



Issue Date: 08 May 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

**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**

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. It is currently on remand from the Administrative Review Board ("ARB"). The preliminary issue to be decided on remand is whether Complainant has established that he is a "seaman" covered by the SPA by naming a respondent that is liable under the SPA. The applicable regulations define 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.” See 29 C.F.R. § 1986.101(m). The central question at this stage in the proceeding is whether Complainant had identified an owner of the vessel he worked on that is “owned by a citizen of the United States” under the regulations applicable to the complaint.

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, Inc., 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.

The instant *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”):

1. contains a ruling on the applicability of the 2016 amendment to 29 C.F.R. § 1986.101(d);
2. provides Complainant with formal notice of the requirements for opposing summary decision;
3. provides a revised list of proposed findings of fact; and
4. permits the parties one final opportunity to present evidence and argument on the coverage issue.

RETROACTIVE APPLICATION OF REGULATORY AMENDMENTS

On remand, both parties have agreed that Carnival Corporation is registered in Panama, and is not incorporated under the laws of the United States or a state. Such incorporation in the U.S. or a state was required under the regulations in effect when the conduct at issue took place. See 29 C.F.R. § 1986.101(d)(2)(i).¹

Complainant argues that the regulations as amended in 2016 should be used.² See Second Response at 3; see also 29 C.F.R. § 1986.101(d), 81 Fed. Reg. 63396, 63401 (Sept. 15, 2016).

¹ The 2015 version of 29 C.F.R. § 1986.101(d) stated:

(d) *Citizen of the United States* means:

(1) An individual who is a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(22)) or a corporation, partnership, association, or other business entity if the controlling interest is owned by citizens of the United States. The controlling interest in a corporation is owned by citizens of the United States if:

(i) Title to the majority of the stock in the corporation is vested in citizens of the United States free from any trust or fiduciary obligation in favor of a person not a citizen of the United States;

(ii) The majority of the voting power in the corporation is vested in citizens of the United States;

(iii) There is no contract or understanding by which the majority of the voting power in the corporation may be exercised, directly or indirectly, in behalf of a person not a citizen of the United States; and

(iv) There is no other means by which control of the corporation is given to or permitted to be exercised by a person not a citizen of the United States.

(2) Furthermore, a corporation is only a citizen of the United States if:

(i) It is incorporated under the laws of the United States or a State;

(ii) Its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States; and

(iii) No more of its directors are noncitizens than a minority of the number necessary to constitute a quorum.

² The 2016 version of 29 C.F.R. § 1986.101(d) states:

(d) *Citizen of the United States* means an individual who is a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(22)); a corporation incorporated under the laws of the United States or a State; a corporation, partnership, association, or other business entity if the controlling interest is owned by citizens of the United States or whose principal place of business or base of operations is in a State; or a governmental entity of the Federal Government of the United States, of a State, or of a political subdivision of a State. The controlling interest in a corporation is owned by citizens of the United States if a majority of the stockholders are citizens of the United States.

After the regulations were amended, Carnival Corporation could arguably fall under the jurisdiction of the SPA because its headquarters are in Miami, Florida. *Second Order* at 6. Specifically, it could fall within § 1986.101(d), as amended, as a corporation “whose principal place of business or base of operations is in a State” even if it is not incorporated in the United States.³

Because § 1986.101(d) was amended after the conduct at issue occurred, this regulation is only applicable in this matter if it can be applied retroactively.

The question of retroactivity of regulations is governed by *Goodyear Tire & Rubber Co. v. Dept. of Energy*, 118 F.3d 1531, 1536-37 (Fed. Cir. 1997) (principles for assessing whether a statute may be lawfully applied retroactively stated in *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994), have been found by the Federal Circuit to be applicable by analogy to regulations). Complainant argues that, “according to § 1986.101(r) of 2014 any future amendments to the SPA that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein. Since the case is still pending, the new definition as per § 1986.101(d) of 2017 can be applied.” Second Response at 3.

What § 1986.101(r) states is that “[a]ny future amendments to SPA that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein.” Thus, § 1986.101(r) relates to future amendments to the SPA statute that may affect the definition of a term in the regulations going forward, but does not speak to the retroactivity of amended regulations. Amended regulations can only be applied to parties retroactively if the amendment satisfies the standard set forth in *Goodyear*.

According to the court in *Goodyear*, in order for an agency to lawfully apply a newly-issued rule to disputes that are pending before it, the court “must determine whether the new [rule] would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Goodyear Tire*, 118 F.3d at 1536. The court goes on to note, “the court must ask whether the new provision attaches new legal consequences to events completed before its enactment,” *Id.*, and “familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.” *Id.* at 1537.

The updated regulation at issue here attaches “new legal consequences to events completed before its enactment.” Before enactment of the 2016 regulations, Carnival Corporation was not covered by the SPA because it is not incorporated in the United States or

³ The *Second Order* instructed Complainant to address “whether any agent of Carnival Corporation & PLC, including the Carnival Fascination’s master, are citizens of the United States as defined by § 1986.101(d)(1),” *Second Order* at 8. In Complainant’s Second Response, he argues that “Carnival Cruise Lines acts as an agent/representative/legal entity of Carnival Corporation operating from its headquarters in Miami.” Second Response at 4. Complainant provided a copy of the “Seafarer’s Agreement” between him and Carnival Cruise Lines to show the relationship between Carnival Cruise Lines and Carnival Corporation. Assuming for purposes of deciding whether summary decision should be granted that Carnival Cruise Lines is an agent of Carnival Corporation, it is not clear what difference that makes unless the amended version of § 1986.101(d) is applied retroactively.

any state. After the regulations were amended, however, Carnival Corporation could arguably fall under the jurisdiction of the SPA because its headquarters are in Miami, Florida. *Second Order* at 6. Therefore, it could fall within § 1986.101(d) as a corporation “whose principal place of business or base of operations is in a State.”

Complainant states that “in the case of regulations that clarify or codify an existing rule, as it has been done in § 1986.101(d) of 2017, retroactive application is allowed.” *Second Response* at 3. However, the amended regulation in this case does not merely clarify or codify an existing rule—it changes the rights of Respondent under the SPA.⁴ Because retroactive application of the amended regulation at 29 C.F.R. § 1986.101(d) to this claim would “impair rights a party possessed when [it] acted,” I deny Complainant’s request for retroactive application and apply the regulations as they were written at the time of the conduct at issue.

NOTICE OF REQUIREMENTS FOR OPPOSING SUMMARY DECISION

An administrative law judge may issue an order to show cause to compel a complainant to specify factual allegations for an essential element of the case. *See, e.g., Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-6 (ARB May 31, 2012). In the instant matter, it was clear from the outset that coverage was an issue and needed to be determined before proceeding with a full evidentiary hearing. Accordingly, orders to show cause have been issued to focus the parties on the question of whether Respondent is a covered vessel owner under the SPA. If Complainant is unable to establish that a genuine issue of material fact exists on this question, the matter may be decided on summary decision. Further, Complainant should again note that he carries the burden to show coverage. *Gummala v. Carnival Cruise Lines, Inc.*, ARB No. 15-088, ALJ No. 2015-SPA-1 (ARB Sept. 26, 2017), slip op. at 5 (“It is Gummala’s burden to show coverage”).

Based on the record currently before me, Complainant has not established that a genuine issue of material fact exists as to whether Carnival Corporation, or its division Carnival Cruise Lines, or any other agent of Carnival Corporation, was a citizen of the United States under the regulations in effect at the time of the conduct at issue in the SPA complaint. It thus appears that summary decision dismissing the SPA complaint is warranted.

Pursuant to the ARB’s decision in *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 09-081, ALJ No. 2009-AIR-6 (ARB Sept. 2, 2011), the ALJ is required to provide pro se litigants notice of: “(1) the text of the rule governing summary decisions before ALJs ..., and (2) a short and plain statement that factual assertions in [the Respondent’s] affidavits will be taken as true

⁴ In reviewing the preamble to the final rule, it is clear that OSHA found that the interim final rule’s use of Title 46 of the U.S. Code to derive the regulatory definition of “Citizen of the United States” was inadequately tuned to the purposes of the SPA, resulted in unduly restrictive criteria, was too complex to apply, and was not the standard normally applied in the maritime context. 81 Fed. Reg. at 64401. Thus, OSHA’s interpretation of the appropriate regulatory definition for citizen of the United States was refined for the final rule. OSHA, however, did not specially address whether the new definition would be applied retroactively. It is noted that Respondent argued in its Response to the *Second Order* at 6-8, that the portion of the Final Rule that made it effective immediately applied only to procedural functions of the rulemaking and not to interpretative matters, such as OSHA’s interpretation of “seaman.”

unless [the Complainant] contradicts [the Respondent] with counter affidavits and other documentary evidence.” *To the same effect Galinsky v. Bank of America, Corp.*, ARB No. 08-014, ALJ No. 2007-SOX-76 (ARB Jan. 13, 2010).

Text of the rule governing summary decisions

The current rule on summary decision is found at 29 C.F.R. § 18.72.⁵ Although a party did not move for summary decision in the instant matter, the procedural stance of the case is effectively one of summary decision because of my orders to show cause on the coverage issue. Section 18.72 states:

§ 18.72 Summary decision.

- (a) *Motion for summary decision or partial summary decision.* A party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.
- (b) *Time to file a motion.* Unless the judge orders otherwise, a party may file a motion for summary decision at any time until 30 days before the date fixed for the formal hearing.
- (c) *Procedures—*
 - (1) *Supporting factual positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
 - (i) Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
 - (ii) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

⁵ At the time the ARB issued the *Wallum* decision, the applicable rule was 29 C.F.R. § 18.40(a) (2010). OALJ’s rules of practice and procedure were significantly updated in 2015, and the applicable rule is now found at 29 C.F.R. § 18.72 (2018). *See generally* 80 Fed. Reg. 28767 (May 19, 2015).

- (2) *Objection that a fact is not supported by admissible evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.
 - (3) *Materials not cited.* The judge need consider only the cited materials, but the judge may consider other materials in the record.
 - (4) *Affidavits or declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.
- (d) *When facts are unavailable to the nonmovant.* If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the judge may:
- (1) Defer considering the motion or deny it;
 - (2) Allow time to obtain affidavits or declarations or to take discovery; or
 - (3) Issue any other appropriate order.
- (e) *Failing to properly support or address a fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c) of this section, the judge may:
- (1) Give an opportunity to properly support or address the fact;
 - (2) Consider the fact undisputed for purposes of the motion;
 - (3) Grant summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or
 - (4) Issue any other appropriate order.
- (f) *Decision independent of the motion.* After giving notice and a reasonable time to respond, the judge may:

- (1) Grant summary decision for a nonmovant;
 - (2) Grant the motion on grounds not raised by a party; or
 - (3) Consider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely in dispute.
- (g) *Failing to grant all the requested relief.* If the judge does not grant all the relief requested by the motion, the judge may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.
- (h) *Affidavit or declaration submitted in bad faith.* If satisfied that an affidavit or declaration under this section is submitted in bad faith or solely for delay, the judge—after notice and a reasonable time to respond—may order sanctions or other relief as authorized by law.

Notice that undisputed facts will be taken as true

In the instant case, my orders to show cause have endeavored to focus the parties on what facts are disputed or undisputed as relevant to the question of whether Complainant has named a respondent covered by the SPA. Procedurally, this is the equivalent of factual assertions in affidavits that will be taken as true unless Complainant contradicts them with counter affidavits and other documentary evidence. In this regard, Complainant's attention is specifically addressed to 29 C.F.R. § 18.72(e)(2), which provides that failure to support an assertion of fact or address another party's assertion of fact may result in judge considering the fact to be undisputed, and 29 C.F.R. § 18.72(e)(3), which provides that a judge may grant summary based on undisputed facts. *See also* 29 C.F.R. § 18.83(a) (stipulations bind the parties unless the judge disapproves them).

To state the situation plainly, in order for Complainant to avoid summary decision dismissing the complaint, he must establish that he has named a respondent that is liable under the SPA, or at least establish that a genuine issue of material fact exists on that question. To avoid summary decision, Complainant must adduce admissible evidence sufficient to show that a genuine issue of material fact exists, and he cannot rely on mere supposition or conclusory allegations.

Ultimately, Complainant must establish that Carnival Corporation, Carnival Cruise Lines, or some other entity, whether the legal owner or agent of the legal owner under § 1986.101(q), is a citizen of the United States by specifically addressing each requirement enumerated in the pre-

amendment version of § 1986.101(d) (2015).⁶ **To survive summary decision on this question, he must, at a minimum, establish that a factual issue exists concerning all elements of the vessel owner and citizenship questions.**

PROPOSED FINDINGS OF FACT

Undisputed Facts

Based on the responses of the parties to the two orders to show cause issued after the ARB remand, I find the following eleven facts were admitted as true (or as to finding 7, not contested 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.⁷
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 not incorporated under the laws of the United States or a state.
11. Carnival Corporation is headquartered in Miami, Florida.⁸

I also find, based on the foregoing, that it appears undisputed that:

12. During all times relevant to this proceeding, Carnival Cruise Lines, Inc. was a brand or division of Carnival Corporation and not a stand-alone legal entity.

The parties shall have one more opportunity to admit or deny each of the 12 apparently undisputed facts listed above. Complainant is hereby notified that if he denies one or more of the listed items, he must provide some sort of factual evidence to support each denial or explain why he may need discovery on the question. A mere supposition or general denial will not suffice. If

⁶ As noted in the *Second Order*, if Complainant identifies an agent that it is a citizen of the United States as defined in the regulations, he is granted leave to amend his complaint to name that agent as a respondent in this matter. See 29 C.F.R. § 18.36.

⁷ Complainant did not state a position in response to the *Second Order* to show cause admitting or denying whether Carnival Cruise Line is incorporated under the laws of the United States or a state.

⁸ In its Second Response, Carnival Corporation denied that it has a headquarters in London.

Complainant seeks discovery, he must identify what information he seeks to obtain. I will not authorize discovery unless Complainant can persuasively explain why it would be likely to lead to relevant evidence given my ruling above that the 2016 amendments to § 1986.101(d) do not apply in this case, and that the apparently undisputed facts indicate that no legal owner or agent of the legal owner of the vessel have been identified as being incorporated in the United States.⁹

ORDER

Based on the foregoing, **IT IS ORDERED** that:

1. The regulatory definition at 29 C.F.R. § 1986.101(d) as it appeared in the Interim Final Rule (i.e., the pre-2016 amendments version of the SPA regulations) applies to this SPA complaint;

2. The parties shall have 30 days from the date of this order to state in writing whether they admit or deny each of the 12 proposed findings of fact listed above;

and

3. The parties shall have 30 days from the date of this order to show cause why this complaint should not be dismissed on summary decision on the ground that Complainant has not named a Respondent that is a citizen of the United States as defined in the Interim Final Rule for SPA.

STEPHEN R. HENLEY
Chief Administrative Law Judge

⁹ See *Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos. 1995-CAA-20, 21 and 22 (ARB Sept. 30, 1999) (ALJ did not abuse his discretion in limiting discovery prior to ruling on jurisdictional underpinnings of the case where additional discovery would not have changed the nature of the Complainants' protected activities claim, or whether such activities were protected under the environmental whistleblower laws).