

Appellate Court Watch

July 22, 2008

FIFTH CIRCUIT COURT OF APPEALS CLARIFIES VESSEL OWNER'S "TURNOVER DUTY" WITH RESPECT TO CARGO STOW

In a significant new decision, the Fifth Circuit Court of Appeals has held that a vessel owner does not breach its duty to turn over a safe ship when an open and obvious condition in the cargo stow results in an injury to a longshoreman. The court also clarified that a vessel owner has no duty to warn of heavy weather encountered by a vessel in transit.

Kirksey v. Tonghai Maritime, No. 07-40616 (5th Cir. July 15, 2008) (Higginbotham, Davis and Demoss) involved a longshoreman's claim under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") against the vessel owner, operator and charterer ("vessel owner"). Longshoreman Kirksey suffered serious personal injury when a four-ton steel coil tipped over and fell from the stow, crushing his leg and hand. The vessel had encountered heavy weather at sea, and there was evidence that some of the steel coils were leaning, creating a danger to the longshoremen. It was uncontradicted, however, that the condition of the stow was open and obvious.

In a trial to the bench, Judge Samuel B. Kent of the Southern District of Texas found that the unstable condition of the stow made the vessel dangerous to the unloading longshoremen, and that the vessel owner failed to exercise reasonable care to turn the ship over to the stevedore in such condition that a reasonably competent stevedore could safely unload it. The trial court further held that the open and obvious condition of the stow was not a defense to the duty to turn over the ship in safe condition because the longshoreman had no reasonable alternative but to unload the coils or leave his job. Finally, the trial court found that the vessel owner had a duty to disclose to the stevedore the fact that the vessel had encountered Force Nine winds at sea. The trial court entered judgment against the vessel owner for a total of \$1,902,901.56.

The Fifth Circuit disagreed, reversing and rendering judgment in favor of the vessel owner. Relying on the United States Supreme Court's decisions in *Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981) and *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994), the court found that a longshoreman cannot recover from the vessel owner when his injuries are caused by an open and obvious defect in the cargo stow. The court further held that the "no reasonable alternative" exception generally applies only to dangerous conditions in the ship's equipment or to conditions created by the shipowner's negligence, and not to a cargo stow. Further, the court clarified that under *Howlett* there is no duty to warn that the vessel encountered heavy weather that created a risk of cargo shifting.

This decision is particularly noteworthy because it answers a question left undecided by *Howlett*—whether the open and obvious defense is applicable to the turnover duty to provide a reasonably safe vessel. The Fifth Circuit's holding on this important issue closes the door on attempts to circumvent the limitations on recovery against vessel owners under Section 905(b).

The decision can be found at <http://www.ca5.uscourts.gov/opinions/pub/07/07-40616-CV0.wpd.pdf>. If you would like additional information, or copies of the briefs, please contact Tom Nork at norkt@phelps.com or Kate Alsina at alsinak@phelps.com. Phelps Dunbar's admiralty and appellate team represented the vessel charterer and argued the appeal.

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Appellate Court Watch is intended to provide late-breaking updates to clients and friends of the firm on issues that may impact business throughout the region. We welcome all comments and suggestions regarding this newsletter. If you know someone who would like to receive a copy, please e-mail one of the editors listed below:

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