

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 January 2013

CASE NO.: 2012-LHC-00503

OWCP NO.: 07-192717

IN THE MATTER OF

**DAVID MARTIN,
Claimant**

v.

**AMERI-FORCE, INC.,
Employer**

and

**SIGNAL MUTUAL INDEMNITY ASSN., LTD.,
Carrier**

APPEARANCES:

John Jacob Goehring, Esq.
On Behalf of Claimant

Edward S. Johnson, Esq.
On Behalf of Employer

BEFORE: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.* brought by David Martin (Claimant) against Ameir-Force, Inc. (Employer) and Signal Mutual Indemnity Association, Ltd. (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 a formal hearing. The hearing was held before the undersigned on September 13, 2012, in Covington, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant offered 9 exhibits, Employer/Carrier offered 10 exhibits which were admitted into evidence along with one Joint Exhibit. Claimant and Employer's representative testified at hearing. This Decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:

1. Claimant is alleging that he sustained injuries to his back on October 20, 2010 and October 21, 2010.
2. An employer-employee relationship existed on October 20 and 21, 2010.
3. Notice of Controversion was timely filed.
4. Informal Conference was held on November 3, 2011.
5. Claimant had two periods of employment with Employer.
6. Employer's pay records from February 14, 2010 to June, 20, 2010 show that Claimant had gross earnings of \$7,220.25 plus per diem pay of \$7,991.50. For the pay period ending 6/27/10 through pay period ending 10/24/10, Claimant was paid gross earnings of \$23,443.85.
7. Claimant began alternative employment in April 2011 at a rate of \$40.00 per hour or \$25,000 per month.

II. ISSUES

The unresolved issues presented by the parties are:

1. Coverage under the Act, Situs and Status.
2. Whether Claimant is owed compensation under the Act.
3. Whether Claimant is owed medical benefits under the Act.
4. Whether Claimant is in need of any medical treatment.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant has an extensive employment history that includes work in the offshore oil and gas industry, boat fabrication, offshore platform fabrication, and management. (Tr. 11).

¹ References to the transcript and exhibits are as follows: Transcript: Tr.__; Claimant's Exhibits: CX-__; and Employer/Carrier Exhibits: EX-__.

Claimant was first hired by Employer in February 2010 to work as a first-class fitter for McDermott. He continued in this position until the Gulf oil spill in June 2010 at which time McDermott laid off all its contractors. Claimant was out of work for approximately two weeks. (Tr. 12-13).

At the end of June 2010, Employer brought Claimant on as a coordinator to handle its oil spill operations out of Grand Isle, LA. Claimant was tasked with assigning cleanup crews to boats and coordinate operations with Danos & Curole and British Petroleum (BP). Claimant was also assigned to coordinate with the U.S. Coast Guard in Fourchon, LA. (Tr. 15).

In describing a typical work day, Claimant testified that his mornings would start at 6:00 am with a safety meeting and briefing with all employees assigned to work out of Grand Isle. Anywhere from 60 to 80 employees would be in attendance. Claimant would address any complaints made or problems raised by the employees and would make sure all employees had the necessary safety gear before heading out. The meetings typically lasted 30 minutes and were necessary since many of the cleanup workers were inexperienced. (Tr. 15-17).

The Grand Isle group was broken up into 15 groups assigned to 15 boats. Claimant would make sure the daily supplies including cleaning equipment, absorbent pads, cleaning boom, etc. were on the boats. Claimant would often coordinate with the boat captains concerning the cleanup needs of the day. (Tr. 18).

After seeing the Grand Isle employees off, Claimant would travel to Fourchon where Employer had approximately 26 people working, some offshore and others onshore performing decontamination, loading, and unloading of boats. (Tr. 19). This typically took Claimant until 11:00 am. Additionally, a few times a week Claimant would have to handle personnel issues including housing problems, sickness, injuries, fighting, sexual harassment complaints, etc. (Tr. 20).

Around lunch, Claimant would always try to make it to the field office located in the middle of Grand Isle. Claimant estimated that it was approximately 6 miles from A-Port, where the morning Grand Isle meetings were held, and 8 miles from Fourchon. Claimant guessed it was about 500 feet from the waterfront. At the office Claimant would take care of employee time records and all other personnel issues that had come up. (Tr. 21-22). After lunch, Claimant would handle what he termed "rat killing" which included any issues concerning the hotels housing the workers whether it is trashed rooms, the discovery of drugs, or unauthorized occupants. (Tr. 23). These duties would typically last until three or four o'clock in the afternoon. At that time, the boats would begin coming in. Claimant was responsible for ensuring that all employees returned safely. Cleanup activity was gauged by the number of soiled bags of absorbent pads that came off the ships each day. (Tr. 24). Claimant's field duties would typically end each day at around 6:30 pm, at which time Claimant would return to the field office trailer to complete an end-of-day report, timesheets, and preparation for the following day. Claimant admits he could work 17-18 hours on a daily basis. (Tr. 25).

Around the beginning of October, operations began to slowdown and layoffs were occurring. Around the second week of October 60 employees, comprising of almost the entire

remaining workforce, were laid off. By the end of the second week of October, Employer's operations were nearly done. (CX-4). Employer asked Claimant to begin shutting down operations by closing and returning the first of four field office trailers, two in Grand Isle and two in Fourchon, to Mobile, AL around October 15, 2010. (Tr. 29; CX-4). Claimant would clean and prepare the trailers by securing any loose or heavy items and disconnecting all utilities and sewerage. Claimant prepared and returned the second trailer October 19th. (Tr. 31).

On the morning of October 20, 2010, Claimant began preparing the third trailer for transport. While moving a bulky television set, Claimant felt a strain in his back. Claimant testified that he mentioned the strain to his supervisor, Philip Wheeler, fifteen minutes after during a telephone conversation. Claimant stated that Mr. Wheeler's response was "[y]ou're going to be all right" and he should "[j]ust tough it out." Claimant believed that his back would be okay. Claimant drove the third trailer to Mobile and returned to Grand Isle that night. Upon returning to Grand Isle Claimant called Mr. Wheeler who instructed him to ready the last trailer for transportation the next day. Claimant stated that he decided to prepare the trailer the next day because he was tired and his back hurt. He woke the next morning feeling okay. (Tr. 32-34).

Claimant began preparing the final trailer on the morning of October 21, 2010. As he was removing an air conditioner unit he felt a pain in his back. Claimant finished his duties, called Mr. Wheeler and told him that he had aggravated his back. Claimant testified that Mr. Wheeler's response was laying him off, telling Claimant not to worry about the fourth trailer and to leave the keys at one of the hotels being used by Employer. Claimant stated that he tried calling and texting Mr. Wheeler in the following weeks because he felt he needed to see a doctor. Claimant testified that Mr. Wheeler did not return any of his calls. (Tr. 24-36).

Claimant visited the emergency room at Leonard Shabert Hospital where he told the doctor he was experiencing pain on his left side of his lower back with burning in his left leg. Claimant was referred to the ACC clinic for further testing. (Tr. 37). The emergency room doctor told Claimant not to bend over and pick up more than 50 pounds. (Tr. 40).

Claimant saw a nurse practitioner on November 22, 2010 at the ACC Clinic and had x-rays and blood work done. Claimant was prescribed muscle relaxers for his back. (Tr. 39). Claimant testified that over the next six weeks with the use of the muscle relaxers, his back began to feel better. (Tr. 43).

At the end of January 2011, Claimant saw Dr. Schultz at the Occupational Medical Clinic in Houma. After taking x-rays and conducting tests, Claimant testified that Dr. Schultz would only release him for light or medium duty work with a restriction of lifting 50 pounds. That was the last time Claimant saw a doctor. (Tr. 44, 98). In April 2011, Claimant took a light duty position with CMSI where he still works today. (Tr. 45).

On cross examination, Claimant testified that in January 2011, he was ready, willing, and able to return to work for Ameri-Force. Before he could return, Employer required clearance from a doctor. It was at this time that Claimant's doctor only released him to return to medium duty work with restrictions on lifting more than 50 pounds. (Tr. 48-49). Claimant's current job

with CMSI as an inspector consultant, contract consultant pays him \$40.00 an hour and approximately \$25,000.00 a month. (Tr. 51).

Claimant's responsibilities while working for Employer as employee relations manager included coordinating worker schedules and housing; liaising with Danos & Curole and the U.S. Coast Guard; and training of workers. (Tr. 54-59).

The trailer Claimant used as an office was in the central part of Grand Isle, in the middle between the Gulf of Mexico and the bay. Claimant estimated that the dock where he would meet with the workers for morning safety briefings was approximately 6 miles from his trailer. (Tr. 61-62; EX-8; CX-4).

Everyday Claimant accompanied the workers to the boats at that A-Dock and Sand Dollar loading docks to ensure that everyone got onboard alright. Claimant testified that he did not always help load equipment onto the boats and that some days it was loaded before he got there. The same was true for unloading at the end of the day. (Tr. 71-72).

Claimant testified that he was specifically instructed by his supervisor, Philip Wheeler, or another superior to physically load the equipment on the boats if necessary. (Tr. 75-76). This typically included two to ten bags of absorbent pads. (Tr. 78-79). According to Claimant, the loading of cleanup equipment was generally handled by the Ameri-Force crew leader. (CX-4). All loading and unloading of decontamination tanks was done with cranes not operated by Claimant. (Tr. 82). Additionally, Claimant was not involved in decontamination operations outside of scheduling workers. (Tr. 84). The individual workers were responsible for removing their own equipment and soiled absorbent pads from the boats and when they failed to do so the boat captains usually handled it. (Tr. 85-86; CX-4).

Claimant estimated that he spent approximately 15 to 20 percent of his average day actually loading or unloading boats. Claimant admitted that he also did not physically load or unload the boats every day. (Tr. 106-07).

B. Testimony of Philip Wheeler

Philip Wheeler is a branch supervisor for Employer in Louisiana and Mississippi. Mr. Wheeler was Claimant's supervisor during his employment with Employer. Claimant was hired as an employee relations manager/coordinator and assigned to Grand Isle and Fourchon operations. Mr. Wheeler testified that Claimant's duties included: coordinating with Employer's Westwego office; setting up worker rotations; maintaining timesheets; performing safety meetings; and coordinating worker housing. Mr. Wheeler testified that loading and unloading boats was not part of Claimant's job and he would question why Claimant was spending as much time engaged in those activities. (Tr. 116-19). O'Brien was responsible for overseeing the loading and unloading of the boats. Many of the boats were being loaded and unloaded while offshore, the soiled boom was unloaded offshore before the boats would return at the end of the day. (Tr. 126, 133-34). Claimant's main duty, as it related to the boats, was to ensure that the cleanup personnel were assigned to and present on their specified vessels. (Tr. 128).

Mr. Wheeler testified that as cleanup operations were winding down, he and Claimant discussed that his employment was coming to an end. (Tr. 121-22). Mr. Wheeler stated that Claimant had done an excellent job supervising the workers under him and coordinating with the Coast Guard, Danos & Curole, and the O'Brien group. (Tr. 125).

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S. Ct. 88, 98 L. Ed. 5 (1953). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of the rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994), *aff'g*. 990 F.2d 730 (3rd Cir. 1993).

Contention of the Parties

Claimant contends that the situs requirement is met due to the fact that at the time of his injury, Claimant was in the process of breaking down trailers used to house personnel and equipment that was part of the BP oil spill cleanup operation. Claimant asserts that the site of his injury, while not over navigable water, was within a few hundred yards of the dock/muster area for the cleanup operations. Claimant also argues that he has met the status requirement because he spent up to eight hours each day assisting and instructing the responders with the loading and unloading operations. Specifically, that Claimant held daily safety meetings and both loaded and unloaded oil boom from the chartered vessels.

Employer/Carrier contend that Claimant lacks a maritime status and that there is no nexus between breaking down the trailers and maritime employment. Employer/Carrier argue that Claimant's work was far removed from traditional maritime activities. While Claimant had duties coordinating cleanup workers, at the time of Claimant's injury this work had ended and his exclusive duties at the time were breaking down the trailers and transporting them to Mobile, AL. Additionally, Employer/Carrier asserts that Claimant's duties lacked the functional nexus to maritime employment and that his activities fail the status test. Should the undersigned find that Claimant has met the jurisdictional requirements of the Act, Employer/Carrier argue that Claimant is not entitled to ongoing medical benefits because there is no plan for future treatment of Claimant's alleged condition.

Jurisdiction and Coverage under The Longshore and Harbor Workers' Compensation Act

A. Situs

The threshold issue in this case is whether there is jurisdiction under the Act in order for Claimant to be covered by its provisions. To be covered under the Act, a claimant must meet both the *status* requirement of Sections 2(3) and the *situs* requirement of Section 3(a). 33 U.S.C. §§ 902(3), 903(a). Section 3(a) states:

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 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). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Melerine v. Hunter Constr. Co.*, 26 BRBS 197 (1992). To be considered a covered situs, a site must have a maritime nexus, but need not be used exclusively or primarily for maritime purpose. *See Textports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980)(en banc), cert. denied. 452 U.S. 905 (1981); *Melerine*, 26 BRBS at 197; *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, and that court has adopted a broad view of the situs test, refusing to restrict it by fence lines or other boundaries. Specifically, the court stated that the perimeter of an “area” is to be defined by function and that the character of the surrounding properties is but one factor to be considered. An area can be considered “adjoining area” within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Winchester*, 632 F.2d at 514-16, 12 BRBS at 726-29; *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Thus, the geography and the function of an adjoining area are of utmost importance. *Stroup*, 32 BRBS at 154. “[I]f a particular area is associated with items used as part of the loading process, the area need not itself be directly involved in loading or unloading a vessel or physically connected to the point of loading or unloading.” *Coastal Prod. Servs. Inc. v. Hudson*, 555 F.3d 426, 434 (5th Cir. 2009).

In *Winchester*, the Fifth Circuit held that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a nexus to maritime activity in that it was used to store gear which was used in the loading process. *Winchester*, 632 F.2d at 514-16, 12 BRBS at 726-729. The facts of the instant case are distinguishable from *Winchester*. Here Claimant alleges that he sustained a back injury while “breaking-down” trailers used for housing and offices during the coordinated cleanup of the 2010 Gulf oil spill. Claimant admits that these trailers were not over navigable waters and were located several hundred yards from the docks/muster areas where cleanup operations were based. While the location of the trailers may arguably be in the vicinity of a navigable waterway, the distinguishing characteristic is that the location has no nexus to maritime activity. Claimant attempts to demonstrate a nexus by explaining that the trailers served the interests of the clean-up operations and they were the prime location for storing safety equipment worn by the workers. However, unlike the gear room in *Winchester* which had a clear nexus to maritime activities, the trailers broken down by Claimant do not. Claimant testified that trailers served as offices for the coordination of the personnel assigned to cleanup duty and asserts that the storage of safety equipment at this site demonstrates a substantial nexus to maritime activity. Nothing about the trailers or their use at the time of Claimant’s injury or during Employer’s operation was associated with the loading/unloading process or items used as part of these processes. Accordingly, Claimant has failed to establish that he has fulfilled the situs requirement for coverage under the Act.

B. Status

The Act confers maritime status on “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) (2006). An employee may qualify for maritime status based on either (1) the nature of the activity in which he is engaged as the time of the injury or (2) the nature of his employment as a whole. *Coastal Prod. Services Inc. v. Hudson*, 555 F.3d 426, 439 (5th Cir. 2009). Occupations in addition to those enumerated in the statute will be covered as maritime employment if the occupation entails activities that are an integral or essential part of the loading, unloading, building, or repairing of a vessel. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 47, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989). Additionally, the employee’s maritime activities must be more than episodic, momentary, or incidental to his non-maritime work. *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980). “[P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered.” *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 267, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). Likewise, the intent of Congress was to cover those persons whose employment is such that they spend at least some of their time in indisputably longshoring operations. *Id.* at 273, 97 S.Ct. at 2362.

Claimant’s title was employee relations manager/coordinator whose main responsibility was managing the workers hired by Employer to assist with the cleanup of the BP oil spill. Claimant asserts that 15 to 20 percent of his 17 or 18 hour work day included loading and offloading equipment. Accordingly, Claimant contends that at least 2.5 hours a day were spent loading and unloading boats. While Claimant certainly worked long hours, his testimony regarding time spent performing his other duties not associated with the boats used in the cleanup operations makes his assertion unlikely. Claimant’s testimony also equated supervision and coordination of personnel to loading and unloading operations. Further, Claimant’s supervisor, Mr. Wheeler, testified that all supply, loading, and unloading activities were the responsibility of another company outside of the control of Claimant. According to Mr. Wheeler Claimant should never have been involved in such activities and he doubts Claimant’s assertions that he had. It cannot be said that Claimant was engaged in maritime employment as enumerated in the Act.

As Claimant was not employed in any of the occupations enumerated in the statute, his work must have been integral or essential to the loading, unloading, building, or repairing of a vessel to be covered under the LHWCA. Claimant here argues that his work included coordinating and supplying the oil cleanup workers. These duties have nothing to do with the loading, unloading, building, or repairing of a vessel. Claimant’s connection to activities covered under the Act is not only indirect but so far removed from what can be considered to be maritime employment in order to have status under the Act.

Conclusion

In light of the foregoing, I find that the Act's jurisdictional requirements of situs and status have not been satisfied. Therefore, the remaining issues are rendered moot and any ruling thereon is unwarranted.

V. ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

Claimant's claim for benefits under the Act is hereby **DENIED**.

SO ORDERED this 15th day of January, 2013, at Covington, Louisiana.

**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**