23 BRBS 336 (DOL Ben.Rev.Bd.), 1990 WL 284083

Benefits Review Board

United States Department of Labor

JOSEPH RIPLEY, SR., Claimant-Respondent
v.
CENTURY CONCRETE SERVICES
and
PMA INSURANCE COMPANY, Employer/Carrier-Petitioners

BRB No. 89-1845
April 27, 1990

DECISION and ORDER

***1** Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.
Robert A. Rapaport and Fay F. Spence (Knight, Dudley, Pincus, Dezern & Clarke), Norfolk, Virginia, for employer/carrier.
Before: SMITH, Chief Administrative Appeals Judge, STAGE, Administrative Appeals Judge, and AMERY, Administrative Law Judge.[a]
PER CURIAM:

Employer appeals the Decision and Order (88-LHC-2669) of Administrative Law Judge Daniel A. Sarno, 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). The administrative law judge's Decision and Order must be affirmed if it is 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, a form carpenter,[1] suffered a lumbosacral strain on January 21, 1988 while working for employer, a concrete-specializing general contractor. At the time of his injury, claimant was working on a project located at the Norfolk Naval Shipyard. The project was located on or near a pier which lay between two dry docks, approximately 100 to 200 feet from the seaward end of the pier, and involved building a completely waterproof box-like concrete addition to an existing metal structure located on the pier; the addition was to be a permanent part of the pier. Claimant testified that he was told by various shipyard workers that the concrete box was to be used for storage of nuclear waste materials from submarines, and testified that based on his own expertise from prior naval service, he recognized that two submarines being repaired in the dry docks while he was on the site were nuclear-powered. Employer's representative testified that its business usually involved non-maritime projects and during the five years prior to the hearing, the only shipyard project it participated in involved the one on which claimant was injured. This project took about six months to complete and represented less than one percent of that year's work for employer.

To be covered under the Act, a claimant must satisfy both the "status" requirement of Section 2(3) of the Act, 33 U.S.C. §902(3), and the "situs" requirement of Section 3(a) of the Act, 33 U.S.C. §903(a). See Northeast Marine Terminals Co., Inc. v. Caputo, 432 U.S. 249, 97 S. Ct. 2348, 6 BRBS 150 (1977). After reviewing the evidence, the administrative law judge found that the record established that the work place in question constitutes a covered situs in that it was designated as a pier by Norfolk Naval Shipyard and, at the very least, claimant was working in an adjoining area used to load, unload, repair, or build vessels, thus rendering the site covered. Consequently, the administrative law judge found that claimant had satisfied the Section 3(a) situs test. The administrative law judge then determined that the weight of the evidence established the maritime nature of claimant's employment at the time of his injury, basing his determination on, inter alia, a finding that the building addition on which claimant was working was to be used to store nuclear waste from vessels being repaired in the dry docks, establishing a strong nexus between claimant's job at the shipyard and maritime employment covered by the Act. Accordingly,

the administrative law judge found that claimant's work in constructing the permanent building addition to the pier was maritime employment which satisfied the Section 2(3) status requirement, and found employer liable for benefits under the Act.

***2** On appeal, employer challenges the administrative law judge's finding that claimant's work at Norfolk Naval Shipyard constituted maritime employment, arguing that claimant as a construction worker was not involved in the essential elements of loading and unloading vessels necessary to establish status. In addition, employer contends that Section 2(3)(D) of the Act, 33 U.S.C. §902(3)(D) (Supp. V 1987), excludes claimant from coverage under the Act in that claimant was an employee of a vendor providing a product to Norfolk Naval Shipyard, was temporarily on the shipyard's premises, and was not engaged in work normally performed by employees of an employer covered under the Act. See 33 U.S.C. §902(3)(D) (Supp. V 1987).[2] Claimant responds, urging affirmance of the decision below.[3]

After consideration of the arguments raised on appeal, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the decision is supported by substantial evidence and accords with applicable law. Section 2(3) of the Act, contrary to employer's implication, covers not only employees who are engaged in loading or construction of ships, but also employees who are "harbor-workers." See 33 U.S.C. §902(3) (Supp. V 1987). Moreover, the Board has held that the term harbor-worker includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves, and adjacent areas used in the loading, unloading, repair or construction of ships) ...." Stewart v. Brown & Root, Inc., 7 BRBS 356, 365 (1978), aff'd sub nom. Brown & Root, Inc. v. Joyner, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980). See also Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86, 90 (1989); Olson v. Healy Tibbitts Construction Co., 22 BRBS 221 (1989). In the instant case, the administrative law judge's findings of fact, which are not challenged on appeal, and the evidence of record establish that claimant was engaged in the alteration of a pier or adjacent area used in the repair of ships while at Norfolk Naval Shipyard; the administrative law judge specifically found that the building addition being constructed was directly related to ship-repairing efforts at the shipyard. Such work is maritime employment covered under the Act. See, e.g., Trotti & Thompson v. Crawford, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980); Matson v. Perini North River Associates, 9 BRBS 967 (1979). Consequently, as claimant's work modifying the pier was maritime in nature, we affirm the administrative law judge's finding that claimant established status pursuant to 33 U.S.C. §902(3).[4]

In addition, since claimant's injury occurred after the enactment of the 1984 Amendments, we must consider employer's argument that claimant is excluded from coverage by Section 2(3)(D). The Board has recognized that, while Section 2(3) provides broad inclusive language in defining "employee" as "any person engaged in maritime employment," Congress has now provided explicit exclusions from coverage for some employees. See Bergguist v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 131 (1989). We reject employer's interpretation of Section 2(3)(D) in this case. Initially, we disagree with employer's argument that claimant was "temporarily" working at the shipyard, as his project required him to be present at the site for at least six months. Moreover, Section 2(3)(D) excludes suppliers, transporters and vendors. Contrary to employer's argument, as a building contractor working under a contract to complete a construction project, employer cannot be considered to be a "vendor," as that term refers to one who sells goods. Employer provided a service, not a product, to the shipyard. Employer's interpretation would result in the exclusion of any workers employed by a subcontractor to perform construction work at a shipyard if that yard did not directly employ such workers. Moreover, employer itself qualified as a statutory employer, rather than a supplier, transporter or vendor to a covered employer, once it began the shipyard project and had workers engaged in maritime employment. See Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984); 33 U.S.C. §902(4). Section 2(3)(D) thus cannot be applied to exclude claimant from the Act's coverage.

***3** Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Chief Administrative Appeals Judge
BETTY ROBERTS STAGE
Administrative Appeals Judge
ROBERT S. AMERY
Administrative Law Judge

Footnotes

[a] Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. V 1987).

[1] A form carpenter erects the forms into which concrete is poured.

[2] Section 2(3) of the Act states, in pertinent part:
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-
D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of ... [a covered employer], and (iii) are not engaged in work normally performed by employees of that employer under this Act. if [such] individuals ... are subject to coverage under a State workers' compensation law.
33 U.S.C. §902(3) (Supp. V 1987).

[3] We note that the administrative law judge's determination regarding ""situs" is not challenged by employer on appeal. We, therefore affirm the administrative law judge's findings pertaining to Section 3(a) of the Act.

[4] In affirming the administrative law judge's finding of status under Section 2(3), we reject employer's contention that claimant is excluded from coverage under the Act because the majority of employer's construction work, and therefore claimant's work, was not maritime in nature. In the instant case, claimant participated in a project approximately six months in duration, and while he was working on the project his primary duties continuously involved marine construction. Contrary to employer's contention, therefore, such participation was not too momentary or episodic to place the claimant outside of the coverage of the Act. See, e.g., Coleman v. Atlantic Container Service, Inc., 22 BRBS 309 (1989).

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