U.S. Department of Labor

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

BRB No. 16-0067

ABDULAZIZ A. AHMED	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Sept. 21, 2016
WESTERN PORTS TRANSPORTATION, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Amie C. Peters and Amanda E. Peters (Blue Water Legal PLLC), Edmonds, Washington, for claimant.

Russell A. Metz (Metz & Associates P.S.), Seattle, Washington, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-LHC-01486) 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant fractured his left elbow on January 26, 2011, at the Union Pacific Intermodal Facility during the course of his work as a commercial truck driver with employer. Dr. Beingessner performed surgery on claimant's left elbow on January 27,

2011. Claimant was subsequently cleared to return to work with no restrictions on April 19, 2011, and he signed a renewed contract with employer on May 3, 2011.

Employer operates a trucking company, headquartered five miles from the Port of Seattle, which contracts with independent truck owner/operators to transport domestic and international containers between rail yards, retail outlets, warehouses, and piers. HT at 59. Employer's operations consist of three groups: 1) international, which moves merchandise from the port and warehouses to retail outlets; 2) domestic, which moves containers between warehouses; and 3) rail, which moves containers between the port terminals and rail yards. Claimant testified that he was usually assigned to employer's rail group and drove trailers between Terminal 5 at the Port of Seattle and the Union Pacific Intermodal Facility. *Id.* at 28-30. He stated that the trip is about two or three miles, that it involved turns onto several streets and Highway 99, as well as crossing a draw bridge, and that, depending upon traffic, he could make between five and nine complete trips in one day. *Id.*

Claimant filed a claim for temporary total disability benefits under the Act.[1] The administrative law judge found that claimant was an independent contractor, rather than employer's employee, that he did not regularly engage in maritime employment, 33 U.S.C. §902(3), and that he was not injured on a covered situs, 33 U.S.C. §903(a). Accordingly, the administrative law judge found that claimant is not covered by the Act and, thus, denied his claim for benefits.

On appeal, claimant challenges the administrative law judge's conclusion that he is not covered by the Act. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief.

Claimant challenges the administrative law judge's three separate bases for denying his claim for benefits under the Act: (1) claimant did not establish that he had an employee-employer relationship with employer; and he did not satisfy either the (2) situs or (3) status tests. For the reasons that follow, we affirm the administrative law judge's findings that neither the situs nor the status test is satisfied in this case. Thus, we affirm the denial of benefits.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee's work is

[1]Claimant initially sought workers' compensation benefits from the State of Washington's Department of Labor and Industries. This claim was rejected after the Department concluded that claimant was "not an employee, but a private contractor," who had not elected to pay for industrial insurance coverage. RX 5.

maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *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 under the Act exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996).

Situs

Claimant contends the administrative law judge erred in finding that the rail yard where his injury occurred is not an "adjoining area" as defined by the Act. Section 3(a) of the Act states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter 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 adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a). In order to be covered by the Act, a site must be an enumerated situs adjoining navigable water (pier, wharf, dry dock, etc.), or an "other adjoining area" customarily used for a maritime purpose. *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993). Claimant was not injured while he was working upon navigable waters or on an enumerated site; thus, as the administrative law judge correctly found, the issue is whether claimant's injury occurred on an "other adjoining area."

An area can be considered an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *See Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978); *see also Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, concluded that an "adjoining area" must have both a functional and a geographical relationship with navigable waters that need not depend on physical contiguity with those waters. *Herron*, 568 F.2d at 141, 7 BRBS at 411. In *Herron*, the Ninth Circuit stated that consideration should be given to the following factors, among others, in determining if a site is an "adjoining area:"

> the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in

> maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

568 F.2d at 141, 7 BRBS at 411.

We reject claimant's contention that the administrative law judge erred in finding his injury did not occur on a covered situs. The administrative law judge fully analyzed the evidence concerning the nature of the Union Pacific Intermodal Facility and found that claimant did not meet the situs element based upon a weighing of the relevant *Herron* factors. The administrative law judge found that the Union Pacific Intermodal Facility functions, fundamentally, as "a railroad facility located, for economic reasons, near the port." Decision and Order at 75. The administrative law judge stated that, generally, once "containers leave the port for inland destinations, maritime activity ceases," *id.*, and that more specifically, as in this case, once "the containers are taken to the near rail facility, the functional nexus is with the landward transportation of cargo, not the loading or unloading of vessels." *Id.* The administrative law judge thus concluded that the Union Pacific Intermodal Facility "functions to transfer cargo and containers, some of which come from the port, between rail and truck and as such serves an important function in the landward transshipment of cargo." *Id.* at 76.

Substantial evidence supports the administrative law judge's findings that the Union Pacific Intermodal Facility is not located in, and does not function as, an area of maritime commerce, as it is surrounded by mixed-use properties, it is located several miles from the Port of Seattle, and it is not customarily used in the loading or unloading of any vessels. CX 7; RX 1; HT at 73-74. The administrative law judge therefore rationally found that claimant did not establish that the Union Pacific Intermodal Facility was customarily being used for the maritime purposes of the Act, i.e., the loading, unloading, repairing, dismantling, or building of a vessel. Absent customary maritime activity, an area cannot be a covered "adjoining area" within the meaning of Section 3(a). 33 U.S.C. §903(a); *O'Donnell v. Nautilus Marine Protection, Inc.*, 48 BRBS 67 (2014); *Arjona v. Interport Maint. Co., Inc.*, 34 BRBS 15 (2000); *Gonzalez v. Ocean Voyage Ship Repair*, 26 BRBS 12 (1992). As substantial evidence supports the finding that the Union Pacific Intermodal Facility is not customarily used for loading and/or unloading of vessels, we affirm the administrative law judge's finding that the site of claimant's injury is not an "adjoining area." *O'Donnell*, 48 BRBS 67; *Arjona*, 34 BRBS 15; *Gonzalez*, 26 BRBS 12. The administrative law judge's finding that claimant's injuries did not occur on a covered situs is therefore affirmed. 33 U.S.C. §903(a); *see generally Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3d Cir. 1988); *Palma v. California Cartage*, 18 BRBS 119 (1986).

Status

Claimant contends his work satisfied the status element because it involved the intermediate step of moving cargo between ships at the Port of Seattle's terminals to the nearby intermodal rail yards, where the containers would then be taken to further inland destinations. Claimant thus maintains that the administrative law judge's finding, under the "point of rest" theory, that maritime transport ended, and landward transport began, at the port terminals rather than at the Union Pacific Intermodal Facility, is contrary to law.[2]

While Congress did not define the term "maritime employment" in the text of the Act or its legislative history, *see Caputo*, 432 U.S. at 265, 6 BRBS at 160, the United States Supreme Court has addressed this issue on a number of occasions. Pertinent to the present case, in *Caputo*, the Court explained that coverage under the Act is limited to those whose work facilitates the loading, unloading, repair or construction of vessels:

> The closest Congress came to defining the key terms [in Section 902(3)] is the "typical example" of shoreward coverage provided in the Committee Reports. The example clearly indicates an intent to cover those workers involved in the essential elements of unloading a vessel - taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. *Thus, employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.*

Caputo, 432 U.S. at 266-67, 6 BRBS at 160-61 (emphasis added). Nevertheless, the Court, in holding claimant covered under the Act, reasoned that the 1972 Amendments emphasized broader coverage and a decision to move that coverage shoreward brought about by containerization. In this regard, the Court rejected the "point of rest theory," which advocated coverage of only those employees who moved cargo from the vessel to its initial point of rest on the pier or in the terminal area and vice versa. *Caputo*, 432 U.S.

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[2]In this regard, claimant asserts that he was engaged in maritime activity because, through employer's contracting for trucking services with APL, a "maritime shipping company," he was, in essence, working for APL. This contention lacks merit, for it is the nature of claimant's actual work that is determinative rather than the legal relationship between the company and its consignees. *See generally Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168(CRT) (3d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984).

at 276-279, 6 BRBS at 166-169. Thereafter, in *Ford*, 444 U.S. 66, 11 BRBS 320, the Court recognized that coverage under the Act extends to land-based workers who, although not actually unloading vessels, are involved in intermediate steps of moving cargo between ship and land transportation. Claimant Ford was working as a warehouseman when he was injured on a public dock in the Port of Beaumont, Texas, while securing military vehicles, unloaded earlier, to railroad cars, for landward shipment. Claimant Bryant, in a consolidated case, was working as a cotton header when he was injured while unloading a bale of cotton from a dray wagon into a pier warehouse where it was stored until loaded on a vessel. The United States Supreme Court held that both claimants were covered because they were engaged in intermediate steps in moving cargo between ship and land transportation. In the case of claimant Ford, the cargo had arrived by ship and had been stored for several days before being loaded onto the flat car. In finding claimant Ford covered, the Court concluded that he was performing the last step before the vehicles left on their landward journey. Similarly, claimant Bryant was performing the first step in removing cargo from a vehicle used in land transportation so that it could be readied for loading onto ships. In holding claimants covered, the Court reasoned that if the goods had been taken directly from the ship to the train, or from the truck directly to the ship, claimant's activities would have been performed by longshoremen and that the only ground to distinguish claimants from those who do such "direct" loading would be the "point of rest" theory previously rejected in *Caputo. Ford*, 444 U.S. at 82, 11 BRBS at 328; *see also Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989).

In contrast, in *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82(CRT) (9th Cir. 1987), *aff'g Dorris v. California Cartage*, 17 BRBS 218 (1985), the Board and the Ninth Circuit held that a truck driver whose regular duties consisted of transporting containerized cargo away from the terminal to a consignee, fastening containers to a chassis, and trucking the containers between different harbors was not engaged in longshoring operations covered under the Act, but in land transportation. Similarly, the Board has held that truck drivers whose responsibility is to pick up and/or deliver cargo unloaded from or destined for marine transportation are not covered under the Act. In *McKenzie v. Crowley America Transport, Inc.*, 36 BRBS 41 (2002), the claimant, who transported cargo between port terminals and facilities, including a railyard, located outside the port, was involved in the land-based stream of commerce and not involved in intermediate steps in the loading process. The containers were not simply at a "point of rest" but were ready to enter overland transportation. The Board thus affirmed the administrative law judge's conclusion that the claimant was not covered by the Act. *See also Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff'd mem.*, 159 F.3d 1354 (3d Cir. 1998) (table) (claimant's duties as a tanker-truck driver for overland delivery to area service stations is not maritime employment); *Martinez v. Distribution Auto Services*, 19 BRBS 12 (1985) (claimant, a truck driver whose sole responsibility

was to pick up and transport a container of sealed cargo from a storage area to his employer's facility, is not covered under the Act).

Conversely, coverage under the Act has been found in instances where the claimant's work as a truck driver was confined to the port area. *See Triguero*, 932 F.2d 95 (cargo transported from dockside storage facility to port's rail facility); *Warren Bros. v. Nelson*, 635 F.2d 552, 12 BRBS 714 (6th Cir. 1980) (gravel transported from dockside hopper to manufacturer's facility within port area); *W.B. [Booker] v. Sea-Logix, L.L.C.*, 41 BRBS 89 (2007), *aff'd mem*., 378 F.App'x 691 (9th Cir. 2010) (the Board reversed the administrative law judge's finding that claimant, a truck driver, was not engaged in covered employment even though the majority of his time was spent in overland work, as his regular job assignments included transporting goods between marine terminals and other sites, e.g., employer's warehouse, other marine terminals and the railhead, located within the port); *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999) (scrap metal hauled from barges to scrap field); *Uresti v. Port Container Industries, Inc*., 33 BRBS 215 (Brown, J. dissenting on other grounds), *aff'd on recon*., 34 BRBS 127 (2000) (Brown, J., dissenting on other grounds)(hauling cargo from ship-side to the storage facility is part of the overall process of unloading). In *Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168(CRT) (3d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984), as in *Triguero*, *Nelson*, *Waugh*, and *Uresti*, the claimant transported maritime cargo within the port area from dockside to storage facilities. The court held that claimant's work involved an intermediate step in the loading process and was covered. *Molee*, 710 F.2d 992, 15 BRBS 168(CRT); *see also Ford*, 444 U.S. 69, 11 BRBS 320; *Waugh*, 33 BRBS 9.

In this case, the administrative law judge rationally found that claimant's work was more like that of the truck driver in *McKenzie* than the driver in *Booker*, as the facts establish that claimant was not involved in intermediate cargo-moving steps within the Port of Seattle.[3] Claimant's deliveries between maritime facilities and facilities outside the port thus make him a non-covered truck driver "whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for

[3]Claimant's contention that there is no distinction between his work in this case and the work performed by the claimant in *Booker*, because the intermodal rail yards in this case have a clear nexus to maritime business, misses the key distinction between *Booker* and *McKenzie*. Claimant Booker's work assignments included transporting containers between facilities "all located within the Port of Oakland," *Booker*, 41 BRBS at 91, whereas claimant McKenzie transported containers from the port's terminals to the rail yards located outside the port.

maritime transportation."[4] *Caputo*, 432 U.S. at 266-67, 6 BRBS at 160-61; *McKenzie*, 36 BRBS 41; *see also generally Jacobs v. G & J Land & Marine Food Distrib.*, 48 BRBS 9 (2014).[5] Therefore, as it is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that claimant was not engaged in maritime employment.[6] 33 U.S.C. §902(3); *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT); *Jacobs*, 48 BRBS 9; *McKenzie*, 36 BRBS 41; *Zube*, 31 BRBS 50. Consequently as claimant has not satisfied either the status or situs requirement of the Act, 33 U.S.C. §§902(3), 903(a), and thus, has not established essential elements of his claim, the administrative law judge's denial of that claim is affirmed.[7]

[4]Additionally, much like the claimant in *McKenzie*, 36 BRBS 41, claimant in this case did not board ships, load or unload cargo, or transport cargo within the port facility. In this regard, claimant stated that drivers do not handle containers or cargo; rather, a longshoreman loads cargo onto the truck and the warehouse or railway worker unloads it while the driver sits in the truck. HT at 74.

[5]That is, claimant's activities were the first step in land transportation of cargo previously at sea and the last step in land transportation of cargo going to sea.

[6]Claimant's contention, that the administrative law judge improperly focused on the five percent of the time he delivered cargo to land-based warehouses and overlooked the ninety-five percent of the time he drove containers between the port terminal and the railyard, is without merit. The administrative law judge's finding that claimant was not engaged in maritime employment explicitly concentrated on claimant's transportation of containers from the port to the rail facilities outside the port. Decision and Order at 60-61, 66-68.

[7]In light of this disposition, we need not address claimant's contentions regarding the administrative law judge's finding that claimant was an independent contractor, rather than employer's employee, at the time of injury.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge