

BRB Nos. 13-0288
and 13-0288A

ALFRED F. WAKELEY)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
KNUTSON TOWBOAT COMPANY) DATE ISSUED: 12/19/2013
)
and)
)
SAIF CORPORATION)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Cross-Respondent) DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and Order Granting Motion for Reconsideration in Part and Amending Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for employer/carrier.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Granting Benefits and Order Granting Motion for Reconsideration in Part and Amending Decision and Order Awarding Benefits (2007-LHC-1749) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. To recapitulate, claimant was hired by employer in 2002 as a carpenter. After spending approximately nine months as a member of the paint shop in employer's downtown facility where he was assigned to clean up and paint the Georgia Pacific lumber mill, claimant split his time between employer's downtown and Millington facilities.¹ He repaired and remodeled the buildings at those sites. Claimant alleged that he injured his back on July 11, 2006, when he jerked/twisted it while using a man-lift to repair the roof of the Millington shop. He finished working the rest of that week and then went to the emergency room on the weekend. He has not worked for employer since.

The administrative law judge found that employer's Millington shop is a maritime situs, in light of its being situated in an enclosed, contiguous, property adjacent to a navigable body of water. However, the administrative law judge found that claimant was not a maritime employee, as his work repairing the shop building does not constitute maritime work. Thus, the administrative law judge denied benefits. Both parties appealed the decision. Claimant contended the administrative law judge erred in finding that he was not a maritime employee pursuant to Section 2(3), 33 U.S.C. §902(3). Employer cross-appealed, contending the administrative law judge erred in finding its Millington facility is a maritime situs under Section 3(a), 33 U.S.C. §903(a).

In its decision, the Board affirmed the administrative law judge's finding that claimant was injured on a maritime situs. *Wakeley v. Knutson Towboat Co.*, 44 BRBS 47, 49-50 (2010). The Board reversed the administrative law judge's finding that claimant was not a covered employee because a worker who maintains structures

¹Employer's facilities are located in Coos Bay, Oregon. The Front Street facility is on the harbor in downtown Coos Bay and the Millington facility is a 40-acre parcel situated a few miles south on the Isthmus Slough.

involved in maritime activities is a maritime employee. *Id.* at 50-51. The Board, therefore, remanded the case to the administrative law judge for consideration of the other issues in dispute.

On remand, the administrative law judge found that claimant sustained a work-related injury. Decision and Order Granting Benefits at 24-33; *see* 33 U.S.C. §920(a). Claimant was awarded compensation for temporary total disability from July 15 to October 1, 2006, permanent total disability from October 2, 2006 to February 28, 2007, permanent partial disability from March 1 to July 31, 2007, during which period claimant earned \$200 a month as a caretaker, and permanent total disability from August 1, 2007. *Id.* at 45, 48; *see* 33 U.S.C. §908(a), (b), (c)(21). The administrative law judge found that employer failed to timely controvert the claim, and she ordered employer to pay an additional 10 percent assessment under Section 14(e), 33 U.S.C. §914(e), for compensation due from July 15 to October 1, 2007. *Id.* at 47, 49. On reconsideration, the administrative law judge rejected claimant's contention that he is entitled to interest on the amount due for the Section 14(e) assessment. Order at 2.

On appeal, employer challenges the Board's affirmance of the administrative law judge's finding that claimant was injured on a maritime situs and its reversal of the administrative law judge's determination that claimant was not a covered employee. BRB No. 13-0288. Claimant filed a response brief to which employer replied. Claimant cross-appeals the administrative law judge's denial of interest on the Section 14(e) assessment. BRB No. 13-0288A. The Director, Office of Workers' Compensation Programs, filed a brief in support of claimant's appeal. Employer filed a response brief to which claimant replied. Employer subsequently filed a letter stating it had paid claimant interest on the Section 14(e) assessment.

In its initial decision, the Board held, consistent with circuit court precedent, that the Millington facility is a covered situs within the meaning of Section 3(a). *Wakeley*, 44 BRBS at 49-50; *see Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). The Board also held, consistent with Supreme Court law and prevailing circuit court decisions, that claimant's work on various construction projects on the Millington shop building, a structure used for a maritime purpose, constituted covered employment. *Wakeley*, 44 BRBS at 50-51; *see Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980). As the Board thoroughly considered these issues in its prior decision, we reaffirm that claimant was injured on a maritime situs and that he is a maritime employee under the Act as these holdings constitute the law of the case. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002). Thus, employer's appeal is rejected.

On cross-appeal, claimant urges the Board to overrule its decision in *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987), upon which the administrative law judge relied in finding that interest is not due on a Section 14(e) assessment. Subsequent to employer's filing its response brief, employer submitted a letter to the Board stating that it, "concedes claimant is entitled to interest on the penalty awarded by the ALJ. The insurer voluntarily paid claimant the amount it estimates is due as interest pending calculation by the District Director." Emp. Oct. 23, 2013 Letter at 1. Employer provided a copy of Form LS-208 with its letter. Therefore, claimant's appeal of the administrative law judge's denial of interest on the Section 14(e) assessment is now moot as he has received the relief he sought; no controversy between the parties remains on this issue. 33 U.S.C. §921(b)(3); see *Sample v. Johnson*, 771 F.2d 1335, 18 BRBS 1(CRT) (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *Andrews v. Petroleum Helicopters, Inc.*, 15 BRBS 160 (1982). Thus, we dismiss claimant's appeal.

Accordingly, employer's appeal of the Board's prior decision in this case is rejected and the Board's prior decision is affirmed. Claimant's appeal is dismissed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge