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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 304
March 2020

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

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

***MMR Constructors, Inc. v. Director, OWCP*, 954 F.3d 259 (5th Cir. 2020).**

Affirming the Board, the Fifth Circuit held that claimant, who was injured while assisting with electrical wiring of an offshore oil platform while it was under construction at a shipyard – floating and temporarily connected to land by steel cables and utility lines -- was injured on navigable waters and thus covered under the Act. Because claimant was injured on navigable waters where he was regularly employed, his employer qualified as a statutory "employer" under § 2(4).

Claimant, a quality assurance and control technician for electrical systems, was injured in the course of his employment with employer while assisting with electrical wiring for the construction of Chevron's tension-leg platform named Big Foot. The platform was under construction at a shipyard in Corpus Christi Bay, floating on pontoons and connected to land by steel cables and utility lines. The ALJ found that claimant was not a maritime employee and thus failed the LHWCA's status test under the 1972 amendments.[2] The Board overturned the ALJ's order, relying on *Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297 (1983) ("*Perini*") to conclude that claimant was covered under the Act because he was injured on navigable waters. Employer appealed.

The court initially noted that it reviews the Board's legal conclusions de novo. Because the facts were not in dispute, the issue here was one of statutory interpretation.

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[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at __) pertain to the cases being summarized and, where citation to a reporter is unavailable, refer to the Westlaw identifier (*id.* at *__).

[2] The ALJ also found that claimant was not entitled to compensation under the Outer Continental Shelf Lands Act. The court did not reach this issue, having concluded that claimant was covered under the LHWCA.

Injury on Navigable Waters

Prior to 1972, the LHWCA's "situs" requirement only extended coverage to employees injured or killed on "navigable waters of the United States (including any dry dock)." When Congress amended the LHWCA in 1972, it (1) expanded the situs requirement to include certain adjoining land areas and (2) added a "status" component in § 2(3), requiring that employees be engaged in maritime employment within the meaning of the Act. The Fifth Circuit stated that *Perini* was factually similar to this case: an employee was denied benefits after being injured on navigable waters because he was not engaged in maritime employment and, thus, could not satisfy the status test under the LHWCA as amended in 1972. The Supreme Court reversed, holding that the 1972 amendments to the LHWCA sought to expand, not limit, coverage. Before 1972, any claimant injured upon navigable waters in the course of his employment who satisfied the definition of "employee" would have been covered under the Act if employed by a statutory "employer." The Supreme Court concluded that such claimants—"injured on the actual navigable waters in the course of [their] employment"—were still eligible under the amended LHWCA because the Court "consider[ed] these employees to be engaged in maritime employment." *Id.* at 262-263 (*quoting Perini*, 459 U.S. at 324).

In this case, the court had to determine whether claimant, injured on a floating platform, would have satisfied the "situs" test under the LHWCA prior to 1972. The answer to this question turned on whether Big Foot was on navigable waters. Based on pre-1972 Fifth Circuit case law, the court concluded that claimant was injured on navigable waters. First, the court rejected employer's contention that because Big Foot is not a vessel, it must be considered an extension of land. This court previously held that a non-vessel located on navigable waters of the United States satisfies the situs requirement for purposes of coverage under the pre-1972 LHWCA. Employer's attempt to distinguish that holding failed, and its reliance on cases arising under the Jones Act or general maritime law were irrelevant to determining coverage under the LHWCA. Further, this court previously held that, pre-1972, if an employee was injured on a floating structure permanently attached to land, he was not covered under the LHWCA. Subsequent decisions emphasized that the extent to which a craft or pier is permanently attached to land is critical. The court concluded that:

> From these cases, it is clear that if a craft resting on navigable waters is permanently attached to land, then the water underneath the craft is removed from navigation and is not navigable under the LHWCA. While Big Foot was attached to land bordering Corpus Christi Bay, its attachment was not permanent. Big Foot was attached only temporarily while under construction—it was built to be moved offshore to drill for oil and gas in the Gulf of Mexico. Because it was not permanently attached to land, the water underneath it was not removed from navigation. Thus, [claimant] was injured on navigable waters and is entitled to benefits under the Act if [employer] was a statutory "employer."

Id. at 264-265 (footnote omitted).[3]

"Employer" Requirement

[3] The court noted that the Second Circuit has adopted a broader test. In *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 414 (2d Cir. 2005), the court considered whether a research barge attached to a buoy rested on navigable waters. The court did not consider the permanence of the barge, holding that a person on any object floating in actual navigable waters must be considered to be on actual navigable waters for LHWCA coverage.

Both the original and amended LHWCA define "employer" 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." In this case, employer argued that it did not qualify as a statutory "employer" under § 2(4) because neither claimant nor any other employee of employer was engaged in "maritime employment" as defined by the post-1972 LHWCA's "status" test. The court disagreed.

Because *Perini* instructs that the 1972 amendments did not intend to limit coverage, the definition of both "employee" and "employer" are relevant. Before the amendments, "employee" was defined negatively to read: "[t]he term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." This definition did not specify the type of maritime work that qualified as "maritime employment"; and the court read it to include anyone who met the situs test, subject to the two exceptions in the "employee" definition. The amended LHWCA substantially changed the definition of "employee" to: "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, and ship-breaker." This new definition became the "status" test. In both pre- and post-1972 decisions, this court has held that if the injured employee meets the definition of "employee," the employer is ipso facto a covered employer—it has at least one employee engaged in maritime employment.

In this case, citing *Perini*, employer urged the court to enforce the post-1972 "employer" requirement of § 2(4) and require claimant to show that employer has at least one employee who can satisfy the post-1972 definition of "employee." However, the court concluded that *Perini* left open the question of whether an employer of an employee injured after 1972 who is covered because of his injury on navigable waters (but who does not otherwise meet the status test) is an "employer" under the Act. In *Perini*, the Supreme Court indicated concern about an employer unfairly being held responsible for LHWCA benefits when it had no notice its employee was working on navigable waters. To address this issue, the Fifth Circuit previously held that a worker injured in the course of his employment on navigable waters is not covered by the LHWCA if his presence on the water is "transient or fortuitous," so that the employer may not have notice of its potential exposure under the LHWCA.[4] However, "the facts here do not raise this concern, because [claimant] had been working on Big Foot for [employer] on navigable waters for several months before his injury." *Id.* at 267. Accordingly, the court held that "because [claimant] was regularly employed by [employer] on navigable waters and, under *Perini*, meets the 'employee' definition, it follows that [employer] had at least one employee engaged in maritime employment." *Id.* The court's conclusion that the "status" test should not be read as narrowing the definition of a statutory employer is consistent with its prior case law, the Board's finding, and the Supreme Court's reasoning in *Perini* that the Congress sought to expand, not limit, coverage under the LHWCA with the 1972 amendments.

The Constitutionality of the LHWCA

Employer argued that applying the LHWCA to accidents with no connections to traditional maritime activity exceeds the constitutional limits of federal maritime jurisdiction. It asserted that the Supreme Court abrogated *Perini*, citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). The Fifth Circuit rejected this contention, stating that nothing in *Grubart* suggests that the Supreme Court sought to abrogate *Perini* and limit admiralty jurisdiction under the LHWCA. In addition, when numerous cases from the Supreme Court seemingly speak to an issue, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own

[4] *See Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 908 (5th Cir. 1999)(en banc).

decisions. Absent clear language abrogating *Perini*, the court is bound by the Supreme Court's understanding of maritime jurisdiction in that case.

Accordingly, the award of benefits was affirmed.

[Section 2(3) STATUS - Injury on Actual Navigable Water; Section 2(4) - Employer; Constitutionality of the LHWCA]

B. Benefits Review Board

No published decisions to report.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

There were no published black lung decisions in March.

B. Benefits Review Board

There were no published BRB black lung decisions in March.