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ADMIRALTY & MARITIME

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U.S. 5TH CIR. NARROWLY INTERPRETS RECENT U.S. SUPREME COURT DECISION REGARDING THE STANDARD OF CAUSATION UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT ("FELA")

The Jones Act provides an injured seaman with a private civil cause of action against his employer in the event of personal injury or death occurring in the course of employment, 46 U.S.C. § 30104 (2012). The laws applied to the FELA, which regulates recovery for personal injury or death to a railway employee, are applied to all actions brought pursuant to the Jones Act. Id. U.S. Courts have applied a "feather-light" standard of causation to cases under the FELA. *Ferguson v. Moore-McCormack*, 352 U.S. 521, 523, 77 S.Ct. 457 (1957) (under the FELA, the standard of causation "is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought").

The most recent U.S. Supreme Court case interpreting this "feather-light" standard of causation is *CSX Transportation, Inc. v. McBride*, 564 U.S. ___, 131 S.Ct. 2630, 180 L.Ed.2d 637 (2011), in which the U.S. Supreme Court rejected the "proximate cause" standards developed in nonstatutory common-law tort actions. Instead, the Court held that causation is established in FELA cases if the employer's "negligence played a part – no matter how small – in bringing about the injury." Id. at 2644. This interpretation of the causation standard set forth in the FELA appeared to substantially lower the burden of proof that must be shown by a plaintiff in a FELA or Jones Act case in order to establish negligence on the part of its employer, thus making FELA and Jones Act cases more difficult for an employer to successfully defend.

However, a recent U.S. 5th Cir. case which narrowly interpreted *McBride,* may give employers some hope. In *Huffman v. Union Pacific Railroad*, 675 F.3d 412 (5th Cir. 2012), a trainman filed suit against his employer alleging that the repetitive physical demands of his work resulted in the cumulative trauma injury of osteoarthritis. Evidence was introduced at trial supporting the position that activities such as those typically performed by a trainman could generally lead to musculoskeletal disorders. However, no direct evidence was introduced linking the plaintiff's particular injury – osteoarthritis – to the repetitive activities that he engaged in as a trainman. After a jury returned a verdict in favor of the plaintiff, the employer moved for a judgment as a matter of law on the issue of causation. The trial court denied employer's motion and employer appealed.

On appeal, the 5th Cir. reversed holding that the evidence was insufficient to establish causation. Applying the *McBride* standard of causation, the 5th Cir. recognized that a "defendant railroad 'caused or contributed to' a railroad worker's

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injury 'if [the railroad's] negligence played a part—no matter how small—in bringing about the injury." However, the court held that at least some direct evidence is required to meet this burden of proof:

> there must be evidence to support that work the claimant performed led to the specific condition the claimant suffered—not a lot of evidence, not necessarily expert evidence, but something probative that supplies jurors with everything they need to which inferences can then be applied. It was necessary, then, for probative evidence to be introduced that work such as *Huffman* performed would play at least a small part in bringing about Huffman's osteoarthritis.

The evidence introduced at trial did not establish even this minimal connection. Although experts testified at trial that the types of activities that plaintiff engaged in as a trainman could lead to musculoskeletal problems, no one testified that these musculoskeletal problems included osteoarthritis.

Plaintiff then petitioned the 5th Cir. for a rehearing *en banc*. The Petition for Rehearing En Banc was denied by a vote of 12-3. Huffman v. Union Pacific Railroad, 2012 U.S. App. LEXIS 11470 (5th Cir. 2012). However, Judge Dennis issued a rather lengthy dissent arguing that the Fifth Circuit's reversal of the jury verdict was improper.

The dissent argued that "[t]he panel opinion hold[ing] that a FELA jury may not infer directly from the evidence that the railroad's negligence contributed to the plaintiff's injury unless a witness has first expressly testified that such a causal relationship exists" . . . "directly conflicts with the Supreme Court's decisions in *CSX Transportation, Inc. v. McBride*, 564 U.S. ___, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011), and *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), and [the 5th Cir.] precedent in *Rivera v. Union Pacific Railroad Co.*, 378 F.3d 502 (5th Cir. 2004)." "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference." *Rogers*, 352 U.S. at 508.

It appears, at least for now, that some direct evidence of causation is necessary to establish causation in a Jones Act case in the 5th Cir. This is obviously good news for employers as it increases the likelihood of a successful defense in Jones Act claims. However, this holding will likely be challenged considering Judge Dennis' dissent and the U.S. Supreme Court's holding in *McBride*. Jones Walker will continue to follow the impact of this ruling on Jones Act claims and will provide updates in future E*Lerts should there be any further developments regarding this issue of causation.

—Matthew S. Lejeune

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SHELL SURVIVES MOTION TO DISMISS ITS SUIT SEEKING CONFIRMATION OF BSEE'S APPROVAL OF SHELL'S OIL SPILL RESPONSE PLAN IN THE ARCTIC OCEAN

Earlier this year, Shell took the preemptive step of filing suit in federal court in Alaska against various environmental entities to request a declaration that Shell's Oil Spill Response Plan ("OSRP") for Shell's Arctic Ocean operations was properly approved by the Bureau of Safety and Environmental Enforcement ("BSEE") under the Administrative Procedure Act ("APA"). No suits had been filed to challenge the BSEE approval at the time Shell filed its lawsuit. Shell had previously been awarded leases from the U.S. Government to drill for oil. In connection with its intent to drill on leases in the Chukchi and Beaufort Seas of the Arctic Ocean, Shell submitted an OSRP to BSEE, the agency tasked with reviewing and approving an OSRP for compliance with the Oil Pollution Act ("OPA") and the Outer Continental Shelf Lands Act ("OCSLA"). Shell submitted a series of revised OSRPs to BSEE after public comment period and BSEE review; and BSEE eventually approved the OSRPs.

Shell argued that although none of the environmental entities had challenged the BSEE approval, it was a "virtual certainty" that litigation would ensue and thus a case and controversy existed. Several environmental entities filed motions to dismiss. On June 26, 2012, the court denied the motions to dismiss and held that several of the entities had threatened to challenge BSEE's approval of the Shell OSRPs. The court found that "it is highly likely that such threatened suit is imminent." Additionally, given the stage of the approval process, the entities' only ability to challenge the OSRPs was through an APA challenge, which supported the exercise of jurisdiction in the declaratory judgment action to redress any harm that may come to Shell's property interests. Since the underlying questions regarding the challenge to the BSEE approval were questions of law, the court held that the challenge was ripe for adjudication. Finally, the court noted that a speedy resolution of these issues served the public interest and judicial economy. The court was sensitive to the burden placed upon Shell in waiting until an 11th hour challenge by the environmental entities.

The defendant environmental agencies have asked the court to certify its order for appeal, and this request is still pending before the court. Subsequent to the court's June 26, 2012, ruling, Shell filed an amended suit to ask the federal court also to declare that BSEE's approval of the OSRPs complied with the Endangered Species Act. This second amended complaint is now the subject of additional motions to dismiss filed by the various defendant environmental entities, and these motions have not yet been ruled upon by the court.

On July 10, 2012, the environmental agencies filed a separate lawsuit against Shell in federal court in Alaska to challenge the OSRPs, contending that the OSRPs are deficient, *inter alia*, under OPA given the unique, icy conditions of the Arctic Ocean. This separate case has now been consolidated with the first-filed Shell action. The environmental entities have also asserted that the capping stack associated with the OSRPs should have been tested in icy conditions in the Arctic Ocean. In short, the entities claim that the OSRPs fail to demonstrate that Shell could handle a "worst-case" oil spill in the Arctic Ocean during the winter as required by post Macondo oil spill regulations.

After being heavily involved in the *Deepwater Horizon* litigation and successfully defending one of the named defendants in that multi-district-litigation, Jones Walker's attorneys are uniquely positioned to use their prior OPA and OCSLA experience to provide advice on BSEE regulations governing OSRPs. The issue of what response technology is required for an OSRP continues to evolve, particularly with respect to capping stack technology and the response time

associated with a capping stack. Specific elements of an OSRP include the emergency response action plan; i.e. the ability to contain and respond immediately to a spill from the facility itself, 30 CFR § 254.21(b)(2); a "worst case discharge scenario" including the operator's plan to cope with the initial spill volume and support operations for a blowout lasting thirty (30) days, 30 CFR §§ 254.21(b)(3)(iii) & 254.26(d); a dispersant use plan, 30 CFR § 254.21(b)(3)(iv); and an *in situ* burning plan, 30 CFR § 254.21(b)(3)(v). Future Notices to Lessees will likely issue on either a national or regional basis from BSEE, and its three regional offices, to provide further clarification of the post-*Deepwater Horizon* response technology in the context of the submission of OSRPs.

We will continue to monitor the evolution of OSRP requirements under BSEE regulations and the interpretation of response technology by BSEE and its regional offices. Please do not hesitate to contact us if you have any questions.

—William C. Baldwin

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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