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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 206 January 2009

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I. Longshore and Harbor Workers' Compensation Act and Related Acts

A. U.S. Circuit Courts of Appeals[1]

Coastal Prod. Serv. Inc. v. Hudson, __ F.3d __, 2009 WL 82367 (5th Cir. 2009).

The Fifth Circuit addressed the requirements of situs and status under Section 3 of the LHWCA. Claimant worked as a platform operator on the Saturday Island facility, which comprises (1) a platform with living quarters ("the platform"), (2) satellite wells, and (3) a sunken oil storage barge ("the Cherokee") from which oil is loaded into transport barges. Claimant was injured while working on the platform.

The Fifth Circuit affirmed the finding of situs by the ALJ and the Board. To qualify as an "other adjoining area" under Section 3(a), the situs must be located in proximity to navigable waters[2] and have a maritime nexus; here, only the latter was in dispute. An "area" that adjoins navigable waters for purposes of the LHWCA is that area "customarily used by an employer in loading, unloading, repairing, or building a vessel." Situs is not defined

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

[2] The Court noted that fixed platforms are treated as islands for almost all purposes, and that it treats the Saturday Island facility as "land" (n.17).

according to fence lines and local designations because they are subject to manipulation.

The Court concluded that, although it also served the arguably non-maritime purpose of production, the platform was part of the "general area" used as part of the "overall loading process"[3] adjoining navigable waters, and was therefore a maritime situs for purposes of the LHWCA.[4] *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 515-16 (5th Cir. 1980)(en banc).[5] The fact that "the specific locus of the injury is not customarily used for maritime purposes even though the general area is so used" is not fatal to a finding of maritime situs. *Id.* at 516. Rather, "[i]f a general area is customarily – not necessarily exclusively or predominantly – used for loading and unloading of vessels, all parts within it are a maritime situs. To determine whether it is fair to call a particular part of a facility 'within' the 'general area' used for loading and unloading, we must look both to its proximity and its interconnectedness to the loading and unloading location, along with its function." *See* Marine Terminal Co. v. Caputo, 432 U.S. 249, 253, 255, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977); *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1, *1 (1999).

Here, the Saturday Island platform was directly and permanently connected (by a permanent walkway and oil transfer pipes) to the Cherokee from which vessels were loaded, was located in close proximity to the Cherokee (30 to 40 feet), and was described in Employer's operations manual as part of the same "*gathering* and processing" facility as the Cherokee. Indeed, the platform was functionally integral and indispensable to the Cherokee's loading mission because the configuration of the Saturday Island field necessitated the use of the platform as the consolidation point for transport.

The Court further noted additional considerations supporting its holding, i.e., the deference to the ALJ/BRB's situs determination; the principal that the LHWCA is to be construed liberally; and congressional

[3] The Court noted in *dicta* that the storage of fully processed oil in the storage tanks on the platform can "quite plausibly" be understood to be part of the loading process (n.23), and that "it is at least arguable that a facility integral to the conversion of material into cargo suitable for maritime transport, such as the platform's separators, has a role in loading a vessel" (n.24).

[4] The Court noted that if it were to address this issue *de novo*, it might have found no situs. Instead, the Court applied the "substantial evidence" standard of review, as it was "bound" by its own "somewhat quizzical" holding in *Winchester* that the determination of suits by an ALJ is one of fact (n.10).

[5] Holding that a room used to store gear located blocks away from the nearest gate to a terminal and outside the property line of the port constituted a covered situs.

policy of avoiding shifting and fortuitous coverage. The Court opined that *Herb's Welding v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985), does not foreclose its holding, and further distinguished the Saturday Island platform from the "production" platform in *Thibodeaux v. Grasso Prod. Mgmt. Inc.*, 370 F.3d 486 (5th Cir. 2004). The Court circumscribed its holding by stating "[w]e hold that, under the discrete facts of this case, the fixed platform in question is inseparable from the Cherokee and that together they constitute a loading facility for the transshipment of cargo by vessel."

