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Issue Date: 14 May 2012

CASE NO.: 2011-LHC-1848

OWCP NO.: 07-191797

IN THE MATTER OF:

KERWINN TEMPLE

Claimant

v.

GLOBAL CONSTRUCTION & EQUIPMENT, LLC

Employer

and

LOUISIANA COMMERCE & TRADE ASSOCCIATION – SELF INSURERS' FUND

Carrier

APPEARANCES:

CHRISTOPHER R. SCHWARTZ, ESQ.
JACOB GOEHRING, ESQ.
For The Claimant

PATRICK H. PATRICK, ESQ.
For The Employer

Before: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*., (herein the Act), brought by Kerwinn Temple (Claimant) against Global Construction & Equipment, LLC (Employer), and Louisiana Commerce and Trade Association (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing, which was conducted on March 8, 2012, in Covington, Louisiana. Each party was represented by Counsel, and each presented documentary evidence, examined and cross-examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1 and 5, and Employer's Exhibits 1-18. This decision is based upon a full consideration of the entire record.[2]

Based upon the stipulations of Counsel, the evidence introduced, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

STIPULATIONS

The parties stipulated (JX-1), and I find:

1) The date of Claimant's injury is February 26, 2011; Employer was given notice of the injury on this day.

2) The injury was within the course and scope of Claimant's employment.

3) There was an Employer/Employee relationship at the time of the accident.

4) The Notice of Controversion was filed on April 26, 2011.

5) An Informal Conference was held on June 15, 2011.

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[1] The parties were granted time to file post-hearing briefs.

[2] References to the transcript and exhibits are as follows: Claimant's Exhibits: EX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-___.

ISSUES

The unresolved issues presented by the parties are:

1) Applicability of the Longshore Act;

2) Causation of current physical restrictions;

3) Nature and extent of Claimant's injuries;

4) Claimant's average weekly wage at the time of the accident; and

5) Claimant's entitlement to Section (7) medical benefits and indemnity benefits.

STATEMENT OF THE EVIDENCE

I. Testimonial Evidence

Claimant is 40 years old. He testified he had no physical restrictions prior to February 26, 2011. Hired as a structural welder, Claimant started work with Employer on December 12, 2010, prior to which he had been a pipe welder at Avondale Shipyards for over 10 years off and on. He had joined Employer a month after leaving Avondale the last time. At Avondale he earned $21.65 per hour. With Employer, Claimant was earning $26.84 per hour, and he was working with ten other welders about 70 hours per week.

Mandeville Wharf is on the Mississippi River in New Orleans and has been abandoned as a port for vessels. It is being converted into a public park with an amphitheatre. Employer had contracted to cut out and replace old beams under the decking, which was to become a parking area for the planned park. As a welder, Claimant's duties were to go beneath the concrete decking, cut out the old iron beams and replace them.

The wharf adjoined the navigable river, and the area where Claimant worked, and fell, actually was over water. Claimant said he parked his vehicle each morning, took steps down to a barge where a safety meeting was held each day, then went under the wharf and stood there on "pick boards" resting on cement pilings. (EX-2; EX-3).

Early in the morning of February 26, 2011, while walking on the pick boards to the site of his work that day, Claimant misstepped and fell against the boards he was walking on, striking his left elbow and left low back. His tools fell in the water and fellow workers helped him up. Claimant was then taken to West Jefferson Hospital where a bruise was noted on his back and the emergency room doctor diagnosed a sprained back.

The accident happened on a Saturday, and when Claimant tried to return to work on Monday, he could not perform his duties. Claimant left work and went to the company doctor, Dr. Bourgeois. He was given no medication, so Claimant went to the emergency room for needed pain medication. In total, Claimant saw Dr. Bourgeois on three occasions and he took Claimant off work for one month, and compensation was paid for that single month.

Claimant said he was dissatisfied with Dr. Bourgeois, so he exercised his choice of physician and placed himself in the care of Dr. Gessner. An MRI was performed, he was taken off work, and Claimant was referred to Dr. Wearing for injections. Claimant was also seen by Dr. Kay who recommends surgery. Claimant has not worked since the accident.

On cross examination, Claimant conceded to a pulled muscle in his back in 1991 and automobile accidents in 2000 and 2002, which injured his back. He also agreed he had been untruthful about his prior back injuries when he completed his job applications. (EX-8; EX-12).

Bryan Rickson, a fellow welder, worked with Claimant and explained that they were reinforcing the decking under the abandoned wharf. On February 26, 2011, after the morning safety meeting on the barge, Mr. Rickson said they left the barge and started walking out on the boards when the Claimant, who was ahead of him, fell. He pulled the Claimant up by his arms and sat him down to recover.

Greg Rink also testified. He was the general supervisor on the job. The task of changing I-beams that supported the decking started Thanksgiving of 2010. The wharf was being converted to a recreational park and new I-beams were needed to support the parking deck.

FINDINGS AND CONCLUSION OF LAW

The 1972 amendments to the LHWCA extended coverage landward to workers performing their duties in certain areas adjacent to navigable waters. Section 3(a) defines the covered "situs," which refers to the place where claimant is injured:

> 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 1972, Congress also added a "status" requirement in Section 2(3), which refers to the nature of the work performed:

> 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...

33 U.S.C. § 902(3). Both the situs and status requirements must be met for a claimant to be covered under the Act.

Prior to the 1972 amendments of the LHWCA, only an employee injured on navigable waters in the course of their employment was covered under the Act, regardless of whether that employment possessed a direct or substantial relation to navigation or commerce. *Director v. Perini North River Assoc. et al*., 459 U.S. 297, 311 (1983). The Act did not extend to longshoremen whose injuries occurred on the pier attached to the land. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). In *Perini*, the Supreme Court held that Congress, in their amendments, intended to continue coverage under the Act for workers who were injured while on navigable waters, as was the case prior to 1972. 459 U.S. at 318-320. The court held that these employees satisfy the situs *and* the newly added status requirement "because they are required to perform their employment duties upon navigable waters." [3] *Id.* at 324. The claimant in *Perini* was injured while working on a cargo barge supervising operations relating to the construction of a sewage treatment plant extending over the Hudson River; in other words, he was injured while performing his duties "on navigable waters." Therefore, he was found to be engaged in maritime employment for purposes of coverage under the amended Act as he would have been found covered under the original Act.

[3] In a footnote, the Court stated that its holding "extends only to those persons 'traditionally covered' before the 1972 amendments. We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters." *Id.*, 459 U.S. at 324 n.34.

Injuries other than those on floating structures are not as easily determined as having occurred "on navigable waters." In *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996), the Board affirmed the administrative law judge's conclusion that claimant's injury, which occurred when he slipped on a gangplank and fell onto a dock, occurred over navigable waters and qualifies him as a maritime employee under *Perini*. A gangplank used for ingress and egress of a vessel is considered part of the vessel, and injuries occurring on gangplanks fall within the realm of admiralty law; therefore, the Board determined that the place of the inception of an injury-causing incident is the critical element in ascertaining whether admiralty or state jurisdiction applies. *Id.* at 3-5. In *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980), the claimant was injured while supervising work from a concrete pier piling out in the river. Even though the claimant normally spent more than 90% of his time on barges or in the water, the court held that at the moment of his injury he would not have met the "on navigable waters" situs requirement of the pre-1972 Act as the pilling was attached to the land. *Id.* at 1217.

Regarding situs for those not injured "on navigable waters," the Act lists six covered sites: any adjoining pier, wharf, dry dock, terminal, building way, or marine railway. Section 3(a) goes on to state "or other adjoining area customarily used by an employer in loading, unloading, repairing dismantling or building a vessel." It has been suggested that a grammatical construction of this language supports a conclusion that the "customarily used" phrase modifies only "other adjoining area. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 280, 6 BRBS 150, 170 (1977); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1218 n.8, 12 BRBS 681, 684 n.8 (5th Cir. 1980); *Rhodes v. Healy Tibbits Constr. Co.*, 9 BRBS 605 (1979). However, the Fifth Circuit has held that even the six enumerated locations must show some functional relationship to maritime work, despite the title given to the location. *Thibodeaux v. Grasso Prod. Management, Inc.*, 370 F.3d 486, 38 BRBS 13(CRT) (5th Cir. 2004). The Fifth Circuit has further interpreted the Act as requiring that the situs meet the statutory requirements as of the time of the injury. *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (2003), *aff'd,* 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005); *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977), *reaff'd*, 575 F.2d 79, 8 BRBS 468 (5th Cir. 1978); *Trotti*, 631 F.2d 1214. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future.

Section 2(3) addresses the nature of an employee's duties, rather than the site of their execution. In *Caputo*, the Supreme Court stated that status involves an occupational test which does not require that a claimant must be engaged in maritime employment at the time of injury; rather, an employee is covered as long as he spends "at least some of his time" in covered work. 432 U.S. at 273. While the specific duties constituting "maritime employment" are not defined by the Act, various occupations have been addressed by the case law. The Supreme Court has held that coverage is not limited to

employees who are called "longshoremen" or who physically handle cargo, and maintenance workers are not excluded just because they have other duties not integrally connected with loading or unloading. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). A worker "who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment." The connection to loading or construction of ships the key characteristic. In *Herb's Welding, Inc., et al. v. Gray*, 470 U.S. 414 (1985), the Claimant was injured on a fixed offshore oil-drilling platform where he worked as a welder, building and replacing pipelines and doing general maintenance. The Court held that offshore drilling is not a maritime activity, and the claimant's welding work had nothing to do with loading or unloading; he built pipelines and platforms and the nature of those activities "is not significantly altered by the marine environment." *Id.* at 422, 425.

Aside from employees engaged in shipbuilding, ship repair or ship-breaking, the Board has defined the general category of coverage as a harbor-worker as including employees 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 (1978). In *Crawford v.Trotti & Thompson, Inc.*, 9 BRBS 685 (1979), *aff'd*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980), the Fifth Circuit rejected any distinction between building a pier and repairing one. The maritime connection remains essential for establishing status of a harbor-worker, as it is for status of a longshoreman. In *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989), the claimant, whose work involved the repair of a seawall with no maritime purpose, did not have status as the Board found no portion of his work was maritime in nature despite the fact that it was next to water. In *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003), the Board affirmed the administrative law judge's finding that claimant's job of removing pilings from the bank of the bayou and placing them in dumpsters does not satisfy the status requirement. The job was not maritime work because it was not established that it was related to the loading, unloading, building, or repairing of vessels, or to building or repairing a harbor facility used for such activity. *Id.* at 3. No evidence was adduced as to what was to be done to the area once the pilings were removed. *Id.* at 6.

In this instance, Claimant argues that both the status and situs requirements are satisfied in his case as he was engaged in construction related to maritime activities, and therefore, coverage under the Act should extend to his injuries. Employer, on the other hand, contends that Claimant does not meet the occupational criteria of Section 2(3) because the work in which he was involved was not related to loading, unloading, building, repairing, or breaking a vessel. Employer also urges that Claimant does not meet the pre-1972 amendment test because he was on framework and supports of the wharf and not upon navigable waters at the time of his injury.

If Claimant had been injured on the barge adjacent to his work area under the wharf, he may have been able to establish that he was injured "on navigable waters," thereby establishing situs and status. Instead, he was injured by hitting the cement slab after falling on the pick boards, neither of which floats in the water. The cement slab is attached to the pilings embedded in the river bank, to which the pick board is attached allowing Claimant to walk above the water to do his work. Neither the pick board nor the cement slab can be analogized to the floating cargo barge in *Perini*. The gangplank injury in *Kennedy* is also distinguishable from Claimant's injury as he was not injured on the pick board attached to the barge. 30 BRBS 1. The facts of Claimant's case instead are very similar to those in *Trotti* where Claimant was injured while working on pilings embedded in the river bed. The origination of his injury was on a structure attached to the land, not attached to something floating on navigable waters. Therefore, Claimant has not established situs according to the pre-1972 amendment test or *Perini*. He was not "on navigable waters" at the time of his injury.

Additionally, situs is not established by Claimant as per the requirements in Section 3(a). While the Mandeville Street Wharf at one time was the site of maritime commerce activities, this was no longer the case at the time of Claimant's injury. The wharf was abandoned. It was no longer used for maritime commerce. (Tr. 87). The purpose of Claimant's work was to convert the wharf into a recreational area. It lacked a functional relationship to maritime work, as did the putative situs in *Thibodeaux*. 370 F.3d at 494.

Even if the situs test of Section 3(a) was met merely because the Mandeville Street Wharf had at one time been used as a commercial wharf, Claimant nevertheless failed to establish that he was engaged in "maritime employment." Duties such as repairing and maintaining a wharf fall under the duties of a harborworker. However, as in *Silva* and *Dickerson*, I find Claimant's job was not maritime work because it was admittedly not related to the loading, unloading, building, or repairing of vessels, or to building or repairing a harbor facility used for such activity. Claimant was repairing what was once used as a harbor facility so that it could be used as a recreational facility. Claimant's work in no way would facilitate shipping or commerce at that site. This particular wharf no longer had a maritime connection, and as a result, Claimant's employment activities there did not either.

While Claimant did spend some time on a barge adjacent to his work area, that time was also insufficient to trigger status under the Act. He stored his tools on the barge, but the Fifth Circuit has explicitly held that loading and unloading one's tools does not constitute "meaningful work responsibilities." *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999). Each morning, Claimant attended a short safety meeting on the barge; on the day of his injury the meeting lasted 10 minutes. (Tr. 23). Claimant testified that he worked on a project on the barge doing welding on a pipe to be placed in the water, but his supervisor, Mr. Rink, did not recall anything about such a project. (Tr. 53;

83-84). Claimant also stated that "a couple of times" he worked on the barge the whole day, "loading stuff on the barge." There is not enough evidence in the record to support the notion that Claimant participated in longshoring activities vis á vis his time on the barge. Ultimately, the presence of the barge at the worksite and the activities Claimant did upon the barge were not related to the purpose of furthering any activities related to shipping, loading, or unloading. As previously discussed, the whole purpose of the work being done by Claimant at the former Mandeville Street Wharf, whether it was on the barge or below the wharf, was to create a recreational and tourism area. The maritime environment that Claimant worked in did not convert Claimant's activities into maritime employment.

Based on the foregoing, I find that Claimant has not established situs and status as required by the Act. Therefore, his injury is not covered under the Act.

ORDER

The Claimant's claim for benefits made under the Longshore and Harbor Workers' Compensation Act is hereby **DENIED** for lack of jurisdiction.

So **ORDERED** this 14th day of May 2012, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge