U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0133

HENRY T. FLORES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MMR CONSTRUCTORS, INCORPORATED	)	
	)	
and	)	
	)	
ZURICH MUTUAL INSURANCE COMPANY	)	DATE ISSUED: Oct. 25, 2016
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, Joshua T. Gillelan, II (Longshore Claimants' National Law Center), Washington, D.C., and Lewis S. Fleischman (Lewis S. Fleischman, P.L.L.C.), Houston, Texas, for claimant.

Russell Manning (Cotton Schmidt & Abbott, L.L.P.), Corpus Christi, Texas, for employer/carrier.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Maia S. Fisher, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-01453) of Administrative Law Judge Lee J. Romero, 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 or the Longshore 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 injured his left Achilles tendon on January 20, 2014, while working on a construction project for employer. He was injured while inspecting electrical systems on the hull of what is to become Chevron's tension leg platform *Big Foot* while it was floating at the dock of the Kiewit yard on Corpus Christi Bay.[1] Employer paid claimant benefits under the Texas Workers' Compensation Act from February 12 through October 20, 2014. It also paid claimant medical benefits. The issues before the administrative law judge included coverage under the Act and the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq*. (the OCSLA), as well as the nature and extent of claimant's disability, his average weekly wage, and claimant's entitlement to additional medical expenses. JX 1.

The administrative law judge found that claimant was injured upon navigable waters and that his presence upon those waters was not transient or fortuitous. Decision and Order at 19. Nevertheless, the administrative law judge denied coverage because he found that claimant is not an employee of a "statutory employer" under the Act.[2] *Id.*; *see*

[1] According to the evidence, the *Big Foot* hull was towed to the dock area by a vessel because it has no means of self-propulsion. CX 37 at 75-77. The platform floated on pontoons while tied to the dock. This is the same platform addressed by the Board in *Baker v. Gulf Island Marine Fabricators, LLC*, 49 BRBS 45 (2015), *aff'd sub nom. Baker v. Director, OWCP*, ___ F.3d ___, 2016 WL 4427111, No. 15-60634 (5th Cir. Aug. 19, 2016).

[2] The administrative law judge explained that employer "is an electrical equipment and instrumentation contractor" whose employees install, inspect, and maintain electrical equipment, instrumentation, and wiring; none of its employees load or unload cargo to/from land or vessels, or operate equipment for such activities. Decision and Order at 19. The administrative law judge further found that employer does not engage in

33 U.S.C. §902(4). In the alternative, the administrative law judge found that the *Big Foot* is not a "vessel" pursuant to the Board's decision in *Baker v. Gulf Island Marine Fabricators, LLC*, 49 BRBS 45 (2015), *aff'd sub nom. Baker v. Director, OWCP*, ___ F.3d ___, 2016 WL 4427111, No. 15-60634 (5th Cir. Aug. 19, 2016). Thus, although claimant met the geographic component of the situs requirement because he was injured on navigable waters, he did not meet the functional component of the situs requirement because the *Big Foot* is not a "vessel." 33 U.S.C. §903(a). Even assuming, *arguendo*, that claimant met the situs requirement, the administrative law judge found that claimant was not a shipbuilder or engaged in other maritime employment, and thus he does not satisfy the Act's status requirement. 33 U.S.C. §902(3); Decision and Order at 20-22. Finally, in accordance with the Board's decision in *Baker*, the administrative law judge found that claimant is not covered under the OCSLA because claimant does not satisfy the "substantial nexus" test of *Pacific Operators Offshore, LLP v. Valladolid*, 566 U.S. ___, 132 S.Ct. 680, 45 BRBS 87(CRT) (2012). That is, his injury did not have a significant causal relation to extractive operations on the OCS; he was "geographically, temporally, and functionally distant from [such] operations." Decision and Order at 26-27; *see Baker*, 2016 WL 4427111 at *4; *Baker*, 49 BRBS at 50. Accordingly, the administrative law judge denied the claim and did not address the remaining issues. Claimant appeals the denial of benefits under both the Longshore Act and the OCSLA. The Director, Office of Workers' Compensation Programs (the Director), responds in support of claimant's contention that his injury is covered by the Longshore Act. Employer responds, urging affirmance of the denial of benefits. Reply briefs were filed.[3]

Claimant contends the administrative law judge erred in finding his injury did not occur within the coverage of the Act.[4] Specifically, claimant asserts it was improper for

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"services in connection with the fabrication, repair, or modification of vessels." *Id*. at 20 (quoting Mr. Cassagne's affidavit at CX 4, p. 2).

[3] Claimant has filed a motion to strike employer's sur-reply. He also has filed a motion to file a sur-sur-reply, as well as the sur-sur-reply itself. Employer responds to the motion to strike. We deny the motion to strike. 20 C.F.R. §802.219. We admit the pleadings into the record, as there were no new issues raised therein. We note, however, that filing additional briefing beyond the petitioner's reply brief is at the Board's discretion. 20 C.F.R. §802.215.

[4] Employer asserts claimant waived this argument by asserting only OCSLA coverage until the case was before the administrative law judge. This waiver argument was not made before the administrative law judge and need not be addressed by the Board on appeal. *See generally Verderane v. Jacksonville Shipyards, Inc*., 14 BRBS 220.15 (1981), *modified*, BRB No. 76-244 (Oct. 16, 1984), *aff'd on other grounds*, 772 F.2d 775, 17 BRBS 154(CRT) (11th Cir. 1985). Moreover, even if claimant first asserted

the administrative law judge to find that he was injured on navigable water, and was not thereon transiently or fortuitously, but to nevertheless deny coverage.[5] The Director agrees that claimant is covered by the Act, as he would have been covered prior to the 1972 Amendments pursuant to the Supreme Court's decision in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). Employer responds, however, that *Perini* requires a claimant to be in the employ of a "maritime employer" in order for him to be covered and that the administrative law judge correctly found employer is not a "maritime employer" pursuant to Section 2(4) of the Act, 33 U.S.C. §902(4).

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that his work is maritime in nature pursuant to Section 2(3) and is not specifically excluded by any provision in the Act. 33 U.S.C. §§902(3), 903(a); *Perini*, 459 U.S. 297, 15 BRBS 62(CRT); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must satisfy both the "situs" and the "status" requirements of the Act. *New Orleans Depot Services, Inc. v. Director, OWCP* [*Zepeda*], 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (*en banc*); *Kinnon v. Lockheed Missiles & Space Co.*, 47 BRBS 13 (2013). However, when an injury occurs on navigable waters in the course of employment on those waters, there is no need to separately consider the issues of situs and status because such an employee is engaged in "maritime employment." An employee injured on navigable waters is "automatically" covered under the Act pursuant

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only coverage under the OCSLA, which he denies, "considerable liberality" is allowed in amending claims. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982). By virtue of its LS-202 Notice of Controversion and its Motion for Summary Decision, employer indicated its awareness that Longshore Act coverage was at issue well before the hearing on February 4, 2015. *See generally Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

[5] The administrative law judge specifically found:

> [T]here is no question that Claimant was on navigable waters at the time of his work injury on a floating hull, upon which the *Big Foot* was being constructed. Moreover, under [*Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*)], Claimant's presence on the water at the time of injury was neither fortuitous nor transient.

Decision and Order at 19. No party challenges these findings.

to *Perini* unless a statutory exclusion applies, *Perini*, 459 U.S. 297, 15 BRBS 62(CRT); *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000); *Dobey v. Johnson Controls*, 33 BRBS 63 (1999), or unless his presence on the water at the time of injury was transient or fortuitous.[6] *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*). Under *Perini*, coverage is based not on whether an employee sustained his injuries while on a "vessel," but whether he was afloat upon, over, or in actual navigable waters. *Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd,* 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006) (barge anchored in lake was afloat on navigable waters; injury thereon covered unless specific exclusion applies); *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1998) (injury while working on a stationary barge used for electrical equipment located on navigable waters covered); *Walker*, 34 BRBS 176 (injury on crane on a jack-up vessel used to secure pilings to a bridge under construction covered because on navigable waters).

The administrative law judge discussed the Act as it existed before the 1972 Amendments (coverage based solely on a situs requirement) and correctly stated that the purpose of the 1972 Amendments (expansion of situs requirement and creation of status requirement) was not to limit the coverage of those employees who would have been covered by the Act before the 1972 Amendments. Decision and Order at 17; *see Perini*, 459 U.S. at 315, 318, 15 BRBS at 71, 74(CRT); *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 14 BRBS 1013 (5th Cir. 1982) (*en banc*), *cert. denied*, 459 U.S. 1170 (1983). The administrative law judge also correctly quoted the Supreme Court, stating:

> [W]e emphasize that **we in no way hold that Congress meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the "maritime employment" language.** We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in §2(3), and is covered under the LHWCA, providing, of course, **that he is the employee of a statutory "employer" and is not excluded by any other provision of the Act.**

Decision and Order at 17 (quoting *Perini*, 459 U.S. at 323-324, 15 BRBS at 79(CRT)) (emphasis and omission of internal footnote is administrative law judge's). The

[6] Determinations as to whether a claimant's presence on navigable waters is "transient" or "fortuitous" must turn on factors such as whether his presence on navigable waters is a regular part of his job assignments or is a matter of chance, whether it happens frequently or is a rare occurrence, and whether it lasts for an extended period of time. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

administrative law judge then found that employer is not a "statutory employer" because "[e]mployer does not employ any employees in maritime employment." Decision and Order at 20; *see* n.2, *supra.* Therefore, the administrative law judge found that claimant's injury is not covered by the Act.

Claimant contends he is a "classically-covered employee" pursuant to *Perini,* as his work on navigable waters is "maritime employment." He asserts the administrative law judge erred in creating an additional, separate, requirement that his employer must be a "maritime employer." Claimant argues, and the Director agrees, that if an employee is engaged in "maritime employment," then his employer is a "maritime employer" within the meaning of the Act. As occupations other than those enumerated in Section 2(3) of the Act may be covered, an employer can be a "maritime employer" despite its usual business being "non-maritime." They assert that coverage requires only that the injury have occurred while claimant was working in his regular capacity on the *Big Foot* while it was floating over navigable waters – there is not a separate criterion of "maritime employer." Case precedent supports the position of claimant and the Director; therefore, for the reasons that follow, we reverse the administrative law judge's finding that claimant's injury is not covered by the Act.

The term "employer" is defined in the Act by using the terms "employee" and "maritime employment."[7] The term "employee" is defined by using the term "maritime employment."[8] Employer contends the administrative law judge correctly looked to the

[7] In conjunction with the 1972 Amendment to Section 2(3), Section 2(4) of the Act was amended to state:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §902(4). Prior to 1972, "employer" was defined as: "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. §902(4) (1970).

[8] Section 2(3) of the Act was amended in 1972 to add this "status" requirement:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder,

nature of employer's business -- that is, is it the type of company that engages in "maritime employment," particularly the activities described in Section 2(3). Employer asserts it is an electrical and instrumentation contractor, which is not maritime employment; therefore, it does not have any employees who work in maritime employment. Consequently, it avers it is not a statutory employer which can be held liable under the Act. We reject this contention.

First, precedent establishes that an employee who is injured on navigable waters is covered by the Act because his work on those waters is considered "maritime employment." *Perini*, 459 U.S. at 324, 15 BRBS at 79(CRT); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962); *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953) (railroad brakeman performed maritime work on employer's car floats); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941) (employee, who worked as a janitor on land, was engaged in maritime employment on navigable waters at the time of his drowning). The 1972 Amendments did not withdraw coverage for those employees injured on actual navigable waters who would have been covered prior to the addition of the Section 2(3) status requirement. *Perini*, 459 U.S. at 324, 15 BRBS at 79(CRT); *Bienvenu*, 164 F.3d at 908, 32 BRBS at 222(CRT); *Boudreaux*, 680 F.2d 1034, 14 BRBS 1013. Presaging the Supreme Court's decision in *Perini*, the *Boudreaux* court stated that when a worker is injured on navigable waters in the course of his employment, it is unnecessary to examine whether he was engaged in "traditional maritime activity involving navigation and commerce on navigable waters" at the time of the injury "because by settled construction of the Act [his] duties necessarily constitute such maritime activity." *Boudreaux*, 680 F.2d at 1048, 14 BRBS at 1025 (internal quotations omitted). In *Perini*, the Supreme Court similarly addressed the intent of the 1972 Amendments to Section 2(3) and 3(a), and stated there is no evidence that:

> Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered.

Perini, 459 U.S. at 318, 15 BRBS at 76(CRT).

> and ship-breaker, but such term does not include [exclusions for specific types of employment]."

33 U.S.C. §902(3).

Second, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has doubted that Section 2(4) creates "the sort of 'jurisdictional confine' that is embodied in the situs and 'employee' status requirements." *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 758 n.8, 14 BRBS 373, 379 n.8 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). In *Carroll*, the claimant was injured while erecting scaffolding beneath a pier over navigable waters as part of a turntable/pier repair project. He was not involved in the actual pier repair work but was involved only in putting up scaffolding. The court held that the claimant was engaged in maritime employment on a covered situs. The Fifth Circuit rejected the employer's argument that its status as a "statutory employer" was a "second independent prerequisite" to its being liable for benefits. The court stated that, with the addition of the 1972 Amendments, "the 'employer' status requirement of the old Act has been rendered largely tautological." *Carroll*, 650 F.2d at 758, 14 BRBS at 379. Specifically, "the injured claimant must himself be engaged in maritime employment" and, if he is, "his employer would automatically qualify as a statutory 'employer.'" *Id.*; *see also Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 779 n.14, 14 BRBS 752, 757 n.14 (5th Cir. 1982) ("since we find that [claimant] was indeed an 'employee' under the Act, . . . there would appear to be no issue of whether [employer] is an 'employer' under § 902(4)").

The Board has long followed this reasoning with respect to the relationship of the claimant's employment to the employer's status as a statutory employer. *Willis v. Titan Contractors, Inc.*, 20 BRBS 11 (1987); *see also Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991); *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). Although, as quoted by the administrative law judge, *see* p. 5, *supra*, the *Perini* Court referenced the requirement that a claimant must be the employee of a statutory employer in order to be covered by the Act, *Perini*, 459 U.S. at 323-324, 15 BRBS at 79(CRT), the Court did not further analyze this issue or suggest that an employer had to be a "maritime employer" independent of the claimant's status.[9]

[9] The *Perini* court noted only:

> that there is an apparent inconsistency between the actual wording of section 2(4) and the expression in the legislative history. Section 2(4) defines an "employer" to be the employer of any employee engaged in maritime employment on the "navigable waters" as defined by the 1972 Amendments to include the expanded landward situs. The legislative history, however, appears to contemplate that a statutory employer must have at least one employee working over the *actual* navigable waters before any employee injured on the new land situs can be covered.

In this case, claimant's injury occurred while he was inspecting electrical wiring on the *Big Foot* hull while it was tied to a dock and floating on navigable waters. No party disputes the administrative law judge's findings that claimant's injury occurred on navigable waters and that his presence on the water was not fortuitous or transient; he was performing his regular job.[10] *See* n.6, *supra*. Pursuant to *Perini*, claimant, therefore, was engaged in maritime employment when he was injured. *Perini*, 459 U.S. at 318, 324, 15 BRBS at 76, 79(CRT). Application of long-standing case precedent thus establishes that claimant's employer is a "maritime employer" who has at least one employee engaged in maritime employment, pursuant to Section 2(4). *Carroll*, 650 F.2d at 758, 14 BRBS at 379; *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 538 n.9, 4 BRBS 482, 485 n.9 (5th Cir. 1976),[11] *vacated and remanded*, 433 U.S. 904 (1977), *reaff'd*, 575 F.2d 79, 8 BRBS 468 (5th Cir. 1978), *aff'd on other grounds sub nom. P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Lewis*, 31 BRBS 34; *Ricker*, 24 BRBS 201; *Willis*, 20 BRBS 11. Thus, claimant was covered by the Act when he sustained his injury. *Perini*, 459 U.S. at 324, 15 BRBS at 79(CRT); *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 24 BRBS 81(CRT) (5th Cir. 1991); *Boudreaux*, 680 F.2d 1034, 14 BRBS 1013. Therefore, we reverse the administrative law judge's finding that claimant's injury did not occur within the Act's coverage, and we remand the case for the administrative law judge to address the remaining issues raised by the parties. *T. M.* [*Meyers*] *v. Great Southern Oil & Gas*, 42 BRBS 21 (2008), *aff'd mem. sub nom. Great Southern Oil & Gas Co. v. Director, OWCP*, 401 F.App'x 964 (5th Cir. 2010) (injury when attempting to cross between two floating barges was on actual navigable waters and is covered by the Act).

Perini, 459 U.S. at 314 n.24, 15 BRBS at 73 n.24(CRT) (emphasis in original); *see* n.7, *supra*.

[10] No party argues that claimant is excluded from coverage by another provision of the Act. *See* 33 U.S.C. §§902(3)(A)-(H), 903(b)-(d).

[11] The Fifth Circuit noted in *Perdue* that, post-1972, Section 2(4) requires merely that an employer have at least one employee engaged in maritime employment as defined in Section 2(3) on a situs as defined in Section 3(a).

Accordingly, the administrative law judge's finding that claimant's injury did not occur within the coverage of the Longshore Act is reversed, and the case is remanded for the administrative law judge to address any remaining issues.[12]

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

[12] In light of our decision, we need not address the remaining issues raised on appeal.