

GILBERT J. GOLDMAN, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HALLIBURTON ENERGY SERVICES)	DATE ISSUED: 03/23/2006
)	
and)	
)	
ACE AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order and Decision and Order Granting Employer/Carrier’s Motion for Summary Decision and Denying Claimant’s Motion for Summary Decision on Remand from the Benefits Review Board of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joseph L. Waitz (Waitz & Downer), Houma, Louisiana, for claimant.

William J. Sommers (Duncan, Courington & Rydberg, L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order and Decision and Order Granting Employer/Carrier’s Motion for Summary Decision and Denying Claimant’s Motion for Summary Decision on Remand from the Benefits Review Board (2003-LHC-1824) 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). 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).

This case is on appeal to the Board for the second time. Claimant, a mud engineer, was injured on March 23, 2001, while working aboard the Falcon Inland Barge 63 in state waters in the Gulf of Mexico in connection with employer's offshore oil and gas exploration activities. Upon the filing of motions for summary decision by both claimant and employer, the administrative law judge granted employer's motion, finding that claimant's employment as a mud engineer is not maritime in nature as it is done in furtherance of oil and gas exploration. Consequently, the administrative law judge concluded that claimant is excluded from coverage under the Act, and dismissed claimant's claim for benefits. The administrative law judge denied claimant's subsequent motion for reconsideration. Claimant appealed the administrative law judge's decisions.

In *Goldman v. Halliburton Energy Services*, BRB No. 04-0302 (Sept. 28, 2004)(unpub.), the Board held that since claimant was injured on actual navigable waters, the Gulf of Mexico, in the course of his employment, he is covered by Section 2(3) of the Act, 33 U.S.C. §902(3), unless he is excluded from coverage pursuant to Section 2(3)(G), 33 U.S.C. §902(3)(G). The Board, therefore, vacated the administrative law judge's decisions, and remanded the case to the administrative law judge to determine whether claimant is excluded from coverage under the Act as a member of a crew pursuant to Section 2(3)(G), and to consider any issues concerning the merits of his claim, if necessary.

On remand, the administrative law judge initially addressed claimant's contention that employer is judicially or collaterally estopped from asserting that claimant is a member of a crew based upon its filing of a motion to compel arbitration in claimant's claim for long-term disability benefits under the Employee Retirement Income Security Act (ERISA). In his Order dated November 4, 2004, the administrative law judge found that employer was neither judicially nor collaterally estopped from asserting that claimant is a member of a crew based upon its actions in claimant's ERISA claim.

Subsequently, the administrative law judge addressed the motions for summary decision concerning whether claimant is a member of a crew. In his Decision and Order dated March 1, 2005, the administrative law judge found that claimant is a member of a crew, and therefore is excluded from coverage under the Act. The administrative law judge thus granted employer's motion for summary decision and dismissed for lack of coverage claimant's claim for benefits under the Act. Due to his finding on the coverage issue, the administrative law judge did not address employer's argument that claimant's claim was barred by Section 33(g) of the Act, 33 U.S.C. §933(g).

In the instant appeal, claimant challenges the administrative law judge's denial of his motion, asserting that employer is judicially estopped from asserting that claimant is a member of a crew.¹ Claimant also challenges the administrative law judge's finding that he

¹ Claimant does not challenge the administrative law judge's finding that employer

is excluded from the Act's coverage as a member of a crew. Employer responds, asserting initially that the Board has no jurisdiction to address claimant's appeal of the administrative law judge's 2004 Order as claimant did not timely appeal it. Employer urges affirmance of the administrative law judge's finding that claimant is a member of a crew. We reject employer's contention that the Board lacks jurisdiction to consider claimant's appeal of the administrative law judge's 2004 Order. The Board may review intermediate orders upon the issuance of a final decision. 5 U.S.C. §704;² *Burns v. Director, OWCP*, 41 F.3d 1555, 1561, 29 BRBS 28, 36-37(CRT) (D.C. Cir. 1994); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 943-944, 25 BRBS 78, 80(CRT) (5th Cir. 1991).

Claimant first argues that the administrative law judge erred in finding that employer is not judicially estopped from asserting that he is a member of a crew because employer took inconsistent positions, which the federal courts accepted, both in its filing of a motion to compel arbitration in claimant's ERISA claim and in its filing of a petition for intervention in claimant's state workers' compensation suit which was subsequently removed to federal court. Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position it previously took in the same or some earlier proceeding. *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003). In order for the party to be estopped, the prior position must be shown to have been "clearly inconsistent." *Id.* In addition, the party must have convinced the court to accept its previous position. *Id.*; *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Upon claimant's filing of a claim for long-term disability benefits under ERISA, employer filed a motion to compel arbitration of claimant's ERISA claim. *See* Ex. 2 of Clt. Judicial and/or Collateral Estoppel Exception; Ex. A of Emp. Memorandum in Opposition to Clt. Judicial and/or Collateral Estoppel Exception. Claimant initially opposed the motion, asserting that his claim was barred from arbitration because he is a seaman. *See* Ex. F of Emp. Motion for Summary Decision (MSD); Ex. C of Emp. Memorandum in Opposition to Clt. Judicial and/or Collateral Estoppel Exception. Subsequently, claimant withdrew his opposition to employer's motion, Ex. G of Emp. MSD; Ex. D of Emp. Memorandum in Opposition to Clt. Judicial and/or Collateral Estoppel Exception, and the court granted employer's motion to compel arbitration. *Goldman v. Hartford Life & Accident Ins. Co.*, No. 03-0759 (E.D. La. July 26, 2004); *see* Ex. H of Emp. MSD; Ex. 5 of Clt. Judicial and/or Collateral Estoppel Exception; Ex. E of Emp. Memorandum in Opposition to Clt. Judicial and/or Collateral Estoppel Exception.

was not collaterally estopped from asserting that claimant is a member of a crew.

² Section 10(c) of the Administrative Procedure Act, 5 U.S.C. §704, provides that, "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. §704.

We affirm the administrative law judge's finding that employer was not judicially estopped from asserting that claimant is a member of a crew. The administrative law judge rationally found that employer did not assert an inconsistent position by filing a motion to compel arbitration in claimant's ERISA claim, and moreover, did not persuade the court to accept that position. *See Hall*, 327 F.3d 391; *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004); *Fox*, 31 BRBS 118. The administrative law judge found that employer did not argue in its motion to compel arbitration that claimant is not a member of a crew, but instead argued that claimant was required to arbitrate with employer based upon his contractual agreement with it at the time of hiring.³ 2004 Order at 4. The administrative law judge accurately pointed out that it was claimant who asserted his status as a member of a crew in his opposition to employer's motion to compel arbitration in order to avoid arbitration. *See* Ex. F of Emp. Motion for Summary Decision (MSD); Ex. C of Emp. Memorandum in Opposition to Clt Judicial and/or Collateral Estoppel Exception; 2004 Order at 4. In addition, the administrative law judge found that the court did not accept the contention that claimant is not a member of a crew, if any contention was indeed raised, in that the court did not address the issue of claimant's status as a member of a crew, but merely granted employer's motion to compel arbitration after claimant withdrew his opposition to the motion. *Goldman v. Hartford Life & Accident Ins. Co.*, No. 03-0759 (E.D. La. July 26, 2004), slip op. at 3-4; *see* Exs. G, H of Emp. MSD; Ex. 5 of Clt. Judicial and/or Collateral Estoppel Exception; Exs. D, E of Emp. Memorandum in Opposition to Clt. Judicial and/or Collateral Estoppel Exception; 2004 Order at 4-5.⁴

The administrative law judge did not address whether employer's filing of a petition for intervention in claimant's state workers' compensation suit, which was subsequently removed to federal court, judicially estopped it from asserting that claimant is a member of a crew before him. We hold, as a matter of law, however, that employer is not judicially estopped on this basis since employer did not take an inconsistent position before the court in its petition for intervention, and, moreover, the court specifically rejected claimant's contention regarding judicial estoppel.⁵ *See Hall*, 327 F.3d 391; *Kirkpatrick*, 38 BRBS 27;

³ Specifically, employer argued that claimant and employer had an agreement to arbitrate which encompasses claimant's claim against employer, and that claimant has refused to arbitrate in contravention of his agreement with it. *See* Ex. A of Emp. Memorandum in Opposition to Clt. Judicial and/or Collateral Estoppel Exception; Ex. 2 of Clt. Judicial and/or Collateral Estoppel Exception.

⁴ The court stated, "As there is no opposition to the motion [to compel arbitration] and [claimant] did not establish his status as a seaman, the Court finds no federal policy that precludes arbitration of his claims. . . ." *Goldman*, No. 03-0759, slip op. at 4.

Fox, 31 BRBS 118. Thus, we affirm the administrative law judge’s finding, in his 2004 Order, that employer is not judicially estopped from asserting in this Longshore Act claim that claimant is a member of a crew, as it is rational and supported by substantial evidence.⁶

Claimant also argues that the administrative law judge erred in granting employer’s motion for summary decision and in concluding that claimant is a member of a crew and thus not covered under the Act. Any party may move for summary decision, at least 20 days before the hearing, where there is no genuine issue as to any material fact. *Buck v. General Dynamics Corp./Electric Boat Corp.*, 37 BRBS 53 (2003); 29 C.F.R. §§18.40, 18.41. To defeat a motion for summary decision, the party opposing the motion must establish the existence of a genuine issue of material fact, which is defined as a fact which affects the outcome of the litigation. *See Roberts v. Cardinal Services, Inc.*, 266 F.3d 368 (5th Cir. 2001), *cert. denied*, 535 U.S. 954 (2002); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999). In determining the propriety of a summary decision, the administrative law judge must draw all reasonable inferences in favor of the party opposing the motion. *See Roberts*, 266 F.3d 368; *Dunn*, 33 BRBS at 207.

The term “seaman” under the Jones Act and “member of a crew” under the Longshore Act are synonymous. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991). Section 2(3)(G) excludes from the Act’s coverage “a master or member of a crew of any vessel.” 33 U.S.C. §902(3)(G). Whether claimant is a member of a crew is a mixed question of law and fact. *Becker v. Tidewater, Inc.*, 335 F.3d 376, 386, 37 BRBS 49, 54 (CRT) (5th Cir. 2003); *Roberts*, 266 F.3d at 373. Claimant is a member of a crew, and thus not covered under the Act if: 1) his duties contribute to the function of the vessel or to the accomplishment of its mission; and 2) he has a connection to a vessel in navigation that is substantial both in duration and in nature. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). The administrative law judge found that claimant is a member of a crew as he contributed to the

⁵ The court held that employer was not judicially estopped from asserting that claimant is a member of a crew because claimant did not establish that employer’s position in that case was clearly inconsistent with its position before the administrative law judge in this case and before the court in its motion to compel arbitration in claimant’s ERISA claim, and claimant did not establish that a court had accepted that inconsistent position. *In the Matter of: R&B Falcon Drilling USA, Inc.*, No. 02-0241 (E.D. La. Feb. 1, 2005)(minute entry), slip op. at 2-3; *see* Ex. C of Emp. Resp. Br.

⁶ In addition, the fact that employer paid claimant benefits pursuant to the Act and the state workers’ compensation act does not preclude employer from averring that claimant is excluded from coverage. *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997).

function of the vessel and had a substantial connection to the vessel in terms of nature and duration. Consequently, the administrative law judge granted employer's motion for summary decision and dismissed claimant's claim for lack of coverage under the Act.

We affirm the administrative law judge's finding that claimant contributed to the function of the vessel based on his uncontradicted deposition testimony that his job duties aboard the rig were to obtain and test drilling fluids samples to ensure that they met programmatic properties. *See Becker*, 335 F.3d at 388, 37 BRBS at 55(CRT); *In Re Endeavor Marine, Inc.*, 234 F.3d 287, 291 (5th Cir. 2000), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001); Clt. Dep. at 15-16; *see* Ex. A of Emp. MSD; 2005 Decision and Order at 7. Contrary to claimant's argument, employer did not admit in its response to claimant's request for admissions in the state claim that he did not contribute to the function of the vessel. Rather, employer's response indicated a refusal to answer the request for admission because it called for a conclusion of law.⁷ Emp. Resp. Br. at 10. Moreover, we decline to address claimant's challenge to the administrative law judge's finding that claimant met the substantial connection test in terms of both duration and nature as claimant did not adequately brief this issue, or assign error to the administrative law judge's finding.⁸ *See Plappert v. Marine Corps Exch.*, 31 BRBS 109, *aff'g on recon. en banc*, 31 BRBS 13 (1997); *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *see also Nordahl v. Oceanic Butler, Inc.*, 20 BRBS 18 (1987), *aff'd* 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988); 33 U.S.C. §921(b)(3); 20 C.F.R. §802.211(a), (b); 2005 Decision and Order at 8-9. Consequently, as claimant has failed to demonstrate error in the administrative law judge's grant of employer's motion for summary decision, we affirm the administrative law judge's finding that claimant is a member of a crew and thus is excluded from coverage under the Act. 33 U.S.C. §902(3)(G); *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 39 BRBS 47(CRT) (2^d Cir. 2005), *aff'g* 37 BRBS 45 (2003). The administrative law judge's 2005 Decision and Order granting employer's motion for summary decision and dismissing claimant's claim for lack of coverage is therefore affirmed.⁹

⁷ In the state compensation claim, employer was requested to admit, "Did a Mud Engineer in drilling, contribute to the overall mission?" *In the Matter of: R&B Falcon Drilling USA, Inc.*, No. 02-0241 (E.D. La.), Request For Admission No. 7; *see* Ex. A at 3 of Emp. Resp. Br.; Ex. 6 at 3 of Clt. Last Rebuttal Memorandum. Employer responded, "Denied. This request calls for a conclusion of law. [Employer] did not operate the vessel." *In the Matter of: R&B Falcon Drilling USA, Inc.*, No. 02-0241 (E.D. La.), Response to Request for Admission No. 7; *see* Ex. A at 3 of Emp. Resp. Br.; Ex. 6 at 3 of Clt. Last Rebuttal Memorandum.

⁸ With regard to this issue, claimant merely asserts in his brief that, "[Claimant] is a mud engineer and his term on a vessel is for a very limited and short period of time." Clt. Br. at 7.

Accordingly, the administrative law judge's Order and Decision and Order Granting Employer/Carrier's Motion for Summary Decision and Denying Claimant's Motion for Summary Decision on Remand from the Benefits Review Board are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁹ Based on our affirmance of the administrative law judge's conclusion that claimant is a member of a crew and thus is excluded from coverage under the Act, we need not address employer's argument that claimant's claim is barred pursuant to Section 33(g). Emp. Resp. Br. at 11-13; *see also* 2005 Decision and Order at 9 n. 4.