



Fourth Circuit Holds Zone of Danger Test Does Not Apply to Award of LHWCA Benefits

2/15/2017

In January, a panel of the Fourth Circuit considered whether the “zone of danger” test outlined by the U.S. Supreme Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) is applicable to a longshoreman’s claim for disability benefits under the Longshore and Harborworkers Compensation Act, 33 U.S.C. § 901 *et. seq.* (LHWCA). In *Ceres Marine Terminals, Inc. v. Director, Office of Workers’ Compensation Programs*, – F.3d – (4th Cir. 2016), 2016 WL 8116747, the Court held that the “zone of danger” test is applicable only in tort claims, and accordingly does not apply to a determination of whether a maritime worker is entitled to workers compensation benefits under the LHWCA.

The Longshoreman Suffers PTSD Because of a Work-Related Accident

Samuel Jackson was employed by Ceres Marine Terminals, Inc. (CMT) as a longshoreman in Portsmouth, Virginia. In March 2011, Jackson was operating a forklift on a pier transporting barrels of container pins. Jackson’s co-worker, Paula Bellamy, was assigned to work nearby as a spotter. During the course of operating the forklift to transport the pins, Samuel was suddenly compelled to turn the forklift quickly in order to avoid a collision with an oncoming truck carrying a 40-foot container. During the emergency turn, Jackson hit the spotter, Bellamy, who became trapped under Jackson’s forklift. There is no dispute that Jackson was never in physical danger during the accident.

Another forklift driver assisted Jackson in lifting the forklift from Bellamy’s badly mangled body. Bellamy’s injuries caused by the accident were both gruesome and horrific. A large crowd gathered at the scene as the emergency medical responders attempted to save Bellamy’s life. Jackson stood approximately 10 feet away from Bellamy and the medical team with a clear, unobstructed view of her mangled body. Ultimately, Bellamy died from the severity of her injuries. Jackson spent the remainder of that day providing official reports to law enforcement, CMT, state officials and federal agencies.

Jackson sought medical assistance one day after the accident. His primary care physician referred Jackson to a social worker who referred him to a clinical psychologist. The psychologist diagnosed Jackson with PTSD "with significant levels of anxiety and depression resulting from the work related accident." Jackson continued to receive weekly treatment from the clinical psychiatrist from mid-2011 through 2013. During this period, Jackson constantly suffered from nightmares and significant levels of guilt, shame and grief, which prevented him from returning to work as a longshoreman.

Jackson's employer, CMT, retained a psychiatrist, Dr. Patrick Thrasher, to conduct an independent review of Jackson's mental condition. Dr. Thrasher opined that Jackson suffered from PTSD and major depression, which were causally related to his work accident. Dr. Thrasher further concluded that because of the severity of Jackson's PTSD and major depression, he was incapable of returning to work. Dr. Thrasher further recommended an increase of Jackson's dose of psychotropic medication.

CMT then requested that the Office of Workers Compensation Programs (OWCP) direct Jackson to submit to yet another independent psychiatric exam pursuant to 33 U.S.C. § 901(e). CMT's request was based on Dr. Thrasher's recommendation of an increase in Jackson's medication. The second psychiatrist, Dr. Mansheim, provided a report of his findings that (1) Jackson was never in danger during the accident, and (2) that he was able to work as a longshoreman. Dr. Mansheim ruled out the PTSD diagnosis and stated that Jackson "demonstrated significant evidence of malingering, attempting to appear more ill than is actually the case." Based on Dr. Mansheim's report, CMT voluntarily terminated Jackson's LHWCA's temporary total disability benefits in 2012.

CMT Opposes Jackson's Claim for LHWCA Benefits on the Basis That He Was Never in the Zone of Danger

Jackson filed a claim for LHWCA disability benefits for his psychological injury and PTSD directly caused by the work-related accident. CMT contested the award of benefits based on the diagnosis of Dr. Mansheim that Jackson did not have PTSD. At the hearing before the Administrative Law Judge (ALJ), CMT relied on the "zone of danger" test articulated by the Supreme Court in *Consolidated Rail*. In *Consolidated Rail*, the Supreme Court analyzed whether a railroad worker was entitled to recover tort damages for a negligence claim against his employer pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA). In that decision, the Supreme Court held that the worker could recover tort damages under a negligence standard only if he was in the zone of danger. "Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." *Consolidated Rail* at 556. Notwithstanding the fact that *Consolidated Rail*

did not consider a non-fault workers' compensation statute, CMT argued, "a claimant cannot recover for a psychological injury unless he sustained a physical injury or is placed in immediate risk of harm."

The ALJ held that Jackson was entitled to temporary total disability LHWCA benefits for PTSD that was directly caused by his work-related injury. CMT appealed the ALJ's decision to the Benefits Review Board (Board), arguing that the *Consolidated Rail* "zone of danger" test precluded an award of LHWCA benefits to Jackson. The Board distinguished the *Consolidated Rail* decision, holding that the "zone of danger" test is only applicable in tort actions concerning common law fault and negligence principles, and not the LHWCA, which is not a fault-based award. The Board affirmed the ALJ's decision awarding benefits to Jackson, holding "that a work related psychological impairment, with or without underlying physical harm, may be compensable under the Act."

The Zone of Danger Test Applies Only to Tort Claims and Not LHWCA

CMT appealed the Board's decision to the Fourth Circuit Court of Appeals. CMT conceded in its argument that benefits could be awarded under the LHWCA for psychological injuries. At the same time, CMT argued the prerequisite for the award of benefits under the LHWCA was that the maritime worker had been within the "zone of danger." The Panel first recognized that the Supreme Court had held that LHWCA "imposes liability without fault and precludes the assertion of various common law defenses." *Potomac Electric Power Co. v. Dir.* OWCP, 449 U.S. 268, 2801 (1980). "Compensation shall be payable irrespective of fault as a cause for the injury." *Id.* The Panel, in reliance on 33 U.S.C. § 903(a), noted that a claimant must only demonstrate that he was a maritime worker within the purview of LHWCA and had suffered a work-related injury.

CMT conceded that benefits could be awarded under the LHWCA for psychological injuries. Notwithstanding that position, CMT relied exclusively on the "zone of danger" test as support for its claim that Jackson was not entitled to LHWCA benefits. The Panel, relying on a Ninth Circuit decision, noted that other courts interpreting § 902(2) of LHWCA have found that claimants are entitled to benefits for work-related psychological injuries, and have never required as a prerequisite that the claimant suffered actual or threatened physical harm as a condition of entitlement to benefits. *Pedroza v. Dir.*, OWCP, 6204 F.3d 926, 931 (9th Cir. 2009). "It is well settled that a psychological impairment, which is work related, is presumed to be compensable under the Act." *Id.*

The Court next held that CMT's "reliance on *Consolidated Rail* is wholly misplaced" because the Supreme Court's decision in that case was limited to a worker's recovery of tort damages under FELA based on

negligent infliction of emotional distress. The Fourth Circuit distinguished FELA, a statute providing a tort cause of action to workers against their employers for work-related injuries, from LHWCA which is a non-fault-based workers' federal compensation system. Accordingly, the Court held that the "zone of danger" test should only be applied to tort-based claims, and is inapplicable to a determination of whether LHWCA benefits should be awarded for a psychological injury.

Katie Matison is a shareholder in the Seattle Office of Lane Powell P.C.

For more information on our team, visit our [**Transportation Practice Group webpage**](#).

For more information, please contact: lanepowellpc@lanepowell.com

1.800.426.5801

lanepowell.com

This is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. If you would like more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

Copyright © 2017 [Lane Powell PC](#)

Seattle | Portland | Anchorage