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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 301
November - December 2019

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

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

International-Matex Tank Terminals v. Director, OWCP [Victorian], 943 F.3d 278 (5th Cir. 2019).

The Fifth Circuit affirmed the Board's decision in *Victorian v. International-Matex Tank Terminal*, __ BRBS __ (2018),[2] holding that claimant met the situs and status requirement of the LHWCA.

Claimant, an assistant shift foreman at employer's oil-and-gas storage facility ("Facility") on the Mississippi River, was injured in a work-related accident and diagnosed with cervical radiculopathy. The ALJ awarded temporary total disability ("TTD") benefits, and the Board affirmed. Employer appealed.

Situs

The court held that claimant's injury occurred on a covered situs. The situs requirement in § 3(a) has two components: geographic and functional. In the Fifth Circuit, to satisfy the geographic component—*i.e.*, that the area of injury be "adjoining" navigable waters—the area must "border on" or "be contiguous with" navigable waters. The functional component requires a more complicated analysis. If the area of injury is putatively one enumerated under § 3(a), such as a terminal, then the question is whether that area has "some maritime purpose." If the area is not one of the enumerated places but instead an "other adjoining area," the court asks whether it is "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a).

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[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 *__).

[2] *See* Recent Significant Decisions Digest #289 (June – July 2018).

The Board agreed with the ALJ/BRB's conclusion that claimant fulfilled the situs requirement because the Facility (1) adjoins navigable waters (meeting the geographic component) and (2) qualifies as a "terminal" under § 3(a) and serves the maritime purpose of loading and unloading vessels (meeting the functional component). Substantial evidence supported the ALJ's finding that the Facility borders on navigable waters. The court rejected employer's contention that the particular platform on which claimant was injured is too far from the river to fulfill the geographic component. 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 further concluded that the Facility qualifies as a "terminal" under § 3(a). The Act employs the undefined word "terminal" as a "maritime term of art," and therefore the court must give the term its established meaning in the maritime industry. The ALJ properly looked for guidance to an OSHA regulation, Webster's Dictionary, and a definition invoked by the Supreme Court in *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 n.30, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). Substantial evidence supported the ALJ's conclusion that the Facility falls comfortably within these definitions of "terminal," as it receives oil products, consolidates and/or mixes product, stores product, and transports or loads product out of the facility. The ALJ found that all the product stored at the Facility departs it by ship and that most arrives by ship, too. The Facility's dock is used by barges every day and several barges dock there. Further, the Facility has a number of adjacent structures that are devoted to receiving, handling, holding, consolidating and loading or delivery of waterborne shipments. Additionally, employer itself refers to it as a "marine terminal."

The Facility's storage function does not undermine its characterization as a "terminal," as it is included in the OSHA and *Caputo* definitions. Further, the Facility's heating and sparging[3] procedures do not convert it into a manufacturing facility. If anything, they reinforce its characterization as a shipping terminal: the fuel it blends is used to power the vessels that dock at the Facility, and the Facility heats oil in part to make it easier to load and unload from vessels. The court also rejected employer's contention that because the Facility is "mixed-use," it had to be analyzed as an "other adjoining area" instead of a "terminal." Employer cited no supporting cases, and the OSHA and *Caputo* definitions make clear that the term "marine terminal" can encompass facilities with several functions.

The ALJ/BRB's conclusion that the Facility has "some maritime purpose" was also supported by substantial evidence. Not every square inch of an area must be used for maritime activity. The Facility ships and receives the overwhelming majority of its liquid bulk product from vessels at a dock on its property, and has sixty storage tanks for the liquid bulk product that is unloaded directly from ship to tanks and stored there. It is used for loading or unloading vessels. The fact that some "manufacturing" — blending and sparging — occurred at the Facility did not mean that it lacked maritime purpose. No tanks are dedicated solely to these processes and all sixty tanks are customarily used to load and unload vessels. A covered situs need not be used exclusively or even primarily for maritime purposes, as long as it is customarily used for significant maritime activity.

Status

Substantial evidence supported the ALJ/BRB's conclusion that claimant met the status requirement under § 2(3). A worker is "engaged in maritime employment" under § 2(3) if he is loading or unloading a vessel at the time of injury or if his employment as a whole entails loading or unloading vessels. To meet the latter criterion, the worker need

[3] "Sparging" is a process by which fuel is created from diesel and oil.

not spend a "substantial" amount of time loading or unloading, but need only spend "some" time doing maritime work. Here, the ALJ properly found that claimant's employment as a whole was an integral part of the loading and unloading process. Claimant was tasked with monitoring and effecting the flow of oil products, opening and closing manifolds to direct flow, and communicating with other team members to ensure vessels were loaded and unloaded properly. He visited the dock and assisted with loading and unloading every day.

Maximum Medical Improvement ("MMI")

MMI is reached when an injury has received the maximum benefit of treatment such that the patient's condition will not improve. But if a physician determines that further treatment should be undertaken, then further medical improvement is possible until such treatment has been completed—even if, in retrospect, it turns out not to have been effective.

Here, the ALJ's conclusion that claimant had not reached MMI was supported by substantial evidence. Two physicians had recommended spinal surgery, and claimant indicated that he intended to undergo it.[4] Employer asserted that claimant reached MMI when he decided not to pursue surgery immediately after it was recommended to him. The court disagreed, stating that

> [t]here may be a point after which a claimant's unreasonable delay in electing further treatment leads to de facto MMI. The [OWCP] Director suggests as much, and the Act allows the ALJ or the Secretary of Labor to suspend payment if a claimant unreasonably refuses to submit to medical or surgical treatment . . . unless the circumstances justified the refusal. But [employer] has not articulated where that point may be, identified any evidence that [claimant's] delay was unreasonable, or supplied legal authority that [claimant] bears the burden of proving his delay was reasonable.

Id. at 289. Employer's assertion that, to avoid slipping into MMI, claimant had an affirmative duty immediately to undergo every kind of treatment available was unsupported and contrary to this court's precedent.

Diligent Job Search

The court affirmed the ALJ's finding that claimant reasonably, but unsuccessfully, sought alternative employment and thus established total disability. It was undisputed that claimant was unable to return to his pre-injury job, and that employer established the existence of suitable alternative jobs. The court rejected employer's assertion that claimant was not diligent in trying to secure alternative employment. The ALJ identified ample evidence, including claimant's job application log, detailing several applications he had submitted. The ALJ also relied on testimony from both claimant and his wife that claimant applied for several other positions online. Claimant's wife testified further that she and her daughter had on separate occasions driven claimant to workplaces to apply for other jobs. Employer asserted that the ALJ disregarded testimony of its rehabilitation counselor, who testified that some employers identified in employer's labor market survey did not receive applications from claimant. Employer also asserted that claimant was not credible because he testified that a particular employer did not respond to his application, when he had in fact received a rejection letter from the employer. However, the court concluded that these arguments did little to offset the substantial evidence on which the ALJ relied, and furthermore it was not authorized to reweigh the evidence.

[4] In his brief to the court, claimant stated that he had undergone the procedure and was recovering.

[Section 3(a) SITUS - Enumerated Sites; Section 2(3) STATUS - Loading and Steps in the Process; Section 8 DISABILITY - Nature: Permanent v. Temporary Disability; Section 8 DISABILITY - Extent: Establishing Total Disability - Diligence in Seeking Work]

B. Benefits Review Board

***Harris v. Virginia International Terminals, LLC,* BRBS (2019).**

Agreeing with the OWCP Director, the Board affirmed the ALJ's finding that claimant was injured on a covered situs pursuant to § 3(a) of the LHWCA.

Claimant injured his knee while working as a forklift operator for employer. He pursued claims under both the LHWCA and the Virginia Workers' Compensation Act ("VWCA"). Employer paid disability benefits under the VWCA until claimant returned to his usual job with employer. The only disputed issue was whether claimant met the § 3(a) situs requirement.[5]

To meet the situs requirement of § 3(a), an injury must occur on an area specifically enumerated in that provision, such as a terminal, or on other adjoining area customarily used for maritime activity. In this case, claimant's injury occurred at the Portsmouth Chassis Yard ("chassis yard"), an approximately 20-acre, fenced-in area located at the edge of the Portsmouth Marine Terminal ("the terminal"), which abuts the Elizabeth River. Employer operates the terminal on behalf of the Virginia Port Authority ("VPA"). Most of claimant's work occurs within the chassis yard, but he sometimes moves chassis between the chassis yard and the terminal.

The ALJ found that the chassis yard is a covered situs under § 3(a) because it is part of the terminal, which adjoins navigable waters and is where vessels are loaded and unloaded. The ALJ found the fence surrounding the chassis yard and separating it from the terminal does not meaningfully sever the contiguity between those areas, so that claimant's injury in the chassis yard occurred on an area adjoining navigable waters customarily used in loading and unloading ships. Employer appealed, arguing that the chassis yard does not fall within any of the areas specifically enumerated in § 3(a), and does not constitute an "other adjoining area" under this section.

The Board reasoned that the Fourth Circuit, in whose jurisdiction this case arose, has defined "adjoining area" as a discrete shoreside structure or facility that is similar to the enumerated areas, actually contiguous with navigable waters, and customarily used for maritime activity. Slip op. at 4 (*citing Sidwell v. Express Container Services, Inc*., 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996))(additional citations omitted). In *Sidwell*, the court stated that marine terminals are covered in their entirety and that it is not necessary that the precise location of the injury be used for loading and unloading operations. Nevertheless, the court also stated that, if there are other areas between the navigable waters and the area in question, the latter area is not "adjoining" the waters. Next, the Board surveilled its own past decisions based on *Sidwell's* holding, which involved injuries occurring on employers' properties where fences, roads, or other boundaries separate the properties from a covered situs. It concluded that "[t]he salient fact distinguishing those cases where the claimant's injury is covered from those where it is not is that the site of the injury is considered geographically and functionally part

[5] The parties agreed that if employer was liable under the LHWCA, it would be entitled to a credit pursuant to § 3(e) for disability benefits paid under the VWCA.

of a contiguous covered area adjoining navigable waters, notwithstanding the existence of barriers such as fencing, which may otherwise divide the two locations." Slip op. at 3.

In this case, the ALJ permissibly determined that the functional and geographic relationship between the chassis yard and the terminal was such that the chassis yard is a part of the terminal. Due to this relationship, and because the terminal is an enumerated situs, the ALJ properly concluded that claimant's injury occurred on a covered situs. Specifically, the ALJ found that trains loaded with cargo pass through the chassis yard into the terminal daily; Gate 22, located on the eastern fence line of the chassis yard, is routinely used to move equipment essential to the handling of cargo containers into and out of the terminal; the VPA Police, though not responsible for guarding the main entrance to the chassis yard, is responsible for opening the gates which provide access for trains to move through the chassis yard to the terminal and for opening Gate 22 to enable heavy equipment to move between the chassis yard and the terminal; and employer's movement of the fence line establishes the fluidity of the area and that the chassis yard is not a discrete parcel, independent from the remainder of the terminal.

Moreover, the ALJ permissibly found that, although a fence and security gates separated the chassis yard from the terminal, the chassis yard was located within the overall perimeter of the marine terminal. The fence does not sever the contiguity. Unlike the fenced-in areas previously held not covered, there are no roads or railroad tracks unrelated to maritime commerce severing the contiguity between the chassis yard, the terminal, and navigable waters. Rather, the chassis yard abuts the terminal, and the railroad track connects rather than separates the two properties. Additionally, the ALJ found that the terminal could not function properly without the ability to move large equipment integral to maritime activities through the chassis yard via Gate 22.

Consequently, the ALJ's award of benefits was affirmed.

[Section 3(a) SITUS - Enumerated Sites]

***Long v. Tappan Zee Constructors, LLC,* BRBS (2019).**

The Board affirmed the ALJ's finding that claimant did not meet the situs requirement under § 3(a).

Claimant suffered a back injury while working for employer as an ironworker on the Tappan Zee Bridge project: the construction of a new bridge to replace the existing one across the Hudson River. Claimant worked from a temporary "saddle," described as an upside down "u-shape" platform. While the bridge was not yet affixed to either shoreline at the time, the saddle was attached to a bridge pier anchored in the riverbed.

The ALJ found that claimant failed to meet the situs requirement of § 3(a) and dismissed the claim for lack of jurisdiction. The "situs" inquiry concerns whether the worker was injured "upon the navigable waters of the United States" that include certain enumerated onshore locations and "other adjoining area[s]." 33 U.S.C. § 903(a). The ALJ found that claimant's injury did not occur on a covered situs because the apparatus supporting him was anchored in the riverbed, establishing it as a "fixed platform," which is not considered navigable waters. Claimant appealed.

Initially, the Board rejected claimant's contention that the § 20(a) presumption applies to the situs issue. The presumption may apply to facts underlying coverage issues, but does not apply to the legal interpretation of those facts. As the facts were undisputed, the situs issue involved a pure question of law.

The Board observed that a bridge is not an enumerated site, and claimant did not argue that the plank on which he was standing is an "other adjoining area." Thus, he could only establish coverage if the injury occurred on actual navigable waters. The Board rejected claimant's contention that he was on navigable waters because the bridge was not yet affixed to the shoreline. "[W]hile the bridge itself was not attached to land, the saddle supporting claimant attached to two concrete bridge piers permanently anchored in the riverbed. The bridge piers affixed to the riverbed were an extension of land, establishing claimant's injury occurred on a fixed platform, not navigable waters. Slip op. at 3-4 (citations omitted).

A structure's ultimate connection to land establishes whether an injury occurring on it took place on navigable waters. Thus, in *Herb's Welding, Inc. v. Gray*, the Supreme Court held that the claimant, who was injured on a fixed offshore oil platform, was not injured upon navigable waters because "fixed" oil platforms are like islands, which are "land." 470 U.S. 414, 424 n.10, 17 BRBS 78, 83 n.10 (CRT) (1985). "The issue, therefore, is properly framed as whether claimant was injured on land or an extension thereof, including a seabed; the test, is not, as claimant suggests, limited to whether the structure is permanently affixed to 'the shoreline.'" Slip op. at 4 (citation omitted). In this case, the ALJ's finding that the saddle, though temporary and located "over" the river, is an extension of land, *i.e.*, the bridge pier, accords with law.

Accordingly, the Board affirmed the ALJ's decision and order dismissing the claim for lack of jurisdiction.

[COVERAGE – Section 20(a) Presumption; Section 3(a) SITUS - Navigable Waters]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

No published decisions to report.

B. Benefits Review Board

McCauley v. DLR Mining, Inc., BRB No. 18-0606 (Nov. 12, 2019). **Holding:** Biopsy evidence is sufficient to support a finding of complicated pneumoconiosis, even if the biopsy is from a lesion that was excised before the filing of the corresponding claim.[6]

Procedural History: This case arises from a subsequent miner claim. The administrative law judge awarded benefits based upon a finding of complicated pneumoconiosis and that employer was the responsible operator; accordingly, the judge found that claimant properly invoked the irrebuttable presumption of total disability due to pneumoconiosis. The evidence supporting the finding of complicated pneumoconiosis was a biopsy of a resected lung lesion and corresponding medical opinion evidence. Employer argues that because the lesion with complicated pneumoconiosis was resected before filing the current claim, claimant is precluded from using that evidence to prove he has complicated pneumoconiosis.

Reasoning: The governing statute, 30 U.S.C. § 921(c)(3)(B), and its implementing regulation, 20 C.F.R. § 718.304(b), expressly permit using biopsy evidence to establish complicated pneumoconiosis without any applicable qualification. Adopting Employer's argument would require claimant to provide evidence of complicated pneumoconiosis existing after the excision, which defeats the purpose of allowing biopsy evidence to establish complicated pneumoconiosis. Because the complicated pneumoconiosis can be established by the biopsy evidence, claimant does not have to further provide evidence of complicated pneumoconiosis.

[6] The BRB ultimately partially vacated and remanded this case because the administrative law judge did not adequately explain its finding that the employer was the responsible operator. This seems to be a less important holding because it is case specific and does not offer any new understanding of governing law, which is why its discussion here is minimal.