U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0123

JAMES LUCKERN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RICHARD BRADY & ASSOCIATES	)	DATE ISSUED: 10/30/2018
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY c/o HELMSMAN MANAGEMENT SERVICES	)	
	)	
Employers/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Motion for Summary Decision and Awarding Benefits of Colleen A. Geraghty, 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 Doug Grauel (Grauel Law Offices, PLLC), Concord, New Hampshire, for claimant.

Thomas C. Fitzhugh III and Jefferson L. Brannon (Schouest, Bamdas, Soshea & BenMaier, PLLC), Houston, Texas, and Steven J. Bolognese

(Tentindo, Kendall, Cannif & Keefe, LLP), Boston, Massachusetts, for employer/carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Claimant's Motion for Summary Decision and Awarding Benefits (2017-LHC-01336) of Administrative Law Judge Colleen A. Geraghty 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 was working at Portsmouth Naval Shipyard when he sustained an injury to his lower back on March 18, 2015. Claimant ultimately required lumbar decompression surgery. He has been receiving New Hampshire state workers' compensation benefits from the date of injury.

Claimant's direct employer was Bri-Weld Industries. Bri-Weld's work at the shipyard consisted of renovating the existing carpentry building at the shipyard, including: a complete reworking and updating of interior office areas; historical window and masonry restoration; upgrading insulation; and installing a new roof.[1] Claimant's work included installing steel roof frames into the existing roof of the carpentry building in order to

[1] Bri-Weld was working under a contract with Brookstone Builders, who was a sub-contractor to Richard Brady & Associates, to renovate the Portsmouth Naval Shipyard. Neither Bri-Weld nor Brookstone has insurance coverage under the Act. Brady is the only employer that carries insurance coverage. Therefore, the administrative law judge found that, under Section 4(a) of the Act, 33 U.S.C. §904(a), Brady, as the general contractor, and its carrier are responsible for any compensation owed to claimant. This finding is not contested on appeal.

upgrade the cooling and heating systems in the building. He also installed railings to new wooden stairs and a wheelchair ramp in the interior of the building and a new steel overhead door frame on the first floor. At the time of his injury, claimant was preparing to drill holes in concrete to install steel handrails along an exterior access ramp to the carpentry building. *See* Joint Statement ¶¶ 7, 11, 12, 14. The carpentry shop is the only one of its kind at the shipyard and is used to build parts for the Navy's ships and submarines, along with wood products for use at the shipyard. *Id.* at ¶¶ 12-13. The naval shipyard and the carpentry shop remained in use while claimant was working there.

Claimant sought benefits under the Act. Employer did not dispute that the Portsmouth Naval Shipyard is a covered situs under the Act. 33 U.S.C. §903(a). Employer asserted, however, that claimant did not meet the status requirement for coverage under the Act, 33 U.S.C. §902(3). The parties filed opposing motions for summary decision on this issue. The administrative law judge defined the relevant issue as whether claimant, as an employee engaged in construction work on an existing building used in the shipbuilding process at a shipyard, satisfies the status requirement. She found that claimant's work is covered employment because the carpentry building is essential to the shipbuilding process. Decision and Order at 7. The administrative law judge therefore granted claimant's motion for summary decision, denied employer's motion for summary decision, and awarded claimant ongoing temporary total disability benefits under the Act.[2]

Employer appeals the administrative law judge's Decision and Order, contending she erred in concluding that claimant is a maritime employee under the Act. Claimant and the Director, Office of Workers' Compensation Programs, each filed a response brief, urging affirmance of the administrative law judge's decision. Employer filed a reply brief.[3]

[2] The parties thereafter filed a joint motion to correct the decision, which the administrative law judge granted to amend claimant's average weekly wage and also to amend the case caption to reflect the correct name of the carrier. Order Granting Joint Motion to Correct Decision (Dec. 22, 2017).

[3] In its reply brief, employer requested that the case be remanded for adjudication by a different administrative law judge pursuant to *Lucia v. SEC*, __ U.S. __, 138 S. Ct. 2044 (2018). The Director filed a motion to strike this argument because it is non-responsive to the response briefs and because employer waived the argument by failing to raise it in its initial petition for review before the Board. Employer filed a response in opposition to the Director's motion.

We grant the Director's motion to strike. Employer did not raise any issue concerning the administrative law judge's appointment in its initial brief to the Board, and thus forfeited its Appointments Clause argument. 20 C.F.R. §802.211. The Appointments

In determining whether to grant a motion for summary decision, the fact-finder must review the evidence in the light most favorable to the non-moving party and determine whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. 29 C.F.R. §18.72; *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). Summary decision is proper in this case as both parties agreed before the administrative law judge that no facts concerning claimant's employment are in dispute. *See* Cl. Mot. for Summary Decision at 1; Emp. Mot. for Summary Decision at 2. The issue of whether a claimant's work qualifies as "maritime employment" is a question of law. *See Southcombe v. A Mark, B Mark, C Mark Corp.*, 37 BRBS 169 (2003).

For a claimant to be covered under the Act, he must meet the "status" requirement set forth in Section 2(3), which defines "maritime employment" as "any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker."[4] 33 U.S.C. §902(3). Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, dismantling or repairing of vessels. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989).

The administrative law judge noted the parties' agreement as to claimant's job duties, *see supra* at pp. 2-3, and found that he was engaged in renovating an already functioning shipyard building that remained open and in operation while he was working there. Decision and Order at 6. The administrative law judge concluded that the carpentry building is essential to the shipbuilding process because ship components are made there and, therefore, claimant was engaged in maritime employment and entitled to benefits under the Act. *Id.* at 7.

Clause issue is "non-jurisdictional," *see Intercollegiate Brad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009), and thus is subject to the doctrines of waiver and forfeiture. *Id.*; *see Lucia*, 138 S. Ct. at 2055 ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief"). Moreover, contrary to employer's contention, *Lucia* does not represent a "change in law" such that it is entitled to raise the issue at this juncture. *Lucia*, 138 S. Ct. at 2053, *citing Freytag v. Comm'r*, 501 U.S. 868 (1991).

Employer also filed supplemental authority on the maritime employment issue on August 3, 2018, which is accepted as part of the record. 20 C.F.R. §802.215.

[4] Employer does not contend that claimant falls into any of the exceptions enumerated in Section 2(3). 33 U.S.C. §902(3)(A)-(H).

Employer contends the administrative law judge erred in concluding that claimant was engaged in maritime employment because he was a temporary worker whose job involved maintenance work on a building that happened to be in a shipyard but whose work was not otherwise related to repairing or building ships. We disagree. Workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and loading/unloading processes are generally covered under the Act. *See, e.g., Schwalb*, 493 U.S. at 47, 23 BRBS at 98(CRT). In *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981), the United States Court of Appeals for the First Circuit, within whose jurisdiction this case arises, held that a maintenance mason whose duties primarily involved repairing masonry in shipyard buildings was engaged in covered employment. The First Circuit reasoned that "[t]he maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself." *Graziano*, 663 F.2d at 342-343, 14 BRBS at 56. The First Circuit concluded, therefore, that the claimant fell "within the broad concept of maritime employment" because his work was a necessary link in the chain of shipbuilding work. *Id.*

Similarly, in *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), the Fifth Circuit rejected a challenge to the status of a carpenter who was injured while building a scaffold for use in a pier repair project:

> That the skills utilized by [the claimant] were "essentially nonmaritime" in character is immaterial. It is the purpose of the work that is the key; "nonmaritime" skills applied to a maritime project are maritime for purposes of the "maritime employment" test of the Act.

Id., 650 F.2d at 756, 14 BRBS at 377. These cases demonstrate that a claimant's work need not be "inherently maritime" if it is performed on structures that are themselves essential to the loading, unloading, building, repairing or dismantling of ships. *See also Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

In addition, the fact that claimant was only temporarily working at the shipyard does not defeat his claim. Employer's reliance on *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 54(CRT) (4th Cir. 1994), and *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001), is misplaced. In *Prevetire*, the Fourth Circuit held that a construction worker, who was temporarily hired to construct a shipyard power plant, was not engaged in "maritime employment" because the power plant would only eventually be used to

provide steam and electricity to shipbuilding operations. *Prevetire*, 27 F.3d at 989-90, 28 BRBS at 62-63(CRT). In *Moon*, the Board applied *Prevetire* to hold that a contract carpenter who was hired to construct a building at a naval base was not covered because the building he was hired to construct did not serve a current maritime purpose. *Moon*, 35 BRBS at 154; *see also Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005); *Southcombe*, 37 BRBS 169. As the administrative law judge properly found, these cases do not turn on the temporary nature of the claimants' work but rather on the Fourth Circuit's precedent that new construction does not have a current maritime purpose. Here, in contrast, claimant was hired to renovate an existing building that served a maritime purpose at the time of his injury. Employees, like claimant, who are hired to maintain an already functioning essential shipyard building are covered under the Act. *See Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980) (painter of a structure essential to the loading and unloading of vessels is covered under the Act).

In this case, the administrative law judge found that it was undisputed that "the carpentry building Claimant was renovating is used to build components installed on ships and is essential to the shipbuilding process." Decision and Order at 7. She properly concluded that case precedent establishes that a person such as claimant, who repairs or remodels such buildings, is engaged in maritime employment because his work also is essential to the shipbuilding process.[5] *Graziano*, 663 F.2d at 342-343, 14 BRBS at 56; *Price*, 618 F.2d 1059. Therefore, we affirm the administrative law judge's finding that claimant meets the status requirement of Section 2(3) and is entitled to benefits under the Act.

[5] The administrative law judge stated that claimant was a "harbor worker" because that term includes work in renovating existing buildings at the shipyard. The term "harbor worker" is not defined in the Act, but case precedent generally describes such a person as one who builds or repairs "harbor facilities" such as bulkheads, piers, and docks. *See, e.g., Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir.), *cert. denied*, 525 U.S. 981 (1998); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Loyd v. Ram Industries, Inc.*, 35 BRBS 143 (2001). Nonetheless, it is the employee's duties, and not his job title or classification, that determines coverage under the Act. *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 25(CRT) (1st Cir. 1984).

Accordingly, the administrative law judge's Decision and Order Granting Claimant's Motion for Summary Decision and Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge