

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 June 2012

CASE NO.: 2010-LHC-01598

OWCP NO.: 06-208283

In the Matter of:

LUIS E. DEJESUS,
Claimant,

v.

VIKING YACHT COMPANY, INC.,
Employer,

and

SEABRIGHT INSURANCE COMPANY,
Carrier.

APPEARANCES:

David C. Barnett, Esquire
For the claimant

Robert B. Griffis, Esquire
For the employer/carrier

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, (the Act). This case was referred to the Office of Administrative Law Judges on June 7, 2010. (ALJX 1)¹

¹ References to ALJX , and JX pertain to the exhibits of the administrative law judge and the joint exhibits of the parties. Counsel also agreed that the transcript of the hearing pertaining to the litigation of other cases involving the claimant may be referred to for purposes of determining the nature of the claimant's

Following proper notice to all parties, a hearing was held on November 16, 2011 at Miami, Florida. Joint exhibits 1 through 6 were admitted in evidence at the hearing. Both parties availed themselves of the opportunity to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered.

ISSUE

The only issue presented for my resolution is whether the claimant's injury while working for the employer on February 2, 2010 is covered by the Longshore and Harbor Workers' Compensation Act.

FINDINGS OF FACT

Claimant is a forty-seven year old male residing in Lake Worth, Florida. He commenced working for Viking Yacht Company, Inc. (hereinafter employer) on February 2, 2006. (Tr. 49). He was still working with that company at the time of the hearing in 2011. He has held the same position during all this time which involves fiberglass patching, painting and boat repair. (Tr. 63). The injury for which he filed a claim under the Act against the employer involves an abrasion or contusion to his forehead while working for the employer on February 2, 2010. (Tr. 84; JX 5, p. 303, 308). At the time of the injury, Mr. DeJesus was performing repair work on a recreational boat named Generation, which is 63.5 feet in length and owned by a consulting company located in Wilmington, Delaware. (JX 6).

Employer is a subsidiary of Viking Yacht Company (hereinafter referred to as the parent company), based in New Jersey, which builds sport fishing and recreational yachts ranging from 42 to 82 feet in length. (JX 2, pp. 5, 6, 40). Employer has two locations on the intra coastal waterway in Riviera Beach, Florida. Its service facilities are involved in maintenance and warranty repairs of boats built by its parent company that are either moored or in dry dock at its facilities. (JX 2, pp. 5-7; Tr. 51). It primarily performs repairs on Viking built boats of varying lengths, but it also is open to the public. Most, if not all, of the boats maintained or repaired at these facilities can best be described as sport fishing boats or yachts and private motor yachts. (JX 2, pp. 41-42). It is not known if any of the privately owned boats repaired at these facilities are used for any type of business. (JX 2, pp. 30-31, 37, 41-43; JX 3, p. 3). No sales of Viking built boats are conducted at these facilities; only repairs, service and maintenance. (JX 2, pp. 7, 42).

Employer also repairs boats at its service facilities that are owned by its parent company and docked at these service facilities. These boats are used by employees in sea trials for potential purchasers and for boat show purposes. These boats are taken to boat shows held at employer's Riviera Beach facilities and are taken to other boat shows in Annapolis, Maryland and Norwalk, Connecticut. (JX 2, p. 15). During the time pertinent to this case, at least one captain is employed

work with the employer. The transcript of that hearing is cited as Tr. and by page number. Also, a copy of that transcript is hereby admitted in evidence in this case as ALJX 3.

whose responsibility was to drive the boats during the sea trials or whenever the boats needed to be moved, such as from one boat show to another or returned to the repair facilities. (JX 2, pp. 16-17). Boats built by the parent company that are either owned by local Viking dealers or provided to them by the parent company also are docked at these service facilities and they sometimes also are used for sea trials for potential purchasers. (JX 2, pp. 16-17). The number of boats that are owned by the parent company that are docked at employer's repair facilities varies from time to time, but there were about forty boats docked there at the time of the claimant's injury in 2010, nine of which were owned by the parent company. (JX 2, pp. 11-13, 48; JX 3, p. 3, answer number 10). Mr. DeJesus performed boat repair work for the employer at both of its service facilities. He worked on both the boats owned by the parent company and the boats of other owners. (JX 2, pp. 9-10; JX 3, p. 3).

Claimant also suffered injuries while performing repair work on vessels for the employer in years prior to the injury involved in this case. I recently issued a decision in that proceeding in which I found the claimant's injuries were compensable under the Act. Claimant was performing the same repair work for the employer in the years involved in those cases that he was performing at the time he suffered the injury involved in this matter. Employer stipulated and I found in that decision that the claims and injuries were subject to the jurisdiction of the Act. *DeJesus v. Viking Yacht Company, Inc., et. al.*, 2010-LHC-00359 (May 30, 2012) (ALJ).

CONCLUSIONS OF LAW

Employer's position in this case is simply explained. Mr. DeJesus was performing repair work on a vessel that was built by the parent company as a recreational vessel when he suffered the injury involved in this case on February 2, 2010. It argues that the Act was amended on February 9, 2009 by the American Recovery and Reinvestment Act of 2009 (ARRA) and the amendment eliminated coverage from the Act for employees that repair "recreational vessels." 33 U.S.C. § 902(3)(F)(2009). Since the injury occurred after the effective date of this statutory amendment, employer maintains "the claim falls under Florida State workers' compensation and not under the Longshore and Harbor Workers' Compensation Act." Employer also argues that its facilities were used exclusively for repair and warranty work on Viking build boats which were used for recreational or pleasurable activities.

Claimant obviously believes the jurisdictional question involved in this case is not so easy to resolve. It is his position that he performed repair on boats covered by the Act and non-covered recreational boats while working for the employer. He therefore contends that all of his repair work for the employer is covered by the Act. He initially notes that it is important to understand that the employer operates marine repair facilities and is a separate subsidiary of a company that is a shipbuilder of recreational vessels, emphasizing that the employer is not a shipbuilder. He argues that since the employer used the Viking built boats at its facilities for promotional and commercial purposes, the vessels were no longer recreational vessels and the employer "lost its qualifying exclusion under" the statutory amendment and the newly promulgated regulations pertinent to the amendment. 33 U.S.C § 902(3)(F)(2009); 20 C.F.R. §§ 701.501 and 701.502.

The Section 2(3)(F) of Act, which pertains to employees covered by the Act, provided the

following prior to the 2009 amendment involved in this case:

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, repair, or dismantle any recreational vessel under sixty-five feet in length; . . . if . . . [they] . . . are subject to coverage under a State workers’ compensation law.

33 U.S.C. § 2(3)(F)(1984).

The term “recreational vessel” was not clearly defined in the implementing regulation other than it restated the statutory exclusion and provided “*recreational vessel* means a vessel manufactured or operated primarily for pleasure, or rented, leased or chartered by another for the latter’s pleasure” It then goes on to explain how length of a vessel is to be measured. 20 C.F.R. § 701.301(a)(12)(F).

The 2009 amendment to Section 2(3)(F) of the Act changed the exclusion as it eliminated the 65 foot length of the vessel limitation for individuals employed to repair any recreational vessels. 33 U.S.C. § 2(3)(F)(2009). Now, these repair workers are excluded from coverage of the Act, regardless of the length vessel, so long as the workers are covered by a State workers’ compensation law. *See* 20 C.F.R. § 701.501(a)(2)(Dec. 30, 2011).

Interestingly, Mr. DeJesus’ 2010 injury would not have been covered by the Act prior to ARRA, if he only performed repair work for the employer on recreational vessels. The reason for this is that he was performing repair work at the time of the injury on a vessel that was less than 65 feet in length. The employer conceded and I found coverage under the Act in the related litigated cases where the claimant was performing the same job duties in the years prior to the effective date of ARRA. *DeJesus v. Viking Yacht Company, Inc., et. al.*, 2010-LHC-00359 (May 30, 2012) (ALJ). I therefore initially question whether it was intended in passing ARRA that the claimant and other similarly situated marine repair workers are to be automatically excluded from coverage under the Act solely because one of the vessels on which repairs are being performed was built to be used for recreational purposes.

The claimant argues that the use of the vessels on which marine repair work is being performed must be considered in determining whether the vessels are recreational. In this case, the employer indeed was using some of the boats on which the claimant performed repair work for other than recreational purposes. These Viking built boats were owned by the parent company and used by the employer for sea trials for potential customers and taken to boat shows obviously for sales or commercial purposes. Of course, these vessels were built by the parent company for recreational use. Nevertheless, I believe these boats lost their recreational character when used by the employer for something other than recreation. I question that it was intended in passing ARRA that the recreational description would follow these boats indefinitely. This is not too say, as the employer suggests, that if an owner purchases a boat for recreational purposes,

but uses it to entertain a client and discusses business with that client that the boat's use changes from recreational to commercial. Indeed, it is indicated in the frequently asked questions pertaining to the promulgation of the new regulations applicable to ARRA that if a vessel is used infrequently to carry passengers-for-hire, for charter with a crew provided, chartered and carries more than 12 passengers, or is engaged in commercial service, the vessel may still be considered recreational.²

The federal register sheds light on what was intended in passing ARRA and in promulgating the regulations pertaining to the statutory change. Obviously, the term "recreational vessel" of ARRA essentially rendered the existing definition of the term to be without limitation. It was therefore anticipated that both employers and employees could encounter difficulties in determining whether a vessel is recreational. Also, the Department of Labor strived to ensure that individuals who perform repair work on vessels that have a significant commercial purpose are not improperly excluded from coverage under the Act because the definition of "recreational vessel" as contained in ARRA is overly vague broad. 75 Fed. Reg. 158, 50718 (2010) (to be codified at 20 C.F.R. Part 701) (proposed August 17, 2010). Hence, 20 C.F.R. Part 701 was proposed and subsequently adopted. 76 Fed. Reg. 251, 82117-82129 (Dec. 30, 2011).³ The purpose of Section 701.501 of that part of the regulations was to provide "a more widely-familiar and workable definition of the term" recreational vessel. 75 Fed. Reg. at 50718. It in part provides categories of use of a vessel that will not be considered recreational, including a vessel routinely engaged in "commercial service." 20 C.F.R. § 701.501(b)(2)(D) (Dec. 30, 2011).

It also is evident from reading the comments in the federal register pertaining to the new regulations regarding ARRA that the Department of Labor was especially concerned about affecting the Supreme Court's principal that "maritime employment" for purpose of the Act is a unitary concept that coverage of the Act is met so long as some of an employee's overall work includes "some qualifying maritime employment" whether or not the employee was performing activity covered by the Act when injured. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265, 273 (1977). The problems associated with the amount of work time needed to constitute "some qualifying maritime employment" also were considered in addressing these comments. *See* 75 Fed. Reg. at 50724. This also is matter that needs to be addressed in this case in order to determine whether the amount of time the claimant spent in repairing the vessels owned by the parent company and used by the employer routinely for commercial or business purposes represented sufficient time to justify coverage under the Act.

The courts generally have conferred coverage under the Act even if maritime duties are infrequently performed so long as the activities are a regular part of the employee's overall job. *Kilburn v. Colonial Sugars*, 32 BRBS 3, 5 (1998). There are several cases where 5% or less of maritime work has been held to be sufficient to afford coverage under the Act. *See Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980)(suggesting 2½% to 5% sufficient); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS

² <http://www.dol.gov/owcp/dlhwc/lsnewregfaqs.htm> (March 6, 2012).

³ These regulations were not in effect at the time of the claimant's injury, but provide guidance as to the how ARRA was to be implemented.

34 (1997)(held 1½% to 3% over a five year period sufficient to constitute maritime employment); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997)(held 3% to 5% of time sufficient to confer maritime status); and, *Atlantic Container Service v. Coleman*, 904 F.2d 611 (11th Cir. 1990)(affirming a finding that 4% to 5% of employment facilitated loading/unloading process and qualified as maritime employment). Moreover, a claimant whose mechanic's work on equipment used in land-based commerce has been held to be covered by the Act because he at times worked on equipment used in maritime commerce. See *Insinna v. Sea-Land Service, Inc.* 12 BRBS 772 (1980); *Arjona v. Interport Maintenance Company, Inc.*, 31 BRBS 86 (1977); *Sea-Land Services, Inc. v. Director, OWCP(Ganish)*, 685 F.2d 1121 (9th Cir. 1982).

At the time of the claimant's injury in 2010, nine of the forty boats docked at the employer's repair facilities were owned by the parent company and used by the employer in sea trials for potential customers and in boat shows obviously for demonstration or commercial purposes. Therefore, it is reasonable to assume that more than a minimal amount of the claimant's work time was devoted to maintaining and repairing these vessels. For this reason, I find that this repair work is sufficient to afford the claimant continuing coverage under the Act, although he also spent a significant amount of his time in repairing and maintaining Viking built recreational vessels. In fact, he was working on a recreational vessel when he suffered the injury involved in this case. I reiterate he was covered under the Act in performing this same job in the years prior to 2009 and ARRA should not be interpreted to exclude him from coverage for the injury involved in this case merely because the purpose of the amendment to the Act was to eliminate the 65 foot vessel length limitation provided in the prior statute.

The employer also argued that its facilities were used exclusively for repair and warrantee work on Viking build boats which were used for recreational or pleasurable activities. The evidentiary record does not support this position. The facilities also were open to the public and the employer simply did not know how or for what purpose all of the owners used the vessels that were being repaired there. Employer also acknowledged that its employees performed repair or service work on the boats owned by its parent company and some of the local Viking dealers that were used for seas trials for potential customers and boat show purposes. The evidence establishes that not all of the vessels on which the claimant and similarly situated employees perform repair were used exclusively for recreational purposes. Had the employer maintained its facilities exclusively for service or repair of recreational vessels, its employees would have been excluded from the Act. However, it chose to commingle the recreational boats with vessels used for non-recreational purposes thereby affording its repair workers continuing coverage under the Act. Thus, I find the claimant's job related injury on February 2, 2010 falls within coverage of the Act rather than Florida workers' compensation.

Attorney Fees

No award of attorney's fees for services to the claimant is made herein since no application for fees has been made by the claimant's counsel. Counsel is hereby allowed twenty business days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties,

including the claimant, must accompany the petition. The parties have twenty business days following the receipt of such application to either resolve this issue or file objections to the application for attorney's fees. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

For the above-stated reasons, **IT IS HEREBY ORDER** that the claimed filed by Luis DeJesus for an injury that he suffered on February 2, 2010 while working for Viking Yacht Company, Inc. falls within the jurisdiction of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*

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DONALD W. MOSSER
Administrative Law Judge