, "the transportation function of Rig 3 was not merely incidental[;] mobility was essential to the work it was designed and built to perform." *Id.*

A comparison between *Hurst* and *Manuel* reveals that the circuit courts espoused similar tests. In establishing its test, the Eleventh Circuit relied on *Cook v. Belden Concrete Prods., Inc.*, 472 F.2d 999, 1001 (5th Cir. 1979), and *The Robert W. Parsons*, 191 U.S. 17, 30 (1903). *Hurst*, 896 F.2d at 506. Following this rule, the Eleventh Circuit noted the common factors characterizing whether a structure is a floating work platform, as set forth originally in the Fifth Circuit's decision in *Bernard*, the third of which includes the question of a craft's transportation function. *Hurst*, 896 F.2d at 506. In *Manuel*, the Fifth Circuit set forth the same two-part test and qualified that "evaluating the importance of the craft's transportation function is the key to determining the craft's status." *Manuel*, 135 F.3d at 351. Thus, a key element in both tests is whether transportation is a primary purpose of the craft or is incidental to some other purpose. Although *Manuel* is not controlling precedent in the Eleventh Circuit, the administrative law judge committed no error, *per se*, in relying on it, as both circuits' tests for ascertaining whether a craft is a "vessel in navigation" consider the same criteria. The problem with the administrative law judge's decision is not that he relied on *Manuel*, but is, as we stated above, that he failed to apply the test to the facts of the case.[11] As the

[11]Nevertheless, the administrative law judge should acknowledge that this case arises within the jurisdiction of the Eleventh Circuit, and he must apply the facts to the test set forth in *Hurst*. The portion of *Manuel* which holds that "special purpose structures" are, as a matter of law, vessels under the Jones Act is not applicable to this case, as that mandate conflicts with the Eleventh Circuit's statement in *Hurst* that

administrative law judge did not fully comply with the Board's remand order and provide a complete analysis of the coverage issue, we vacate his determination that claimant is precluded from coverage under the Act because the dredge *Stuart* is a "vessel in navigation." We, therefore, remand this case to the administrative law judge for further consideration of the coverage issue. On remand, the administrative law judge must apply the pertinent facts to the applicable law.

**Attorney's Fee**

Next, we address employer's appeal of the administrative law judge's award of an attorney's fee. BRB No. 03-854. The administrative law judge issued his initial decision awarding claimant benefits in August 2002. The Board affirmed the average weekly wage and suitable alternate employment findings, but it vacated the award of benefits based on coverage grounds. It remanded the case to the administrative law judge on August 26, 2003. Nonetheless, after addressing claimant's fee petition and employer's objections, on September 9, 2003, the administrative law judge awarded claimant's counsel a total fee, including costs, in the amount of $55,000.25. Employer appeals the fee award, arguing that it is inappropriate because the issue of entitlement had not been finally decided at the time the fee award was issued. Therefore, employer argues that, as claimant may not be entitled to any fee, the administrative law judge's fee award is premature. Claimant responds, urging the Board to affirm the fee award, but recognizing that it is not enforceable until the decision on entitlement becomes final. He notes further that employer did not challenge the rate, hours or amount of the fee.

Claimant is correct in arguing that the fee award is not enforceable until the case becomes final, but the administrative law judge has the authority to award a fee during the pendency of appellate proceedings. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). However, employer is correct in arguing that if claimant is excluded from the Act's coverage, then claimant's counsel is not entitled to a fee under the Act. 33 U.S.C. §928; *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); 20 C.F.R. §702.134(a). We affirm the amount of the fee award, as it has not been challenged. If the administrative law judge concludes that claimant is a covered employee, then claimant's counsel is entitled to the fee awarded when the award of

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summary judgment, or judgment as a matter of law, is inappropriate if the facts can lead to reasonable, yet different, inferences about whether a structure is a vessel. *Hurst*, 896 F.2d at 506. Finally, to the extent claimant interprets the Board's mandate to use *Hurst* as indicative of the outcome the administrative law judge must reach, claimant is mistaken. Although the Board remanded the case for the administrative law judge to consider the facts of this case in light of the controlling test in *Hurst*, the administrative law judge is not required to reach the same conclusion as the court did in *Hurst* unless application of the facts so warrants.

benefits becomes final. *McKnight*, 32 BRBS 165.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for further consideration consistent with this opinion. The Supplemental Decision and Order is affirmed, contingent upon claimant's success on remand before the administrative law judge.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge