U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0154

STEVEN A. KNICELEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/23/2020
	)	
MICHAEL RYBOVICH AND SONS BOAT WORKS	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion for Summary Decision and Dismissing Claim for Lack of Jurisdiction of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Scott A. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Robert B. Griffis (Jones, Hurley & Hand, PA), Orlando, Florida, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Paul R. Almanza's Decision and Order Granting Motion for Summary Decision and Dismissing Claim for Lack of Jurisdiction (2017-LHC-00110) rendered on a claim filed pursuant to the Longshore and Harbor

Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer opened for business in April 2011 as a recreational boat builder and repair facility adjacent to the Intracoastal Waterway in Palm Beach Gardens, Florida. Claimant, hired by Employer as a marine carpenter in June 2011, sustained a fractured right knee cap on October 12, 2012,[1] while working on the construction of a sixty-four foot recreational vessel known as *Lizzy Bee*.[2] Claimant continued to perform light-duty work sporadically with Employer after the accident until he had right knee surgery in May 2014. He returned to intermittent part-time work in July 2014, having to miss significant portions of time thereafter to undergo additional surgical procedures.[3] He returned to work with Employer sometime in January 2016. Employer paid Claimant medical and disability benefits under Florida's workers' compensation law through May 2015.[4]

Claimant subsequently sought benefits under the Act. Employer filed a motion for summary decision on the ground Claimant lacked "status" under the Act. Administrative Law Judge Daniel F. Solomon denied Employer's motion in an order dated July 3, 2017, because he found a "credibility dispute" existed as to whether Claimant worked or had to work on vessels in excess of sixty-five feet in length. Judge Solomon conducted a formal hearing on February 20, 2018, and post-hearing briefs were submitted by the parties, but before he issued a decision, the case was reassigned, without objection, to Judge Almanza (the administrative law judge). Employer then filed a second motion for summary decision.

---

[1]Claimant also alleged injuries to his right hip, left knee and low back resulting from the October 12, 2012 work accident.

[2]*Lizzy Bee* was the only vessel Employer constructed from the opening of its business through the date of Claimant's injury on October 12, 2012.

[3]Claimant underwent a second right knee arthroscopic procedure in January 2015, a total right knee replacement in July 2015, and had triple by-pass surgery shortly thereafter. *Id.* at 64, 77.

[4]Employer paid Claimant temporary partial disability benefits from October 12, 2012 through May 13, 2014, temporary total disability benefits from May 14 through August 5, 2014, temporary partial disability benefits from August 6, 2014 through February 17, 2015, and temporary total disability benefits from February 18 through May 19, 2015.

In his decision, the administrative law judge, after stating he drew inferences from the evidence in the light most favorable to Claimant, concluded there were no genuine issues of material fact. Based on the undisputed evidence, he found Claimant was not employed to build recreational vessels greater than sixty-five feet in length between the company's start date and the date of his work accident on October 12, 2012, nor did Employer have any such vessels under construction during this period. He thus determined Claimant is excluded from the Act's coverage under Section 2(3)(F) of the Act, 33 U.S.C. §902(3)(F), granted Employer's motion for summary decision, and dismissed the claim. On appeal, Claimant contends the administrative law judge erred in finding he is excluded from the Act's coverage under Section 2(3)(F). Employer responds, urging affirmance of the administrative law judge's decision to dismiss the claim. The Director, Office of Workers' Compensation Programs, filed a non-participation letter.

Claimant first contends the administrative law judge improperly granted Employer's second motion for summary decision. He contends the administrative law judge should have respected Judge Solomon's Order denying Employer's original motion for summary decision as Employer presented no additional facts or case law in the second motion. As a result, Claimant requests that the Benefits Review Board reverse the administrative law judge's decision and maintains he "should be awarded benefits under the Act."[5] Cl. Brief at 6.

Claimant's contention that the administrative law judge was required to adhere to Judge Solomon's denial of Employer's first motion for summary decision is mistaken as he had the discretion to address anew Employer's second motion, which was based, in part, on evidence adduced at the formal hearing. *See generally* 29 C.F.R. §§18.12(b), 18.15(b). The administrative law judge was not bound by the prior interlocutory order. *See generally Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). We therefore reject Claimant's contention.

Claimant next contends the administrative law judge erred in finding he is excluded from the Act's coverage under Section 2(3)(F). He maintains established case law mandates that his overall work history with Employer, rather than his duties on the date of the accident, are relevant in addressing the status issue. Claimant states Employer, from its inception, had the capacity to construct vessels greater than sixty-five feet in length and that his post-injury, light-duty work for Employer included work on such vessels. Analyzing his work with Employer as a whole, Claimant states it is clear Employer

[5]Claimant's inference that a reversal of the administrative law judge's grant of summary decision entitles him to benefits is erroneous as the case has not been adjudicated on the merits.

engaged him to build recreational vessels over sixty-five feet in length. He thus avers a reasonable legal basis exists to find his injury occurred in covered employment. Employer responds the administrative law judge properly considered the undisputed facts in terms of the appropriate legal standard and urges the Board to affirm the administrative law judge's denial of the claim.

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 a matter of law. 29 C.F.R. §18.72; *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Claimant does not contend there are any genuine issues of material fact in dispute. Thus, we review the administrative law judge's decision for adherence to law. *See generally O'Keeffe*, 380 U.S. 359. The question before the Board is whether the administrative law judge properly applied the law to the established facts with respect to the applicability of Section 2(3)(F).

In order for a claim to be covered under the Act, a claimant must establish his injury occurred on a site covered by Section 3(a),[6] he was a maritime employee pursuant to Section 2(3), and he is not subject to any specific statutory exclusions. 33 U.S.C. §§902(3), 903(a); *Chesapeake & Ohio Ry. v. Schwalb*, 493 U.S. 40, 45 (1989); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). The "status" inquiry at issue here concerns whether Claimant's work with Employer falls within the statutory exclusion of Section 2(3)(F). Section 2(3)(F) states:

> (3) The term "employee" means 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, but such term does not include—
>
> (F) individuals *employed to* build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel;

[6]Employer conceded Claimant's work at its facility satisfies the situs provision of Section 3(a), 33 U.S.C. §903(a). Emp. Second Mot. for Summ. Jud. dated July 24, 2019 at 2.

> if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. §902(3)(F) (emphasis added); 20 C.F.R. §§701.401(a), 701.502(a)(2)(i). A claimant need not have been engaged in covered maritime activities at the time of the injury as long as he spent "at least some of [his] time" in indisputably covered activities. *Caputo*, 432 U.S. 249, 6 BRBS 150; *Atl. Container Serv., Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990); *see also Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Lennon v. Waterfront Transp.*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

Because Section 2(3)(F) uses the phrase "employed to," we look at the nature of job duties to which Claimant could have been assigned through the date of his injury.[7] *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 23 (CRT)(1st Cir. 1984) (in addressing Section 2(3)(A),[8] "it is the employee's actual duties rather than a formal job classification

[7]As the administrative law judge stated in his decision, statements in the legislative record indicate an intent to exempt "an employer engaged in qualifying activities involving recreational vessels 65 feet in length or longer until such time as that employer actually began engaging in those activities." Decision and Order at 6 n.4. In discussing a proposed exemption for such employers, the Senate Committee on Labor and Human Resources stated it would apply to "operations which work on such vessels under 65 feet *provided there is no work* at the operation on a vessel which is 65 feet in length or more." S. Rpt. 98-81 (May 10, 1983) at 28 (emphasis added). In discussing a related provision, the House Committee on Education and Labor stated, "no compensation shall be paid to an employee of an operation used to build, repair, or dismantle recreational boats under 65 feet in length, unless the injury shall occur within fixed periods of time *after such facility commences work on a recreational vessel larger than 65 feet.*" *See* H.R. Rep. No. 98-570(I) (Feb. 7, 1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2739 (emphasis added). Section 2(3)(F)'s exclusion for individuals "engaged to" work on vessels under 65 feet was enacted in lieu of this specific exclusion for their employers. *See* H.R. Conf. Rep. No. 98-1027 (Sept. 14, 1984), reprinted in 1984 U.S.C.C.A.N. 2771; *see also* 33 U.S.C. §903(d) (excluding from coverage work on other types of small vessels). Nevertheless, an inquiry that addresses the nature of the job duties to which a claimant could have been assigned by his employer through the date of injury accords with the Committees' intent to exclude an employee from coverage until his employer actually built, repaired, or dismantled a recreational vessel sixty-five feet in length or longer.

[8]Section 2(3)(A) contains the similar "*employed to*" language found in Section 2(3)(F). *Compare* 33 U.S.C. §902(3)(A) *with* §902(3)(F). As such, the analysis as to a

that must be looked at in determining coverage"); *K.L.* [*Labit*] *v. Blue Marine Sec., LLC*, 43 BRBS 45 (2009) (security guard was not excluded from the Act's coverage pursuant to Section 2(3)(A) because some of his assignable duties were performed on vessels on navigable waters); *Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001), *aff'd sub nom. Maher Terminals, Inc. v. Director, OWCP*, 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir. 2003), *cert. denied*, 540 U.S. 1088 (2003) (Section 2(3)(A) exclusion is inapplicable because claimant's assignable duties as an office clerk included time as a checker, which is covered work); *Dobey v. Johnson Controls*, 33 BRBS 63 (1999) (security guard was not excluded from coverage under Section 2(3)(A) even though he was primarily a traffic officer, because he was also "employed to" serve as an alternate marine patrol officer, a task he performed on several occasions prior to the date of injury, with a reasonable expectation of being called upon to perform duties in a boat on navigable waters); *Spear v. Gen. Dynamics Corp.*, 25 BRBS 132 (1991) (guard/watchman was not excluded by Section 2(3)(A) because his assignable duties included performing fire and safety duties and he regularly spent several hours a night on duty on submarines which is integral to the shipbuilding process); *Jannuzzelli v. Maersk Container Serv. Co.*, 25 BRBS 66 (1991) (Clark, J., dissenting) (Section 2(3)(A) inapplicable because in addition to performing administrative functions in an office on a regular basis, claimant checked in workers on the dock for payroll purposes and ensured work crews were fully staffed and thus, spent at least some of his time performing functions which were maritime in nature); *Caldwell v. Universal Mar. Serv. Corp.*, 22 BRBS 398 (1989) (claimant who primarily performed clerical duties involving documentation presented by truck drivers delivering cargo but was subject to reassignment as a checker was not excluded by Section 2(3)(A), because the exclusion does not apply to "cargo checkers and clerks" who have traditionally been considered to be maritime workers); *see also Lennon*, 20 F.3d 658, 28 BRBS 22(CRT) (although a majority of claimant's assignable duties were clerical in nature, he regularly was required to sort, pack and handle cargo destined for loading on ships and thus, engaged in longshoring operations covered under the Act).

The undisputed facts in this case establish Employer constructed only recreational vessels less than sixty-five feet in length from the date of its opening through the date of Claimant's accident. *See* Decision and Order at 2; Emp. Second Mot. for Summ. Jud. dated July 24, 2019 at 2-3, 5-6; Cl. Resp. to Emp. Second Mot. at 2. Thus, Claimant was, in his pre-injury work with Employer, "employed to build" only the *Lizzy Bee*, a recreational vessel under sixty-five feet. As such, he was not "engaged in" qualifying maritime

---

claimant's assignable work duties in determining the applicability of both exclusions is essentially the same.

employment at any point through the time of injury.[9] 33 U.S.C. §902(3)(F). Additionally, the facts establish Claimant could not have been assigned to work on vessels exceeding sixty-five feet in length prior to his injury because Employer did not have any projects involving construction of such vessels until February 2013, after Claimant returned to work post-injury. HT at 12-13, 18-19.

The fact Claimant performed post-injury work on vessels in excess of sixty-five feet does not alter the conclusion that his only assignable duties with Employer through the time of his injury involved building a "recreational vessel under sixty-five feet in length." 33 U.S.C. §902(3)(F). That Employer, at the time it created the business, intended to engage in new construction of vessels in excess of sixty-five feet, and that it was expected Claimant would work on such vessels, does not undermine the conclusion Employer did not engage in such work, and thus it was not assignable to Claimant, until months after his work injury. *See generally Shano v. Rene Cross Constr.*, 32 BRBS 221 (1998). Claimant did not claim that he was further injured in any work he performed after October 12, 2012. Thus, as it accords with law, we affirm the administrative law judge's finding that the statutory exclusion of Section 2(3)(F) applies to Claimant's work for Employer at the time of his injury and resulting conclusion that Claimant is excluded from the Act's coverage.

[9]We note the administrative law judge, in reaching this conclusion, properly distinguished the cases Claimant cited in support of his coverage argument because the employees in those cases performed some amount of qualifying maritime activities prior to the dates of their alleged injuries, whereas "*zero* percent of Claimant's work [up to and including his October 12, 2012 date of injury] qualified as maritime work under the Act." Decision and Order at 6.

Accordingly, we affirm the administrative law judge's Decision and Order Granting Motion for Summary Decision and Dismissing Claim for Lack of Jurisdiction.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge