APPEAL NO. 990787

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 3, 1999, a hearing was held. He determined that deceased died in the course and scope of employment and that it has not been shown that he was covered under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 USC § 901 *et seq.,* a method of compensation established by Federal law which, if shown, would exempt claimant from the 1989 Act (*see* Section 406.901). Appellant (carrier) asserts that deceased was subject to the LHWCA at the time of death, while respondent (claimant) replied that deceased was not covered by the LHWCA.

DECISION

We affirm.

This case presents as a legal question. The facts were basically not in dispute. An overriding point, touched on by the hearing officer, under which this opinion is provided is that the Texas Workers' Compensation Commission (Commission) does not administer the LHWCA and, obviously, has no power to determine its scope in regard to deceased or any other worker. At this point, the Commission has been presented with no ruling by any Federal authority that the deceased either was, or was not, subject to the LHWCA.

Deceased worked for (employer), at the time of his death on _____. The evidence shows that employer provided hydraulic work including repair and design. Employer primarily obtained work through the petroleum industry but did service and repair hydraulics for marine use, including "on board service." Mr. S provided a deposition in February 1999 in which he identified himself as the owner of the employing company. His company performed repair work to pumps both in his shop and on board vessels. His company is "approved" by the American Bureau of Shipping. He has about 20 to 25 employees and estimated, by considering the number of marine jobs secured in the last two years and the number of employees, that about five percent of employer's work is related to marine service. He also said, when asked if anyone in the company worked on more ships than deceased, "probably" Mr. Sh or himself. He said that marine work was not a big part of the business but that it was "being pursued, I believe [deceased] when he came, he was starting to try to pursue that." While the Appeals Panel is not a fact finder, this evidence could indicate that deceased's activity for employer amounted to more than the five percent estimated by Mr. S in regard to employer's total business.

Deceased died from exposure to hydrogen sulfide from oil on the (ship) while working in its pump room; this vessel is a tanker over 700 feet long, of foreign registry docked in City 1, Texas. Mr. Sw is a vice president of employer. He said that deceased and one other worker were in a field service group, and that deceased had been to the (ship) three to four times in _____; deceased was said to be excited about the amount of work that was available on the (ship).

There is some evidence in the record that deceased and another worker with him (who also died) were not fully aware of the danger of hydrogen sulfide and may have lingered to finish a repair after a leak had occurred.

The hearing included no testimony. Depositions of the persons identified above were introduced along with investigative reports, specifications, and time logs of deceased. As stated, there was no significant dispute about the facts, but, of course, certain facts were emphasized by the respective parties.

The LHWCA has been referred to in at least two prior Appeals Panel cases. In both cases, the claimant involved was "covered" under the LHWCA in the sense that employers therein had obtained insurance coverage. In the case under review, Mr. S testified that he filled out reports for his insurance agent showing the various work employer did and thought therefrom that he had obtained LHWCA in addition to Texas Workers' Compensation. Mr. S described an abundance of "fringe benefits" employer provides for its employees. The evidence in the record indicates that deceased was not covered by insurance for accidents occurring under the LHWCA.

As the hearing officer stated, the law in regard to LHWCA has just undergone a significant change in the 5th Circuit. Bienvenu v Texaco, Inc., 124 F.3d 692 (5th Cir. 1997), rev'd en banc, 164 F.3d 901 (5th Cir. 1999). This case cited Director, Office of Workers' Compensation Programs, United States Department of Labor v Perini, 459 U.S. 297, 103 S. Ct. 634 (1983). In that case, a worker was injured while on a cargo barge in the (River) that was being used in the construction of a sewage facility extending over the river. The court said that historically the worker would have been covered since he was "injured on navigable waters." An amendment to the LHWCA in 1972 was said to extend coverage to certain workers even though injured while beside navigable waters. The court considered whether such change diminished the coverage of workers injured on navigable waters and concluded that it did not, although it agreed that the 1972 amendment resulted in both a situs test and a status test for LHWCA applicability. In a footnote, that case mentioned that an employer must have at least one worker working over navigable before any worker injured "on new land situs can be covered." (It could be concluded from Perini that the status test applied to workers adjacent to navigable waters and did not apply to those on navigable waters unless they were excluded by the LHWCA - exclusions to the LHWCA do not appear to be relevant to this review.) The court in Perini said that Congress, in the 1972 amendment, intended to "extend coverage." In a footnote, it said that "most" state workers' compensation laws provide inadequate benefits. Another footnote cited Executive Jet Aviation, Inc. v City of Cleveland, 409 U.S. 249, 95 S. Ct. 493 (1972) in which an aircraft mishap involved a crash onto navigable waters within the continental U.S.; the injury therefrom on navigable water was said to be "wholly fortuitous." The Perini court then stated in another footnote that a "worker's performance of his duties upon actual navigable waters is necessarily a very important factor" but "we express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters". The latter quoted footnote was very significant to the Bienvenu decision provided by the 5th circuit in 1999. However, the Supreme Court has not issued an opinion that transient or fortuitous situs on navigable waters does not result in coverage by LHWCA.

In Bienvenu, the worker maintained automated equipment on offshore platforms which he reached by boat. While going from one to another each day, he worked on equipment relative to the platforms; he did not work on matters relative to the boat he was in. He was injured while on the boat. The court in 1999 stated that he spent 75% of his time working on the platforms, 16.7% in transit on the boat, and 8.3% working on equipment while in the boat. It reversed and remanded a prior decision which said that the worker was not covered by the LHWCA. The en banc court said that it believed the Supreme Court would find that a worker injured while on navigable water transiently or fortuitously would not be subject to the LHWCA. It held that a worker

> injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test only if his presence on the water at the time of injury was neither transient or fortuitous. The presence, however, of a worker injured on the water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient or fortuitous. (Emphasis added.)

The court then seemed to confirm that it was not considering "transient and fortuitous" just in the plain meaning of those words (transient and fortuitous would not seem to call for a measurement of time spent, but, rather, would appear to consider the purpose of the situs on the water), by saying, "[t]hough we decline to set today the exact amount of work performance on navigable waters sufficient to trigger LHWCA coverage, instead leaving that task to the case-by-case development." (Emphasis added.) We note that before the 1972 amendment, which was meant to "extend coverage," the LHWCA was said to cover any injury occurring while the worker was on navigable water.

While the Perini case is read as indicating that deceased in the case under review would certainly qualify for coverage under the LHWCA, that conclusion will not necessarily result in a decision by the Appeals Panel reversing the decision of the hearing officer. Bienvenu addressed a set of facts far different from that of deceased; the worker in Bienvenu was traveling on a boat, which could appear to trigger a question of transience; deceased was working on a pump on the (ship), had worked on that vessel earlier in the same month, and worked on hydraulic systems on ships, if not routinely, regularly; a decision relative to Bienvenu should not normally apply to a fact situation as different as that of deceased, and, therefore, Perini would seem to control. But, the statements in Bienvenu do not speak simply to limiting coverage for a worker who is transiently or fortuitously on navigable water, but appear to be stating that a certain amount of "work performance" must be done on navigable water. Obviously, the Bienvenu holding may reach beyond the facts of that case.

With no guidance from any subsequent "case-by-case development," with the Commission's Appeals Panel not charged with administration of coverage under the LHWCA, with no evidence provided in this case that there has been any determination by Federal officials that the LHWCA applies to deceased, with the facts showing that employer had no insurance coverage of deceased relative to the LHWCA, with Section 406.091,

which exempts workers "covered" by Federal law from receiving benefits under the 1989 Act, also using the word "coverage" in terms of whether an employer has obtained "workers' compensation insurance coverage for an employee" (emphasis added), the Appeals Panel cannot conclude that deceased has been shown to be "covered" by a method of compensation established under Federal law. The hearing officer's determination that deceased's death was in the course and scope of employment was not appealed; neither is the determination that claimant is his legal beneficiary.

Finding no error of law, the decision and order are sufficiently supported by the evidence and are affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge