Fourth and Fifth Circuits Issue Coverage Decisions

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Given that the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.S. § 901 *et seq.* ("LHWCA" or "Act") was enacted in 1927 and last substantially amended in 1972, it would seem that the scope of the Act's coverage should be a settled matter. However, on-the-job injuries regularly manage to present almost endless permutations on different workers' duties performed in an unceasing variety of locations. Thus, coverage questions are litigated on a recurring basis. Two recent published Court of Appeals decisions demonstrate the ongoing search for the contours of the LHWCA and related remedies for workers injured in the course of their employment.

On June 4, 2019, the United States Court of Appeals for the Fourth Circuit decided *Muhammad v. Norfolk Southern Railway Co.*, 925 F.3d 192, 2019 U.S. App. LEXIS 16773, 53 BRBS 29 (CRT) (4th Cir. 2019) and on July 22, 2019, the Fifth Circuit issued *Wood Group Production Services v. Director, OWCP [Malta]*, 930 F.3d 733, 2019 U.S App. LEXIS 21762, 53 BRBS -- (CRT) (5th Cir. 2019). Both cases involve disputes over whether the injuries occurred on a covered situs. *Malta* also involved whether the injured worker had status as a covered maritime employee. Although *Malta* was a routine claim for LHWCA benefits, *Muhammad* was initiated as a civil suit for negligence brought against his employer under the Federal Employers' Liabilities Act, 45 U.S.C. § 51 (FELA).[1]

Statutory Background

Prior to 1972, the Act covered only injuries that occurred on the actual navigable waters of the United States, or on a dry dock. *See* 33 U.S.C. § 903(a) (Act of March 4, 1927, c. 509, 44 Stat. 1424), ("Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)"); *Director, OWCP v. Perini North River*

[1] After the *Muhammad* trial court held on June 13, 2018 that he satisfied the LHWCA's situs and status requirements, Document 16, E.D. Va. Case No. 2:18-cv-00020, Muhammad filed a LHWCA claim but continued to pursue his FELA suit. FELA provides the remedy for injured railroad workers and is the counterpart to the Jones Act, 46 U.S.C. § 30104, which incorporates the FELA in establishing a cause of action for a seaman injured in the course of his employment. Thus, paradoxically, FELA and Jones Act cases sometimes are the source of precedent defining the scope of LHWCA coverage even though they are not decided by DOL ALJs or the Benefits Review Board. *See e.g., Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40 (1989) and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). This was the case in *Muhammad* as the FELA suit made its way to the United States Court of Appeals before the LHWCA benefits case was heard by an ALJ.

Assocs., 459 U.S. 297, 299 (1983).[2] This coverage formula, unfortunately, led to considerable uncertainty about the correct remedy in a given case (including whether state law or federal law applied) causing the Supreme Court to describe the situation as one where "[e]mployees and employers alike were thrust on '[t]he horns of a jurisdictional dilemma.'" *Perini* at 308, *citing Davis v. Department of Labor*, 317 U.S. 249, 255 (1942).

In 1972, Congress amended the Act to fundamentally change the basis for coverage, moving from a solely situs-based inquiry to one that required both that the injury occur on a covered situs, and that the worker have status as a maritime "employee." *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977). In doing so, it broadened the definition of "navigable waters" to include adjoining lands that are commonly used for maritime purposes (the situs requirement). *Perini,* 459 U.S. at 299; 33 U.S.C. § 903(a).[3] To offset the landward expansion of coverage, Congress added a requirement that injured employees must be engaged in "maritime employment" to be covered (the status requirement). *Id.; see* 33 U.S.C. § 902(3) (defining "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker").

Many LHWCA coverage disputes arise where non-maritime industries require work over the navigable waters. Two such industries include railroad work, particularly on railroad bridges over water and oil and gas extraction from underwater sources. Muhammad was a railroad worker and Malta an oil worker. Ultimately, Muhammad was found not covered and Malta was found covered by the LHWCA. Comparison of the cases explains each result.

Muhammad

Muhammad was a carpenter for the Norfolk Southern Railway Company which owns the South Branch Lift Bridge which crosses the Elizabeth River in Virginia. The center span of the bridge lifts to allow vessels to navigate beneath it. The train traffic crossing the Bridge primarily serves business to the west of the River by allowing frequent travel to and from the Portlock Railyard, which is landlocked approximately one mile east of the River.

On May 19, 2016 he was working on a project to deconstruct, remove, and install railroad bridge ties on the east approach span of the bridge. His work crew traveled to the bridge by truck over the road and the work did not require the use of a boat. While performing his duties, he had to cross a wooden "catwalk" walkway platform and a portion of the walkway gave out underneath

[2] The Court in *Perini*, and this commentary, uses the phrase "actual navigable waters" to describe the situs requirement as it existed prior to 1972, which is to say injuries that occurred seaward of the land (or on a dry dock). *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 223-24 (1969); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

[3] Specifically, Congress added piers, wharves, terminals, building ways, marine railways, and other adjoining areas "customarily used in loading, unloading, repairing, dismantling, or building a vessel." 33 US.C. § 903(a).

him. He managed to grab a hand rail to prevent falling into the river but he was seriously injured when a bridge beam hit him in the head. He also hurt his knees and back.

He sued his employer alleging negligence and failure to follow safety rules and procedures. The employer responded by asserting that the LHWCA covered the injury and provided the exclusive remedy rather than the FELA.[4] Thus, the parties were in the somewhat unusual position of the employer urging LHWCA coverage and the injured worker denying coverage.

The Elizabeth River, at the site of Muhammad's injury, was indisputably navigable. Coast Guard regulations require that the South Branch Bridge open during mandated hours to facilitate and aid safe navigation of maritime traffic on the Elizabeth River. Relying on *LeMelle v. B. F. Diamond Const. Co.*, 674 F.2d 296 (4th Cir. 2982), the District Court held that Muhammad was covered by the LHWCA. Accordingly, the court dismissed his FELA claim for lack of subject matter jurisdiction.

On appeal, the appellate court first noted that the district court erred in finding a lack of subject matter jurisdiction. It is settled law that in tort actions by an employee against his employer for a work-related injury, the employer bears the burden of proof to establish the affirmative defense that the plaintiff is an employee entitled only to workers' compensation. The Fourth Circuit itself has held that LHWCA coverage preempts a FELA claim, *In re CSX Transp., Inc. [Shives]*, 151 F.3d 164, 171 (4th Cir. 1998), and the applicability of the LHWA's exclusivity provision, 33 U.S.C. § 905(a), presents an issue of preemption, not jurisdiction. Therefore, because the exclusivity of the LHWCA was an affirmative defense to the FELA claim the district court did not lack subject matter jurisdiction. Instead, the Fourth Circuit treated the question before it as whether the district court correctly concluded Muhammad's FELA claim was barred because his injury was covered exclusively by the LHWCA (and preempted his FELA claim). 53 BRBS 30-31 (CRT); 925 F.3d at 195-96.

The court extensively analyzed coverage under the LHWCA. First, it noted that Muhammad was covered only if he established both the situs and status requirements. Examining situs, it considered whether Muhammad was covered under the pre-1972 standard – injured on actual navigable waters. Citing *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215 (1969), the court held that the LHWCA did not cover injuries on a bridge extending *over* navigable waters because such work was not *upon* navigable waters. The court recognized that an employee working from a barge on navigable waters while constructing or maintaining a bridge would be on navigable waters and thus covered. But Muhammad was working on the bridge itself, a non-covered location. The court then considered whether 1972's landward expansion of situs reached Muhammad's injury. In extending coverage landward, the 1972 amendments defined "navigable waters" to include certain "adjoining areas." 33 U.S.C. §903(a). Under the statutory language, a covered "other adjoining area" must be "customarily used by an employer in loading, unloading, repairing, or building a vessel." *Id*. The Fourth Circuit ruled that the facts were undisputed in Muhammad's case that he was not injured on a facility contiguous to navigable waters that was so

[4] The FELA makes an employer liable for a jury award of damages including pain and suffering making potential recovery greater than that available under the limited benefits afforded by the LHWCA.

customarily used. The court distinguished *LeMelle* on the ground that situs was conceded by parties there as the work was performed with the extensive use of boats. Only the issue of status was decided by the *LeMelle* court. And, because Muhammad was not injured on a covered situs, there was no need to reach the question whether he had covered status. As a result, the Fourth Circuit reversed the district court's conclusion that Muhammad was covered by the LHWCA and remanded the case for further proceedings under the FELA.

Malta

In *Wood Group Production Services v. Director, OWCP [Malta]*, the Fifth Circuit reached the opposite conclusion, holding that an injured oil production worker was covered by the LHWCA. Unlike *Muhammad*, *Malta* arose as a claim for benefits under the LHWCA. An ALJ initially denied the claim, finding that Malta's April 14, 2012 injury, incurred while he was unloading a third-party vessel on Wood Group's Black Bay Central Facility – a fixed oil platform located in the territorial waters of Louisiana – did not occur on a covered situs.

Malta was a warehouseman whose duties included loading and unloading vessels arriving at and departing from the Central Facility. That Facility provides support services for oil and gas production from several satellite platforms. It comprises four separate platforms connected by catwalks and has three cranes. It houses 22 workers and includes a warehouse holding stores of supplies and tools necessary to sustain both the workers themselves and the employer's oil operations. A significant portion of Malta's work time, between 25% and 35%, was spent loading and unloading vessels onto a portion of the platform customarily used for that purpose. Malta testified that there was no difference between his duties and those of a dock worker loading and unloading vessels on the mainland. He was injured while standing on the deck of the platform in front of the warehouse when a crane sent up a filled cargo basket. He grabbed the line to which the basket was attached and when the basket landed on the platform, a CO2 cannister, which had been mistakenly marked as empty, exploded next to him.

Holding that the plain language of LHWCA section 3(a), 33 U.S.C. § 903(a), controlled, the Benefits Review Board reversed the ALJ's lack of situs finding and remanded for further proceedings. 49 BRBS 31 (2015). Because 33 U.S.C. § 903(a) makes compensation payable (i.e., affords situs coverage under the LHWCA) if an injury occurs upon an area customarily used by an employer in loading or unloading a vessel, the Board held that Malta was injured on a covered situs. Ultimately, after additional administrative proceedings, the ALJ awarded benefits and the Board affirmed. 52 BRBS 31 (2018).

In the Fifth Circuit, the employer contended that the situs requirement was not met because: (1) the purpose of the Central Facility was not maritime but for the production of oil and gas – a non-maritime enterprise; and (2) the items Malta loaded and unloaded were not maritime cargo. The court rejected the argument that the purpose of the structure where the injury occurred somehow controlled over the plain language of the statute. The court stated "We are not persuaded by [the] argument that the purpose of the structure where the injury occurred is the Alpha and Omega of the situs inquiry, regardless of whether the platform is customarily used for loading/unloading vessels. This does not comport with … the plain text of the statute …." 930 F.3d at 739. The Court also affirmed the Board's holding that the nature of the items loaded and unloaded is

irrelevant to whether an adjoining area meets the situs test. No case law grafts a maritime cargo requirement onto the text of the statute. Under the statute, the nature of the items loaded and unloaded is not determinative of coverage. 930 F.3d at 743.

For similar reasons, the Fifth Circuit affirmed the holding that Malta had status when injured. Status may be met either by the nature of the worker's activity at the time of injury or the nature of his employment duties as a whole. Here, Malta spent 25 to 35 percent of his work time loading and unloading vessels and was also injured while unloading a vessel.

His loading and unloading activities were sufficiently connected to maritime commerce by virtue of the simple fact that it involved loading and unloading of a vessel – which is by definition all that is required by the statute. Accordingly, the section 2(3) requirement that to be covered a worker must be engaged in maritime employment was satisfied. The court concluded that Malta's work was sufficiently connected to maritime commerce because it involved loading and unloading vessels.

This decision is significant because it expressly holds that the nature of the items being loaded and unloaded to or from a vessel need not be inherently maritime cargo. Thus, even supplies intended for use in the exploration and production of oil and gas may be sufficient to confer coverage under the LHWCA. To the extent the employer sought to carve out oil and gas production related activities from LHWCA coverage, the Fifth Circuit rejected that approach. Instead, the court hewed to the plain language of the Act in finding coverage.