

SAMUEL C. JOHNS)	
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Claimant-Petitioner)	
)	
v.)	
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DAVIDSON SAND & GRAVEL)	
)	
and)	
)	
AMERICAN HOME INSURANCE)	
COMPANY)	
)	
and)	
)	
MARINE OFFICE OF AMERICA)	
)	
and)	
)	
U.S. FIDELITY & GUARANTY)	
COMPANY)	
)	
and)	
)	
AETNA INSURANCE COMPANY)	DATE ISSUED: _____)
)	
Employer/Carriers-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim for Want of Jurisdiction of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Neal A. Sanders (Law Offices of Neal A. Sanders), Butler, Pennsylvania, for claimant.

William W. Schrimpf, Sr. (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer and U.S. Fidelity & Guaranty Company.

David J. Singley (Israel & Wood), Pittsburgh, Pennsylvania, for employer and American Home Insurance Company.

Richard Q. Whelan and David P. Thompson (Palmer Biezup & Henderson), Philadelphia, Pennsylvania, for employer and Marine Office of America Corporation.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-2390) of Administrative Law Judge Gerald M. Tierney 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, who worked for employer in many capacities aboard the dredge *Allegheny* and its replacement the *Allegheny II*, filed a claim for benefits under the Act, alleging that he is totally disabled due to work-related silicosis. Employer, through various insurance companies, disputed liability, contending that claimant was not entitled to benefits under the Act, as the Act specifically excludes a "master or member of a crew" of any vessel, 33 U.S.C. §902(3)(G), and claimant was a member of the crew of the *Allegheny* and *Allegheny II*.

The only issue addressed by the administrative law judge was whether claimant was a "member of a crew" of a vessel and therefore excluded from coverage under the Act pursuant to Section 2(3)(G) of the Act. In his Decision and Order, the administrative law judge applied the United States Supreme Court's decision in *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT) (1991), and found that claimant's work activities as deckhand, loader, process equipment operator, and welder contributed to the dredge's overall mission as well as its function. Relying on the decision of the United States Court of Appeals for the Third Circuit in *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), and the decision in *Steven W. Gallop v. Pittsburgh Sand & Gravel, Inc.*, 696 F.Supp. 1061 (W.D. Pa. 1988), the administrative law judge also found that the *Allegheny* was a vessel in navigation and that as claimant worked on the *Allegheny* all but one of his 42 years of employment and performed all of his work aboard the vessel in navigable waters, he had the requisite permanent connection to the vessel to confer seaman status. Accordingly, he determined that claimant was a "member of a crew" pursuant to Section 2(3)(G) of the Act, and therefore excluded from coverage under the Act.

Claimant appeals the denial of benefits, arguing that although he may have been a seaman from 1948 to 1974, when he was working as an equipment processor on the dredge, his work thereafter from 1974 to 1989 as a laborer, welder, and repairman was not seaman's work as it had nothing to do with making his ship or any other ship navigable. Accordingly, claimant asserts that some type of apportionment is required. In addition, claimant asserts that the administrative law judge erred in concluding that the *Allegheny I* and *II* were vessels in navigation. Employer responds, urging affirmance.

We affirm the administrative law judge's determination that claimant is excluded from

coverage under the Longshore Act. 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). The United States Supreme Court has held that the Longshore Act and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is the same as a "master or member of a crew of any vessel" under the Longshore Act.¹ *Wilander*, 498 U.S. at 353, 26 BRBS at 75 (CRT). The United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, initially identified the elements for defining member of a crew status under the Jones Act as requiring that: (1) the vessel must be in navigation; (2) the worker must have a more or less permanent connection with the vessel; and (3) the worker must be aboard primarily to aid in navigation. *Griffith*, 521 F.2d at 36 (quoting M. Norris, *The Law of Seaman* §668 at 301 (3d ed. 1970)). Subsequent to the Supreme's Court decision in *Wilander*, however, wherein the Court reexamined seaman status and decided that it was time to jettison the "aid in navigation" test, and set forth a new standard solely in terms of the employee's connection to a vessel in navigation, 498 U.S. at 353,² the United States Court of Appeals for the Third Circuit followed suit. See *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247 (3rd Cir. 1994); see also *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995). Under *Reeves*, the post-*Wilander* test for seaman status requires: (a) that claimant maintain a more or less permanent connection on (b) a vessel in navigation; and (c) that his employment contribute to the function of the vessel or its mission. *Id.*, 26 F.3d at 1251. The test for seamen status is not to be applied mechanically, but rather is to be used as a guide to determine whether the total circumstances of a claimant's employment could reasonably support the conclusion that claimant is entitled to seaman status. *Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992); *Griffin v. T. Smith & Son, Inc.*, 25 BRBS 196 (1991). The issue of whether a worker is a member of a crew is primarily a question of fact, and the Board will defer to the administrative law judge's determination of crew member status if it has a reasonable basis. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44 (CRT) (1991); *Thompson v. Potashnik Construction*, 21 BRBS 59 (1988), *on recon.*, 21 BRBS 63 (1989).

Claimant's argument that the administrative law judge erred in finding that he was a member of the crew because the work he performed as a laborer, welder, and repairman between 1978 and 1989 did not make the ship navigable or aid in navigation, is rejected in light of the abandonment of the "aid in navigation" requirement in *Wilander* and *Reeves*. As the administrative law judge correctly recognized pursuant to *Wilander* in determining seaman status, the key is whether the employee had an employment-related connection to the vessel; "[i]t 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." *Wilander*, 498 U.S. at 355, 26 BRBS at 83 (CRT). A "seaman" is an employee whose

¹A "seaman" under the Jones Act is defined as a "member of a crew" of a vessel as stated in the Act. See *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT) (1991).

²The Court thus held that in order to qualify for coverage under the Jones Act, the employee must: (1) have an "employment-related connection to a vessel in navigation," and (2) contribute to the function of the vessel or the accomplishment of its mission." 498 U.S. at 355 (citing *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959)).

duties contribute to the function of a vessel or to the accomplishment of its mission; such employees must have a connection to the vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, U.S. , 115 S.Ct. 2172 (1995).

Claimant in the present case was employed for over 42 years by employer. With the exception of one winter, claimant worked exclusively on the dredge *Allegheny* and its replacement, the *Allegheny II*. These dredges were located in the middle of the Allegheny River in Pennsylvania, a navigable body of water, and were operated to maintain a navigable channel in the river as well as to produce gravel and sand for sale by employer. Claimant testified that over the years he held various jobs on the dredges, including beltsman, deckhand, loader, process equipment operator or engineer, and welder. The dredge, which was about 190 feet long and 46 feet wide, had its own power plant, but no motive power of its own; shorelines were used to maneuver the dredge in the channel in which it was working. The dredge was outfitted with navigation lights and would move from pool to pool or lock to lock by tugboat. Claimant testified that he was frequently aboard the dredge when it was being moved, and had participated both in the manipulation of the shorelines and the dredge's four anchors. Tr. at 77. Claimant would be transported to and from the dredge, following an 8 hour shift in which he worked with 10 other people, by boat. There were no living quarters aboard the dredge, but there were storage lockers. As a beltsman, claimant was required to watch over the dredges' conveyor belts and crushers, USFG 14 at 5-6. As a loader, he was involved in the process of loading barges with the dredge's work product via the conveyor belts. USFG 14 at 6. As a process equipment operator or engineer, he maintained the dredge's crushers and belts, while as a welder and repairman or member of the maintenance crew, his duties were associated with maintaining the dredge's seaworthiness. He would also be required to stop and start the dredge's engine. Tr. at 49, 51, 53.

We conclude that in the instant case, the administrative law judge rationally found that claimant had the requisite employment-related connection to a vessel envisioned by the Supreme Court in *Wilander* and *Latsis* because claimant's duties contributed to the overall mission of the dredge as well as to its function, and as claimant performed no landbased activities and had worked aboard the dredge for 41 years, his connection to the dredge was permanent. In so concluding, the administrative law judge specifically relied on claimant's testimony that he assisted in the movement, tying, and maintenance of the dredge, and his statements indicating that he contributed to the production of the gravel and sand which were sold in commerce by virtue of the dredging activities. Because the administrative law judge's finding that claimant performed work which contributed to the function of the dredge and its mission, *i.e.*, to maintain a navigable channel in the river and produce gravel for commerce, is rational, supported by substantial evidence, and in accordance with *Wilander* and *Latsis*, we affirm his determination that claimant had an employment-related connection to a vessel. *See generally Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992); *Reeves*, 26 F.3d at 1252.

We also affirm the administrative law judge's determination that claimant satisfied the remaining requirement for seaman status because the *Allegheny I* and *II*, were "vessels in

navigation." Although claimant asserts that because the dredge had no motive power it was more like a dry-docked ship than a vessel in navigation, the fact that a vessel has no motive power is not, in and of itself, determinative. In general, the term "vessel in navigation" is a broad term that encompasses many vessels that do not literally navigate the high seas. *Katrinier v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992). In *Griffith*, 521 F.2d at 31, which was relied upon by the administrative law judge as controlling, the Third Circuit specifically ruled that a non-motive barge utilized on a river to transfer coal from one area to another is properly considered a vessel in navigation for purposes of the Jones Act. In its decision in *Griffith*, the Third Circuit stated that the term "in navigation" is to be construed in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of commerce or transportation on navigable waters. In so concluding, the *Griffith* court relied on *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944), a pre-*Wilander* decision, in which the Supreme Court held that a barge is a vessel within the meaning of the Act "even when it has no motive power of its own, since it is a means of transportation." Subsequent case law from the district courts in the Third Circuit indicates that to qualify as a "vessel in navigation," the purpose and business of the craft must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters. See, e.g., *Bryant v. Gates Construction Co.*, 735 F.Supp. 602, 606 (D. Del. 1990).

Inasmuch as the purpose of the dredge in the present case was to maintain a navigable waterway, it was clearly facilitating transportation on navigable waters. Moreover, it also functioned as an instrument of commerce when it would move along the navigable waters of the Allegheny River to transfer the dredged sand and gravel via conveyor belts to barges for sale. Given the precedent established in *Griffith*, we affirm the administrative law judge's finding that the *Allegheny I* and *II* were "vessels in navigation" under the broad standard articulated therein, because on the facts presented it is rational and supported by substantial evidence. See generally *Thompson*, 21 BRBS at 59. Inasmuch as the administrative law judge properly found that claimant was a "member of a crew," his decision dismissing this claim for lack of jurisdiction under the Longshore Act is affirmed.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge