BRB No. 02-0512

MARIE UZDAVINES (Widow of FRANK UZDAVINES) Claimant-Petitioner v. WEEKS MARINE, INCORPORATED Self-Insured Employer-Respondent	)	DATE ISSUED: APR 18, 2003 DECISION and ORDER

Appeal of the Decision and Order Denying the Claim of Robert J. Kaplan, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying the Claim (2001-LHC-0352) of Administrative Law Judge Robert J. Kaplan 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).

Frank Uzdavines (decedent) was employed as a welder in construction, shipyards, and factories for 35 years where he was exposed to asbestos. He alleged he was last exposed to asbestos while working for employer in 1990 as an oiler in the engine room of a dredge. Mr. Uzdavines retired in June 1990, due to a second heart attack, and filed a claim against employer in May 1991 seeking benefits for asbestosis. At the hearing, he admitted that he had entered into third-party settlements with asbestos manufacturers since 1991 without informing employer, and employer moved to dismiss the claim under Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1). Administrative Law Judge Ralph A. Romano summarily concluded that decedent admitted to these settlements and employer established that no written approval was given to decedent. Consequently, Judge Romano dismissed the claim. On appeal, the Board vacated Judge Romano's dismissal and remanded for further review of the applicability of Section 33(g)(1). *Uzdavines v. Weeks Marine, Inc.*, BRB No. 96-1502 (May 19, 1997)(unpub.); *see also* CX 5. On remand, Judge Romano again dismissed the claim. No further action was taken in that case.

Decedent died on August 10, 1999, due, in part, to asbestos exposure, and claimant thereafter filed a claim for death benefits under the Act. Employer responded to that claim, seeking summary judgment on the basis that decedent was a member of a crew excluded from coverage under the Longshore Act. In his decision, Administrative Law Judge Robert D. Kaplan (the administrative law judge) determined that decedent was a member of the crew of the dredge and that the dredge is a vessel. He thus concluded that decedent is, as a member of a crew, excluded from coverage under the Act. *See* 33 U.S.C. ' 902(3)(G).

On appeal, claimant challenges the administrative law judge's dismissal of her claim for death benefits. Employer responds, urging affirmance.

Collateral Estoppel

Claimant asserts that the administrative law judge erred, as a matter of law, in failing to give binding effect to the decision of Judge Romano finding that decedent was "a person entitled to compensation" and thus covered under the Act. Specifically, claimant avers that the parties, in litigating decedent's disability claim, submitted a joint stipulation to Judge Romano, wherein employer conceded that the claim falls within the subject-matter jurisdiction of the Act. Claimant therefore argues that Judge Romano's decisions, read together with the Board's decision, represent a final determination, on the merits, that decedent was covered under the Act. Claimant further avers that in contrast to the administrative law judge's conclusion, the "finding" of coverage on decedent's disability claim is binding on the parties in this survivor's claim. Claimant maintains that the administrative law judge's reliance on the Board cases in *Doucet v. Avondale Industries, Inc*., 34 BRBS 62 (2000), and *Cortner v. International Oil Co., Inc*., 22 BRBS 218 (1989), is misplaced as these holdings are irrelevant to the issue presented in the instant case. Lastly, claimant contends, citing *Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130(CRT)(1st Cir. 1983), that the administrative law judge erred in finding that the disability claim and death benefits claim are separate since they, in essence, merely represent a single claim for compensation, particularly with regard to the issue of coverage under the Act.

Collateral estoppel, or issue preclusion, prevents parties or their privies from relitigating in a subsequent action an issue of fact or law that was fully and fairly litigated in a prior proceeding. *See Boguslavsky v. Kaplan,* 159 F.3d 715, 719-20 (2d Cir. 1998); *see also Comm'r of Internal Revenue v. Sunnen,* 333 U.S. 591, 598 (1948) ("Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel."). The doctrine of collateral estoppel may apply to preclude relitigation of an issue actually litigated in the prior case where the determination of the issue was a critical and necessary part of the judgment in the

prior action. *See, e.g., Figueroa v. Campbell Industries,* 45 F.3d 311, 315 (9th Cir. 1995); *Taylor v. Plant Shipyards Corp.,* 30 BRBS 90, 96 (1996); *Weber v. S.C. Loveland Co.,* 28 BRBS 321, 325 (1994). In particular, collateral estoppel applies when: "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Boguslavsky,* 159 F.3d at 720.

With regard to the adjudication of the decedent's disability claim, following decedent's hearing testimony that he had entered into third-party settlements with asbestos manufacturers without informing employer, employer moved to dismiss the claim under Section 33(g)(1). Judge Romano granted employer's motion and thus summarily dismissed the decedent's disability claim pursuant to Section 33(g)(1). In its decision, the Board held that Judge Romano did not make the requisite determination as to whether the decedent was a "person entitled to compensation," or the necessary "comparison between the gross amount of claimant's aggregate third-party settlement recoveries and the amount of compensation, excluding medical benefits, to which claimant would be entitled under the Act." *Uzdavines*, slip op. at 3. Accordingly, the Board remanded the case for consideration of these issues. *Id.* On remand, Judge Romano again dismissed the disability claim under Section 33(g)(1) since "[t]he parties have agreed that [decedent]: is a 'person entitled to compensation' under the Act," and the amount decedent received due to the settlements was less than the compensation to which he would have been entitled to under the Act. Judge Romano's Decision and Order on Remand at 1-2.

In reviewing the administrative decision regarding decedent's disability claim, the administrative law judge in the present claim observed that the parties submitted a joint stipulation to Judge Romano stating that decedent was a person entitled to compensation for purposes of Section 33(g). The administrative law judge, however, concluded that this stipulation does not constitute a concession of coverage under the Act by employer. Additionally, the administrative law judge found that Judge Romano's decision contains no explicit or implicit finding that the decedent's disability claim came within the coverage of the Act.

From the decisions regarding decedent's *inter vivos* claim, it is clear the sole issue which was actually litigated before Judge Romano involved whether that claim was barred by Section 33(g)(1). The present case is a claim for death benefits in which employer has controverted the claim on the basis that decedent was a

[1]Section 33(g)(1) provides a bar to a claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than his compensation entitlement without obtaining employer's prior written consent. 33 U.S.C. §933(g)(1)(1994).

member of a crew while working for employer on the dredge and thus excluded from coverage under Section 2(3)(G) of the Act. This issue was, as the administrative law judge found, never raised, and it thus was not *actually litigated* before Judge Romano. *Figueroa*, 45 F.3d 311 (collateral estoppel is not applicable when record does not reflect an express finding by anyone in the prior administrative proceeding that claimant was a "member of a crew"). Thus, the doctrine of collateral estoppel does not apply to the coverage issue raised in this case. *See Epperson v. Entertainment Express, Inc,* 242 F.3d 100 (2d Cir. 2001); *Sedlack v. Braswell Services Group, Inc.,* 134 F.3d 219 (4th Cir. 1998); *Figueroa*, 45 F.3d 311; *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995); *Kollias v. D&G Marine Maintenance*, 22 BRBS 367 (1989), *rev'd on other grounds*, 29 F.3d 67, 28 BRBS 70(CRT)(2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995). Moreover, we hold that, in contrast to claimant's assertion, the parties' prior agreement before Judge Romano that decedent was a "person entitled to compensation" cannot be interpreted as a stipulation to decedent's coverage under the Act in the death claim. Initially, the documents in the prior proceeding state that this stipulation was not binding in any other claims against employer. Furthermore, an employer need not admit liability in order for a claimant to be a "person entitled to compensation" for purposes of

---

[2]In his decision, the administrative law judge observed that "[e]ven if there were such a ruling on the decedent's claim [*i.e*., a ruling as to jurisdiction under the Act], it would not be binding in the instant case," because, citing *Doucet*, 34 BRBS 62, and *Cortner*, 22 BRBS 218, he determined that the decedent and claimant are different parties and thus not "privies" under the doctrine of collateral estoppel. Decision and Order at 9. In light of the fact that the relevant issue of "member of a crew" was not raised, let alone actively litigated, in the proceeding before Judge Romano, the administrative law judge's finding regarding privity and thus citation to these cases is merely *dicta*. Consequently, we need not address claimant's argument that the administrative law judge, in what is tantamount to an alternative finding, erred with regard to his finding on privity. *But see Holmes v. Shell Offshore Inc.,* BRBS , No. 02-499 (Mar. 31, 2003) (family relationship alone does not result in privity).

[3]As claimant's attorney acknowledges, in the prior proceeding employer "stated that this stipulation [decedent a person entitled to compensation in disability claim before Judge Romano] is in no way binding with respect to any other claims brought against the employer." EX 6; CX 18. Thus, it cannot be said that parties intended for this stipulation to be binding in later proceedings. *Cf. Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa, S.A.*, 56 F.3d 359, 369 n.4 (2d Cir. 1995) (holding that, if the parties intended to be bound by a prior stipulation the issue that is the subject of the stipulation may be deemed to have been "actually litigated" for collateral estoppel purposes).

Section 33(g). *See Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93(CRT) (5th Cir. 1991) (*en banc*), *aff'd sub nom. Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), *cert. denied*, 505 U.S. 1218 (1992) (a claimant is a person entitled to compensation when he satisfies the prerequisites for asserting the right, not when his employer admits liability).

Finally, it is well-settled that a claim for death benefits is a separate and distinct cause of action, in relation to a claim for disability benefits, which does not arise until the death of the worker. *Compare* 33 U.S.C. §908 *with* 33 U.S.C. §909. *See generally State Ins. Fund v. Pesce*, 548 F.2d (2d Cir. 1977); *see also Nacirema Operating Co. v. Lynn,* 577 F.2d 852 (3d Cir 1978), *cert. denied,* 439 U.S. 1069 (1979); *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, OWCP*, 539 F.2d 378 (4th Cir. 1976), *cert. denied,* 429 U.S. 1078 (1977). The fact that the two claims may be linked, as claimant suggests, with regard to the establishment of certain critical elements, such as the employee's coverage under the Act, does not alter the procedural requirements that the claimants in a disability and death claim separately establish their entitlement under Sections 8 and 9 respectively. 33 U.S.C. §§908, 909. Claimant's reliance on *Graziano*, 14 BRBS 950, is misplaced.

In *Graziano,* the Board considered the express language of Section 8(f), 33 U.S.C. §908(f), and concluded that where there is an award of permanent total disability under Section 8(a), 33 U.S.C. §908(a), followed by a work-related death giving rise to death benefits under Section 9, 33 U.S.C. §909, employer's liability is limited to one period of 104 weeks. Contrary to claimant's assertion, *Graziano* does not establish that disability and death claims represent, in actuality, a single claim; rather, the case supports the opposite conclusion. The Board therein specifically added that where employer claims Section 8(f) relief and the case involves *two separate claims*, *i.e*., a claim for total disability and a claim for death benefits, employer's entitlement to relief must be *separately evaluated with regard to each claim*. *Graziano*, 14 BRBS at 953. Where employer is entitled to Section 8(f) relief on both claims, under the express language of Section 8(f) its liability is "only" for 104 weeks. Thus, *Graziano* explicitly acknowledges the separate and distinct nature of disability and death claims.

We therefore affirm the administrative law judge's finding that Judge Romano's decision regarding the decedent's disability claim contains no findings which are binding with regard to the issue of coverage under the Act. Consequently, we hold that the administrative law judge properly considered the issue of coverage pursuant to Section 2(3)(G) of the Act in the instant claim for death benefits.

Member of a Crew

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). "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.*

Initially, claimant challenges the administrative law judge's finding that the dredge was a vessel in navigation, arguing that the dredge herein is instead merely a work platform, which clears the channel and loads material onto a permanent barge. Claimant asserts that *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30 (2d 1996), precludes a finding that the dredge, whose sole movement consists of perpendicular and lateral movement by spuds in relation to its function as a work platform, is a vessel in navigation. Claimant maintains that, by definition, a vessel in navigation requires a finding that the structure is involved in the movement of people or cargo, as opposed to movement related solely to its function as a work platform.

In addressing the issue as to when a floating structure is a "vessel in navigation," the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, in *Tonnesen*, 82 F.3d 30, "essentially adopt[ed]" the test derived by the United States Court of Appeals for the Fifth Circuit. *See Tonnesen,* 82 F.3d at 36; *see also Green v. C.J. Langenfelder & Son, Inc.*, 30 BRBS 77 (1996). In *Bernard v. Binnings Constr. Co., Inc.*, 741 F.2d 824 (5th Cir. 1984), the Fifth Circuit affirmed the district court's ruling that the plaintiff, who was injured while working on a raft or work punt, was not a seaman since he was not injured on a vessel within the meaning of the Jones Act. In so holding, the court considered three factors used in determining whether a floating work platform is a vessel: (1) if the structure involved was constructed and used primarily as a work platform; (2) if the structure was moored or otherwise secured at the time of the accident; and (3) if the structure was capable of movement across navigable waters in the course of normal operations, was this transportation merely incidental to its primary purpose of serving as a work platform. *Bernard*, 741 F.2d at 831. The court concluded that the work punt was not designed for navigation, was not engaged in navigation, and was not actually in navigation at the time of the injury; thus, the plaintiff was not a Jones Act seaman. *Bernard*, 741 F.2d at 832.

---

[4]The Fifth Circuit observed that the "term vessel has generally been defined broadly and, in its traditional sense, refers to structures designed or utilized for transportation of passengers, cargo or equipment from place to place

In *Tonnesen*, the Second Circuit reversed the district court's decision granting summary judgment on the basis that a stationary barge was not a "vessel in navigation." While the Second Circuit determined that the second and third *Bernard* factors must be applied, the court disagreed with regard to the first factor, namely, the Fifth Circuit's focus on the original purpose for the structure. With respect to the general question of when a structure may be deemed a "vessel in navigation," the court concluded that the inquiry should look to (1) whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident; (2) whether the structure was moored or otherwise secured at the time of the accident; and (3) whether, despite being capable of movement, any transportation function performed by the structure was merely incidental to its primary purpose of serving as a work platform. *Tonnesen*, 82 F.3d at 36. The court further remarked that "[c]ourts considering the question of whether a particular structure is a 'vessel in navigation' typically find that the term is incapable of precise definition," and thus, concluded that "under the Jones Act, the term 'vessel' has such a wide variety of meaning that, except in rare cases, only a jury or trier of facts can determine its application in the circumstances of a particular case." *Tonnesen*, 82 F.3d at 33. On the facts before it, the court concluded that the district court erred in granting partial summary judgment because "the evidence [was] incomplete and support[ed] competing inferences." *Tonnesen*, 82 F.3d at 37. In particular, there was competing affidavit testimony on the structure's purpose at the time of the accident, as well as to whether whatever transportation function it had was "merely incidental" to a primary function as a work platform. In remanding the case for a jury determination on the facts, the Second Circuit also observed that "the transportation of a crane or other supplies across navigable waters on a regular basis would provide a basis for a jury to conclude that the transportation function was more than merely incidental to the [barge's] use as a work platform." *Id*.

In the instant case, the administrative law judge determined that the dredge on which decedent worked was a vessel in navigation under the test of *Bernard,* as substantially adopted by the Second Circuit in *Tonnesen.* First, he found, based on decedent's testimony regarding the operation of the dredge, CX 17 at 34-38, that although it could be considered a "work platform," it is a platform that in operation must float and move along navigable water because its purpose is to dredge ships' channels in waterways. Thus, he concluded that the first two elements did not apply to the dredge. As for the third element, the administrative law judge found that movement on water, *i.e*., navigation, is a function that is inherent, and not "merely incidental," to its dredging purpose. The administrative law judge concluded that the dredge is a floating craft designed and used to transport the crane with its bucket on navigable waterways, and that without the ability of the dredge to transport the crane

---

across navigable waters." *Bernard*, 741 F.2d at 828-829.

on navigable waters, it would have been unable to perform its mission of deepening the channel. The administrative law judge therefore found it reasonable to state that the primary purpose of the dredge was actually transportation on navigable waters. He added that this purpose applies whether the dredge was towed by a tugboat or moved on its own by using its spuds.

The administrative law judge further found that the dredge herein is analogous to the barge employed by the plaintiff in *Brunet v. Boh Brothers Constr.*, 715 F.2d 196 (5th Cir. 1983), a case discussed by the Fifth Circuit in *Bernard* and the Second Circuit in *Tonnesen.* In *Brunet,* the worker was injured aboard a moored pile-driving barge that was used to carry and transport a 150-ton crane. The Fifth Circuit, in reversing the district court's grant of summary judgment holding, in essence, that the barge was not a vessel in navigation, held that the "barge by necessity is designed to transport a pile-driving crane across navigable waters to sites that could not be reached by land-based pile-drivers." *Brunet*, 715 F.2d at 198. The court added, that "while we agree that the barge was used more often to support the crane than to transport it, we cannot agree that the transportation function was so 'incidental' as to warrant a conclusion that the barge was not a vessel as a matter of law." *Id.*

Thus, the decisions in *Tonneson* and *Brunet,* wherein the courts remanded the cases for jury trials on the pertinent issues, indicate the factual nature of the inquiry regarding whether a floating structure is a "vessel in navigation." In the instant case, the administrative law judge, after consideration of the factors stated in *Bernard* and *Tonnesen*, made a factual determination that the dredge is a vessel in navigation. As his factual findings are rational, supported by substantial evidence, and in accordance with law, they are affirmed. *Tonnesen*, 82 F.3d at 37; *Bernard*, 741 F.2d at 831; *Brunet*, 715 F.2d at 198. Consequently, we affirm the administrative law judge's conclusion that the dredge is a vessel in navigation. *Id.*

Claimant next asserts that the administrative law judge's finding that decedent had a substantial connection to the claimed vessel is erroneous as there is no evidence whatsoever as to how long decedent worked on the dredge. Claimant argues that in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the United States Supreme Court determined that seaman status should be granted only to those with a more or less permanent connection to a vessel; thus, employees with a momentary or episodic period of work on board a vessel are not entitled to seaman status. Claimant maintains that decedent's employment with employer on board the dredge was not permanent but rather only temporary and thus was insufficient to establish the substantial connection required for seaman status. In this regard, claimant asserts that the administrative law judge erred by not considering decedent's overall employment as a welder, or the fact that during his career he predominantly worked in shipyards or as a general welder without any connection to a vessel.

The employee's connection to a vessel must be substantial in terms of both its nature and duration in order to separate sea-based workers entitled to coverage under the Jones Act from land-based workers with only a transitory or sporadic connection to a vessel in navigation. *Chandris*, 515 U.S. at 368; *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). The Supreme Court stated in *Papai* that "for the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees." *Papai*, 520 U.S. at 555, 31 BRBS at 37(CRT). The Court, after consideration of the evidence, held that the claimant, who was injured when hired for one day to paint a tug, was not a "member of a crew," inasmuch as he did not have a substantial connection with "an identifiable group of ... vessels." *Id.*

The Second Circuit has held that that an "employment-related connection" to a vessel exists if the "worker's duties contribute to the function of the vessel or to the accomplishment of its mission" and the worker's connection to the vessel is "substantial in both its duration and its nature." *Tonnesen*, 82 F.3d at 32 n. 2 (citing *Chandris*, 515 U.S. at 368). The Second Circuit observed that the former inquiry focuses on "the plaintiff's employment at the time of the injury," *Fisher v. Nichols*, 81 F.3d 319, 322 (2^{d} Cir. 1996), while the latter inquiry, described as "status based," focuses on "whether the plaintiff derives his livelihood from sea-based activities." *Fisher*, 81 F.3d at 322; *see also Chandris*, 515 U.S. at 361.

In *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2^{d} Cir. 2002), a Jones Act case, the Second Circuit held that the claimant, who worked on barges as a dockbuilder to repair and reconstruct parts of the Staten Island Ferry Maintenance Facility, did not meet the second part of the test for determining whether he had an "employment-related connection" to a vessel, as his connection to the barges was insufficiently "substantial in both its duration and its nature." *O'Hara*, 294 F.3d at 64; *see also Chandris*, 515 U.S. at 368. In that case, the court observed that the claimant spent more than half his working hours during a five-month span aboard the barges, but that he spent all of that time performing tasks related to repair of the Staten Island pier while the barges were secured to the pier. *O'Hara*, 294 F.3d at 64. In addition, the court found that the claimant never spent the night aboard a barge nor did he ever operate a barge or otherwise assist in its navigation. The court therefore concluded that the evidence, at most, establishes that the claimant had a "transitory or sporadic" connection to the barges in their capacity as vessels in navigation. *O'Hara*, 294 F.3d at 64.

In his decision, the administrative law judge determined that decedent's employment satisfied the first condition of "an employment related connection" to

the vessel since, as claimant herein conceded, decedent was engaged in the "mission" of the dredge. With regard to the second condition, the administrative law judge determined that decedent had a substantial connection to the dredge for he worked on it as an oiler for three to four consecutive weeks. In calculating this time, the administrative law judge relied on decedent's employment records, which indicated that he worked for employer for seven weeks between October 22, 1990, to December 9, 1990, CX 1, in conjunction with decedent's testimony that he first worked for employer at that time as a tugboat deckhand for three weeks to a month, before serving on the dredge as an oiler. CX 17 at 32-33. Thus, in contrast to claimant's assertion, there is evidence to establish the length of decedent's employment on the dredge. Applying this evidence, the administrative law judge rationally concluded that decedent's work on the dredge lasted for three to four consecutive weeks. Moreover, the evidence establishes that decedent worked exclusively on the dredge during that period. CX 17 at 33-34.

[5]In fact, decedent stated that his work for employer as an oiler might have been a "month" or as long as "two months." CX 17 at 5.

[6]Moreover, as the administrative law judge observed, claimant took the position that decedent was not exposed to asbestos when he was employed by employer in activities on land or as a deckhand on a tugboat. Decision and Order at 2 n. 2.

The issue of whether a worker is a seaman/member of a crew is primarily a question of fact, and the Board will affirm the administrative law judge's determination of crewmember status if it has a reasonable basis. *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996); *Griffin v. Louisiana Ins. Guaranty Ass'n*, 25 BRBS 196 (1991). The administrative law judge's findings in the instant case are rational and supported by substantial evidence and are therefore affirmed. Decedent's work for employer spanned the period from October 22, 1990 until December 9, 1990. CX 1. During this period of time he served first as a deckhand on employer's tugboat and then as an oiler aboard the dredge in question. CX 17 at 33-35. Decedent's employment history, at least insofar as employer is concerned, is not that of a land-based maritime worker who happens to be working on a vessel at the time of injury. In contrast to *O'Hara*, decedent's connection to the dredge was not "transitory or sporadic" but instead, as the administrative law judge determined, substantial in nature and duration, as decedent worked exclusively aboard the dredge during the appropriate time in question. Thereafter, based upon his findings and relying on

---

[7]We note that these vessels thus represent a fleet under common control. *Papai*, 520 U.S. 548, 31 BRBS 34(CRT).

[8]In *Papai*, the Supreme Court explicitly stated:

> the context of our statement in *Chandris* makes clear our meaning, which is that the employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer, an assignment with different 'essential duties' than his previous ones. In *Chandris*, the words 'particular employer' give emphasis to the point that the inquiry into the nature of the employee's duties for seaman-status purposes may concentrate on a narrower, not broader, period than the employee's entire course of employment with his current employer. There was no suggestion of a need to examine the nature of an employee's duties with prior employers."

Papai, 520 U.S. at 556, 31 BRBS at 38(CRT) (internal citations omitted). Thus, in contrast to claimant's contention, there is no requirement to consider an employee's prior employment with independent employers in resolving the issue of seaman status. As the administrative law judge determined in the instant case, decedent's work assignment for employer at the time of his injury was as an oilman, and not a welder. Moreover, his employment with employer immediately prior to that was as a deckhand on a tugboat.

[9]In *Chandris*, the Supreme Court acknowledged the Fifth Circuit's rule of

Wilander, the administrative law judge concluded that decedent was a "member of a crew" of a vessel pursuant to Section 2(3)(G) of the Act. Inasmuch as the administrative law judge examined the total circumstances of decedent's work with employer in concluding that he was a "member of a crew," and as the administrative law judge's findings in this regard are rational, supported by substantial evidence, and are in accordance with the law, his finding that decedent was a "member of a crew" and consequent determination that claimant's claim against employer is not covered by virtue of Section 2(3)(G) of the Act is affirmed. *See Chandris*, 515 U.S. 347; *Wilander,* 498 U.S. at 337, 26 BRBS at 75(CRT).

---

thumb that "a worker who spends less than about thirty percent of this time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Chandris*, 515 U.S. at 349. The Court however, specifically recognized that the thirty percent figure "serves as no more than a guideline established by years of experience," and that "departure from it will certainly be justified in appropriate cases." *Id.*

[10]The record contains evidence regarding decedent's extensive exposure to asbestos while working for 35 years as a welder in the maritime industry. CX 17 at 37-38, 57-58, 64-66. Claimant, however, sought death benefits solely against the instant employer, based on evidence that it was during decedent's work aboard the dredge for employer that he was last exposed to asbestos while at work. Claimant did not allege, nor was any evidence adduced to indicate, that decedent's other work for employer prior to 1990 exposed him to asbestos. As determined by the administrative law judge, decedent's work for employer on the dredge is not covered under the Act. Since, under the Act, the responsible employer is the last maritime employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease, *see Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied,* 350 U.S. 913 (1955); *see also General Ship Service v. Director, OWCP*, 938 F,2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991), claimant may seek death benefits against an earlier maritime employer. *See Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), (in occupational disease cases where there is a succession of employers and a claim is timely filed against a later employer, the Section 12 and 13 time limits, 33 U.S.C. §§912, 913, do not begin to run against a prior employer until claimant becomes aware, or should have become aware, that liability could be asserted against that particular employer). As Weeks Marine, Incorporated has been released from liability, claimant is now aware that liability could be asserted against a prior employer for purposes of Sections 12 and 13 of the Act. *Smith*, 647 F.2d 518, 13 BRBS 391.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
PETER A. GABAUER, Jr.
Administrative Appeals Judge