



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 198
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I. Longshore

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- A.** Please note the following policy changes for Defense Base Act cases:
- a. OALJ will no longer automatically expedite Defense Base Act cases arising in a war zone, but will require a written request for expedited processing.
 - b. ALJs may now require an initial conference and initial disclosures similar to those required by Fed. R. Civ. P. 26(f)(2).
 - c. OALJ has revised the Prehearing Statement and Stipulation forms used in longshore and related cases.

For further information, and to view the revised forms, visit: <http://www.oalj.dol.gov/LIBLHC.HTM>.

B. U.S. Circuit Courts of Appeals

McLaurin v. Noble Drilling, Inc., 2008 WL 2132863 (5th Cir. May 22, 2008).

A scaffold carpenter was injured in a shipyard while working on a vessel when heavy material, suspended by a crane, fell on him, crushing his left hand and arm. *McLaurin v. Noble Drilling, Inc.*, 2008 WL 2132863, at *1 (5th Cir. May 22, 2008). His family filed suit against Noble Drilling, the vessel's owner, alleging negligence claims under Mississippi law, general maritime law, and § 905(b) of the LHWCA. *Id.* Noble Drilling moved for summary judgment on the basis that the claimants' state-law tort claims were preempted by the last sentence of § 905(b). *Id.* The sentence states, "The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." *Id.* (citing 33 U.S.C. § 905(b)).

The district court held that § 905(b) preempted the claimants' state-law tort and general maritime claims. *Id.* It then dismissed Claimants' § 905(b) claim for lack of jurisdiction since the injury occurred on land and not on navigable waters. *Id.* Claimants appealed the dismissal of the state-law tort claim, arguing that if there was no LHWCA jurisdiction under § 905(b), then the language of that section does not preempt their state-law tort claims. *Id.*, at *2.

The Fifth Circuit upheld the district court's dismissal of Claimants' § 905(b) claim for vessel negligence, agreeing that the claim failed as a matter of law since the injury did not occur in navigable waters. *Id.*, at *2, 4. However, the Court found that the district court erred in finding that "§ 905(b)'s exclusivity provision preempts the McLaurins' state-law tort claims," *Id.*, at *2, and noted the following:

[T]he [LHWCA] provides nonseaman maritime workers . . . with no-fault workers' compensation claims (against their employer, § 904(b)) and [vessel] negligence claims (against the vessel, § 905(b)) for injury and death. As to those two defendants, the LHWCA expressly pre-empts all other claims, §§ 905(a), (b), but it expressly preserves all claims against third parties, §§ 933(a), (1).

Id., at *4.

The Fifth Circuit went on to reason that the claimants:

cannot recover from Noble Drilling as a vessel owner because they cannot state a cognizable claim for vessel negligence under § 905(b), so the language of § 905(b) does not preempt their state-law claim against Noble Drilling as a third-party tortfeasor. The plain language of § 933 clearly contemplates and preserves a maritime worker's ability to pursue separate claims against third parties, including vessel owners allegedly responsible for the injury.

Id., at *5.

C. Benefits Review Board

T.M. v. Great Southern Oil & Gas, (BRB No. 07-0756)(May 28, 2008).

The sole issue before the Board in this case was whether the ALJ erred in holding that Claimant's injury occurred in employment not covered by the Act. The claimant crushed his left knee when he slipped and fell between two barges while working as a derrick man. At the time of his injury, the claimant was attempting to cross from a pipe barge to a blending barge. Both barges were afloat on navigable waters, however both were attached to a keyway barge, which the ALJ determined to be a "fixed" platform.

In denying the claim, the ALJ noted, *inter alia*, that the keyway barge was "spudded" and "did not move while the claimant was at the job site, it could remain secured at one location for months at a time, it was not used as a means of transportation, and any movement of the keyway barge was incidental to its use as a work platform." *T.M. v. Great Southern Oil & Gas*, *supra*, slip op. at 3-4. The ALJ relied on the Supreme Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), in which the Court held that "while the claimant would have been covered under the Act if he was injured on a floating platform and therefore his injury occurred on navigable waters, he was not covered because he worked on a fixed platform in state waters and his work was not maritime in nature." *T.M. v. Great Southern Oil & Gas*, *supra*, slip op. at 3.

The Board reversed the finding of the ALJ and awarded the claimant benefits, providing the following rationale:

Significantly, the uncontradicted evidence of record establishes that claimant was injured while attempting to cross between the floating pipe and blending barges that were attached to the keyway barge. . . Inasmuch as the pipe and blending barges moved during the course of the work day, there is no evidence that these barges were ever affixed to the water bed, and claimant's injury occurred while he was attempting to cross between these floating barges, claimant's injury occurred on actual navigable waters while in the course of his employment on those waters. Pursuant to *Perini*, claimant satisfies both the situs and status requirements, and he thus is entitled to coverage under the Act based on the actual site of his injury.

Id. (citing to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983)). The Board went on to note that although the keyway barge was affixed to the sea bed by spudding to prevent movement, it was not permanently affixed to the sea bed and was routinely moved to other sites. *Id.* at 4.

The Board further held that the ALJ "erred in requiring that the keyway barge meet the test for a 'vessel in navigation'" in order for the claimant working on it to be covered. *Id.* at 4. The Board emphasized, "coverage under the Act concerns only whether the employee was upon, over, or in actual navigable waters at the time of his work injury." *Id.*

Finally, the Board rejected Employer's contention that coverage should be denied to Claimant because of the minimal amount of time Claimant spent working on navigable waters. *Id.* at 5-6. Employer argued that Claimant worked for Employer for approximately two-and-a-half years doing exclusively land-based work, and had only worked on the keyway barge for four or five days before sustaining his injury. *Id.* at 5. Employer cited to the Fifth Circuit's decision in *Biennu v. Texaco, Inc.*, 164 F.3d 901 (1999), in which the Court held that a worker meets the "status" test and is engaged in maritime employment if his presence on navigable waters at the time of his injury was neither "transient nor fortuitous." *Id.* at 5.

The Board rejected Employer's argument, noting that "pursuant to *Perini*, the pertinent inquiry for establishing

coverage under the pre-1972 Act is whether the worker was injured during the course of performing his employment duties on navigable waters. . . The nature and location of claimant's work with previous employers or on other jobs with this employer are not relevant considerations." *Id.* at 6 (citing to *Perini*, 459 U.S. at 323-24, 15 BRBS at 80 (CRT)).

II. Black Lung Benefits Act

There are no significant black lung cases to report for this month.