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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 221 May 2010

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

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

***Valladolid v. Pacific Operations Offshore, LLP*, __ F.3d __, 2010 WL 1929890 (9th Cir. 2010).**

The Ninth Circuit held that an employee need not be injured on the outer continental shelf ("OCS") to be eligible for benefits under the Outer Continental Shelf Lands Act ("OCSLA") and, accordingly, vacated the Board's decision upholding the ALJ's denial of OCSLA benefits under the "situs-of-injury" test to the widow of a roustabout who had worked primarily on an offshore drilling platform and suffered a fatal work-related injury on the grounds of employer's onshore oil processing La Conchita facility.

The Ninth Circuit held, as a matter of first impression, that the OCSLA workers' compensation provision, 43 U.S.C.A. § 1333(b), may apply to injuries occurring outside the situs of the OCS, so long as they occur "as the result of operations conducted on the outer Continental Shelf." Slip. op. at *11, *14. The two other circuits that have considered this question have reached conflicting conclusions: the Third Circuit rejected the situs-of-injury test and held that a claimant need only satisfy a "but for" test in establishing

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

that the injury occurred "as a result of" operations on the OCS; while the Fifth Circuit, in an en banc decision, adopted a situs-of-injury requirement for OCSLA claims. The Ninth Circuit reasoned that the plain language of § 1333(b) unambiguously does not contain a "situs-of-injury" requirement, and legislative history and policy considerations do not compel a different result.[2] The court also rejected the alternative theory that § 1333(a)(1) provides a situs requirement applicable to all of § 1333 as simply inconsistent with its plain language, statutory structure, and legislative history. Subsection (a) merely extends federal jurisdiction and federal and state law to the OSC. It has no applicability beyond that purpose, other than to provide a situs definition that several other provisions – but not § 1333(b) -- expressly incorporate.

The court further held that an injury is "the result of" OCS operations for purposes of coverage under § 1333(b) if there is a "substantial nexus" between the injury and the extractive operations on the shelf; "[t]o meet the standard, the claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations."[3] Slip. op. at *11. The court concluded that Congress did not intend to enact a simple "but for" test in covering injuries that occur "as the result of" such operations; and thus "[i]njuries with a tenuous connection to the outer continental shelf are not covered." *Id.* The court, accordingly, remanded this matter for further consideration consistent with this opinion.

The Ninth Circuit further held that the Board did not err in denying death benefits under LHWCA on maritime situs ground.[4] 33 U.S.C.A. § 903(a). This Circuit uses a functional relationship test in determining whether a particular facility is an "adjoining area" within the meaning of the LHWCA by considering various factors set forth in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978). Although physical congruity with navigable water is not required, the facility must be "used as an integral part of longshoring operations." Slip. op. at *13, citing *id*.

Here, even though the onshore oil flocculation facility where the roustabout was killed was only 250-300 feet from the ocean, it was

[2] The court concluded that a footnote in *Offshore Logistics, Inc. v. Tellentire*, 477 U.S. 207 (1986), stating that a situs requirement applies to § 1333(b), is unconsidered dictum and thus lacks any predictive or persuasive value.

[3] The court noted that this test is consistent with the Fifth Circuit's earlier approach that was later overruled. The court also noted that in a recent decision, the Fifth Circuit changed its rationale for applying the situs-of-injury test by stating that this requirement was found in § 1333(a)(1), rather than § 1333(b).

[4] The Court, like the Board, did not reach the status issue.

separated from water by highway and railroad tracks and had no direct access to any pier, dock, or other loading facility, closest pier used was roughly three miles away, and there were no adjoining properties engaged in maritime commerce. The primary purpose of the facility was to receive and process crude oil slurry -- a non-maritime activity; and its use as convenient dumping ground for scrap metal from offshore platforms, before it was sold to third parties, did not convert it into a maritime situs. The maritime activity of moving the scrap metal from ship to land transportation began and ended at the pier; the scrap metal was then picked up by third-party drivers and driven three miles to La Conchita.

[Topic 60.3.2 OCSLA – Coverage (Situs, Status, "But for" Test) – Circuit Courts]

***Sea-Logix, LLC v. Booker*, Nos. 06-0908, 09-0380, 2010 WL 1841884 (9th Cir. 2010)(unpub.)**

Upholding the Board's reversal of the ALJ's decision, the Ninth Circuit held that the following job duties regularly performed by claimant constituted intermediate steps in the movement of cargo between ship and land transportation and thus entitled him to LHWCA status: transportation of cargo between the Maersk Terminal and Sea-Logix's container freight station, and from the Maersk Terminal to the Joint Intermodal Terminal JIT railhead, all located within the Port of Portland. *Cf. Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 262-63 (1977); *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 83 (1979). To have status, the claimant must "engage[ ] in intermediate steps of moving cargo between ship and land transportation." *Pfeiffer,* 444 U.S. at 83. Applying *Caputo* and *Pfeiffer,* claimant's transportation of cargo from Maersk Terminal to employer's warehouse "was an intermediate step in the unloading process that continued until the containers were stripped." Slip. op. at *1. The court "[found] unpersuasive Sea-Logix's contentions that Booker lacks Longshore Act status because he is a truck driver, he drove on public roads for part of the time, he did not physically handle cargo, he would allegedly not have been covered under the pre-1972 Longshore Act, and legal liability for the containers shifted from the Maersk Terminal to Sea-Logix when he exited the Maersk Terminal." *Id.* Similarly, his transportation of cargo in the reverse direction, from the warehouse to the terminal, "required him to transport already-stuffed containers, meaning that he participated in a loading process that was already underway. *Cf. Pfeiffer,* 444 U.S. at 83." *Id.* Additionally, claimant's transportation of cargo from the terminal to the railhead, where railway employees loaded the containers onto railway cars for transit to consignees, "was an intermediate step in the cargo's transition from ship to land transportation. *Cf. Pfeiffer,* 444 U.S. at 71, 83." *Id.* at 2.

Claimant performed this duty during the great majority of his tenure at Sea-Logix; while this job duty was discontinued in the last few months of his work, employer cited no authority that this affected his status. Having found status, the court saw no need to address the Board's finding that claimant also had status based on his transportation of cargo from the Maersk Terminal to other marine terminals within the Port of Oakland.[5]

[Topic 1.7.1 STATUS – "Maritime worker" ("Maritime Employment")]

B. U.S. District Courts

***Robertson v. W & T Offshore, Inc.*, __ F.Supp.2d __, 2010 WL 1956706 (W.D.La. 2010).**

The district court granted defendants' (W & T and Baker) motions for summary decision on various tort-based claims, holding that both plaintiff and his supervisor were borrowed employees of W & T, and thus plaintiff could not sue either W &T or his supervisor's nominal employer (Baker) in tort based on the injury he sustained while working as a cook/steward on a fixed production platform owned and/or operated by W & T.

First, considering the nine factors comprising the borrowed employee test as set forth in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir.1969), the court concluded that plaintiff was a borrowed employee of W & T, as all factors weighed in favor of such status except for his length of employment. Pursuant to OSCLA, plaintiff's exclusive remedy against his borrowing employer, W & T, is compensation benefits under the LHWCA, 33 U.S.C. § 905(a).

The court similarly concluded that plaintiff's supervisor was a borrowed employee of W & T. The court held that plaintiff was barred by Section 33(i) of the LHWCA from bringing a tort action against his supervisor based on their status as co-employees. The court further held that to allow plaintiff to bring a respondeat superior action against his supervisor/co-employee's nominal employer "would not be consistent with the LHWCA's comprehensive scheme." Slip. op. at *17-18, citing *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992).

[Topic 5.1.1 Exclusive Remedy; Topic 33.9 EXCLUSIVE REMEDY AGAINST OFFICERS/FELLOW SERVANTS OF EMPLOYER]

[5] *See W.B. [Booker] v. Sea-Logix, LLC*, 41 BRBS 89, 94-95 (2007).

***Dinh v. Stalker, et. al.*, No. 09-3019, 2010 WL 1930945 (E.D.La. 2010)(unpub.)**

In a lawsuit filed by an injured worker seeking to enforce an ALJ's compensation order, the district court held that the ALJ's order could not be enforced against individual alleged to be employer's corporate officer (i.e., Chief Financial Officer) as he did not receive notice of the claim for compensation or notice of the administrative hearing required under subsections 18(b) and (c) of the LHWCA, and, accordingly, dismissed the claim against the CFO.[6]

[Topic 19.1 Procedure – Generally (liability of corporate officers, providing notice of hearing); Topic 19.2 District Director must Notify Employer; Topic 21.5 Review of Compensation Orders – Compliance]

C. Benefits Review Board

***Christensen v. Stevedoring Servs. of Am.*, __ BRBS __ (2010).**

The Board granted in part claimant's motion for reconsideration of its earlier order awarding claimant's counsel, Charles Robinowitz of Portland, Oregon, an attorney's fee. *Christensen v. Stevedoring Servs. of Am.*, 43 BRBS 145 (2009), on remand from 557 F.3d 1049 (9th Cir. 2009). In that decision, the Board determined counsel's hourly rate by averaging the rates for three types of work reflected in the 2007 Oregon Bar Survey: workers' compensation, plaintiff personal injury civil litigation, and plaintiff general civil litigation. Claimant contended that the Board's analysis resulted in an artificially low hourly rate. *Compare id. with Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

Agreeing with claimant, the Board held that the workers' compensation rate should not be included in the hourly rate calculation as it is not a "market rate" within in the meaning of the Ninth Circuit's decision in *Christensen*, *supra.* The Ninth Circuit observed that there is no private market under the Longshore Act, and that, therefore, counsel must be awarded a fee "commensurate with those which [he] could obtain by taking

[6] As the court's rationale is analogous to that employed in *Dihn v. Stalker, et. al.*, No. 09-3019, 2010 WL 925292 (E.D.La. 2010)(unpub.), summarized in the March 2010 Recent Significant Decisions Monthly Digest, it will not be reproduced here.

other types of cases." Slip op. at 2, citing *Christensen,* 557 F.3d at 1053-54. Pursuant to the Oregon workers' compensation statute, the amount of a fee award is usually capped and is often paid out of claimant's compensation award. *Id.* Thus, such fees are not based on a market rate. Moreover, the Board was persuaded by claimant's counsel's explanation and supporting evidence as to why the rates for workers' compensation defense attorneys do not represent a "market rate" under *Christensen*. Claimant proffered a portion of the 2009 Survey of Small Law Firm Economics which states that "lawyers who litigate for insurers and workers' compensation tend to show lower hourly rates." Similarly, Mr. Skerritt testified in a deposition that insurers are able to negotiate lower rates with their attorneys based on a steady source of work. Accordingly, the Board modified counsel's market rate to eliminate workers' compensation rates from the calculation. Claimant similarly contended that the rates for plaintiff personal injury work do not represent a "market rate," as such work is compensated based on a percentage of recovery. The Board saw no need to address this contention, as the bar survey reflects a rate for such work that is the same as the rate for general plaintiff civil litigation.

Contrary to claimant's contention, the Board stated that it did not ignore the affidavits he offered in support of a rate of at least $400. Rather, it found, based on employer's affidavits, that the rates asserted were not for comparable work that counsel could realistically obtain from paying clients in Portland, OR. Moreover, contrary to claimant's assertion, the Board expressly accounted for counsel's many years of experience by utilizing the 95th percentile hourly rate figures reflected in the Survey. The rate may not be determined based solely on years of experience, as it must be based on the appropriate "market."

The Board further rejected claimant's contention that it erred in not awarding the fees at current rates to account for delay in payment of the fee. Claimant asserted that the Supreme Court has held in *Missouri v. Jenkins*, 491 U.S. 274 (1989), that such delays should be compensated, whether by use of current rather than historical rates, or otherwise. The Ninth Circuit, however, agreed with the Board's determination that a two-year delay in the payment of attorney's fees at an earlier stage of this case was "not so egregious or extraordinary as to require a delay enhancement." Slip. op. at 3, citing *Christensen*, 557 F.3d at 1056. The delay in payment of any additional fee has been due to appeals of the fee award itself, and the Ninth Circuit has held that an attorney cannot recover for any extraordinary delay due to appeals of the fee award, as this would amount to an award of

interest unauthorized by the Act. Slip. op. at 3, citing *Anderson v. Dir., OWCP*, 91 F.3d 1322, 1325 n.3, (9th Cir. 1996). The Board noted that *Anderson* was based on the Supreme Court's decision in *Missouri v. Jenkins.*

The Board further awarded counsel fees for 8 hours, down from 11.75 hours requested, for work on the motion for reconsideration, as it was largely, but not wholly, successful.

[Topic 28.6.1 Hourly Rate]

II. Black Lung Benefits Act

Benefits Review Board

In *Parks v. Eastern Associated Coal Corp.*, 24 B.L.R. 1-__ (May 25, 2010) (pub.), the Board remanded an attorney fee award stating that Claimant's counsel failed to sustain his burden of providing "specific evidence of the prevailing market rates in the relevant community for which he seeks an award . . .." However, the Board affirmed the Administrative Law Judge's conclusion that affidavits proffered by Employer regarding the prevailing market rate for Claimant's counsel "were entitled to no weight, as they either did not provide sufficient specific underlying information to make them reliable, or they failed to recognize the factors that are necessarily incorporated into a rate charged by a claimant's counsel" in black lung claims. The Board instructed that, on remand:

> . . . the administrative law judge must, as a starting point to his fee analysis, require Mr. Wolfe to provide evidence of an applicable prevailing rate. (citations omitted). The administrative law judge must also reconsider counsel's fee petition in accordance with the criteria set forth at Section 725.366.

Slip op. at 5. The Board offered suggested sources of "evidence" for Claimant's counsel:

> Counsel may submit evidence of the fees he has received in the past as well as affidavits of other lawyers, who might not practice black lung law, but who are familiar both with the skills of the fee applicant and more generally with the type of work in the relevant community. Further, in determining a reasonable prevailing rate, the administrative law judge is not limited to consideration of fees granted in black lung cases; rather,

> consideration of fees granted in other administrative proceedings of similar complexity would also yield instructive information. (citations omitted).

Slip op. at 5.

[**establishing an hourly rate for attorney's fees**]