



Issue Date: 12 June 2018

Case No.: 2015-SPA-00001

In the Matter of:

DEVENDRA GUMMALA,

Complainant,

v.

CARNIVAL CORPORATION,

Respondent.

Appearances: Devendra Gummala, Pro Se
Maipu, Santiago, Chile
For the Complainant

Brooke T. Iley, Esquire
Sean T. Pribyl, Esquire
Blank Rome LLP, Washington, D.C.
For the Respondent

Before: Stephen R. Henley
Chief Administrative Law Judge

DECISION AND ORDER
DISMISSING COMPLAINT

This matter was filed under the employee protection provisions of the Seaman's Protection Act ("SPA"), 46 U.S.C. § 2114 and the implementing regulations at 29 C.F.R. Part 1986. I find that the complaint must be dismissed because Complainant has not raised a genuine issue of material fact to show that he is a "seaman" covered by the SPA by naming a respondent that is liable under the applicable regulations. Specifically, Complainant had not identified an owner of the vessel he worked on that is "owned by a citizen of the United States" under the

2015 version of the SPA implementing regulation at 29 C.F.R. § 1986.101(d)(2)(i). Thus, summary decision under 29 C.F.R. § 18.72 is required.

PROCEDURAL BACKGROUND

Filing of complaint, OSHA determination, ALJ dismissal and ARB remand

On June 22, 2014, Devendra Gummala (“Complainant”), a citizen and resident of Chile, filed a SPA complaint with OSHA alleging that his former employer, Carnival Cruise Lines, a division of Carnival Corporation (“Respondent”), terminated Complainant’s employment “in retaliation for making a safety complaint to Respondent regarding a housekeeping hazard” while on board the vessel *Carnival Fascination*. On December 24, 2014, OSHA issued a findings letter dismissing the complaint because the vessel on which Complainant worked was not owned by a citizen of the United States, and therefore Complainant did not qualify as a “seaman” under the SPA. Complainant filed a letter with the OALJ on February 24, 2015, which was later clarified to be a request for a formal hearing. On May 4, 2015, I issued an *Order to Show Cause* instructing the parties to show why the matter should not be dismissed for lack of jurisdiction.

On August 6, 2015, I issued an *Order of Dismissal* pursuant to the regulations at 29 C.F.R. § 1986.101(d)(1)-(2) and (m), finding that Complainant was not a covered “seaman” under the SPA because he was not employed on a vessel owned by a citizen of the United States. *Gummala v. Carnival Cruise Lines, Inc.*, 2015-SPA-00001 (ALJ Aug. 6, 2015). I found in this regard that the record showed that Carnival Cruise Lines is a division of Carnival Corporation, and that Carnival Corporation is a Panamanian company not incorporated under the laws of the United States or a state as required by § 1986.101(d)(2)(i).

On appeal, the Administrative Review Board (“ARB”) vacated my decision and remanded the matter for consideration of whether Carnival Cruise Lines is a “vessel owner” under the regulatory provision found at 29 C.F.R. § 1986.101(q). Citing the definition of a “vessel owner” under the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 902(21), the ARB wrote:

“Vessel ownership” is a lynchpin to the rest of SPA coverage. Carnival argues that Carnival Corporation is the owner and it is registered in Panama. But Carnival Cruise Line, its subsidiary, is likely also a vessel owner and agent as the operator of the vessel. The ALJ did not discuss the regulatory definition of “vessel owner,” and we find this to be reversible error.

Gummala v. Carnival Cruise Lines, Inc., 2015-SPA-00001, slip op. at 6 (ARB Sept. 6, 2017).

Proceedings on Remand

On November 6, 2017, I issued an *Order to Show Cause* for the parties to establish why the case should or should not be set for hearing. The parties were directed to specifically admit or deny certain seven facts which appeared to be undisputed. I also directed the parties to address whether the parties were appropriately designated in the caption; brief the issue of whether Carnival Cruise Lines is an operator, agent, or other covered entity under 29 C.F.R. § 1986.101(q); and address whether the controlling interest in Carnival Cruise Lines is owned by citizens of the United States by specifically addressing each requirement enumerated in § 1986.101(d) (2015).

Based on the responses from the parties, on February 13, 2018, I issued a *Second Order to Show Cause* (“Second Order”). In the Second Order, I specifically notified the parties that although a degree of latitude would be afforded to Complainant based on his pro se status, it is his burden to establish coverage of his complaint under the SPA. I found, based on the parties’ filings and attachments, that eleven facts appeared to be undisputed, and I ordered that the parties admit or deny each of those facts in their responses. I amended the caption of the case to reflect the named Respondent as “Carnival Corporation.” I ordered Complainant to file a written statement, supported by documents, affidavits, declarations, stipulations or other materials, addressing whether any agent of Carnival Corporation & PLC, including *Carnival Fascination*’s master, is a citizen of the United States as defined by § 1986.101(d)(1). I noted that Complainant could amend his complaint as necessary, and allowed for a response from Carnival Corporation. I also requested the parties to brief the implications of applying the 2016 amendments to 29 C.F.R § 1986.101(d) retroactively. I denied Complainant’s request that his claim under Section 11(c) of the Occupational Safety and Health Act (the “OSH Act”) be set for hearing because I do not have jurisdiction over that claim.

After review of the parties’ responses to the Second Order, I issued an order on May 8, 2018 entitled *Ruling on Retroactive Application of 29 C.F.R. § 1986.101(d); Notice of Requirements for Opposing Summary Decision; and Third Order to Show Cause* (“Third Order”). This order contained a ruling on the applicability of the 2016 amendment to 29 C.F.R. § 1986.101(d); provided Complainant with formal notice of the requirements for opposing summary decision; provided a revised list of proposed findings of fact; and permitted the parties one final opportunity to present evidence and argument on the coverage issue.

UNDISPUTED FACTS

Based on the responses of the parties to the three orders to show cause issued after the ARB remand, I find the following eleven facts were admitted as true by both parties, and are therefore undisputed:

1. Complainant was a photographer on board the cruise ship *Carnival Fascination* from September 11, 2011 until his discharge on or about June 12, 2014.
2. On June 22, 2014, Complainant filed a complaint with OSHA alleging Carnival Cruise Line violated the SPA by discharging him for engaging in activity protected by the SPA.

3. The *Carnival Fascination* flies the Bahamian flag.
4. Carnival Cruise Line operates 25 ships, including the *Carnival Fascination*.
5. Carnival Cruise Line is one of ten cruise line brands or divisions of Carnival Corporation & PLC.
6. Carnival Cruise Line has offices in Miami, Florida.
7. Carnival Cruise Line is not incorporated under the laws of the United States or a state.
8. Carnival Corporation is the owner of the *Carnival Fascination*.
9. Carnival Corporation has been incorporated in the Republic of Panama since 1972.
10. Carnival Corporation is headquartered in Miami, Florida.
11. During all times relevant to this proceeding, Carnival Cruise Line was a brand or division of Carnival Corporation and not a stand-alone legal entity.¹

In his response to the Third Order to Show Cause, Complainant declined to admit that Carnival Corporation is not incorporated under the laws of the United States or a State. Rather, he makes an argument as to why, despite incorporation in Panama, Carnival Corporation should nonetheless be found to be incorporated under the laws of the United States. This question is the crux of the case.

WHETHER A COVERED RESPONDENT HAS BEEN NAMED

Complainant filed his SPA complaint on June 22, 2014 naming Carnival Cruise Line as Respondent. Carnival Cruise Line, however, is a brand or division of Carnival Corporation and is not a stand-alone legal entity. Carnival Corporation is a Panamanian company not incorporated under the laws of the United States or a State as required by § 1986.101(d)(2)(i). The implementing regulations in effect at the time that Complainant filed his complaint defined a “seaman” for the purposes of the SPA as “any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States.” 29 C.F.R. § 1986.101(m). “Citizen of the United States” was defined in 29 C.F.R. § 1986.101(d) (2015). That provision of the regulations stated a multi-prong test. The crucial factor of that test as it applies to this case is that, if the named respondent is a corporation,² it must be “incorporated under the laws of the United States or a State.” 29 C.F.R. § 1986.101(d)(2)(i) (2015).³

¹ In its responses to the Third Order to Show Cause, Complainant admitted that “Carnival Cruise Lines, Inc.” was a brand or division of Carnival Corporation and not a stand-alone legal entity. Carnival Corporation denied that “Carnival Cruise Lines, Inc.” was a brand or division of Carnival Corporation and not a stand-alone legal entity because Carnival Cruise Lines is not incorporated. Carnival Corporation admitted that “Carnival Cruise Lines” was a brand or division of Carnival Corporation and not a stand-alone legal entity. I find that the fact that Carnival Cruise Line is not a stand-alone legal entity was admitted by both parties.

² A preliminary question in this matter was whether amendments to the SPA regulations in 2016 should apply retroactively to this complaint. This is a very important question because under the amended regulations, Carnival Corporation could arguably fall under the jurisdiction of the SPA because its headquarters are in Miami, and under the revised regulation at § 1986.101(d), a covered respondent includes a corporation “whose principal place of business or base of operations is in a State.” In my Third Order issued on May 8, 2018, I found that the revised § 1986.101(d) could not be applied retroactively under the principles stated in *Goodyear Tire & Rubber Co. v. Dept. of Energy*, 118 F.3d 1531, 1536-2 (Fed. Cir. 1997), citing *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994). Although I observe that it is not clear that Carnival Corporation could avoid coverage under the amended

In his response to the Third Order to Show Cause, Complainant argues that Carnival Corporation's registration with the State of Florida as a Foreign Profit Corporation, "grants the Respondent jurisdiction within the State of Florida to operate as a foreign business as though it is incorporated there...." (Complainant's Response to Third Order at 6). Complainant argues that the point of registration is to subject the foreign corporation to Florida law – both its obligations and protections. *Id.* Complainant pointed out several factors that show how thoroughly Carnival Corporation is rooted in Florida (e.g., it has a registered agent and its principal place of business is in Florida; it pays taxes in Florida; it employs many Florida residents to operate and direct its headquarters; its highest ranking executive officer is a citizen of the U.S. and resident of Florida; only a minority of its directors are noncitizens). *Id.* at 6-8.⁴ Thus, Complainant's position is essentially that, although Carnival Corporation was incorporated in Panama, in all material respects it is a de facto U.S. corporation.

In a supplemental response to the Third Order to Show Cause, Respondent argues that Complainant has only shown that Carnival Corporation is legally registered as a Foreign Profit Corporation operating in Florida, and that such a showing in no way shows that Carnival Corporation was incorporated under U.S. or State law as required for coverage under the 2015 version of the SPA regulations. Respondent argues that Complainant is proposing a non-existent "quasi-significant contacts test" to find U.S. incorporation. It argues that it relied on the 2015 regulation's verbatim use of the corporate citizenship test described in 46 U.S.C. § 50501. Respondent concedes that the SPA implementing regulations were later amended to broaden the legal test for corporate citizenship to include factors such as whether a corporation has a principal place of business or operations in a State. It contends, however, that such factors were not the standard at time of the filing of the instant complaint.

I agree with Respondent. If this complaint was governed by SPA implementing regulations as amended in 2016, Complainant might be able to establish that he was a covered "seaman" by virtue of his employment by Carnival Corporation through Carnival Cruise Lines. However, the 2015 regulations unambiguously stated, in pertinent part, that "a corporation is only a citizen of the United States if ... [i]t is incorporated under the laws of the United States or a State...." 29 C.F.R. 1986.101(d)(2)(i) (2015). Carnival Corporation was not so incorporated.

regulations, the question for this particular complaint is whether Carnival Corporation could be a covered respondent under the 2015 regulations.

³ The ARB remanded this case for consideration of whether Carnival Cruise Line is a "vessel owner" under the regulatory provision found at 29 C.F.R. § 1986.101(q). Under 29 C.F.R. § 1986.101(m), a covered "seaman" must have been "engaged in employed on board a vessel owned by a citizen of the United States." It is quite possible that Carnival Cruise Line could be considered a vessel owner under the 2015 regulations. But, under the 2015 version of the regulations, even an "other business entity" must be shown to have a controlling interest "owned by citizens of the United States." 29 C.F.R. § 1986(d)(1). Here, Carnival Cruise Line is owned by Carnival Corporation. The central question thus remains whether Carnival Corporation is a citizen of the United States.

⁴ I have taken into consideration the exhibits attached to Complainant's Response to the Third Order, as well as the exhibits previously submitted in this matter. Those exhibits soundly support Complainant's contention that Carnival Corporation has its base of operations in Florida, and that many of its executives and directors are U.S. citizens and residents of Florida.

Complainant's response to the Third Order to Show Cause is, in essence, an argument that might work under the 2016 regulatory amendments—but it does not support coverage of Carnival Corporation under the 2015 version of the regulations.

Accordingly, because Complainant has not named a covered respondent under the regulations applicable to his complaint, the complaint must be dismissed.⁵

ORDER

IT IS ORDERED that this complaint is **DISMISSED**.

STEPHEN R. HENLEY
Chief Administrative Law Judge

⁵ This grant of summary decision moots the several requests and motions filed by the parties in their responses to the Third Order to Show Cause—specifically, Complainant's requests for a temporary restraining order barring Respondent from changing or altering evidence related to this case—and Respondent's request that Complainant be ordered to disclose whether any legal advisor assisted in preparation of his response to the Third Order.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1986.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1986.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1986.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1986.109(e) and 1986.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1986.110(b).