U.S. Department of Labor

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

BRB No. 18-0059

LUIGI MALTA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: July 23, 2018
	)	
WOOD GROUP PRODUCTION SERVICES	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Al J. Robert, Jr. (Law Office of Al J. Robert, Jr., LLC), New Orleans, Louisiana, for claimant.

Scott A. Soule and Emily C. Canizaro (Blue Williams, L.L.P.), Mandeville, Louisiana, for employer/carrier.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2013-LHC-01511) 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). 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).

This case is before the Board for the third time. To recapitulate, on April 14, 2012, claimant sustained injuries to his back, left arm, shoulder, and foot, in the course of his work for employer as an offshore warehouseman at its Black Bay Central Facility, a fixed platform in state waters, when a CO_2 bottle he was unloading from a cargo basket forcefully discharged. HT I at 25. The administrative law concluded that claimant's injury did not occur on a situs covered by the Act and he thus denied benefits. Claimant appealed, and the Board reversed the administrative law judge's decision, holding that the Central Facility is a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). *Malta v. Wood Group Prod. Services*, 49 BRBS 31 (2015). The Board remanded the case for consideration of any remaining issues. *Id.* at 35.

On remand, the administrative law judge conducted a second hearing on the issue of whether claimant was engaged in "maritime employment" pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3).[1] After this hearing, the parties stipulated that the Board's decision established jurisdiction under the Act, but that employer reserved its "right to properly controvert payment of benefits due to a change of status." Joint Stipulation at 2-3. The administrative law judge, in a decision dated June 10, 2016, incorporated the parties' Joint Stipulation in its entirety, and ordered employer to pay claimant benefits from April 18, 2015, at a rate of $289.15 per week for his loss in wage-earning capacity. *See* Decision and Order Based on the Parties' Joint Stipulation at 2.

Employer appealed, challenging the administrative law judge's "finding" that claimant is a "maritime employee" under Section 2(3) of the Act. The Board, stating that the parties' joint stipulation incorrectly interpreted the Board's decision as holding that

[1]The parties agreed that the issue of claimant's "status" under the Act was the only issue to be addressed at the hearing. HT II at 4, 7.

claimant was an employee covered under the Act, vacated the administrative law judge's June 10, 2016 decision.[2] *Malta v. Wood Group Prod. Services*, BRB No. 16-0552 (Apr. 13, 2017) (unpub.) Stating that the administrative law judge did not make any specific findings or reach any legal conclusions with regard to claimant's status as a maritime employee, the Board remanded the case to the administrative law judge "for consideration of the issue of status and the other remaining issues." *Id*.

In his Decision and Order on Second Remand, the administrative law judge found claimant's employment activities satisfy the status requirement of the Act. 33 U.S.C. §902(3). He therefore ordered employer to pay claimant ongoing temporary partial disability benefits from April 18, 2015, and medical benefits.

On appeal, employer challenges the administrative law judge's finding that claimant's work duties constituted maritime employment covered by the Act. Claimant, and the Director, Office of Workers' Compensation Programs, have each filed a response brief, urging affirmance of the administrative law judge's Decision and Order on Second Remand.

Under Section 2(3) of the Act, a covered employee is "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 . . . ." 33 U.S.C. §902(3). Generally, a claimant satisfies the status requirement as a maritime employee if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, claimant need only "spend at least some of [his] time" in indisputably maritime activities. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977); *see Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

As an offshore warehouseman, claimant's duties included shipping, receiving, warehousing, and dispatching tools and supplies to different operators for use on various satellite platforms, and loading and unloading vessels at various times throughout the day. HT I at 10-11, 13. There is no dispute that claimant spent "at least some" of his time loading and unloading vessels and that his injury occurred while performing such duties.

[2]The Board also held that employer's "reservation of a right to challenge the stipulated facts reflects its intent to not be bound by the stipulations." *Malta v. Wood Group Prod. Services*, BRB No. 16-0552 (Apr. 13, 2017) (unpub.), slip op. at 4.

See Emp. Br. at 5. In this regard, claimant's undisputed testimony establishes he spent approximately 25 to 35 percent of each seven-day work period loading and unloading something on to, or off of, vessels. HT II at 37-38. This was confirmed by employer's project manager, Ray Pitre, who testified that loading and unloading vessels was a "big part of [claimant's] job." HT I at 27-29. The record also establishes claimant was injured while he was unloading a pressurized cylinder from a vessel via a cargo basket. *Id.* at 16-18; CXs 1, 2.

The administrative law judge found claimant satisfied the status requirement because he spent 25 to 35 percent of his work day loading and unloading supplies from third-party vessels that originated in Venice, Louisiana. In reaching this conclusion, the administrative law judge noted that the Board's rationale in finding the functional component of the situs test satisfied, i.e., that the location where claimant suffered the injury was customarily used for the loading and unloading of vessels,[3] "can be equally applied to status." Decision and Order on Second Remand at 5. He also found *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g denied,* 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994), factually distinguishable. While claimant Munguia "loaded and unloaded unto a boat only the gear and equipment he needed to perform his individual platform-related duties," claimant in this case "used a crane to unload pipes, compressors, valves, drinking water, tools, chemicals, repair parts, nitrogen cylinders, and phalanges from supply vessels coming in from Venice, Louisiana, on a daily basis." Decision and Order on Second Remand at 5 (citing HT 1 at 19, 30).

Employer contends that claimant's employment activities, which included unloading and loading equipment and tools for use in the oilfield, are akin to the activities of claimant Munguia in that they were unrelated to maritime commerce and did not serve a maritime purpose or involve the movement of cargo.

In *Munguia*, the Fifth Circuit concluded that the claimant's loading and unloading of supplies and tools from a small crew boat and repairing this boat were merely incidental to his job on fixed oil platforms. Specifically, the court reasoned that this "loading" and "unloading" alone did not warrant a conclusion that the employee was engaged in "maritime employment" as the work on fixed platforms is not maritime in nature. The *Munguia* court relied on the rationale espoused in *Fontenot v. AWI, Inc.*, 923 F.2d 1127,

[3]The Board stated "the uncontroverted evidence in this case reflects that the Central Facility, in essence, functioned as an offshore dock and a collection and distribution facility used to unload and store supplies and equipment delivered from the mainland by vessels and to load materials onto other vessels for delivery to the satellite oil and gas production platforms." *Malta*, 49 BRBS at 34.

24 BRBS 81(CRT) (5th Cir. 1991), to find there is a limit to conferring coverage by "loading:"

> the unloading and loading, and construction activities that the [Supreme] Court recognizes as the focus of the maritime employment test . . . can be unconnected with maritime commerce. . . . For example, an employee might unload one train, and load another; or an employee might engage in construction activities, but build an airplane instead of a ship. Nothing intrinsic in any of these activities established their maritime nature; rather it is that they are undertaken with respect to a ship or vessel. When the tasks are undertaken to enable a ship to engage in maritime commerce, then the activities become "maritime employment."

Munguia, 999 F.2d at 813, 27 BRBS at 107(CRT) (quoting *Fontenot,* 923 F.2d at 1131, 24 BRBS at 85(CRT)). The court concluded that "Munguia's daily activities as a pumper-gauger were intrinsically related to the servicing and maintenance of fixed platform wells" which is not "inherently maritime" work. *Id*. (citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985)). As Munguia's work was not integral to the loading or unloading of cargo from vessels, the court held he was not engaged in maritime employment. *Id.*

We affirm the administrative law judge's finding that claimant was engaged in maritime employment. Claimant is entitled to coverage based on both his overall job, a portion of which involved loading and unloading vessels, and the covered employment duties he was performing at the moment of injury. *See Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Caputo*, 432 U.S. 249, 6 BRBS 150; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *see also Smith*, 878 F.2d 843, 22 BRBS 104(CRT); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999). We reject employer's contention that this case is similar to *Munguia*. The administrative law judge properly found this case distinguishable in that claimant did not merely load his personal gear onto small transport vessels. Rather, claimant used a crane to load and unload third-party supply vessels with, among other items, pipes, valves, compressors, and repair parts. Decision and Order on Second Remand at 5. In this regard, *Coastal Prod. Services Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009), is instructive. In *Hudson*, the Fifth Circuit affirmed the finding of coverage for a claimant who spent 9.7 percent of his work time engaged in loading oil onto transport barges and servicing equipment necessary to load the oil onto barges. The court held that the claimant clearly engaged in maritime activities: transferring previously produced oil from the platform's storage tanks to the larger tanks on the sunken oil barge where it awaited transport by barge (not by pipeline); checking the sunken barge's cargo loading lines for leaks; maintaining the engine of the

sunken barge; hooking up lines for transferring the oil from the sunken barge to the customer transport barges; manning the emergency shutoff during such transfers; and boarding customers' barges to witness gauge readings. That the majority of the claimant's time was spent in activities relating solely to uncovered oil and gas production did not detract from his routine, non-episodic maritime activities. Thus, the mere fact that the claimant's work is in the "oil and gas industry" is not sufficient to deny coverage.

In addition, contrary to employer's contention, the administrative law judge properly concluded it was not necessary that claimant establish an additional "independent connection" to maritime commerce in order to be covered under the Act.[4] The Fifth Circuit extensively discussed this issue in *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983). In *Gilliam*, the claimant was injured while supervising and assisting in the off-loading of pilings from a barge. The

[4]As the Director correctly notes, the cases cited by employer in support of its argument that claimant must establish an additional, independent connection to maritime commerce, involved employees who, unlike claimant in this case, were not directly involved in the loading or unloading of vessels. *Herb's Welding*, 470 U.S. at 425, 17 BRBS at 83(CRT) (Court held that welders on fixed offshore oil platforms in state waters are not engaged in maritime employment within the meaning of Section 2(3), as such work was land-based work "far removed from traditional LHWCA activities, notwithstanding the fact that [the claimant] unloaded his own gear upon arriving at a platform by boat"); *Smith v. Labor Finders*, 46 BRBS 35 (2012) (claimant's duties as a beach-walker in an oil-spill clean-up project picking up oil debris from the beach and water's edge, loading and unloading his supplies and tools to and from the transport vessel, driving a "Gator" to shuttle workers around the island, and occasional loading of waste on to the debris vessel were either not part of claimant's regular duties and/or were not maritime in nature and did not constitute a step in the loading process); *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011) (claimant's removal of debris from a bridge was not covered employment, even though the debris was vacuumed onto a barge, because the purpose of the claimant's work was to clean a bridge); *McKenzie v. Crowley America Transport, Inc.*, 36 BRBS 41 (2002) (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); *Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff'd mem. sub nom. Zube v. Director, OWCP,* 159 F.3d 1354 (3d Cir. 1998) (table) (claimant's duties as a tanker-truck driver which required him to load petroleum products from a storage tank at employer's terminal facility into his tanker-truck for overland delivery to area service stations was not engaged either directly or indirectly in the loading or unloading of a vessel, nor were they intermediate steps in the movement of cargo from ship to shore).

pilings were to be used in the construction of a bridge. In holding that the claimant was engaged in maritime employment, the court discussed the notion of "cargo:"

> It can hardly be disputed that the pilings in the case sub judice were cargo. They traveled 110 miles over navigable waters to reach their intended destination. Similarly, the barge upon which the pilings traveled was clearly a vessel. It was not simply a work platform used to facilitate construction of the bridges. Gilliam was unloading the pilings from the barge when he was injured. Therefore, Gilliam was unloading cargo from a vessel and, hence, was engaging in longshoring activities at the time he was injured. It is that simple.
>
> The fact that the pilings he was unloading were to be used to build a bridge does not add a different gloss to the situation. As petitioner points out in his brief, only a minute percentage of cargo actually bears a direct relationship to maritime employment. Certainly, had the pilings been off-loaded at a port, destined to be shipped to an inland location for another purpose, no one would contend that they did not constitute maritime cargo.

Gilliam, 659 F.2d at 58, 13 BRBS at 1052. Thus, the administrative law judge properly concluded on the facts here that it is of "no consequence [to the status inquiry] that the cargo being unloaded would be used for oil production work."[5] Decision and Order on Second Remand at 6; *see Hudson,* 555 F.3d 426, 42 BRBS 68(CRT); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996) (loading and unloading of construction materials is a traditional longshoring activity); *see also Boudloche*, 632 F.2d 1346, 12 BRBS 732 (claimant was covered where he spent a small amount of time loading or assisting in loading oil field equipment onto docks and ships in the course of his regular duties as a truck driver).

Substantial evidence supports the administrative law judge's finding that claimant regularly engaged in the loading and unloading of vessels at employer's facility and his conclusion that the facts in this case are materially different from those in *Munguia*. The finding that claimant was engaged in maritime employment within the meaning of Section

[5]Consequently, we reject employer's contention that the equipment and tools being transferred by claimant cannot be considered "cargo" because they were not being loaded as part of "the chain of transferring cargo from vessel to land transport," but instead were being moved from the "point of delivery to the point of consumption." Emp. Brief at 10-11.

2(3) of the Act accords with law. *Hudson,* 555 F.3d 426, 42 BRBS 68(CRT). Consequently, we affirm the award of benefits.[6]

Accordingly, the administrative law judge's Decision and Order on Second Remand is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

[6]The administrative law judge's award of temporary partial disability benefits from April 18, 2015, and medical benefits is affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).