



BRB No. 18-0029

JASON P. KOVACH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BARTON AND GRAY MARINERS CLUB	)	
	)	DATE ISSUED: <u>May 31, 2018</u>
and	)	
	)	
TECHNOLOGY INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision and Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan Israel, Jacksonville, Florida, for claimant.

Foster P. Nash III and Nicholas J. Cenac (Degan, Blanchard & Nash), New Orleans, Louisiana, for employer/carrier.

Before: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Decision and Denying Benefits (2016-LHC-01399) of Administrative Law Judge Paul C. Johnson, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3);

*O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sought benefits under the Act for breathing difficulties he suffered after allegedly inhaling particles of buffing compound while working for employer on its vessel, the DIVINE MISS E, on December 2, 2014, as it was docked at the Palm Beach Yacht Club, in Palm Beach, Florida. The hearing was originally scheduled for November 14, 2016, but at the parties’ requests it was rescheduled first for November 14, 2016, and then for September 12, 2017. On August 14, 2017, employer filed a motion for summary decision with the administrative law judge, asserting claimant is a member of a crew and therefore excluded from the Act’s coverage pursuant to Section 2(3)(G), 33 U.S.C. §902(3)(G).

On August 31, 2017, the administrative law judge issued an Order Cancelling Hearing scheduled for September 12, 2017, so that he could have sufficient time to rule on employer’s unopposed motion for summary decision, because it “raises a complex issue of law that requires significant research and analysis.” In the order, the administrative law judge stated “Claimant has not responded to the motion for summary decision and the time for doing so has passed.” The administrative law judge also reminded the parties that pursuant to his Order dated July 24, 2017, discovery was to be completed by September 6, 2017, and he stated, “that deadline remains in effect.” On September 15, 2017, the administrative law judge issued a Decision and Order, finding the undisputed facts establish that claimant is a member of a crew who is not covered under the Act. 33 U.S.C. §902(3)(G). The administrative law judge thus granted employer’s motion for summary decision and denied claimant’s claim for benefits under the Act.

Meanwhile, due to Hurricane Irma, on September 11, 2017, Chief Administrative Law Judge Stephen R. Henley issued an Administrative Order postponing until further notice “[a]ll OALJ proceedings, including formal hearings, oral arguments, mediations, and pre-hearing conferences, involving any attorney or law firm located in the State of Florida scheduled to take place up to and including October 6, 2017.” Judge Henley’s order stated that “[a]ll associated hearing related deadlines, such as pre-hearing exchanges, discovery deadlines, post-hearing briefs and similar matters, are TOLLED until subsequent order.”<sup>1</sup>

Claimant appeals Judge Johnson’s September 12, 2017 Decision and Order Granting Summary Decision and Denying Benefits, alleging that Judge Henley’s September 11, 2017 Administrative Order precluded the issuance of the decision because

---

<sup>1</sup>No subsequent order was issued.

claimant's counsel's firm is in Florida.<sup>2</sup> Employer responds, urging rejection of claimant's contention and affirmance of the administrative law judge's decision.

Claimant contends that because he had not yet filed a response to employer's motion for summary decision as of September 11, 2017, and Judge Henley's Administrative Order, dated September 11, 2017, tolled all deadlines relating to this case, it was improper for the administrative law judge to issue his decision on September 15, 2017, without first affording claimant the opportunity to file his response to employer's motion. Claimant thus requests that the Board vacate the administrative law judge's decision and instruct the administrative law judge to enter a new decision and order after claimant has responded to employer's motion.

In his August 31, 2017 Order Canceling Hearing, the administrative law judge noted that the due date for claimant's response to employer's motion for summary decision had passed. The administrative law judge reiterated this in his Decision and Order Granting Summary Decision and Denying Benefits. Decision and Order at 1. The deadlines for claimant's filing a response to employer's motion for summary decision and for all discovery-related matters in this case passed prior to the issuance of Judge Henley's September 11, 2017 Administrative Order. *See* 29 C.F.R. §18.33(d).<sup>3</sup> The administrative file is devoid of any requests for extensions of either of those deadlines, nor does claimant contend he requested any extensions. Thus, as all deadlines had passed prior to September 11, 2017, Judge Henley's Administrative Order had no effect on the procedural posture of this case. Additionally, we do not construe the tolling order as precluding the administrative law judge from ruling on a motion where, as here, all briefing had been received or the deadlines for filing such briefing had passed. Moreover, there was no violation of claimant's due process rights, as claimant was provided notice of employer's

---

<sup>2</sup>Judge Johnson's office is in Newport News, Virginia.

<sup>3</sup>29 C.F.R. §18.33(d) states:

(d) *Opposition or other response to a motion filed prior to hearing.* A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing.

motion for summary decision and an opportunity to be heard prior to the administrative law judge's issuance of his decision. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Therefore, we reject claimant's assertion that the administrative law judge's decision granting employer's motion for summary decision violated Judge Henley's September 11, 2017 Administrative Order. Moreover, as claimant does not challenge the administrative law judge's finding that he is a member of a crew who is not within the Act's coverage, that finding is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). The administrative law judge's grant of employer's motion for summary decision and denial of claimant's claim under the Act are affirmed. *See* 33 U.S.C. §902(3)(G); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991); *see also Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision and Denying Benefits is affirmed.

SO ORDERED.

---

GREG J. BUZZARD  
Administrative Appeals Judge

---

RYAN GILLIGAN  
Administrative Appeals Judge

---

JONATHAN ROLFE  
Administrative Appeals Judge