IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5471

RICKIE P. BERGERON, ET AL.,

Plaintiffs-Appellees,

versus

ATLANTIC PACIFIC MARINE, ET AL.,

Defendants-Appellants,

GREIG FILTERS, INC. AND
TRAVELERS INSURANCE CO.,

Intervenors-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(91-CV-2019)

June 28, 1995

Before WISDOM, WIENER, and PARKER, Circuit Judges.

PER CURIAM:[1]

We granted interlocutory review in this case pursuant to 28 U.S.C. § 1292(b) primarily to determine whether a final though

[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

erroneous decision by the Department of Labor denying benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* (LHWCA), would preclude reconsideration of LHWCA status in a subsequent action against a vessel, and if so, whether the plaintiff could maintain an unseaworthiness action against the vessel. Other issues before the Court are whether an offshore oil worker injured on a vessel in state territorial waters can maintain an action for punitive damages, and whether his spouse is entitled to pursue a claim for loss of consortium. After reviewing the record and upon further consideration, we conclude that this interlocutory appeal was improvidently granted. Accordingly, this appeal is dismissed.

I.

Background

Rickie Bergeron allegedly was injured while performing filtering operations on the Ranger V, a jackup oil production vessel operating in Louisiana territorial waters. Chevron U.S.A., Inc. owned the vessel and contracted with Atlantic-Pacific Marine Corporation (APMC) to do all remedial work in the field. Chevron contracted with Greig Filters, Inc. to perform all filtering operations on the vessel. Bergeron worked for Greig.

Bergeron applied to the Department of Labor, Office of Worker's Compensation Programs (the Department) for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* (LHWCA). Traveler's Insurance Co., Greig's insurance carrier, filed a Notice of Controversion of Right to Compensation,

claiming that Bergeron's injuries did not fall within LHWCA jurisdiction. The Department, citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421 (1985), determined that Bergeron's injury did not occur on a covered maritime situs necessary to establish LHWCA jurisdiction. Neither Chevron nor APMC participated in the Department's decision.

Bergeron then sued Chevron and APMC claiming, *inter alia*, that he was entitled to pursue a general maritime unseaworthiness action as a *Sieracki* seaman. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872 (1946). Chevron and APMC filed a motion to dismiss Bergeron's *Sieracki* claim, alleging that § 905(b) of LHWCA provides Bergeron's exclusive remedy. Bergeron filed a motion, styled as a motion for partial summary judgment, seeking a declaration that he would be allowed to maintain a claim for punitive damages and his wife a claim for loss of consortium.

In September, 1993, the district court entered an order denying Chevron's motion and granting Bergeron's. The district court concluded that the Department's determination that Bergeron failed to meet LHWCA's maritime situs requirement was wrong because Bergeron was allegedly injured on a jackup vessel operating in Louisiana territorial waters.[2] The district court nonetheless

[2]An offshore oil worker working on a fixed platform outside of state territorial waters but within United States waters is covered by LHWCA through the Outer Continental Shelf Lands Act. *See* 43 U.S.C. § 1333. Workers on floating platforms are covered by LHWCA if they are not Jones Act seamen. *Herb's Welding*, 105 S.Ct. at 1424 n. 2; *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991). Only workers on fixed platforms located in state territorial waters fail to meet LHWCA's situs requirement.

determined that our warning in *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991), against reexamining final decisions of the Department was applicable and that the Department's decision could not be relitigated. The court then determined that absent LHWCA coverage, Bergeron was entitled to pursue his unseaworthiness claim as a *Sieracki* seaman.[3] The district court further concluded that Bergeron was entitled to maintain an action for punitive damages and that Bergeron's wife was entitled to pursue a claim for loss of consortium. The district court recognized the uncertainty of the law in these areas and certified the order for interlocutory appeal under 28 U.S.C. § 1292(b). Shortly after we agreed to hear the appeal, the district court stayed the proceedings pending a ruling on the appeal.

II.

The Court of Appeals may, in its discretion, grant interlocutory review of an order where the district court certifies that that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). The appellate court may address all issues material to the order and is

[3]In 1972 Congress amended LHWCA to abolish a covered employee's unseaworthiness action against the vessel. *See* 33 U.S.C. § 905(b). We have held that, at least in some circumstances, the *Sieracki* unseaworthiness action survives where LHWCA does not apply. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1110 (5th Cir. 1981) (plaintiff a federal employee expressly exempted from LHWCA coverage); *Cormier v. Oceanic Contractors, Inc.*, 696 F.2d 1112 (5th Cir. 1983) (plaintiff injured in a foreign country, beyond the territorial reach of LHWCA).

not limited to consideration of the "controlling question." *Ducre v. Executive Officers of Halter Marine, Inc.*, 752 F.2d 976 (5th Cir. 1985).

A.

Sieracki Issues

The district court's Memorandum Ruling states that "The record does not reflect that the Department ruling has been appealed within the Department, therefore it appears that the Department determination of plaintiff's status is final as within the Department." None of the parties challenges the finality of the Department's ruling, but the record, which includes a certified complete copy of the Department's file, contains no final order by the Department. Absent such a final decision, the district court is free to make its own determination of LHWCA status. *Cf. Southwest Marine, Inc. v. Gizoni* 502 U.S. 81, 112 S.Ct. 486 (1991) (holding that plaintiff could maintain Jones Act action in the absence of a final determination by the Department of LHWCA status).

It appears that under the plain language of LHWCA a final order should have been entered by the Department. LHWCA provides that within ten days after a claim for LHWCA benefits is filed, the deputy commissioner is required to notify the employer and "any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed." 33 U.S.C. § 919(b). Thereafter, upon application of any "interested party," the deputy commissioner "shall order a hearing

thereon," but if no hearing is ordered within twenty days after notice is given of the claim, the deputy commissioner "shall, by order, reject the claim or make an award in respect to the claim." 33 U.S.C. § 919(c). Despite what appears to be mandatory language, the twenty day period has been held to be directory and not mandatory or jurisdictional. *See Maryland Casualty Co. v. Cardillo*, 99 F.2d 432 (D.C. Cir. 1938). Actual Department procedures, as set out in the C.F.R., contemplate situations where no final order is issued. *See* 20 C.F.R. 702.315.

If no "interested party" requests a hearing, the deputy commissioner's decision becomes effective 30 days after the compensation order is filed in the office of the deputy commissioner, unless an interested party petitions for review by the Benefits Review Board. 33 U.S.C. § 921. In the instant case there was no final decision because there was no compensation order. A compensation order must be formally filed and dated, sent by certified mail to the parties or their representatives, and must contain "a paragraph entitled 'proof of service' containing the certification of the district director that the copies were mailed on the date stated, to each of the parties and their representatives, as shown in such paragraph." 20 C.F.R. § 702.349. The letter in the Department's file which the district court regarded as the Department's final ruling is not styled a compensation order, it is not file stamped,[4] it is addressed to

[4]The Department's file actually contains two copies of the letter, one of which is stamped "RECEIVED" and the other is not stamped at all. The "RECEIVED" stamp does not appear to be an

Bergeron's employer[5], it contains no proof of service, and there is no record in the Department's file that it was sent by certified or registered mail. It appears to be something in the nature of a memorandum of agreement such as would be prepared following an informal conference. *See* 20 C.F.R. § 702.315.[6]

Even if the letter in the file were intended as a compensation order, it still would not be a binding order because there is no indication that it was filed with the deputy commissioner. A compensation order does not become effective until 30 days after it has been filed in the office of the deputy commissioner and sent by registered or certified mail to the claimant and his employer. *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966 (9th Cir. 1993); 33 U.S.C. §§ 919(e) & 921(a).[7]

---

official government stamp; rather, it appears that that copy of the letter was submitted as an attachment to a request for records by APMC and Chevron.

[5]The letter was addressed to Bergeron, Bergeron's attorney, and Traveler's Insurance Co., but not to Greig.

[6]20 C.F.R. § 702.315 provides that, following an informal conference at which agreement is reached on all issues, the district director has the option of preparing a memorandum of agreement or entering a formal compensation order. In the event the district director opts for the memorandum of agreement, the district director need file a compensation order at the request of one or both of the parties.

[7]Section 921(a) provides that "A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter." 33 U.S.C. § 921(a) Section 919(e) provides that "The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by

Because there was no final order by the Department of Labor, whether such an order would be binding in a subsequent action against the vessel and the resulting *Sieracki* question are not controlling questions of law and any opinion we expressed on that issue would be wholly advisory. As such, it would be inappropriate to address it in a § 1292(b) interlocutory appeal.

B.

Loss of Consortium

Any uncertainty about the availability of loss of consortium where a longshore worker is injured in state territorial waters has been cleared up by our decision in *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994), which was released after the district court certified the question for appeal. In *Nichols*, we determined that the uniformity rule articulated by the Supreme Court in *Miles v. Apex Marine Corp.*, 111 S.Ct. 317 (1990), does not apply to longshore workers killed or injured in territorial waters, and that a claim for loss of consortium survives for those workers. Although *Nichols* is distinguishable in that it involved a longshore worker injured on the outer continental shelf, its reasoning encompasses injuries to longshoremen injured in territorial waters. After *Nichols*, there is considerably less ground for difference of opinion on the availability of loss of consortium than there was when the district court certified its order. The question is not appropriate for

---

registered mail or by certified mail to the claimants and to the employer at the last known address of each." 33 U.S.C. § 919(e).

interlocutory appeal.

C.

Punitive Damages

There is certainly ground for difference of opinion with respect to the availability of punitive damages to a longshoreman injured in state territorial waters. Although the law of this Circuit has been that punitive damages are available under general maritime law under *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981), there is a legitimate question whether *Merry Shipping* is still viable after the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 111 S.Ct. 317 (1990).[8] And even if *Merry Shipping* has been generally overruled by *Miles,* punitive damage claims of longshoremen killed or injured in territorial waters might have been shielded by *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806 (1974) and *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673 (1980). *See Nichols*, 17 F.3d 119.

The district court's resolution of this issue is consistent with current Fifth Circuit precedent. However, the Fifth Circuit's recent grant of *en banc* review in *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279 (5th Cir. 1994) (holding that punitive damages may be awarded for wrongful failure to pay maintenance and cure) suggests that the full Court may be ready for a general review of

[8]*See, e.g., Guevara v. Maritime Overseas Corporation*, 34 F.3d 1279, 1284-85 (5th Cir. 1994, rehearing en banc granted) (Garwood, J., concurring and urging en banc review); *Penrod Drilling Corporation v. Williams*, 868 S.W.2d 294 (Tex. 1993) (holding that *Miles* overruled *Merry Shipping*).

punitive damages awarded under general maritime law. Addressing this question would be an invitation for *en banc* review. While this is an interesting question which no doubt will have to be answered sooner or later, it is not one that requires an immediate answer or one that would justify any further delays in this action. Wading through the Serbonian bog is not likely to materially advance the ultimate termination of the litigation, and the purposes of § 1292(b) would not be served by ruling on this issue.

III.

Although it initially appeared that the district court's order was ripe for interlocutory appeal under 28 U.S.C. § 1292(b), upon closer examination it is apparent that interlocutory appeal is not appropriate in this case. Accordingly, this interlocutory appeal is DISMISSED.