**U.S. Department of Labor**

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

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

***RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 299***
***July 2019***

*Stephen R. Henley*
*Chief Judge*

*Paul R. Almanza*
*Associate Chief Judge for Longshore*

*Yelena Zaslavskaya*
*Senior Counsel for Longshore*

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

*Alexander Smith*
*Senior Counsel for Black Lung*

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

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

***Wood Group Production Services v. Director, OWCP,*** **F.3d , 2019 WL 3281417 (5th Cir. 2019).**

Agreeing with the OWCP Director and the Board, the Fifth Circuit held that an employee who was injured in an explosion on a fixed platform located in territorial waters was covered under the LHWCA. Claimant, who spent 25 to 35 percent of his working hours loading/unloading vessels, was injured while unloading a vessel on a platform customarily used for that task. As such, he satisfied both the situs and status requirements.

Claimant worked for employer as a warehouseman for the Black Bay Central Facility, a fixed platform located in the territorial waters of Louisiana. Central Facility provides support services for oil and gas production occurring at various satellite production platforms. Claimant was injured while unloading a vessel on the platform.

To enjoy coverage under the Act, a claimant must show both that he was in a place covered by the Act (situs) and that he was engaged in maritime employment (status). In this case, the Board affirmed the ALJ's finding, on remand, that both requirements were met. The Board compared the platform to an offshore dock and it concluded that the nature of the items claimant loaded and unloaded was "irrelevant." Employer appealed.

The court initially noted the Supreme Court's instruction that situs should be liberally construed. Here, the site of claimant's injury qualified as an "other adjoining area customarily used by an employer in loading [and] unloading a vessel" under Section 3(a). The court rejected employer's contention that the platform could not satisfy the situs requirement because it did not have a "maritime purpose." The text of the Act does not expressly include any "maritime purpose" requirement. Employer's reliance on *Thibodeaux v. Grasso Production Management, Inc.*, 370 F.3d 486 (5th Cir. 2004), was misplaced. Unlike in

[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 *__).

*Thibodeaux*, the facility in this case was not a standalone fixed platform, but instead designed as a central hub to support a multitude of smaller platforms in and around the oilfield. It was comprised of four platforms and included a safe harbor designed to allow for loading and unloading vessels in rough seas. Third-party vessels serviced surrounding facilities by traveling daily between them, and the platform was equipped with three cranes and a fulltime crane operator who worked with dedicated warehousemen to load and unload vessels throughout the day. Significantly, Thibodeaux was not injured on the portion of the platform used to dock vessels; minor maritime activity occurring in specific areas of the fixed platform—where the injury did not occur—did not transform the entire platform into a covered situs. An injury that occurs on a specific portion of a platform where loading/unloading take place does not evade coverage merely because the general purpose of the entire platform is dedicated to another task.

The court also rejected employer's contention that the situs requirement was not met because the items claimant loaded/unloaded were not maritime "cargo." Employer argued that "cargo" is a product to be delivered into the stream of commerce, while in this case claimant loaded/unloaded supplies used by the workers on the platforms with the purpose to produce oil and gas. The court observed that the language of the statute's situs requirement does not use the word "cargo." Further, contrary to employer's contention, this court's prior decisions did not read a maritime cargo requirement into the Act. In particular, *Coastal Prod. Servs. Inc. v. Hudson*, 555 F.3d 426, 432 (5th Cir. 2009), did not add such a requirement. In *Munguia v. Chevron U.S.A. Inc.*, 999 F.2d 808 (5th Cir. 1993), this court held that a claimant, who unloaded nothing more than personal gear from a boat in furtherance of pursuits not customarily thought of as maritime commerce, failed to satisfy the loading/unloading requirement because he performed little or no loading/unloading of boats. By contrast, claimant in the present case spent at least 25 percent of his time unloading vessels, and he used a crane to unload vessels containing tools and supplied for use by 22 men on multiple satellite production platforms. Nor did this court's decision in *Thibodeaux* graft a maritime cargo requirement onto the statute. In *Thibodeaux*, this court reasoned that although personal gear and occasionally supplies were unloaded at docking areas on the platform, the purpose of the platform was to further drilling for oil and gas, which is not a maritime purpose. However, Thibodeaux's accident did not occur on the part of the platform where the loading/unloading occurred, and those activities were limited in any event. The court concluded that "[u]nder the Act, the nature of the items loaded and unloaded is not determinative. Rather, coverage under the Act extends to all those on the situs involved in the essential or integral elements of the loading or unloading process." Slip op. at 15 (internal quotation marks and citation omitted). Furthermore, claimant, unlike Thibodeaux, was injured while unloading a boat on a platform used to load and unload boats.

Next, the court concluded that claimant met the maritime status requirement of Section 2(3). An employee may qualify for maritime status 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. A claimant will satisfy the status requirement if he spends at least some time loading or unloading ships, and this court has expressly ruled that this time need not be "substantial." But if a claimant was not injured on actual navigable waters at the time of the injury, then the employee is engaged in "maritime employment" only if his work is directly connected to the commerce carried on by a ship or vessel.

In this case, claimant —who spent 25 to 35 percent of his time loading/unloading vessels—was injured while unloading a vessel. Thus, the Board correctly concluded that claimant met the status requirement based on both his overall job and his duties at the moment of injury.

The court rejected employer's contention that claimant did not meet the status requirement because the purpose of his employment was not maritime as his

loading/unloading did not enable a ship to engage in maritime employment. Employer asserted that claimant's loading/unloading was incidental to non-maritime work. The court distinguished the three Board decisions cited by employer. The first case, *Smith v. Labor Finders*, No. BRB No. 12-0035, 2012 WL 4523618 (DOL Ben. Rev. Bd. Sept. 11, 2012), held that a "beach-walker" engaged in gathering oil and pollutants from the beaches of an island after an oil spill was not covered under the Act. Smith would load his tools and supplies into a boat and ride for 30-45 minutes to/from the mainland. However, Smith did not routinely participate in the loading/unloading of the collected oil onto vessels. He was injured on a trailer, and he was not engaged in loading/unloading a vessel at the time of his injury. Thus, the facts of this case are clearly distinguishable.

The second case invoked by employer, *Hough v. Vimas Painting Co., Inc.*, No. BRB No. 10-0534, 2011 WL 2174854 (DOL Ben. Rev. Bd. May 24, 2011), held that the claimant who was cleaning a bridge by vacuuming up debris was not covered. The vacuum deposited the debris onto a barge, where it was stored until the completion of the project. The court observed that Hough grew sick while working on the bridge, not the barge. Further, vacuuming debris from a bridge onto a vessel is quite different from the loading/unloading activities in the present case. The Board's analysis in *Hough* was ultimately geared to determining whether the vacuuming could be considered "loading" a vessel. In this case, there was no dispute that claimant was loading/unloading vessels at the time of the injury. Finally, the court distinguished *Bazenore v. Hardaway Constructors, Inc.*, No. BRB no. 83-2842, 1987 WL 107407 (DOL Ben. Rev. Bd. June 18, 1987). In that case claimant was injured while working in a construction yard cutting poles with a chainsaw for nonmaritime customers. This activity differs significantly from the loading/unloading in the present case. In sum, because claimant's injury occurred when he was loading/unloading a vessel, and because he regularly loaded/unloaded vessels, the status requirement was satisfied.

**[SITUS – "Over land;" STATUS – "Maritime employment"]**

### B. Benefits Review Board

No decisions to report.

## II. Black Lung Benefits Act

### A. U.S. Circuit Courts of Appeals

The U.S. Court of Appeals for the Tenth Circuit addressed an appeal in a deceased miner's claim in *Energy West Mining Co. v. Lyle*, 929 F.3d 1202, 2019 WL 2934065 (10th Cir. July 9, 2019). Below, the administrative law judge found that the miner had invoked the rebuttable presumption of total disability due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. He further found that, while the employer had established the absence of clinical pneumoconiosis, it had failed to disprove the existence of legal pneumoconiosis or establish that the disease played no part in the miner's disability. The administrative law judge therefore awarded benefits, and the Board affirmed the award on appeal. The employer then appealed to the Tenth Circuit.

On appeal, the court first addressed the employer's argument that the administrative law judge lacked the authority to adjudicate the matter because he was subject to the Appointments Clause of the U.S. Constitution and was not properly appointed under that provision. Because the employer did not present this issue to the Board, which had the authority to remedy an Appointments Clause violation, the court concluded that it was deprived of jurisdiction to consider the issue.

The court next addressed the employer's contention that the administrative law judge erred in finding that the miner was totally disabled from a respiratory or pulmonary impairment. In rejecting this argument, the court noted that "the administrative law judge considered all of the evidence and explained his conclusion." *Lyle*, 2019 WL 2934065 at *6. Moreover, the administrative law judge's explanation was supported by substantial evidence; accordingly, the court upheld the administrative law judge's total disability finding.

Third, the court considered whether the administrative law judge erred in finding that the employer failed to disprove the existence of legal pneumoconiosis on rebuttal. Drs. Farney and Tomashefski opined that the miner did not have legal pneumoconiosis, and the administrative law judge concluded that the probative value of their opinions was "minimal to none." *Id.* The employer challenged three of the four reasons the administrative law judge gave for according no probative value to Dr. Farney's opinion: (1) that his report was internally inconsistent; (2) that he misunderstood the miner's actual work; and (3) that he, in part, based his opinion upon a belief that black lung is relatively infrequent in the western states. The court rejected each challenge, thus affirming the administrative law judge's decision to discredit Dr. Farney's legal pneumoconiosis opinion.

The court finally turned to the employer's argument that the administrative law judge erred in his weighing of Dr. Tomashefski's opinion that the miner did not suffer from legal pneumoconiosis. In according Dr. Tomashefski's opinion no probative value, the administrative law judge concluded that the physician did not explain why the miner's constrictive bronchiolitis and interstitial fibrosis were unrelated to his coal mine dust exposure. The court concluded that the administrative law judge appeared to overlook Dr. Tomashefski's deposition testimony, in which he stated the following:

> Well, let's start with the constrictive bronchiolitis. In the first place, coal dust, when it affects the small airways, produces what I refer to as a coal macule, not constrictive bronchiolitis. The changes of constrictive bronchiolitis are much different from the coal macule, and furthermore, there was no histologic evidence of dust deposition in those airways that were constricted.
> And then if we move to the interstitial fibrosis, it's the same thing, that the pattern of interstitial fibrosis did not qualify as pneumoconiosis, and although coal mine dust can cause interstitial fibrosis, to make that diagnosis, you need

> to see deposition of pigment and mineral particles significantly present in the areas of interstitial fibrosis. That was not seen here.

*Id.* at *8, *quoting* Joint App'x at 151. Considering this explanation, the court concluded that the administrative law judge erred when he solely relied on the absence of any explanation in according no weight to Dr. Tomashefski's opinion.

In light of the above, the court granted the employer's petition for review, vacated the award of benefits, and remanded the matter for reconsideration of Dr. Tomashefski's legal pneumoconiosis opinion.

**[The request for a formal hearing: An Administrative Law Judge must be properly appointed]**

In *Paramont Coal Co. VA, LLC v. Goode*, Fed. App'x. , 2019 WL 3451754 (July 31, 2019) (unpub.), the U.S. Court of Appeals for the Fourth Circuit affirmed the administrative law judge's finding that the employer was properly named as the successor operator to the company that employed the miner before he contracted complicated pneumoconiosis.

**[Successor liability: For claims filed after January 19, 2001]**

### B. Benefits Review Board

No decisions to report.