The Court further held that the platform operator met the status requirement of the LHWCA. An employee may qualify for maritime status for purposes of the LHWCA based on either (1) the nature of the activity in which he is engaged at the time of the injury or (2) the nature of his employment as a whole. Here, the platform operator regularly engaged in sufficient maritime activities to meet the status requirement. He transferred previously produced oil stored on the platform to the Cherokee, checked the Cherokee's cargo loading lines for leaks, maintained its engine, hooked up lines for transferring the oil from the storage barge to the transport barges, manned the emergency shutoff during such transfers, and boarded customers' barges to witness gauge readings.

The dissenting Judge stated in a lengthy opinion that "[t]he crux of my argument is simple: the production platform, which extracts hydrocarbons and converts them into a marketable form, is functionally distinct from the loading barge, which facilitates the loading of marketable crude oil onto mobile transport barges."

[**Topic 1.6.2 Situs, "Over land;" Topic 1.7.1 "Maritime worker" ("Maritime Employment")**]

Jeffboat, LLC v. Dir., OWCP, __F.3d __, 2009 WL 66961 (7th Cir. 2009).

An ALJ did not abuse his discretion by awarding attorney fees at the hourly rate requested by Claimant's attorney ($261). Employer asserted that Claimant's counsel had to show that her requested hourly rate was in line with the prevailing market rate in Indiana, where the case was litigated, and that discretionary factors (e.g., the quality of representation) can only be used to increase an hourly rate shown to be reasonable.

Attorney fees are calculated using a "lodestar" amount, which is the number of hours expended multiplied by a reasonable hourly rate. An ALJ is also allowed to consider various discretionary factors. 33 U.S.C.A. § 928; 20

C.F.R. 702.132. An applicant for attorney fees bears the burden of demonstrating that the amount requested is in line with the prevailing hourly rate in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. *See Blum v. Stevenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Interpreting *Blum*, the Seventh Circuit holds that, instead of a local market area, the "community" whose prevailing hourly rate must be used can be read as referring to a "community of practitioners," particularly when the subject matter of the litigation is highly specialized and the market for legal services within that subject matter is a national market. The party seeking attorney fees can create a presumption that an hourly rate is reasonable where the attorney demonstrates that the requested hourly rate is in line with what she charges other clients for similar work (citation omitted).[6]

In this case, the fee petition established a baseline hourly rate of $250 to $340, and substantiated this rate with evidence that it was consistent with the market rates for specialized legal services in Connecticut, where Claimant's attorney was based. Further, the rate was not out of line with other LHWCA cases in the same locality, as another ALJ in the same jurisdiction had awarded similar legal fees.

The Court further determined that a claimant need not prove that he first attempted to find local counsel before hiring an out-of-area attorney. It is within an ALJ's discretion to adjust an out-of-town attorney's rate downward if local counsel could have provided comparably effective legal services and the rate of the out-of-town practitioner was higher than the local market rate. Here, the ALJ did not abuse his discretion in not reducing the rate; the cases proffered by Employer, awarding fees at a lower rate, were not directly relevant. The ALJ was entitled to find that Claimant would need to seek counsel outside of southern Indiana.

As the award was in line with the reasonable market rate, the ALJ did not make an upward adjustment to the market rate when considering the factors cited in 20 C.F.R. 702.132. Rather, this provision instructs ALJs to calculate an award of attorney's fees based on a reasonable hourly rate multiplied by the number of hours worked, and to consider various factors when making the award. Here, the quality of representation was just an additional factor supporting the award.

[**Topic 28.6 Attorney's fees, Factors considered in award; Topic 28.6.1 Hourly rate**]

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[6] Notably, Claimant's counsel did not present evidence that the requested rate was the rate that she normally charged clients for workers' compensation cases.

Hotard v. Devon Energy Prod. Co. L.P., No. 08-30754, 2009 WL 166688 (5th Cir. Jan. 23, 2009)(Unreported).

Alvin Hotard, who was employed by Wood Group, worked as a mechanic on an offshore platform operated by Devon. For almost one year Hotard worked on the platform for seven days followed by seven days off. Hotard sued Devon in a district court to recover damages for injuries which arose after he was bitten by a spider while sleeping in his bunk on the platform. The Fifth Circuit affirmed the grant of a summary judgment in favor of Devon on the grounds that Hotard was Devon's "borrowed employee," which grants Devon tort immunity under Section 5(a) of the LHWCA, and that Hotard was injured in the course and scope of his employment so as to fall within the LHWCA.

