U.S. Department of Labor

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

BRB No. 18-0163

HENRY T. FLORES	)	
Claimant-Respondent	)	
v.	)	
MMR CONSTRUCTORS, INCORPORATED	)	DATE ISSUED: 11/29/2018
and	)	
ZURICH MUTUAL INSURANCE COMPANY	)	
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 Remand of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, Joshua T. Gillelan, II (Longshore Claimants' National Law Center), Washington, D.C., and Lewis S. Fleischman (Lewis S. Fleischman, P.L.L.C.), Houston, Texas, for claimant.

Russell Manning (Cotton Schmidt & Abbott, L.L.P.), Corpus Christi, Texas, for employer/carrier.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2014-LHC-01453) of Administrative Law Judge Lee J. Romero, Jr., 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 or the Longshore Act), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the OCSLA). 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 second time.

Claimant filed a claim seeking benefits for a left Achilles tendon injury he sustained on January 20, 2014, while working for employer on the hull of what became Chevron's tension leg platform *Big Foot* as it floated at the dock of the Kiewit yard on Corpus Christi Bay. In his initial decision, the administrative law judge found claimant was injured upon navigable waters and that his presence upon those waters was not transient or fortuitous. The administrative law judge, however, denied coverage because he found claimant was not an employee of a "statutory employer" under the Act, 33 U.S.C. §902(4), and alternatively, because claimant did not satisfy either the functional component of the Act's situs requirement, 33 U.S.C. §903(a), or the status requirement, 33 U.S.C. §902(3). Furthermore, the administrative law judge found that claimant is not covered under the OCSLA because he did not satisfy the "substantial nexus" test of *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 45 BRBS 87(CRT) (2012). Decision and Order at 26-27. Accordingly, the administrative law judge denied the claim and did not address the remaining issues.

Claimant appealed the denial of benefits under both the Act and the OCSLA. The Board held it was undisputed that claimant was performing his regular job for employer on navigable waters at the time of injury and that he thus satisfied the pre-1972 maritime employment test pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). *Flores v. MMR Constructors, Inc.*, 50 BRBS 47 (2016). The Board reversed the administrative law judge's decision that claimant was not covered

by the Longshore Act, and remanded the case for the administrative law judge to address any remaining issues.[1] *Id.*

On remand, the administrative law judge addressed only claimant's average weekly wage as he found it was the sole "unresolved issue presented by the parties." Decision and Order on Remand at 4. The administrative law judge found claimant's average weekly wage is $1,552.85, and he awarded claimant compensation.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant and the Director, Office of Worker Compensation Programs (the Director), each respond urging the Board to reject employer's contentions. Employer has filed a reply brief.

Employer contends the administrative law judge lacked subject matter jurisdiction over claimant's claims because it maintains that claimant's injury is not covered under the Act or the OCSLA.[2]

In response, the Director contends employer has not raised any contentions relating to the only issue resolved by the administrative law judge on remand, i.e., claimant's average weekly wage, and instead has limited its appeal to challenging the Board's prior decision in this case. Because the Board's 2016 decision is law of the case and because employer's arguments challenging that prior decision are without merit, the Director urges

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[1]Employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit, but the court dismissed the appeal because the Board's decision was not a final order. *MMR Constructors, Inc. v. Director, OWCP*, No. 16-60842 (5th Cir. Jan. 19, 2017).

[2]Employer contends claimant's injury is not covered because: 1) the *Big Foot* was firmly affixed to the shore and, thus, should be considered an "extension of land" upon which injuries occurring thereon are not compensable; 2) the *Big Foot* was being used as a work platform for its own construction; and 3) claimant was not engaged in traditional maritime employment and would not be covered by the pre-1972 maritime employment test. These contentions are without merit as the *Big Foot* was not "permanently affixed to shore," *see Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), and it is undisputed that it was floating on navigable waters, irrespective of whether it was a "vessel." *Flores*, 50 BRBS at 51. As the Board held in its prior decision, claimant was injured while he was working on navigable waters in the course of his employment on those waters and is covered under the Act. *Perini North River*, 459 U.S. 297, 15 BRBS 62(CRT); *see also Flores*, 50 BRBS at 49, 51.

the Board to reaffirm its holding that claimant is covered under the Act, and accordingly, summarily affirm the administrative law judge's Decision and Order on Remand. In its reply brief, employer avers that the law of the case doctrine is inapplicable because the issue decided by the Board in its 2016 decision was treated solely as a coverage issue such that the Board did not analyze the administrative law judge's subject matter jurisdiction, the issue it allegedly now raises in this appeal.

The Board has held that it will adhere to its initial decision when a case is before it for a second time unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002); *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.,* 35 BRBS 190 (2002); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999); *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998).

In its prior decision, the Board, after discussion of the requirements for a claim to be covered by the Act, stated that because claimant's injury occurred on navigable waters in the course of his employment on those waters, and because his presence on the water was not "fortuitous or transient," claimant was, pursuant to *Perini North River*, "engaged in maritime employment when he was injured." *Flores*, 50 BRBS at 48-51. The Board thus held that "claimant was covered by the Act when he sustained his injury," and, accordingly, it reversed the administrative law judge's finding that claimant's injury did not occur within the Act's coverage.[3] *Id.* Employer's present contentions were either

[3]Employer now contends the administrative law judge rendered inconsistent findings, i.e. that the administrative law judge found both that claimant was injured on navigable waters and that claimant was injured in an area adjoining navigable waters. Although the language of the administrative law judge's initial opinion is slightly ambiguous, we read it as providing alternative findings: 1) claimant was injured while on navigable waters, and his presence there was not fortuitous, but he was not a maritime employee because his employer does not employ any employees in maritime employment; or 2) if one were to consider the two-part situs test related to a claimant injured in an area adjoining navigable waters, claimant would not meet the element requiring that the employer customarily use the area in the loading and unloading of a vessel. *See* November 5, 2015 Decision and Order at 19 ("Indeed, there is no question that Claimant was on navigable waters at the time of his work injury on a floating hull…."); *see also* Decision and Order at 20-21 ("In the alternative, Employer/Carrier argue that, while claimant was injured on navigable waters, he was not on a vessel, but rather 'another adjoining area.' Accordingly, for the purpose of comprehensiveness, I will also address whether Claimant has met the situs requirement under Section 903(a)'s 'adjoining' clause . . . . As discussed

specifically resolved by the Board's prior decision, *Flores*, 50 BRBS at 48-51, or rendered moot by virtue of the conclusion reached in that decision, i.e., there was no need to address the OCSLA contentions because claimant was covered by the Act pursuant to *Perini North River*. The issue of claimant's coverage under the Act was, therefore, fully addressed in the Board's prior decision and, as such, constitutes the law of the case. *Kirkpatrick*, 39 BRBS 69; *Ravalli*, 36 BRBS 91; *Weber*, 35 BRBS 75. As none of the exceptions to this doctrine is applicable,[4] we affirm the Board's prior decision that claimant was covered by

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above, Claimant was injured on navigable waters while working on a floating hull….”). In both sets of findings, the administrative law judge determined that claimant was injured on navigable waters. Further, employer did not contest the finding that claimant was injured on navigable waters when the case was before the Board previously.

[4]Employer does not suggest that there has been a change in the underlying factual situation in this case. Nor has employer presented any intervening controlling authority to demonstrate that the initial decision was erroneous. Rather, as the Director points out, employer's "challenges to the Board's 2016 decision [are] not based on any cases decided since 2016, but on one decided 23 years ago [referencing employer's citation to *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*., 513 U.S. 527 (1995)]." Dir. Resp. Br. at 5. In this respect, we decline employer's invitation to hold that this case undermines the holding in *Perini North River*, as the Supreme Court was addressing the scope of the federal courts' admiralty tort jurisdiction and not jurisdiction under the Longshore Act. We emphasize that the claimant in *Perini North River* was working on a sewage treatment plant in the Hudson River. The Supreme Court stated:

> There is nothing in [the legislative history of the 1972 Amendments] to suggest, as Perini claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered.

Perini North River¸ 459 U.S. at 318-319, 15 BRBS at 76(CRT). Moreover, the court held that workers injured on actual navigable waters in the course of employment on those waters is covered under the Act, "not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters." *Id.*, 459 U.S. at 324, 15 BRBS at 80(CRT); *see generally Ramos v. Universal Dredging Corp.,* 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981).

the Act. Consequently, we affirm the administrative law judge's Decision and Order on Remand awarding compensation.[5]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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[5]Employer concedes it "do[es] not challenge the ALJ's calculation of compensation that would be due to [claimant] if his injury were covered under the LHWCA." Emp. Br. at 5.