BRB No. 04-0781

JACKSON C. JONES, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TIDEWATER MARINE SERVICES, INCORPORATED	)	DATE ISSUED: 06/22/2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Jackson C. Jones, Jr., Natchitoches, Louisiana, *pro se*.

Stephanie Skinner (Fowler, Rodriguez & Chalos), New Orleans, Louisiana, for self-insured employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2002-LHC-2611) 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). In an appeal by a claimant without counsel, 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant, while working for employer as a deckhand aboard the supply boat *NORTHTIDE*, allegedly sustained injuries as a result of an accident which occurred in either December 1978, or January 1979.[1] Claimant has no specific recollection of the

[1] Claimant's work as a deckhand for employer spanned from approximately

accident; rather, he relies on a dream he had in 1998, which revealed the following state of affairs. On the night in question, claimant indicated that weather conditions prevented the *NORTHTIDE* from tying up to the rig where it was delivering equipment and pipes. After being relieved for the night and going to sleep, claimant said that he was later awakened and told that the captain wanted him back on deck to assist in the loading process. Specifically, claimant said that he was instructed to hook the crane line to the slings embracing the equipment to be hoisted and delivered aboard the rig. While performing this work, claimant alleged that he was struck by a load as the vessel bucked in the rough seas.

Claimant's next recollection is awakening first in the cabin of the vessel where he briefly spoke with a "white woman," Hearing Transcript (HT) at 23, but then eventually awakening in his home town of Natchitoches, Louisiana, although he had no recollection of how or when he got there or the circumstances of any treatment he may have received. HT 21-23. Claimant's next memory is his going to work as a Parish Deputy Sheriff in 1980. Since then, he has worked for a variety of law enforcement departments, performed maintenance jobs, and is presently working as a corrections officer at the parish detention center. Claimant has been involved in numerous incidents since 1980, in which he alleged he was injured and for which lawsuits were filed. EX 18.

On July 20, 1999, claimant filed a state claim for compensation which was dismissed with prejudice by the workers' compensation judge on the alternative bases that he lacked jurisdiction to hear claimant's claim because he was a seaman, and because claimant's claim was prescribed. EXs 20, 21. The dismissal, on the grounds that claimant's seaman status precluded coverage, was affirmed by the Louisiana Third Circuit Court of Appeals on November 7, 2001. *Jones v. Tidex/Tidewater Marine Service, Inc.*, 801 So.2d 541 (La. App. 2001); EX 21. Claimant also filed the instant claim under the Longshore Act.

In his decision, the administrative law judge initially concluded that claimant was barred, by virtue of the doctrine of collateral estoppel, from re-litigating the issue of his status as a seaman as that identical issue was fully addressed and completely resolved in the prior state claim, *i.e.*, the state court concluded, and its decision was affirmed on appeal, that claimant was a seaman. Nevertheless, "out of an abundance of caution," the administrative law judge independently reviewed claimant's status aboard the *NORTHTIDE* and likewise concluded that claimant's status as a seaman precluded his claim for benefits pursuant to Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G). Accordingly, the claim for benefits under the Act was dismissed. Claimant appeals, without representation by counsel, and employer responds, urging affirmance.

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

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October 1978 until he was terminated, for lack of contact, on July 3, 1979.

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). The issue of whether a worker is a seaman/member of a crew is a mixed question of law and fact. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); *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 addressing the status issue, the administrative law judge initially determined, and it is undisputed, that the *NORTHTIDE* was a vessel in navigation since its primary purpose, as an offshore supply vessel, was to transport cargo consisting of oilfield equipment, tools, materials such as water, fuel and cement from the dock, across navigable waters, to offshore platform rigs located in the Gulf of Mexico. HT at 57-58, 142; *see generally Manuel v. PAW Drilling & Well Services, Inc.*, 135 F.3d 344 (5th Cir. 1998); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990). The administrative law judge next found that claimant conceded, and the evidence supports his finding, that claimant's duties contributed to the function of the *NORTHTIDE* in accomplishing its mission. Substantial evidence supports this finding as both claimant and Steve Comeaux, who served as captain of the *NORTHTIDE* in 1978 and 1979, testified that the duties of a deckhand involved the performance of general maintenance and upkeep of the vessel, including general daily housecleaning, chipping and painting, as well as the tying and untying of lines at the dock and various platform rigs. HT at 58-59, 143-144; *In re: Endeavor Marine, Inc.*, 234 F.3d 287.

The administrative law judge further found that claimant had a connection to the *NORTHTIDE* that was substantial in both duration and nature. *Latsis*, 515 U.S. 347. First, the administrative law judge found that claimant was assigned to the *NORTHTIDE* and spent the entirety of his work time aboard the vessel in service of its mission.[2] In this regard, claimant acknowledged that he would work seven days on and then seven days off, and that during his seven days on, he would remain aboard the vessel and eat all of his meals and sleep there until the end of his shift. HT at 58-59. Captain Comeaux

[2] Claimant cites to *Chauvin v. Sanford Offshore Salvage, Inc.* 868 F.2d 735 (5th Cir. 1989), in support of his appeal. In that case, the United States Court of Appeals for the Fifth Circuit held that the employee, who was injured while assisting the rigging of a spreader bar to a crane of derrick barge, was a longshoreman under the Act, rather than a seaman under Jones Act. The court was persuaded by the fact that for two months prior to the accident, the employee spent only two days engaged in seaman's work, with the remaining time spent on shore conducting vessel repairs. This is the distinguishing factor from the case at hand as the record indisputably establishes that the vast majority of claimant's time was spent engaged in seaman's work. HT 58-59, 143-144.

echoed claimant's testimony by acknowledging that while on shift, all of the crewmembers would eat and sleep aboard the vessel. HT at 143. Claimant further testified repeatedly that, with the exception of the one alleged time, he was not, as a deckhand, required to load/unload the equipment transported by the *NORTHTIDE* to and from the platform rigs. HT at 26-27, 59. Captain Comeaux testified that the crewmembers never went onto the platform or rigs to perform any work, HT at 144, that crewmembers did not assist in offloading operations as it is strictly against company policy, HT at 149, 162, that it is specifically not a deckhand's duty to unload freight, HT at 153, 162, and that in any event no one would be unloading cargo in rough weather. HT at 148, 162. Moreover, Captain Comeaux testified that although he does not remember claimant, he would have remembered any severe injuries sustained aboard his vessel, and he has no recollection of anyone being severely injured aboard the *NORTHTIDE* during the time in question. As such, the administrative law judge's finding, that claimant had a substantial connection to a vessel in navigation, is supported by substantial evidence, and therefore affirmed. *See generally In Re: Endeavor Marine*, 234 F.3d 287; *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003); *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997); *Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992). Consequently, we affirm the administrative law judge's conclusion that claimant is excluded from coverage under the Act as a member of a crew.[3] *See* 33 U.S.C. §902(3)(G); *Papai*, 520 U.S. 548, 31 BRBS 34(CRT); *Latsis*, 515 U.S. 347; *Wilander*, 498 U.S. 337, 26 BRBS 75(CRT).

Claimant also raises, on appeal, issues pertaining to a review of the state court's decision by the Board, and allegations that employer violated Section 49 of the Act, 33 U.S.C. §948a, by discriminatorily terminating him without a hearing. These issues were not among those raised by the parties before the administrative law judge. *See* Joint Exhibit 1. As such, they cannot be considered as they are being raised for the first time on appeal. *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). In any event, we note that the Board does not have the authority to review the state court's decision as its authority to hear and determine appeals is limited to cases arising under the Longshore Act. 33 U.S.C. §921(b)(3). Moreover, claimant's claim that employer violated Section 49 of the Act,[4] is inherently

[3] In light of our affirmance of the administrative law judge's determination that claimant is excluded from coverage pursuant to Section 2(3)(G) of the Act, we need not address the administrative law judge's alternative rationale for denying claimant's claim, *i.e.*, application of the doctrine of collateral estoppel.

[4] Section 49 states in pertinent part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment *because such employee has claimed or attempted to claim*

flawed as that provision requires that employer's actions, in this case its termination of claimant, be tied to claimant's filing of his claim for benefits under the Act. In the instant case, the record establishes that employer terminated claimant on July 3, 1979, as he "cannot be contacted for work," EX 17, and that claimant did not file his claim for benefits under the Act until October 3, 1998, EX 19. Thus, as employer's alleged discriminatory action preceded claimant's filing of his claim under the Act by over 19 years, claimant cannot establish the requisite nexus between his claim for benefits and the alleged wrongful termination. 33 U.S.C. §948a.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

> *compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter.* The discharge or refusal to employ a person who has been adjudicated to have filed a fraudulent claim for compensation is not a violation of this section. Any employer who violates this section shall be liable to a penalty of not less than $1,000 or more than $5,000, as may be determined by the deputy commissioner.

33 U.S.C. §948a (emphasis added).