WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEREMIAH BRAZIL, *Applicant*

vs.

BLUE AND GOLD FLEET; AMERICAN ZURICH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ12142266
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Order of March 20, 2020, the Workers' Compensation Judge (WCJ) found that on July 8, 2014, applicant, while employed as a captain by Blue and Gold Fleet at San Francisco, California, sustained an industrial injury to his right knee, that the injury claim was accepted by Charles Taylor, a third party administrator, for maritime cure and maintenance benefits, and that there is no concurrent jurisdiction under California workers' compensation law.

On April 13, 2020, applicant filed a petition for reconsideration of the WCJ's decision. Applicant contends that his employment was maritime but local in character, bringing his industrial injury within the concurrent jurisdiction of California workers' compensation law and federal maritime jurisdiction. Applicant also contends that Labor Code section 5905 confirms the WCAB's jurisdiction over injuries arising outside the territorial limits of California where the injured employee is a resident of this state and the contract of hire was made here.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

At the outset, we observe that to be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now §

10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).[1] In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.[2] Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020. In this case, applicant's petition was filed on April 13, 2020 and it is deemed filed on that date.

Based on our review of the record and applicable law, we conclude that the WCJ erred in finding that there is no concurrent jurisdiction under California workers' compensation law in this case. The applicant herein, a ferry captain who is a "seaman" under the federal Jones Act, was injured while working on the engine of his ferry, which was tied to a pier in Fisherman's Wharf over the waters of San Francisco Bay. As we explain below, the fact that applicant's employer initially provided maritime benefits under federal law does not deprive the WCAB of concurrent jurisdiction over the ferry captain's subsequently-filed California workers' compensation claim. As our Decision After Reconsideration, we will rescind the WCJ's finding of no concurrent jurisdiction and substitute our finding that the WCAB has concurrent jurisdiction over applicant's workers' compensation claim herein.

BACKGROUND

The parties stipulated in this case that applicant, while employed in San Francisco by Blue and Gold Fleet ("employer") on July 8, 2014 as a "vessel captain" of the ferry boat "Zelinsky," sustained an admitted industrial injury to his right knee. Applicant was working inside the engine room of the Zelinsky, checking engine fluid levels, when he slipped on an oily deck plate and

[1] The March 16, 2020 DWC Newsline may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-18.html.
[2] The April 3, 2020 DWC Newsline regarding reopening the district offices for filing may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-29.html.

injured his knee. At the time, the "Zelinsky" was tied up to Berth Five of a pier extending into San Francisco Bay, in the Fisherman's Wharf area. According to applicant's trial testimony, the Zelinsky was "an old, oily vessel."

As a captain, it was applicant's job to make sure the vessels he piloted were properly licensed. According to applicant's trial testimony, the "Zelinsky" was only licensed by the U.S. Coast Guard to sail inside San Francisco Bay and not outside it, in "international waters." While working for this employer, applicant never operated vessels carrying passengers in international waters. There is no dispute that applicant is a California resident and the contract of hire was made in San Francisco.

At the outset, applicant's injury claim was accepted on behalf of the employer by Charles Taylor, a third party administrator, for maritime cure and maintenance benefits pursuant to federal law. Under that coverage, applicant had knee surgery that proved to be unsuccessful. After applicant's right knee worsened over a period of years, his treating physician requested an MRI from the employer in February 2019. The employer denied the request, after which applicant retained an attorney and filed a state workers' compensation claim. Although the employer initially provided benefits pursuant to federal maritime law, it appears that there was never any finding of federal jurisdiction in any formal proceeding brought under the Jones Act.

Zurich, the employer's California workers' compensation carrier, denied applicant's state claim based on the statute of limitations, with the denial letter also stating that "California workers' compensation does not have jurisdiction because [applicant] was a seaman under the Jones Act." (Zurich denial letter to applicant dated June 6, 2019, trial defense exhibit A. See also applicant's exhibit 3, TPA letter to applicant dated February 12, 2019, noting "Jones Act/Maritime" jurisdiction in the heading.)

As noted above, applicant's state claim was tried before the WCJ, who found no state jurisdiction concurrent with applicant's federal claim. We reverse.

DISCUSSION

Although the federal Longshore and Harbor Workers' Compensation Act (LHWCA; 33 U.S.C. § 901 et seq.) is not involved here, the jurisprudence of concurrent jurisdiction has often been addressed in that context, resulting in the development of the "twilight zone" doctrine.

As discussed in the panel decision *Koch v. R.E. State Engineering, Inc.* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 80, the LHWCA establishes a federal system of workers' compensation

benefits for stevedores and other dockside and maritime workers, and LHWCA jurisdiction over an industrial injury may be concurrent with the California Workers' Compensation Act. (Citing *Sun Ship, Inc. v. Pennsylvania* (1980) 447 U.S. 715 [45 Cal.Comp.Cases 1314].) In *Koch*, the panel also noted that the previous acceptance of benefits under the LHWCA does not constitute an election of remedies that precludes the injured worker from subsequently claiming benefits under California's workers' compensation laws. (Citing *Calbeck v. Travelers Insurance Co.* (1962) 370 U.S. 114 [27 Cal.Comp.Cases 204].) However, the injured worker may not receive a double recovery and credit must be allowed against an award for any payment to the extent that a double recovery would otherwise occur. (Citing *Sea-Land Serv. v. Workers Compensation Appeals Bd.* (*Lopez*) (1996) 14 Cal. 4th 76 [61 Cal.Comp.Cases 1360].) Although *Lopez* involved the issue of credit for benefits received under both LHWCA and California's Workers' Compensation Act, our Supreme Court noted that "the rule of concurrent jurisdiction was established to protect maritime workers against the harsh consequences of an exclusive jurisdiction system—under which a mistake in forum selection could result in no benefits at all." (61 Cal.Comp.Cases at 1370.) Whether there is concurrent jurisdiction must be decided by reference to the particular circumstances, on a case by case basis. (*Sun Ship, Inc. v. Pennsylvania* (1980) 447 U.S. 715, 718 [100 S.Ct. 2432, 65 L.Ed 2d 458, 45 Cal. Comp. Cases 1314].)

In *CNA Ins. Co. v. Workers Compensation Appeals Bd.* (*Baker*) (1997) 58 Cal.App.4th 211 [62 Cal.Comp.Cases 1371], the Court of Appeal reviewed the history of case law involving concurrent federal maritime and state jurisdiction, and the Court found that there was concurrent jurisdiction under the circumstances presented there. We believe the principles discussed by the Court in *Baker* provide persuasive guidance in this case.

In *Baker*, injured employee Cella Baker was a Long Beach Water Concessions bartender who spent 80 percent or more of her time working on board the vessels to which she was assigned. While working, Baker was injured crossing the gangway of her assigned vessel; she fell onto the City of Avalon's floating dock when a surge of water destabilized the gangway leading to the dock. Baker claimed compensation under the federal Longshore and Harbor Workers' Compensation Act (LHWCA; 33 U.S.C. § 901 et seq.); she also sued Long Beach Water Concessions, the City of Avalon, and Catalina Cruises (apparent owner of the vessel in question) in California Superior Court, citing both the federal Jones Act (46 U.S.C. Appen. § 688) and general maritime law; and

she filed both an application for benefits under the Jones Act and an application for California workers' compensation benefits.

Navigators Insurance Company covered the employer for LHWCA and Jones Act compensation; CNA Insurance Company (CNA) provided state workers' compensation coverage. Baker settled with the City of Avalon and Navigators in the Superior Court action, and a short time later she settled her LHWCA claim. Baker also received (apparently minimal) workers' compensation benefits, which the Court described as "several small unpaid medical bills and money advanced by the California Employment Development Department." Navigators sought contribution from CNA in Baker's state workers' compensation case. The Board denied contribution but held CNA liable for certain liens (apparently the medical bills and the benefits paid by EDD). The Board rejected CNA's contention that since Baker claimed seaman status for purposes of the Jones Act, federal maritime law was her exclusive remedy. CNA sought review, but the Court of Appeal agreed with the Board. At 58 Cal. App. 4th 226-227, the Court reviewed federal and state case law addressing concurrent jurisdiction and concluded as follows:

> …The survey of these and numerous other cases teaches that the lines drawn are sometimes driven by the language of the state statutes, sometimes by the evidence, sometimes by actual findings of fact or the lack thereof, sometimes by philosophy.
>
> During the early development of the "maritime but local" doctrine, which recognized a state's interest in preventing injured citizens from becoming destitute and public charges, the *Massachusetts Supreme Judicial Court* summarized the problem of the diversity of opinions and *suggested an approach with which we agree* [italics added]:
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> "[A]lthough apparently some heed must still be paid to the line between State and Federal authority as laid down in the cases following the *Jensen* case [*Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205 [37 S. Ct. 524, 61 L. Ed. 1086]], the most important question has now become the fixing of the boundaries of the new 'twilight zone,' and for this the case gives us no rule or test other than the indefinable and subjective test of doubt. . . . Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to regard the Davis case [*Davis v. Department of Labor* (1942) 317 U.S. 249 [63 S. Ct. 225, 87 L. Ed. 246]] as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed <u>to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way</u> [underscoring added], even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one

> way or the other." (*Moores' Case* (1948) 323 Mass. 162 [80 N.E.2d 478, 480-481], affd. *Bethlehem Steel Co. v. Moore* (1948) 335 U.S. 874 [69 S. Ct. 239, 93 L. Ed. 417].)
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> Professor Larson has simply stated that "in those rare instances in which a 'successful' Jones Act proceeding might precede a compensation claim, the normal principle ought logically to be that the same rules apply as in the much more numerous cases in which the sequence is reversed." (9 Larson, The Law of Workmen's Compensation Law, *supra*, § 90.52, p. 16-547.)
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> Here, Baker is a California resident, employed under a contract made within this state, and injured within territorial waters where the City of Avalon has control over the floating dock involved. All parties accept that the LHWCA and the state have concurrent jurisdiction where there is a showing of local interest. We conclude that Baker's contacts with California, coupled with the state's interest in the welfare of its citizens, conferred upon it concurrent jurisdiction with the Jones Act as well.

The Court's opinion in *Baker* indicates that it is appropriate to consider the following factors in determining whether concurrent jurisdiction exists: (1) where "a reasonable argument can be made either way," the Board should include "within a wide circle of doubt" all waterfront cases involving aspects pertaining both to the land and to the sea; (2) whether the injury occurred in "territorial waters" and whether the local California entity has control over the floating dock; and (3) the extent of the injured employee's contacts with California, coupled with the state's interest in the welfare of its citizens.

The facts of this case, considered in light of the three elements described above, support a finding of concurrent federal-state jurisdiction. It appears that factor (1) supports a finding of concurrent jurisdiction because this is a waterfront case involving both land (the ferry was tied to the pier, which connects the ferry to land so passengers can easily embark and disembark) and sea (applicant was a sea captain under the Jones Act). Concerning factor (2), on one hand the injury occurred in territorial waters (as opposed to the open sea); on the other hand the extent to which the City and County of San Francisco controlled the pier, to which the Zelinsky was tied, is not clearly set out in the record. Concerning factor (3), we believe it supports a finding of concurrent jurisdiction because applicant is a California resident who was hired in California, and because the Zelinsky carried both tourists and local commuters within San Francisco Bay. Thus, California has substantial interests in the welfare of the applicant and the passengers he regularly transported. (Accord, *Klip v. Marine Spill Response Corp.* (2012) (Northern Dist. Cal.) 2012 U.S.Dist.LEXIS 16026 [merchant marine claiming intentional infliction of emotional distress not exempted from

workers' compensation exclusivity by reason of his employment aboard a vessel in U.S. navigable waters].)

In *Baker*, the Court also considered *Duong v. Workers' Comp. Appeals Bd.* (1985) 169 Cal.App.3d 980 [50 Cal.Comp.Cases 352], wherein the Court of Appeal held that a land-based shipyard worker was entitled to receive state workers' compensation benefits for injuries incurred while making repairs on a vessel floating in federal navigable waters but tied to a dock, i.e., activities covered by both LHWCA and state compensation laws. In *Duong*, the Court also stated: "When dual federal and state coverage is available, simultaneous applications under each act [are] permitted because the delay in determining whether both or only one of the acts covers injuries incurred in employment arguably overlapping both the state and federal jurisdictions, may allow a statute of limitations to run for claims where the applicant files only with an agency lacking jurisdiction. […] [T]here is no danger of double recovery because an employer's contributions under one will be credited against the other. (*Calbeck v. Travelers Insurance Co.* (1962) 370 U.S. 114, 131 [82 S. Ct. 1196, 1205-1206, 8 L. Ed. 2d 368]." (Id. at p. 982.)"

We acknowledge that the *Baker* Court distinguished *Duong* because it did not involve settlement agreements or the relationship of the Jones Act to a later-filed application for state workers' compensation coverage. Nevertheless, *Duong* speaks to the Statute of Limitations problem faced by applicant in the instant case. That is, applicant and the employer first invoked the Jones Act to provide surgery on his knee, but the delay in the follow-up with maritime care has invited the state workers' compensation carrier to raise a Statute of Limitations defense (deferred by the WCJ for now). In any event, the *Baker* case is similar to this one because as here, *Baker* involved a Jones Act claim in which the applicant also pursued a state workers' compensation claim, with the applicant in *Baker* settling her Jones Act claim first.

In its answer herein, defendant claims exclusive federal jurisdiction based on *Occidental Indem. Co. v. Industrial Acci. Com.* (1944) 24 Cal.2d 310. In that case, the California Supreme Court found exclusive maritime jurisdiction on the following facts: "In the instant case the employee was a seaman. The day before the injury he had been employed as a member of the crew to go on a fishing cruise in navigable waters. The following day he worked on the ship for a while, then at the direction of his employer went on land to get a fishing net, which was certainly an act in the course of and related to his service to the ship. The only reasonable conclusion from those circumstances is that he was a seaman injured in the course of his duties as such." (24 Cal.2d at

321.) Although it appears that *Occidental* has never been explicitly overruled, the *Baker* Court never even mentioned *Occidental* in its 1997 opinion. This is most likely because *Occidental* is out-of-date with respect to subsequent U.S. Supreme Court jurisprudence on the issue of concurrent jurisdiction. As discussed in *Baker*, the high court in *Sun Ship, Inc. v. Pennsylvania* (1980) 447 U.S. 715, 718-719 [100 S. Ct. 2432, 2435-2436, 65 L. Ed. 2d 458] found that that the 1972 LHWCA extension of federal jurisdiction supplements, rather than supplants, state compensation law.

Finally, we note that although some Appeals Board panel decisions issued after *Baker* have disagreed with *Baker's* finding of concurrent jurisdiction, those panel decisions are factually distinguishable. In *House v. Moore Dry Dock Co.* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 556, no concurrent LHWCA/WCAB jurisdiction was found where the parties stipulated that 100% of applicant's work was performed on-board ships in navigable waters. There is no such factual stipulation in this case. In *Collins v. Crowley Tech. Servs.* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 61, no California jurisdiction was found over the workers' compensation claim of applicant, a Bosun seaman, who was injured on board a vessel moored in San Diego while employed by an agent of the United States and while serving as a member of the crew of a vessel owned by an agency of the United States. In this case, applicant was employed by a private employer who is subject to state and local law.

In *Lowery v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 517 (writ den.), the injured worker lashed containers to ships. Because the work was a traditional maritime activity and was almost exclusively performed on board navigable vessels moored in navigable waters, the Board determined that the "twilight zone" doctrine was inapplicable and there was exclusive federal jurisdiction over his claim. In this case, it is true that applicant, as a sea captain, was involved in a traditional maritime activity, but a crucial aspect of his work involved insuring the safety of his land-based passengers, many of whom were California residents. On these facts, we cannot reasonably conclude that applicant's work was 'exclusively performed on board navigable vessels moored in navigable waters,' which distinguishes this case from *Lowery*.[3] And of course *Lowery* is not binding authority, unlike the Court of Appeal's decision in *Baker*.

CONCLUSION

This case falls within the ambit of concern discussed by the Court of Appeal in *Duong*, wherein the Court stated, "the delay in determining whether both or only one of the acts covers injuries incurred in employment arguably overlapping both the state and federal jurisdictions, may allow a statute of limitations to run for claims where the applicant files only with an agency lacking jurisdiction." (*Duong, supra,* 169 Cal.App.3d at 982.)

More importantly, the policy considerations discussed in *Baker*, i.e., the extent of the injured employee's contacts with California, coupled with the state's interest in the welfare of its citizens, weigh in favor of finding concurrent jurisdiction here. Applicant's contacts with California were substantial, if not exclusive, and there is no serious argument that California lacks interest in the welfare of its citizens, who were regularly transported in applicant's ferry over local waters. We follow the *Baker* Court in concluding that the California WCAB has concurrent jurisdiction over applicant's workers' compensation claim herein.

[3] Although there is no digest of the opinion but only a reported headnote, in *Brodine v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 911 (writ den.), the Board found that the WCAB had no jurisdiction over applicant's claim where (1) applicant was a seaman covered under Jones Act; (2) neither the ship on which applicant was working nor applicant had any contact with State of California during applicant's employment; and (3) applicant's only contact with State of California was telephone call notifying applicant of potential employment. Of course, facts (2) and (3) above distinguish the instant case from *Brodine*. Here, both applicant and his ferry had substantial contacts with the State of California, and applicant was a resident of this state at the time of injury.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of March 20, 2020 is **AFFIRMED**, except that Finding 2 and the Order are **RESCINDED**, and the following Finding 2 and Order are **SUBSTITUTED** in their place:

2. There is concurrent jurisdiction under California workers' compensation law.

ORDER

IT IS ORDERED that all other outstanding issues under California workers' compensation law, including but not limited to EDD's lien, are deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and determination of all outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 1, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

JEREMIAH BRAZIL
LARSON VANDERSLOOT & RIVERS
LAW OFFICES OF THOMAS J. BURNS

JTL/bea

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o