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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 275
October 2016

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

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

[no published decisions to report]

B. Benefits Review Board

***Flores v. MMR Constructors, Inc.*, __ BRBS __ (2016).**

The Board reversed the ALJ's determination that the injury claimant sustained upon navigable waters in the course of his employment was not covered by the Longshore Act because claimant's employer, an electrical and instrumentation contractor, was not a maritime employer under Section 2(4).

Claimant 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 on pontoons at the dock of the Kiewit yard on Corpus Christi Bay. The ALJ found that claimant was injured upon navigable waters and that his presence upon those waters was not transient or fortuitous. Nevertheless, the ALJ denied coverage based on his finding that employer is not a "statutory employer" under § 2(4), because it is an electrical and instrumentation contractor and none of its employees are engaged in maritime employment. In the alternative, the ALJ found that the *Big Foot* is not a "vessel." 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 ALJ 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). Finally, the ALJ found no coverage under the OCSLA.

[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 Lexis identifier.

On appeal, claimant argued, and the OWCP Director agreed, 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 § 2(3) of the Act may be covered, an employer can be a "maritime employer" despite its usual business being "non-maritime." They asserted 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." Employer, for its part, argued that the ALJ correctly looked to the nature of employer's business -- that is, is it the type of company that engages in 'maritime employment,' particularly the activities described in § 2(3).

The Board concluded that case precedent, including *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), supports the position of claimant and the Director. It reasoned that:

> "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. Thus, in order to demonstrate that coverage exists, a claimant must satisfy both the 'situs' and the 'status' requirements of the Act. 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 to *Perini* unless a statutory exclusion applies, or unless his presence on the water at the time of injury was transient or fortuitous. *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."

Slip op. at 4-5 (additional citations and footnote omitted). 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 § 2(3) status requirement.

Further, the Fifth Circuit, within whose jurisdiction this case arose, "has doubted that § 2(4) creates 'the sort of 'jurisdictional confine' that is embodied in the situs and 'employee' status requirements." Slip op. at 8 (*quoting 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 court stated that a "statutory employer" is not a second independent prerequisite to liability. Rather, the injured claimant must himself be engaged in maritime employment and, if he is, his employer would automatically qualify as a statutory "employer."

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. Although, as quoted by the ALJ, 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, 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.

In this case, no party disputed the ALJ'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. Pursuant to *Perini*, claimant, therefore, was engaged in

maritime employment when he was injured. 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 § 2(4).

The Board reversed the ALJ's finding that claimant's injury did not occur within the Act's coverage and remanded the case for the ALJ to address the remaining issues.

[Topic 1.6.1 JURISDICTION/COVERAGE – SITUS – "Over Water;" 1.7.1 JURISDICTION/COVERAGE - "Maritime Employment;" Topic 1.9 JURISDICTION/COVERAGE - MARITIME EMPLOYER; Topic 2.4 DEFINITIONS - § 2(4) EMPLOYER]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

[There are no published Circuit Court decisions to report, though the Fourth Circuit issued an unpublished black lung decision in *Westmoreland Coal Co. v. Director, OWCP* [*Mabe*], ___ Fed. Appx. ___, 2016 WL 6068840 (4th Cir. Oct. 17, 2016). The decision is available via Google Scholar here.]

B. Benefits Review Board

In *Osborne v. Eagle Coal Co., Inc.*, BLR , BRB No. 15-0275 BLA (Oct. 5, 2016), the Benefits Review Board ("Board") addressed the use of Exhibit 609, found in the Black Lung Benefits Act Procedure Manual, which contains the Social Security Administration's ("SSA") wage base table that "sets forth the maximum amount of yearly earnings on which employers and employees in all occupations are required to pay Social Security tax." The Board noted its agreement with the allegation, raised by Claimant and the Director, Office of Workers' Compensation Programs, that the ALJ's "reliance on Exhibit 609 to determine the length of claimant's coal mine employment in 1982 and 1985 does not provide the basis for a reasonable method of computation." *Id*. For those two years, the ALJ had divided the miner's yearly earnings by the yearly figure contained in the SSA's wage base table listed at Exhibit 609. *See id.* at 5-6. The Board held "that reliance on Exhibit 609 to determine the length of a miner's coal mine employment when the formula at 20 C.F.R. §725.10l(a)(32)(iii) is applied is not appropriate because it contains a wage base that is not specific to the coal mine industry." *Id.* at 9. Because the ALJ applied Exhibit 609 and Section 725.101(a)(32)(iii) in calculating Claimant's length of coal mine employment ("CME") for the years 1982 and 1985, the Board vacated these findings and the finding that Claimant did not invoke the 15-year rebuttable presumption. The Board therefore remanded the case to the ALJ in order to recalculate the length of Claimant's CME for these two years.

Additionally, the Board reemphasized that a CME finding will be upheld if it is based on substantial evidence and a reasonable method of computation. *See id.* at 8-9. Furthermore, the Board specifically "decline[d] to instruct the administrative law judge to use a method treating 125 days as the divisor for the purpose of calculating a fractional portion of a year." *Id.* Agreeing with the Director, the Board pointed out that "direct evidence of claimant's actual coal mine work history exists in the form of the paystubs reflecting his coal mine employment earnings in 1982 and 1985 that can provide the basis for computing the fractional years of that employment." *Id.* at 9-10. The Board concluded that the preference for use of such "direct evidence" is in accord with Section 725.101(a)(32)(ii), which provides that "[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony." *Id.* at 10, quoting 20 C.F.R. §725.10l(a)(32)(ii).

The Board directed the ALJ, if he finds on remand that Claimant worked for at least 15 years in CME, to address whether Claimant may invoke the 15-year presumption at Section 411(c)(4) by establishing a totally disabling respiratory or pulmonary impairment. *Id.* at 10. In the event that the ALJ determines on remand that Claimant is unable to establish 15 years of CME, the Board also addressed the validity of the ALJ's denial on the merits, which was based on a finding that Claimant failed to prove he suffers from pneumoconiosis. The Board affirmed the ALJ's finding that Claimant failed to establish the existence of clinical pneumoconiosis, but it vacated the ALJ's finding that Claimant did

not establish the presence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *Id.* at 12-14.

In light of the above, the Board remanded the matter for further consideration consistent with its opinion.

[Bureau of Labor Statistics table – Exhibit 609, "Wage Base History" – *to be amended to read* Use of Bureau of Labor Statistics table – Exhibit 609, "Wage Base History" – not a reasonable method for computing length of coal mine employment]