BRB No. 07-0457

T.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PENROD DRILLING COMPANY	)	DATE ISSUED: 12/13/2007
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

T.H., Toxey, Alabama, *pro se*.

Andrew H. Meyers (Breaud & Meyers), LaFayette, Louisiana, for self-insured employer.

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 on Remand (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).

This is the second time this case has come before the Board. 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)(G). The

administrative law judge granted employer's motion because he found there was no genuine issue of material fact.

Claimant appealed, *pro se*. Although the administrative law judge found that claimant had not presented any evidence of an issue of material fact, the Board vacated the administrative law judge's order because the administrative law judge did not make any legal findings demonstrating that employer is entitled to summary decision as a matter of law. The Board set forth the pertinent law and remanded the case for the administrative law judge to apply the law to the facts to determine whether claimant is excluded from coverage as a member of a crew. Claimant filed a motion for reconsideration, asserting that Rig 55 "was a drilling rig not a drilling ship" because it was a fixed platform. The Board denied reconsideration, as claimant had not established error in the Board's decision, and in a footnote, advised him to file a motion for modification with the administrative law judge if he had additional information to show that the rig was a fixed platform. *[T.H.] v. Penrod Drilling Co.*, BRB No. 05-0798 (May 31, 2006), *recon. denied* (July 27, 2006).

On remand, the administrative law judge found that the record is devoid of any evidence establishing that Penrod 55 is not a jack-up rig, which is a vessel, or that claimant is not a member of its crew.[1] Accordingly, he concluded that claimant's claim is not covered by the Act, he granted employer's motion for summary decision, and he dismissed claimant's claim. Claimant appeals, contending the administrative law judge erred in granting summary decision because his claim is covered by the Longshore Act. Employer responds, urging affirmance of the administrative law judge's decision.

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. *See generally Morgan v. Cascade General, Inc.*, 40 BRBS 9 (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). In this case, the administrative law judge found, and the evidence supports, that Rig 55 is a vessel and claimant worked as a roustabout on that

[1]In response to the administrative law judge's request for briefs, claimant submitted "assorted documents with annotations" but the administrative law judge did not consider these as he did not reopen the record. However, in a footnote, the administrative law judge stated that even if he were to consider claimant's submissions, the result would be the same because none of claimant's submissions established a genuine issue of material fact. Order at 2 n.6.

rig.[2] Absent any contradictory evidence, the Board affirmed the administrative law judge's determination that there is no genuine issue of material fact in this case.[3] *T.H.*, slip op. at 3; *see Buck v. General Dynamics Corp./Electric Boat Div.*, 37 BRBS 53 (2003); *see also 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*). Despite having been affirmed on that issue, the administrative law judge addressed it once again in his decision on remand and concluded that "the record creates no genuine issue of material fact disputing that the Penrod 55 was a jack-up rig and a vessel or that Claimant was a member of its crew and a seaman." Order at 2. However, once again, the administrative law judge did not apply the pertinent law to the facts of this case to determine whether employer is legally entitled to summary decision. Absent a finding that a party is entitled to summary decision as a matter of law, the administrative law judge cannot grant summary decision. As the administrative law judge found there is no genuine issue of material fact in this case, for the sake of judicial economy, we shall perform the legal analysis to determine whether employer is entitled to summary decision as a matter of law.

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

[2]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 for summary decision 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.

[3]That holding constitutes the law of the case. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

1873, 18 Stat. pt.1, p.1).[4] *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).

Penrod Rig 55 is classified as a "jack-up rig" pursuant to the evidence of record. A jack-up rig is a vessel, *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 35 BRBS 131(CRT) (5th Cir. 2002); *Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992), and it remains a "vessel" while moored, at anchor, undergoing repairs, or "jacked-up." *Chandris, Inc.*, 515 U.S. 347; *Demette*, 280 F.3d 492, 35 BRBS 131(CRT); *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997). Contrary to claimant's arguments, even if the rig is attached to a fixed platform, it remains a "vessel" unless the evidence establishes that it can no longer function as a vessel. *Id.* Therefore, Rig 55 is a vessel. Further, claimant did not counter employer's evidence that he was employed to work as a roustabout on Rig 55. Thus, his duties as a roustabout contributed to the vessel's function. *Coulter v. Texaco, Inc.*, 714 F.2d 467 (5th Cir. 1983). Additionally, the record demonstrates that claimant asserts long-term exposure, seven years, to asbestos and other chemical dusts while working offshore. As he was employed to work on Rig 55 as a roustabout, there is no evidence to dispute that his connection to the vessel was substantial in both duration and nature. As such, he is a member of a crew, *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), *aff'd*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005); *see also Coulter*, 714 F.2d 467; *Rains v. Diamond M. Co.*, 396 So.2d 306 (La. App. 3d 1981), *cert. denied*, 399 So.2d 623 (La), and *cert. denied*, 455 U.S. 938 (1982), and he is excluded from coverage under the Longshore Act, 33 U.S.C. §902(3)(G); *Chandris, Inc.*, 515 U.S. 347; *see also Papai*, 520 U.S. 548, 31 BRBS 34(CRT). As claimant is excluded from Longshore coverage, employer is entitled to summary decision as a matter of law. Therefore, we affirm the administrative law judge's dismissal of claimant's claim.

[4] 1 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.

Accordingly, the administrative law judge's Order dismissing claimant's claim is affirmed for the reasons set forth herein.

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