RECENT DEVELOPMENTS IN MARITIME LAW

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FAIR LABOR STANDARDS ACT

Seaman Status under the FLSA

5th Circuit

- ***Adams v. All Coast, LLC*, 988 F.3d 203 (5th Cir. 2021).**

The Fifth Circuit in *Adams* sought to determine whether a crane operator working on a liftboat was properly denied overtime pay after being classified by the trial court as "seaman" under the Fair Labor Standards Act ("FLSA").

Significantly, the FLSA provides that any employee who works "longer than forty hours" in a workweek must be compensated "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). "An employee is not protected by this broad prohibition, however, if he falls within an exemption." *Coffin v. Blessey Marine Servs., Inc*., 771 F.3d 276, 279 (5th Cir. 2014). Among the exemptions to the FLSA's standards are employees employed as "seamen" *under the FLSA.* 29 U.S.C. § 213(b)(6). Significantly, the parameters of who is a "seaman" are not defined in the Act.

After setting forth the applicable law under the FLSA, the Fifth Circuit turned to its prior decision in *Coffin.* In that case, the Fifth Circuit held that an employee is a seaman for FLSA purposes if: "(1) the employee is subject to the authority, direction, and control of the master; and (2) the employee's service is *primarily* offered to aid the vessel *as a means of transportation*, provided that the employee does not perform a *substantial amount of different work*." *Coffin*, 771 F.3d at 281 (*citing* 29 C.F.R. § 783.31).

The liftboat employer argued that "crane operation was one of many fully integrated seaman's duties that aided in the safe operation of the vessel as a means of transportation of personnel and equipment." In contrast, the workers argued that their main job was crane operation, which they posited had nothing to do with the operation of the vessel as a means of transportation.

The Fifth Circuit ultimately ruled in the employees' favor. In doing so, the Court found instructive deposition testimony that established the plaintiffs "spent between 25% and 90% of their day operating the crane"—but only when the liftboats were stationary, and never when underway. In the Court's opinion, the plaintiffs were not aiding in the navigation of the vessel under these facts because they performed loading or unloading operations only "at the beginning or end of a voyage."

Later in the opinion, the Fifth Circuit acknowledged that many of the plaintiffs' duties did fall under the definition of "seaman's work." The Court concluded, however, that that work was not enough to overcome the "substantial" amount of work not performed in aiding the vessel as a means of transportation.

JONES ACT

Contributory Negligence

5th Circuit

- ***Andrew Lee Knight v. Kirby Offshore Marine Pacific, LLC*, 983 F.3d 172 (5th Cir. 2020).**

In *Andrew Lee Knight v. Kirby Offshore Marine Pacific, LLC*, the 5th Circuit recently held that a Jones Act seaman can be contributorily negligent when following a supervisor's general orders.

Seaman Andrew Knight, brought a Jones Act claim against his employer, Kirby Offshore Marine Pacific LLC, for an ankle injury sustained when he stepped on a chafed line while installing a its replacement.

The district court found Kirby negligent because the captain ordered Knight to change the chafed line during inclement weather conditions. The court also held Knight contributorily negligent by 50% because he placed the chafed line in an areas where he could step on it and because he failed to watch his footing. The district court also awarded, inter alia, $60,000 for Knight's general damages for pain and suffering.

Knight appealed, arguing that the district court erred as matter of law in finding he was contributorily negligent because he was following an order at the time of his injury. He also contested the award of only $60,000 in general damages.

Knight relied on dicta from *Williams v. Brasea,* Inc. In that case, the Fifth Circuit stated that "a seaman may not be contributorily negligent for carrying out orders that result in his own injury, even if he recognized possible danger." The majority rejected Knight's argument and found that the rule in *Williams* was unnecessary for deciding the issue before the court.

The court analyzed Knight's Jones Act negligence claim by distinguishing between general and specific orders—that is, whether the task the seaman is ordered to do can be accomplished in more ways than one—and reiterated the principle that a seaman must perform his tasks with ordinary prudence under the circumstances. The majority held that the order given to Knight was a general order and therefore did not trigger the *William's* dictum, which applied to specific orders.

The majority further upheld the district court's finding that Knight was contributorily negligent because he failed to watch where he stepped, but remanded for the district court to reassess the percentage of Knight's contributory negligence as to the placement of the chafed line on the deck.

Last, the majority affirmed the district court's award of general damages, as not reversibly too low.

Judge Ho concurred with the majority opinion that *Williams* is not controlling in this case. Judge Elrod dissented, reasoning that *Williams* applied because Knight was given an order.

Accordingly, Judge Elrod disagreed with the majority's opinion that Knight was contributorily negligent.

Seaman Status

7th Circuit

- ***White v. Fincantieri Bay Shipbuilding*, No. 19-C-946, 2019 U.S. Dist. LEXIS 217259 (E.D. Wis. Dec. 18, 2019)**

Plaintiff sued for injuries sustained while working as a technician on a towing motor vessel during sea trials. Plaintiff was an employee of Engine Motor, Inc. and was aboard for the sea trials to observe the vessel's steering equipment. During the voyage, he allegedly suffered traumatic brain and cervical spine injuries.

The plaintiff asserted claims under the LHWCA, the Jones Act, and for unseaworthiness as well as state law claims for negligence, respondeat superior, and punitive damages. The defendants filed 12(b)(6) motions to dismiss the Jones Act and the state law claims for negligence and punitive damages.

The court examined the question of the plaintiff's "status" and determined that he was not a Jones Act seaman, but instead fell within the LHWCA's "ship repairman" or "shipbuilder" definitions. The Court reiterated that unseaworthiness is a remedy exclusively for seaman and not for longshoreman. Accordingly, the plaintiff's classification as a longshoreman was found to be dispositive of not only his unseaworthiness claims, but also his state law negligence claims by application of the LHWCA. Regarding punitive damages, the Court noted that while they were not recoverable based on state law, this did not necessarily prevent their recovery based on maritime law.

8th Circuit

- ***Upper River Servs., LLC v. Heiderscheid*, No. 19-cv-00242 (SRN/ECW), 2020 U.S. Dist. LEXIS 9757 (D. Minn. Jan. 21, 2020)**

The plaintiff towboat company, Upper River Services, LLC, filed a declaratory judgment action seeking to have the district court rule that one of employees who was injured on the job was a Jones Act Seaman subject to federal maritime law and not state worker's compensation law. At the time of the declaratory judgment action, the employee had submitted a state worker's compensation claim, which was subsequently dismissed for lack of jurisdiction.

The employee was a deckhand and spent 59% of his time aboard the company's towboats. During the winter months when portions of the Upper Mississippi were closed to commercial traffic, the deckhand would work on land for the towboat company. The employee was working on land when his injury occurred. Both sides moved for summary judgment, seeking a determination as to his status as a Jones Act seaman.

In considering the parties' dispositive motions, the Court framed the question as follows: Was the employee a Jones Act seaman during the his normal work, and, if so, did he retain seaman status in the winter while performing shoreside tasks for his employer. The court found that the nature of the employee's work as a deckhand on towboats made him a Jones Act seaman during the regular season.

The court further found, relying in part on analogous cases from the Fifth Circuit, that the employee's assignment to shoreside activities was temporary and did not alter the fundamental nature of his employment or relationship to the vessels. Furthermore, all of Upper River's vessels remained in the water and the employee could have been called to work on them at any time while assigned to shore-side activities. Further, the employee's 59% of time working aboard vessels greatly exceeded the 30% guideline articulated by the Supreme Court for determining seaman status in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 371 (1995).

LHWCA

Substantial Nexus to OCS

5th Circuit

- ***Mays v. Chevron Pipeline Co.*, 968 F3d 442 (5th Cir. 2020).**

The 5th Circuit recently addressed what constitutes a "substantial nexus" to activities on the Outer Continental Shelf (OCS), extending the Longshore and Harbor Workers' Compensation Act (LHWCA) to a fatality in state waters.

The decedent was killed by an explosion on a facility in Louisiana waters while employed by a contractor to Chevron.

The decedent's widow and children sued Chevron for state-law wrongful death. Chevron's defense relied on which workers' compensation scheme applied to the decedent's employment. If the Louisiana State Workers' Compensation Act applied, Chevron would have been immune from suit. If the LHWCA applied, Chevron would not have been immune.

Chevron filed for summary judgment. The trial court initially agreed that the LHWCA did not apply and Chevron was immune under Louisiana's compensation act. But the plaintiffs filed a motion for reconsideration, and the trial court decided to put the question to a jury.

The jury sided with the plaintiffs, awarding over $2.9 million. It held that the LHWCA applied because the facility had a substantial nexus to the OCS.

Chevron appealed to the 5th Circuit. Chevron claimed that the jury instructions violated the U.S. Supreme Court's decision in *Pacific Operators Offshore, LLP v. Valladolid*, which interpreted the federal law extending LHWCA coverage to OCS activities. Chevron argued that the jury should have been asked if the OCS activities of the decedent's direct employer (the contractor for Chevron) caused the decedent's death. Because the contractor had no OCS activities,

the LHWCA could not have applied to negate Chevron's state immunity. Chevron argued that asking the jury instead about Chevron's OCS activities was legal error.

The 5th Circuit rejected Chevron's argument. It found that the inquiry is more general and requires a link only between the decedent's injury and extractive operations conducted on the OCS. The 5th Circuit held there was ample evidence to support the jury's decision that there was a sufficient link, including that:

- The gas that escaped the valve and fueled the explosion was from the OCS.
- The platform that exploded was connected to two OCS platforms, and gas flow from these platforms had to be shut down because of the accident.
- The decedent's employer repaired Chevron's valves extensively.
- The decedent's employer provided valve services in the past for on-OCS platforms.

Based on these facts, the 5th Circuit refused to disturb the jury's finding that there was LHWCA coverage. This decision is significant. It adopted a broad construction of whether LHWCA coverage can be extended to OCS operations that impact platform workers located in state territorial waters.

Status and Situs

5th Circuit

- ***MMR Constructors, Inc. v. Dir*., OWCP, 954 F.3d 259 (5th Cir. 2020).**

This case arose when Henry Flores, a quality assurance and control technician for MMR Constructors ("MMR"), was injured while working on Chevron's offshore oil platform, Big Foot. Although Big Foot is currently located on the Outer Continental Shelf of the Gulf of Mexico, at the time of Flores' accident it was under construction at a shipyard in Corpus Christi Bay. While under construction, the platform floated in the bay on pontoons, connected to land by steel cables and utility lines. Flores brought a claim against MMR under the Longshore and Harbor Workers' Compensation Act ("Act") and as extended by the Outer Continental Shelf Lands Act ("OCSLA"). An Administrative Law Judge ("ALJ") found that although Flores was injured in navigable waters, he was not a maritime worker, and thus failed to meet the status requirement under the Act. Flores appealed the ALJ's order before the Benefits Review Board ("BRB"), which upon review overturned the order. The Board relied on the Supreme Court's decision in *Perini*[1] to conclude that Flores was covered under the Act because he was injured in navigable waters. Subsequently, MMR appealed to the Fifth Circuit.

[1] *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 299, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983). *Perini* was issued after the 1972 amendments to the LHWCA, whereby the situs requirement was expanded to include certain adjoining areas and a "status" component was added requiring employees be engaged in maritime employment within the meaning of the Act.

In order to determine if Flores was entitled to benefits under the Act, the Fifth Circuit had to answer, first, if Flores was injured on navigable waters; and, second, if his employer was a statutory "employer." As to the first issue, the court considered the Supreme Court's ruling in *Perini* and two Fifth Circuit cases[2] that were issued before the 1972 amendments to the Act, and found that when a craft resting on navigable waters is permanently attached to land, then the water underneath the craft is removed from navigation and is not navigable under the Act. Distinguishing from those cases, the Court noted that Big Foot was only temporarily attached to land while under construction, as it was built to be moved offshore to drill for oil and gas in the Gulf of Mexico. Thus, Flores was injured in navigable waters. As to the second issue, the court found that Flores' presence on the water was not transient or fortuitous, as he had been working on Big Foot for MMR on navigable waters for several months before his injury; MMR had notice of its potential exposure under the Act. Thus, the Fifth Circuit held that, because Flores was regularly employed by MMR on navigable waters, and he met the definition of "employee" under *Perini*, it followed that MMR had at least one employee engaged in maritime employment, and as such it was a statutory employer under the Act.

Turnover Duty

11th Circuit

- ***Purvis v. Maersk Line A/S*, 795 F. App'x 756 (11th Cir. 2020)**

Plaintiff longshoreman Albert Purvis was injured aboard a vessel when a hatch cover "crashed down" onto his head as he reached the top of the stairs he was climbing. This caused him to fall to the platform below. Purvis sued the vessel/Maersk Line A/S ("Maersk") pursuant to Section 905(b) of the LHWCA alleging that the vessel breached its turnover duty by leaving a hatch cover in a condition such that it could fall. The Southern District of Georgia granted summary judgment for Maersk, and the Eleventh Circuit affirmed on appeal.

Purvis appealed based solely on the turnover duty arguing the hatch was either defective or a Maersk employee opened the hatch cover and failed to latch or secure it properly. The Eleventh Circuit held that a video filmed by Purvis' counsel almost three years after the incident depicting him manipulating the hatch's latch was not undisputed evidence sufficient to overcome summary judgment. While the video depicted Purvis' counsel manipulating the same hatch, and he caused it to close unexpectedly on a third attempt, there was no accompanying testimony to explain why the video demonstrated the hatch was defective. There was also no testimony to support the notion that the hatch was in the same condition at the time of filming that it was on the day of the accident, years earlier. Purvis himself testified that he had no recollection of the condition of the hatch at the time of his accident. There was "no evidence, other than speculation, that the hatch cover and lock were defective on the day of the accident." *Id.* at 759.

[2] *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971) and *Travelers Insurance Co. v. Shea*, 382 F.2d 344 (5th Cir. 1967).

Secondly, Purvis alleged that a Maersk employee left the hatch open but failed to secure it. Purvis had no direct evidence of this allegation. He also testified that he had been working on the same level as the hatch on the day of the accident and could have visually inspected the hatch at any time earlier in the day. Purvis had previously dealt with unsecured hatches on other vessels and such circumstances are obvious to a "reasonably competent" longshoreman. That it was dark at the time of the accident had no bearing on the issue. The Eleventh Circuit reasoned that if the hatch door was not latched, it should have been open and obvious to Purvis "when he, as an experienced longshoreman, could have remedied the potential hazard." *Id.* at 760.