The Court noted the nine factors that determine the borrowed-employee status: (1) Who had control over the employee and his work? (2) Whose work was being performed? (3) Was there an agreement, understanding, or meeting of the minds between the two employers? (4) Did the employee acquiesce in the new work situation? (5) Did the original employer terminate his relationship with the employee? (6) Who furnished tools and place for performance? (7) Was the new employment over a considerable length of time? (8) Who had the right to discharge the employee? (9) Who had the obligation to pay the employee?

Here, only the third factor conceivably supported Hotard's contention that he was not a borrowed employee, and the district court had found that the course of the relationship indicated that an agreement existed. The 2nd, 6th and 7th factors clearly indicated that Hotard was Devon's borrowed employee. The fact that he reported only to a Devon employee showed that Devon had control over him and his work. The same fact, coupled with the absence of contact with Wood Group, satisfied the 5th factor; total severance of all connection is not required. The lengths of Hotard's employment on the platform established his acquiescence. Factors 8 and 9 also indicated his borrowed-employee status: Devon had the right to discharge him from its platform and, while Wood Group issued his pay check, Devon supervisors approved his time sheets and paid Wood Group an hourly rate for his work.

The Court further held that Hotard was injured in the course and scope of his employment. "The test for whether an employee is within the course and scope of his employment requires only that the obligations or conditions of employment create the zone of special danger out of which the injury arose." Slip op. at 2, citing O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 506-07 (1951). It is not necessary that the employee be performing an activity to benefit the employer when the incident occurs. *Id.* To be

outside the course and scope of employment, an employee must "go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *Id.* (internal quotation and citation omitted). Thus, Hotard was injured in the course and scope of his employment since his work typically involved sleeping on the platform, and he would not have been bitten by the spider but for his employment with Devon. Devon's assertion that he could have taken a helicopter to spend the night elsewhere did not change this result.

[**Topic 5.1.1 Exclusive remedy; Topic 2.2.9 Course of employment**; Topic 2.2.12 Zone of Special Danger]

Nitschke v. Coastal Tank Cleaning, No. 06-73949, 2009 WL 188159 (9th Cir. Jan. 26, 2009)(Unreported).

Claimant petitioned *pro se* for review of the Board's decision affirming an ALJ's finding that he did not establish injuries to his back, neck, or ankles were related to his 20-foot fall into a tank in 1990. The Court held that the Board properly concluded substantial evidence supported the ALJ's conclusions. The ALJ's decision to accord Dr. O'Neill's medical opinion little weight was not contrary to "the clear preponderance of the evidence" or "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978). Dr. O'Neill's testimony was contradicted by the testimony of Drs. Brooks and Kay. Dr. O'Neill did not treat Claimant until a year after his fall, and her opinions, unlike those of Dr. Brooks, were not based on a comprehensive review of Claimant's medical records.

[**Topic 2.2 Injury – Arising out of employment**]

Romero v. Cajun Stabilizing Boats Inc., No. 08-30017, 2009 WL 150655 (5th Cir. Jan. 22, 2009)(Unreported).

Ken Romero, a marine welder, was injured while working on a boat owned by Cajun, when he slipped in a greasy and wet area of the boat and a barricade he attempted to hold on to gave way. Romero sued Cajun for negligence under Section 5(b) of the LHWCA,[7] and the district court granted a summary judgment for Cajun.

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[7] Romero received no-fault worker's compensation benefits under the LHWCA fro his employer.

The Fifth Circuit first rejected Romero's challenge to federal jurisdiction, stating that a brief hiatus from service for routine repairs did not terminate the boat's "vessel in navigation" status.

The Court next observed that a vessel owes narrow duties under Section 5(b) to maritime workers. Here, Cajun did not owe Romero a "turnover duty" to warn him of the slippery conditions on the vessel, since the hazard was open and obvious. When turning his vessel over to a stevedore or marine contractor, the owner has no duty to warn of, or remedy, an open and obvious hazard.

However, a genuine issue of material fact existed as to whether Cajun owed Romero an "active control" duty under Section 5(b) and breached such duty. The vessel may be held liable "for injury caused by hazards under the control of the ship." The vessel has a duty to exercise due care to avoid exposing longshoremen and marine workers to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel. It is no defense that the hazard was open and obvious. The key issue is whether the work area in question has been "turned over" to the contractor. For an "active control" duty to arise, "the vessel must exercise active control over the actual methods and operative details of the longshoreman's work."

Here, Romero's testimony created a genuine issue of fact as to whether Cajun had active control of part or all of the vessel. Romero's testimony suggested that Cajun's owner closely oversaw and directed "operative details" of his work and made decisions affecting the safety of his work area (e.g., denying Romero's request to weld the barricade to the deck). Romero had to traverse greasy and wet areas which had not been turned over to his employer in order to reach his work site.

[**Topic 5.2.1 Third party liability – Generally**]

B. Benefits Review Board

There were no published Board decisions under the LHWCA in January 2009.

II. Black Lung Benefits Act

Benefits Review Board

In *A.H.A. v. Eastern Coal Corp.*, BRB No. 08-0476 BLA (Jan. 30, 2009) (unpub.), a survivor's claim with no autopsy evidence of record, the Board held that collateral estoppel applies to findings of *clinical* as well as *legal* coal workers' pneumoconiosis made in support of a final award in the miner's claim. Here, an administrative law judge concluded that legal coal workers' pneumoconiosis was established in the miner's finally awarded claim, but x-ray evidence did not demonstrate the presence of clinical pneumoconiosis. Thus, in the survivor's claim, Employer was collaterally estopped from re-litigating the existence of legal coal workers' pneumoconiosis which, in turn, affected the weighing of medical opinions addressing the cause of the miner's death.

[**collateral estoppel, applicable to clinical and legal pneumoconiosis**]

In *B.S. v. Itmann Coal Co.*, BRB No. 08-0309 BLA (Jan. 29, 2009) (unpub.), the Board reiterated that, prior to considering digital x-rays as evidence of the presence or absence of pneumoconiosis, the administrative law judge must determine whether "the proponent of the evidence has established that digital x-rays are 'medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits' as provided in 20 C.F.R. § 718.107(b)." From this, the Board held that it was error for the judge to "determine[] that because the digital x-ray readings in the treatment records were performed for diagnostic purposes, they are implicitly medically acceptable," while discrediting the digital x-ray readings developed for purposes of litigation based on a party's failure to "satisfy the requirements of 20 C.F.R. § 718.107(b)." The Board reasoned:

> . . . the relevant inquiry concerns the medical acceptability and relevance of digital x-ray technology as it pertains to the diagnosis of pneumoconiosis. It does not concern the identity of the reader or the purpose for which the digital x-ray reading was performed.

Slip op. at 6.

[**digital x-rays and the requirements at § 718.107(b)**]

In *F.L. v. Zeigler Coal Co.*, BRB No. 08-0302 BLA (Jan. 29, 2009) (unpub.), Employer moved to dismiss the black lung claim on grounds that there was no "proper party-in-interest to proceed with its adjudication." Counsel for Claimant maintained that the "miner's grandson ha[d] an interest in protecting the award of benefits because there were costs incurred by the miner in pursuing the claim, there could be outstanding benefits due the miner's estate, and there could be a claim against the miner's estate for the overpayment of benefits." Counsel also asserted that Illinois law did not require probate of the miner's estate such that the grandson "did not have letters of administration to submit to the administrative law judge."

Nonetheless, the judge subsequently "advised claimant's counsel to provide her with a copy of the death certificate and the letters of administration that authorized the miner's grandson to represent the miner's estate." In response, the administrative law judge noted receipt of the death certificate, obituary, and "a letter from a law firm that referenced a trust agreement that was not in the record." In particular, the law firm's letter provided that there "was no probate administration of the miner's estate because all of the miner's assets at the time of his death were held by his grandson as the trustee of a revocable living trust agreement." The Board noted that "[a]lthough the administrative law judge determined that this documentation was lacking in some respects regarding the authority of the miner's grandson to represent the miner's estate, she found that the miner's estate would remain the named party in the case." The Board upheld the judge's finding and concluded that, under 20 C.F.R. § 725.360, "it was not unreasonable for the administrative law judge to find that the miner's estate qualified as a party to the claim . . .."

[**death of the miner, establishing a party qualified to pursue claim**]