U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0409

JAMES WHITTAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INDUSTRIAL STAFFING SERVICES, INCORPORATED d/b/a FLEXIBLE SERVICES, INCORPORATED	)	
	)	
and	)	DATE ISSUED: June 30, 2015
	)	
TEXAS MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision of Larry W. Price, Administrative Law Judge, United States Department of Labor.

James Whittaker, Houston, Texas, *pro se*.

Matthew H. Ammerman (Law Office of Matthew H. Ammerman, P.C.), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judges, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Employer's Motion for Summary Decision (2014-LHC-0194, 2014-LHC-0593) of Administrative Law Judge Larry W. Price 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.). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed two claims for benefits under the Act, alleging he sustained injuries while employed by employer, a temporary staffing agency: (1) a toxic exposure incident occurring on April 1, 2007, while pressure washing and sandblasting at a football field at LaPorte High School in LaPorte, Texas; and (2) a fall occurring on August 9, 2007, while building shelves in a Regal Plastics warehouse on Wirt Road in Houston, Texas. Decision and Order at 2; EXs 1, 2 to Emp. Motion for Summary Decision.[1] Claimant also filed claims for both injuries under the Texas Workers' Compensation Act (TWCA), and these claims were adjudicated at formal hearings before the Texas Department of Insurance, Division of Workers' Compensation. Decision and Order at 2; EXs 3-7, 11.

On July 2, 2014, employer filed with the administrative law judge a motion for summary decision, with supporting documentation, asserting that the April 1, 2007 and August 9, 2007 injuries alleged by claimant did not occur within the Act's coverage. 33 U.S.C. §§902(3), 903(a). Employer contended, in the alternative, that claimant is prohibited from pursuing his claims under the Act, as they were fully adjudicated under the TWCA. On July 16, 2014, the administrative law judge issued an Order to Show Cause why employer's Motion for Summary Decision should not be granted. Claimant filed a timely response to the Order to Show Cause; claimant's response, however, did not address the evidence submitted by employer to demonstrate that claimant's alleged injuries did not satisfy the status and situs requirements of the Act.

In his Decision and Order Granting Employer's Motion for Summary Decision, the administrative law judge found that the undisputed material facts establish that neither of the incidents alleged by claimant satisfies the situs or status requirements of the Act. The administrative law judge therefore granted employer's motion for summary decision and denied the claims under the Act.[2]

[1] Citations to all exhibits refer to attachments to employer's Motion for Summary Decision.

[2] The administrative law judge did not address employer's alternative contention that the claims are barred pursuant to the doctrine of collateral estoppel, and in light of our disposition of claimant's appeal, we need not consider this issue.

Claimant, without the assistance of counsel, appeals the administrative law judge's summary decision in favor of employer. Employer has not filed a response brief.[3]

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003). In this case, the documents submitted by claimant in response to the administrative law judge's Order to Show Cause why employer's motion for summary decision should not be granted do not give rise to any genuine issues of material fact with respect to the situs and status requirements of the Act. Moreover, the administrative law judge applied the correct law to these undisputed facts and properly concluded that claimant's injuries did not occur within the Act's coverage. *Buck*, 37 BRBS 53.

For a claim to be covered by the Act, claimant's injury must have occurred upon the navigable waters of the United States, including any dry dock, or on a landward area covered by Section 3(a) of the Act, 33 U.S.C. §903(a). This is referred to as the "situs" requirement. Moreover, claimant's work must have been maritime in nature pursuant to Section 2(3) of the Act, 33 U.S.C.§902(3), and not specifically excluded by any provision in the Act. This is known as the "status" requirement. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *Anaya v. Traylor Brothers, Inc.*, 478 F.3d 251 (5th Cir. 2007), *cert. denied*, 552 U.S. 814 (2008).

With respect to the Section 3(a) situs requirement, the site of the claimant's injury must be an enumerated site (pier, wharf, dry dock, etc.), or an "other adjoining area" customarily used for a maritime purpose. The administrative law judge in this case properly found that neither LaPorte High School nor the Regal Plastics warehouse meets the definition of any of the facilities specifically enumerated in Section 3(a). Decision and Order at 2. Consequently, the administrative law judge correctly recognized that, in order to be considered a maritime situs, the sites of claimant's injuries would need to qualify as an "other adjoining area." *Id.* In a case arising within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, such as this case, an area may be considered an "adjoining area" within the meaning of Section 3(a) only if it borders on or

[3] Employer filed with the Board a motion to supplement the record. By Order dated February 23, 2015, the Board denied employer's motion, having determined that all documents related to this appeal had been received from the district director.

is contiguous with navigable waters and is customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP [Martin]*, 732 F.3d 457, 47 BRBS 39(CRT) (5th Cir. 2013); *New Orleans Depot Services, Inc. v. Director, OWCP* [*Zepeda*], 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (en banc); *Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009). The administrative law judge properly found the undisputed facts in this case establish that both LaPorte High School and the Regal Plastics warehouse are landlocked and are not contiguous with navigable water. Decision and Order at 2-3; *see* Emp. Motion for Summary Decision at 5-7. Moreover, as found by the administrative law judge, claimant did not provide any information countering employer's evidence that neither location is customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. *Id.* at 3. We therefore affirm the administrative law judge's finding that the undisputed facts establish that neither of the alleged injuries occurred on a site covered by the Act.

The administrative law judge also addressed the Section 2(3) status requirement, correctly stating that, to satisfy this element, an employee must be engaged in work integral to the loading, unloading, constructing, dismantling or repairing of vessels. Decision and Order at 3; *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). The administrative law judge properly found that the undisputed facts demonstrate that claimant was engaged in pressure washing and sandblasting activities at the LaPorte High School football field and in building shelves at the Regal Plastics warehouse, and that claimant presented no evidence that these activities were in any way related to maritime employment. Decision and Order at 2-3; *see* EX 7 at 18-21, 36-38; EX 8; EX 9 at 5-6; EX 10; EX 11 at 15-19; EX 12 at 2-8. We therefore affirm the administrative law judge's finding that the undisputed facts establish that claimant's work at LaPorte High School and at the Regal Plastics warehouse does not meet the Section 2(3) status requirement. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT). As claimant has failed to establish that his injuries occurred within the coverage of the Act, we affirm the administrative law judge's denial of his claims for benefits under the Act.

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge