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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000924-WC

JASON E. MORRIS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00462

OWENSBORO GRAIN CO., LLC;
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND KELLER, JUDGES.

ACREE, JUDGE: Jason E. Morris petitions for review of a decision of the Workers' Compensation Board. The Board affirmed an order of the

Administrative Law Judge (ALJ) which held that compensability for Morris's work-related injuries fell exclusively within the purview of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (LHWCA), and that there was no concurrent jurisdiction under Kentucky's Workers' Compensation Act, Kentucky Revised Statutes (KRS) Chapter 342. We affirm.

On August 13, 1998, Morris started working at Owensboro Grain, a soybean and grain processing refinery located on the Ohio River. Two docks beside the plant are connected to the riverbank by catwalks. Barges deliver raw materials such as soybeans which are unloaded at the docks, and take away the finished products of meal and pellet feed for livestock. Morris estimated that he spent sixty percent of his time maintaining and monitoring the computerized machinery which makes the pellet feed. The other forty percent of his time was spent performing deckhand duties such as hooking winch cables to the barges in order to maneuver them at the docks.

On February 8, 2008, after he had finished loading some product onto a barge, Morris slipped and fell while climbing from a dock onto a platform. He caught himself by grasping a beam over his head and dislocated his shoulder. He immediately sought emergency medical treatment. He then consulted an orthopedic surgeon who found several lesions and performed an arthroscopy with anterior capsule labral repair and superior labral anterior-posterior (SLAP) repair. Morris continued to work, performing light duty, from the date of his injury through the date of the surgery on May 5, 2008. Following the surgery, he

remained off work for approximately three weeks. He returned to work with restrictions through September 2008 when he was released to full-duty work by his surgeon without any restrictions. The record contains the First Report of Injury, dated the day of the accident and completed by Steve Coomes, the safety manager for Owensboro Grain. It describes the accident as occurring at "Meal Pier" and identifies Morris as a "deckhand" who "normally works" in shipping/receiving. The report specifies that Morris's injury was reported under the LHWCA, a federal law designed to provide compensation for injured maritime employees. Morris received benefits under Owensboro Grain's LHWCA coverage provided by Liberty Mutual Insurance; Morris later testified that at the time he filed his claim, he was unaware of the type of coverage Owensboro's insurance provided.

On May 3, 2010, Morris sought state workers' compensation benefits. Owensboro Grain denied the claim, asserting that Morris's injury was not covered under Kentucky's workers' compensation law because he qualified for federal benefits under the LHWCA.

Following a hearing, the ALJ found that Morris's injury fell within the exclusivity provisions of the LHWCA and held that Kentucky has no jurisdiction over the subject matter under its workers' compensation statutes.

On appeal, the Board agreed that Morris's injury fell within the jurisdiction of the LHWCA, and that he did not qualify as an employee authorized to prosecute a concurrent state workers' compensation claim. The Board's opinion included a dissent, which agreed with the majority that the injury fell within the jurisdiction of

the LHWCA, but contended that Morris had met his burden of showing that Owensboro Grain had elected to provide state workers' compensation coverage. This petition for review followed.

Our standard of review requires us to show deference to the rulings of the Board.

> The function of further review of the WCB in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

Western Baptist Hosp. v. Kelly, 827 S.W.2d 685, 687–88 (Ky. 1992).

All employees in Kentucky are subject to the provisions of the workers' compensation act with the exception of several classes of employees specified in KRS 342.650. Employers may elect to provide voluntary workers' compensation coverage to such exempted employees. KRS 342.660. One type of employee that is specifically exempted from coverage is "[a]ny person for whom a rule of liability for injury or death is provided by the laws of the United States[.]" KRS 342.650(4). In this case, the Board affirmed the ALJ's determination that Morris was a member of this exempted class because he was covered by the provisions of a federal statute, the LHWCA. The Board also agreed with the ALJ that Morris had failed to show that Owensboro Grain had elected to provide voluntary state workers' compensation coverage to exempted employees under KRS 342.660.

On appeal, Morris argues that there was concurrent jurisdiction under the LHWCA and the Kentucky workers' compensation statutes such that he could elect to proceed under either, and that he had met his burden of proving that Owensboro Grain had elected to provide voluntary state workers' compensation coverage to exempted employees.

The LHWCA was passed in 1927 as a response to the holding of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917). In *Jensen*, the United States Supreme Court ruled that Article 3, § 2 of the United States Constitution, which vests "[e]xclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction . . . in the Federal district courts[,]" barred states from applying their workers' compensation systems to maritime injuries. *Jensen*, 244 U.S. at 218, 37 S. Ct. at 529; *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 717, 100 S. Ct. 2432, 2435, 65 L. Ed. 2d 458 (1980). By enacting the LHWCA, Congress sought to provide a federal compensation system for injuries "occurring upon the navigable waters of the United States[.]" *Sun Ship*, 447 U.S. at 717, 100 S. Ct. at 2435.

Difficulties thereafter arose in determining whether an injury fell within the exclusive jurisdiction of the LHWCA. For instance, in *Davis v. Department of Labor and Industries of Washington*, 317 U.S. 249, 251, 63 S. Ct. 225, 226–27, 87 L. Ed. 246 (1942), a steelworker employed to dismantle an abandoned drawbridge was working on a barge, cutting the scrap steel into manageable lengths, when he

was knocked into the river and drowned. The Supreme Court characterized the ensuing jurisdictional predicament as follows:

> Harbor workers and longshoremen employed "in whole or in part, upon the navigable waters" are clearly protected by this Federal Act [the LHWCA]; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation[.]

Id. at 253, 63 S. Ct. at 227 (citation omitted).

As a result of this "shadowy area" of coverage between the LHWCA and state workers' compensation schemes, injured workers were often forced to make "a jurisdictional guess before filing a claim; the price of error was unnecessary expense and possible foreclosure from the proper forum by statute of limitations." *Sun Ship*, 447 U.S. at 718, 100 S. Ct. at 2435.

The Supreme Court thereafter attempted to solve, or at least to clarify, the jurisdictional conundrum by delineating a "twilight zone" of concurrent jurisdiction for "maritime but local" injuries occurring on "navigable waters" that could be compensated under the LHWCA or under state law. *Davis*, 317 U.S. at 256, 63 S. Ct. at 229; *Sun Ship*, 447 U.S. at 718, 100 S. Ct. at 2436.

In 1972, the LHWCA was amended. Its coverage was extended beyond the original "navigable waters" *situs* to include injuries which occurred on "certain adjoining land areas." *Director, OWCP v. Perini North River Associates*, 459 U.S.

297, 299, 103 S. Ct. 634, 637, 74 L. Ed. 2d 465 (1983). The LHWCA currently provides that

> 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.A. § 903(a). To ensure that purely land-based employees were not included within the Act, "Congress added a *status* requirement that employees covered by the Act must be 'engaged in maritime employment.'" *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 420, 105 S. Ct. 1421, 1425, 84 L. Ed. 2d 406 (1985). An employee is defined in the statute as "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.A. § 902(3). An employer for purposes of the LHWCA means

> an employer any of whose employees are employed in maritime employment, in whole or in part, 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, or building a vessel).

Id. § 902(4).

Employees injured on actual navigable waters need not meet the new *status* requirement because their injuries would have been covered under the pre-1972 version of the LHWCA. As the *Perini* court stated,

> we are unable to find anything in the legislative history or in the 1972 amendments themselves that indicate that Congress intended to withdraw coverage from employees injured on the navigable waters in the course of their employment as that coverage existed before the 1972 amendments.

459 U.S. at 325, 103 S. Ct. at 651.

Morris argues that the ALJ erred in finding that his injuries fell within the exclusive purview of the LHWCA. He contends that, as a land-based worker with some longshore responsibilities, his injury falls within the twilight zone of concurrent jurisdiction. We agree insofar as Morris's injury did not occur upon the navigable waters and would not therefore have been automatically covered under the pre-1972 LHWCA. The Board found that "[s]ince Morris was injured on a dock while working as a deckhand in the process of loading and unloading barges on the Ohio River," he met the both the *status* and *situs* tests and qualified to invoke the coverage of the LHWCA.

> By enlarging the covered situs and enacting the status requirement, Congress intended that a worker's eligibility for federal benefits would not depend on whether he was injured while walking down a gangway or while taking his first step onto the land. Congress therefore counted as "longshoremen" persons who spend "at least some of their time in indisputably longshoring operations."

P. C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 75, 100 S. Ct. 328, 333, 62 L. Ed. 2d 225 (1979) (citation omitted). The Board explained that even though longshoring operations comprised only forty percent of Morris's employment, he still qualified as a "maritime employee" for purposes of the LHWCA. The Board correctly assessed the evidence in reaching this conclusion.

As we noted earlier in this opinion, the Board further held that Kentucky's Workers' Compensation Act did not apply to Morris because he fell within the class of employees described in KRS 342.650(4), which exempts from coverage "[a]ny person for whom a rule of liability for injury or death is provided by the laws of the United States[.]" KRS 342.650(4).

Morris argues that the exemption under KRS 342.650(4) should apply only in cases where the federal compensation scheme is truly exclusive, as it is for postal workers and federal employees, not in the case of the LHWCA where concurrent jurisdiction may be available. But the plain language of the statute does not specify that the rule of liability must be exclusive, and we decline to attribute such a meaning to the statute. Hypothetically, therefore, Morris's injury did fall within the twilight zone of concurrent jurisdiction. But the Board further ruled that Morris could not invoke state jurisdiction because he failed to meet his burden of showing that Owensboro Grain had elected to provide workers' compensation coverage under KRS 342.650.

An employer may elect to provide worker's compensation coverage for exempted employees like Morris under the following circumstances:

(1) An employer that has in its employment any employee exempted under KRS 342.650 may elect to be subject to this chapter. This election on the part of the employer shall be made by the employer securing the payment of compensation to these exempted employees in accordance with KRS 342.340. Any employee, otherwise exempted under KRS 342.650, of the employer shall be deemed to have elected to come under this chapter, if at the time of the injury for which liability is claimed, his or her employer has in force an election to be subject to this chapter with respect to the employment in which the employee was injured and the employee has not, either upon entering into employment or within five (5) days after the filing of an election by the employer, given to his or her employer and to the commissioner notice in writing that he or she elects not to be subject to this chapter.

(2) An employer within the scope of subsection (1) of this section, within five (5) days after securing the payment of compensation in accordance with KRS 342.340, shall give the commissioner written notice of its election to be subject to this chapter. The employer shall post and keep posted on the premises where any employee or employees, otherwise exempted under KRS 342.650, works, printed notices furnished by the commissioner stating its acceptance of this chapter. Failure to give the notices required by this paragraph shall not void or impair the employer's election to be subject to or relieve it of any liability under this chapter.

(3) Any employer who has complied with subsection (2) of this section may withdraw its acceptance of this chapter, by filing written notice with the commissioner of the withdrawal of its acceptance. A withdrawal shall become effective 60 days after the filing of notice or on the date of the termination of the security for payment of compensation, whichever last occurs. The withdrawal shall not be effective until the employer shall theretofore post notice of the withdrawal where the affected employee or employees work or shall otherwise notify the employees of withdrawal.

KRS 342.660.

The Board held that Morris did not meet his burden of showing that Owensboro Grain maintained a policy of insurance voluntarily extending the payment of Kentucky workers' compensation to its exempted employees in accordance with KRS 342.660. "It has long been determined that the burden of proving by competent evidence all facts necessary to establish a claim for compensation is on the claimant." *Collier v. Wright*, 340 S.W.2d 597, 598 (Ky. 1960). The Board observed that Owensboro Grain, in addition to shipping finished products and receiving raw materials by means of barges along the Ohio River, also operated a grain and soybean refinery. The Board found that it was reasonable for the ALJ to infer that Owensboro Grain, in the operation of its refinery, employed workers who had no connection with its longshoring operations, and for whom it had to provide workers' compensation under state law. The Board observed that "[w]hile it is apparent Liberty Mutual [Owensboro Grain's insurance carrier] provided insurance on behalf of Owensboro Grain both with respect to the LHWCA and KRS Chapter 342, there is absolutely no proof in the record establishing the coverage overlapped." Board Opinion at 25. Furthermore, there is no indication that Owensboro Grain provided notice to the Board, or to its employees, that it had chosen to cover exempted employees, although of course such notice is not mandatory under KRS 342.660(2). We agree with the Board that knowledge of the actual terms of the insurance agreement was necessary to determine whether Owensboro Grain had elected to provide state workers'

compensation coverage for employees whose injuries might also fall within the ambit of coverage provided under the LHWCA. As the Board aptly stated

> If, as we have concluded, Morris fell within a class of persons expressly exempt from coverage pursuant to KRS 342.650(4), it stands to reason, as the party asserting voluntary coverage under KRS 342.660, he was charged with establishing that jurisdictional fact. It further stands to reason if Morris failed in that burden, the twilight zone rule, for purposes of concurrent state and federal jurisdiction, has no application.

Board Opinion at 27.

Morris argues that Owensboro Grain acknowledged that there was coverage by purchasing insurance and filing notice of insurance with the Kentucky Department of Workers' Claims. But this notice of insurance, which is printed from the Department's website, does not specify whether Owensboro Grain has elected to provide coverage for any exempted employees and is therefore of little evidentiary value. We agree with the Board that mere procurement of insurance by an employer does not create a presumption of coverage that would shift the burden of proof to the employer to show a lack of coverage for employees exempted under KRS 342.650.

Morris further argues that Owensboro Grain has never denied that there was coverage, and in its litigation of this claim stressed only the exclusivity of the LHWCA. Whatever the tactical approach taken by Owensboro Grain in defending this claim, Morris "clearly bore the burden of proving by competent evidence all facts necessary to establish Kentucky jurisdiction for his claim." *Eck Miller*

Transp. Corp. v. Wagers, 833 S.W.2d 854, 858 (Ky. App. 1992). The Board did not err in holding that he had not met this burden.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
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