**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

# *RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 251 April 2013*

*Stephen L. Purcell*
*Chief Judge*

*Paul C. Johnson, Jr.*
*Associate Chief Judge for Longshore*

*Yelena Zaslavskaya*
*Senior Attorney*

*William S. Colwell*
*Associate Chief Judge for Black Lung*

*Seena Foster*
*Senior Attorney*

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

### ***New Orleans Depot Services, Inc. v. Director, OWCP* [*Zepeda*], __ F.3d __, 2013 WL 1798608 (5th Cir. 2013)(*en banc*).**

The Fifth Circuit held, *en banc*, that claimant was not injured on a covered situs under Section 3(a) of the LHWCA, where the site he was working at did not border upon and was not contiguous with navigable waters.

Claimant filed a claim under the LHWCA against New Orleans Marine Contractors (NOMC) seeking benefits for his hearing loss. As a defense, NOMS contended that NODSI was a subsequent maritime employer responsible for the benefits. Claimant worked in NODSI's "Chef Yard" facility (described as a small industrial park). NODSI employees, including claimant, performed repairs and maintenance on containers, some of which were used to transport ocean cargo. The Chef Yard is located approximately 300 yards from the Intracoastal Canal and is surrounded by non-maritime businesses. A bottling company facility is located between the Intracoastal Canal and the Chef Yard.

The ALJ had found that NODSI Chef Yard employees' work repairing ocean containers was a significant maritime activity necessary to loading and unloading cargo. The ALJ further concluded that the § 3(a) situs requirement was met, as the location of the NODSI Chef Yard was an area "adjoining navigable waters." Also, the ALJ found claimant's work was

[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 refer to the Westlaw identifier.

closely related to loading or unloading vessels and constituted "maritime employment" which satisfied the status test under § 2(3). The BRB affirmed, and a divided panel of the Fifth Circuit affirmed the BRB. On rehearing *en banc*, the Fifth Circuit vacated the award and remanded for further proceedings against NOMC.[2]

The court observed that most courts hold that an "other adjoining area" under § 3(a) must satisfy (1) a geographic component (the area must adjoin navigable waters) and (2) a functional component (the area must be "customarily used by an employer in loading [or] unloading ... a vessel"). *Id. at *3.* This decision addressed primarily the first element. The court discussed a split in the circuit courts' interpretation of "other adjoining area," with the Fourth Circuit adopting a "literal definition" in *Sidwell v. Express Container Services, Inc.,* 71 F.3d 1134 (4th Cir.1995), as contrasted with "expansive, yet differing approaches" adopted by the Third, Fifth, and Ninth Circuits. The court acknowledged that it had previously held in *Texports Stevedore Co. v. Winchester,* 632 F.2d 504 (5th Cir.1980) (*en banc*), that "adjoining" does not require absolute contiguity, and that so long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, it can be covered. The court, however, rejected its prior holding in *Winchester* and progeny, and instead "adopt[ed] the *Sidwell* definition of 'adjoining' navigable water to mean 'border on' or 'be contiguous with' navigable waters." *Id.* at *7. The court found persuasive the Fourth Circuit's discussion in *Sidwell* of the statutory language and Congressional intent, and further explained its holding as follows:

> "[w]e adopt this definition primarily because it is more faithful to the plain language of the statute. We are also influenced by the fact that the vague definition of 'adjoining' we adopted thirty years ago in *Winchester* provides litigants and courts, in cases such as this one, with little guidance in determining whether coverage is provided by the Act. More than perhaps any other statutory scheme, a worker's compensation statute should be 'geared toward a nonlitigious, speedy, sure resolution of the compensation claims of injured workers.' One could hardly imagine an area where predictability is more important."

---

[2] The court rejected the OWCP Director's argument that NODSI had waived the argument that claimant failed to establish the situs requirement by failing to raise it before the BRB or the panel of the court. The court stated that this issue has been contested throughout this case's history, and was addressed by both the ALJ and BRB.

*Id.* at *7 (footnotes and citation omitted). The court acknowledged that dictionaries do include "neighboring" and "in the vicinity of" as possible definitions of "adjoining," but stated that "such is not the ordinary meaning of the word." *Id.* at *5. It also agreed with *Sidwell*'s criticism of other circuit courts that have suggested that the functional component should be dispositive of the situs inquiry. The court further cited *Sidwell*'s admonition that its literal definition of "adjoining" could not be circumvented by a broad interpretation of "area;" thus, in order to constitute an "other area" under § 3(a), it must be a discrete shoreside structure of facility whose very *raison d'etre* is its use in connection with navigable waters (like the enumerated areas). Further, it is the parcel of land underlying the employer's facility that must adjoin navigable waters, not the particular part of that parcel upon which a claimant is injured.

The court rejected the OWCP Director's arguments against the adoption of *Sidwell*'s narrow interpretation. The Director argued that a broad definition of "adjoin" furthers the congressional goal of preventing longshoremen from walking in and out of coverage. The court agreed instead with *Sidwell*'s determination that "[the] loss of coverage when a longshoreman crossed the ship's gangplank was the inequity Congress sought to cure." *Id.* at 6. Moreover, Congress recognized that a longshoreman could still leave and re-enter the geographic bounds of LHWCA coverage. The court also rejected the Director's argument that the Act should be construed liberally in favor of coverage, stating that the plain language of the statute may not be ignored.

On the facts of this case, the court concluded that, as the Chef Yard does not border upon and is not contiguous with navigable waters, it is not an LHWCA-covered situs.[3]

In a concurring opinion, Circuit Judge Clement, joined by six other Judges, agreed with the majority's situs analysis, but wrote separately to address claimant's lack of status under § 2(3). She reasoned that "container repair satisfies the status inquiry when it is one step in the direct chain of unloading a ship, and when 'the maintenance men would [halt] the entire loading process' if they were not available for the repair." *Id.* at *10 (citations omitted). By contrast, "container repair does not satisfy this standard when it is not of the sort that is, or would have been, traditionally performed by longshoremen or harborworkers." *Id.* Here, claimant's work – the repair of empty containers that were neither headed for delivery nor toward a ship for transport – was not "essential" or "integral" to a longshoreman's task of un/loading a vessel, because nothing about his work

[3] As the situs requirement was not met, the court did not address the status requirement.

was part of the process of moving cargo between ship and land transportation.

In a separate concurrence, Circuit Judge Higginson disagreed with the court's rejection of the "time-settled" *Winchester* approach, but agreed that the situs requirement was not met in this case.

In a dissenting opinion, three Circuit Judges opined that *Winchester* properly adopted a broad definition of "adjoining area," as it is in keeping with the plain meaning of the words and the spirit of the congressional purposes. In the absence of any compelling evidence of *Winchester*'s dysfunction or change in the maritime industry, this *en banc* precedent should stand. The *Winchester* interpretation recognized the practical reality that the amount of land contiguous to the water is limited. Moreover, adopting a narrow definition of "adjoining area" would allow maritime employers to circumvent LHWCA coverage by purchasing land with a narrow gap separating it from the water. Additionally, the majority's decision creates a split with the Eleventh Circuit, which continues to apply *Winchester*. The dissenting Judges further concluded that the status requirement was met in this case, citing the Supreme Court's statement that containers are the modern substitute for the hold of the vessel, as well as Board decisions holding that container repair mechanics are engaged in maritime employment. Judge Clement's contrary conclusion disregards the fact that maintenance of shipping containers is necessary to prevent their breakage, and therefore integral to the un/loading process.

**[Topic 1.6.2 – JURISDICTION/COVERAGE – SITUS – "over land"]**

***Kealoha v. Director, OWCP*, __ F.3d __, No. 11-71194, 2013 WL 1405951 (9th Cir. 2013).**

The Ninth Circuit held that a suicide or injuries from a suicide attempt are compensable under the LHWCA when there is a direct and unbroken chain of causation between a compensable work-related injury and the suicide attempt. The claimant need not demonstrate that the suicide or attempt stemmed from an irresistible suicidal impulse, and evidence that claimant had planned his suicide did not necessarily preclude compensation.

Claimant filed a claim under the LHWCA, alleging that his suicide attempt resulted from his fall from a barge to the dry dock and litigation over a prior claim for injuries from his fall. The ALJ denied the present claim based on a finding that claimant's suicide attempt was not the "natural and unavoidable" result of his fall. Alternatively, the ALJ found that claimant's injuries were not compensable because § 3(c) precludes compensation for an injury "occasioned solely by . . . the willful intention of the employee to injure or kill himself . . . ." The Board has recognized an exception to this

provision, holding that when a suicide attempt result from an "irresistible impulse" caused by a work-related injury, § 3(c) does not bar compensation because such a suicide attempt is not "willful" under the Act. The ALJ, however, credited employer's medical expert who opined that claimant was not in a state of "impulse dyscontrol;" this testimony was supported with evidence that claimant planned his suicide attempt. The Board reversed, holding that instead of applying the "naturally and unavoidably" standard, the ALJ should have afforded claimant a presumption of compensability under § 20(a).[4] It further held that the ALJ erred by failing to address whether claimant's illness was "so severe that he was unable to form the willful intent to act." The Board instructed that planning of the claimant's suicide attempt alone is not enough to show "willful" intent. On remand, the ALJ held that claimant established that his fall was a cause of his suicide attempt, and that employer failed to rebut this presumption. Nevertheless, the ALJ found that compensation was barred because claimant's suicide was "planned" and "intentional" and therefore was not the result of an irresistible impulse. The BRB affirmed.[5]

The court observed that other courts have held that, despite § 3(c), the Act does not necessarily preclude compensation for a suicide caused by a compensable work-related injury.[6] States have adopted one of two tests to determine whether a suicide is compensable under their workers' compensation laws: the irresistible impulse test or the chain of causation test. The latter test conditions compensation on "the existence of an unbroken chain of causation from the injury to the suicide." *Id.* at *3 (citing Arthur Larson & Lex K. Larson, 2 Larson's Workers' Compensation Law § 38.03 (2011)(additional citation omitted). If this test is met, the suicide is the product of the work-related injury, and thus not "willful" for purposes of workers' compensation laws. In contrast, under the irresistible impulse test, an injury is compensable only if a work-related injury causes insanity such that the employee takes his life through an uncontrollable impulse or in a delirium or frenzy. The irresistible impulse test was once the prevailing rule, but in recent years, states have moved away from this test, finding that the chain of causation test better accords with principles of modern medicine. The court observed that "[a]s these states recognize, whether an employee

---

[4] *Kealoha v. Leeward Marine, Inc.*, BRB No. 05-0731 (5/31/06)(unpub.)

[5] *Kealoha v. Leeward Marine, Inc.*, BRB No. 10-0468 (4/4/11)(unpub.)

[6] Because claimant alleged that his suicide attempt resulted from a compensable work-related injury, the court did not reach the issue whether the LHWCA permits compensation for a suicide resulting directly from work, without any primary injury.

committed or attempted suicide in a 'delirium or frenzy' has no bearing on whether a work-related injury caused the suicide." *Id.* at *3 (citation omitted). The court further noted the dearth of case law addressing § 3(c) of the LHWCA. The court concluded that

> "[g]iven the best-reasoned modern trend of case law, we hold that a suicide or injuries from a suicide attempt are compensable under the Longshore Act when there is a direct and unbroken chain of causation between a compensable work-related injury and the suicide attempt. The claimant need not demonstrate that the suicide or attempt stemmed from an irresistible suicidal impulse. The chain of causation rule accords with our modern understanding of psychiatry. It also better reflects the Longshore Act's focus on causation, rather than fault."

*Id.* at * 4 (citation omitted).

In this case, the ALJ erroneously applied the irresistible impulse test. The court instructed that "under the correct chain of causation test, a suicide may be compensable even if it is planned. Kealoha need not demonstrate that he attempted to end his life in a delirium or frenzy." *Id.* The court remanded the case for the BRB to apply the chain of causation test or to remand to the ALJ so that she may have the first opportunity to do so.

**[Topic 3.2.2 COVERAGE – SECTION 3(c) OTHER EXCLUSIONS - Willful Intention]**

**B. Benefits Review Board**

***Kinnon v. Lockheed Missiles and Space Co.*, __ BRBS __ (2013).**

The Board held that claimant who built and repaired missiles which would eventually be loaded onto and carried by submarines for military purposes, did not meet the status prerequisite to coverage under § 2(3), as his work was not integral to maritime activity.

Claimant worked as a missile mechanic senior at a Naval Base. The ALJ found that claimant's duties involved building, dismantling and repairing missiles, which were later delivered to the Navy and eventually carried by submarines. The ALJ further found that claimant's work on the missiles, while essential to the mission of the submarines, was not essential to the operation of the submarines, citing *Stallings v. Dyncorp*, 39 BRBS 287(ALJ)(2005).[7]

[7] The BRB noted that although the ALJ relied on a decision that is not controlling precedent because it was rendered by another ALJ, *Stallings*,

The BRB affirmed the ALJ's finding that claimant was not engaged in maritime employment.[8] The BRB stated that in order for claimant's work to be covered, it must be integral to the loading, unloading, building, repair, or maintenance of the submarines. The Board discussed *Wilson v. General Engineering & Machine Works, Inc.*, 20 BRBS 173 (1988)(claimant's work maintaining the physical plant, forklifts and cranes at a facility used to test missile launching systems for submarines is not maritime employment), and concluded that

> "[s]imilarly, claimant's work here involved building and maintaining missiles in accordance with employer's contract with the Navy. Contrary to claimant's assertion, a missile on a submarine is not akin to machinery that is an appurtenance of a vessel, such as a crane or boom used for loading and unloading, or to a propeller that is a component of a vessel. That is, the missile is not part and parcel of the submarine: it is a separate entity that is carried by the submarine, more akin to cargo. Movement of cargo by vessel does not render the manufacturing of the cargo 'maritime' in nature – the car manufacturer or the widget builder is not performing maritime work merely because its products are to be transported by vessel; only the loading and unloading of that cargo is covered employment. Claimant's work did not involve loading or unloading vessels, and he was not engaged in the construction, demolition or repair of ships or their components. As claimant built and repaired missiles which were, many months later, to be carried by submarines for military purposes, the [ALJ] properly found that claimant did not establish the status element, as his work was not integral to maritime activity."

Slip op. at 5 (citations omitted).

**[Topic 1.7.1 JURISDICTION/COVERAGE – STATUS - "Maritime Worker" ("Maritime Employment")]**

---

which involved a claimant who built and repaired equipment necessary for the operation of aircraft onboard aircraft carriers, is strikingly similar to this case, and it was not unreasonable for the ALJ to find the rationale persuasive.

[8] As lack of status precludes coverage under the Act, the BRB did not reach the issue of § 3 (a) situs.

## II. Black Lung Benefits Act

There are no published decisions to report for this month.