

IN THE COURT OF APPEALS OF IOWA

No. 1-095 / 10-1237
Filed May 25, 2011

BLUFF HARBOR MARINA, INC.
and WEST BEND MUTUAL,
Petitioners-Appellants,

vs.

RENEE WUNNENBERG, Surviving Spouse
of Decedent DAVID WUNNENBERG,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

An employer and its insurer appeal from a district court judicial review
ruling affirming the appeal decision of the workers' compensation commissioner.

AFFIRMED.

Katrina A. Nystrom and Charles A. Blades of Scheldrup, Blades, Schrock,
Smith & Aranza, P.C., Cedar Rapids, for appellants.

Brent R. Ruther and Sara L. Schultz of Aspelmeier, Fisch, Power,
Engberg & Helling, P.L.C., Burlington, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J. and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VAITHESWARAN, J.

This appeal of an agency decision raises the question of whether state or federal law governs a work-related death.

I. Background Facts and Proceedings

David Wunnenberg, manager of the Bluff Harbor Marina along the Mississippi River, decided to remove a torn canopy by using the bucket and boom of a mini-excavator. To properly situate the excavator for the project, he began driving it down two boat ramps and onto a barge. Before he could get the excavator on the barge, the ramps slipped and the excavator fell into the water. Wunnenberg, who was trapped inside, drowned.

Wunnenberg's surviving spouse filed a petition for death benefits with the Iowa Workers' Compensation Commissioner. Bluff Harbor answered, asserting the federal Longshore and Harbor Workers' Compensation Act (LHWCA), rather than Iowa's Workers' Compensation Act, covered this death and deprived the commissioner of subject matter jurisdiction.

Following an evidentiary hearing, a deputy workers' compensation commissioner determined the LHWCA did not apply and the commissioner had subject matter jurisdiction. On intra-agency review, the commissioner adopted the decision in its entirety. That final agency decision was affirmed by the district court, and Bluff Harbor sought further judicial review with this court.

Bluff Harbor now reiterates that the agency lacked subject matter jurisdiction. This issue presents a mixed question of law and fact. *Harvey's Casino v. Isenhour*, 724 N.W.2d 705, 708 (Iowa 2006). Factual determinations are reviewed for substantial evidence. See Iowa Code § 17A.19(10)(f) (2009).

As for the agency's legal conclusion, the interpretation of the LHWCA is not clearly vested by a provision of law in the discretion of the commissioner. See *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010) (stating where the provisions to be interpreted are found in a statute other than the statute the agency has been tasked with enforcing, "we have generally concluded interpretative power was not vested in the agency"). Accordingly, our review is to determine whether the agency action was "[b]ased upon an erroneous interpretation of a provision of law." Iowa Code § 17A.19(10)(c).

II. Analysis

"Under Iowa Code section 85.1(6), if an injured worker is covered by a compensation statute enacted by Congress, the worker is not covered by Iowa's workers' compensation law." *Harvey's Casino*, 724 N.W.2d at 706. As noted, the relevant federal compensation statute is the LHWCA. It states in pertinent part:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of *an employee*, but only if the disability or death results from an injury occurring *upon the navigable waters of the United States* (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a) (emphasis added). Bluff Harbor argues Wunnenberg was covered by this provision because his injury occurred "upon the navigable waters of the United States." Counsel for Wunnenberg does not dispute that the harbor area where the accident occurred constituted "navigable waters."¹ He focuses

¹ In his brief, he suggests that Wunnenberg "was not on navigable water when the accident occurred." However, at oral arguments he stated there was no dispute that the

instead on whether Wunnenberg was “an employee” within the meaning of the LHWCA. “Employee” is defined as

any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—

. . . .
 (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

. . . .
 if individuals described in clauses (A) through (F) are subject to coverage under a State workers’ compensation law.

33 U.S.C. § 902(3)(C). According to counsel, Wunnenberg was not an “employee” because, under exception (C), he was employed by a marina and was not engaged in construction, replacement, or expansion of the marina but in “routine maintenance.” See *Healy Tibbitts Builders, Inc. v. Dir., OWCP*, 444 F.3d 1095, 1099 (9th Cir. 2006) (“It follows, then, that those who *are* engaged in the construction of a marina are covered.”).

The commissioner² agreed with Wunnenberg, finding as follows:

The greater weight of the evidence in this case is that David was employed doing routine maintenance. The removal of the canopy may have been a one of a kind task, but the purpose of removing it was to eliminate an eyesore and potential hazard. There is no evidence that a replacement canopy was to be built once the old canopy was removed. Thus David was not engaged in construction, replacement or expansion of the marina. He was rather doing cleaning and small repairs. The fact that he was using an excavator and a barge does not change the analysis. The nature of the work is critical: it was maintenance as opposed to construction regardless of what tools were used.

area in which the accident occurred was part of the navigable waters of the Mississippi River.

² As the commissioner adopted the deputy’s findings and conclusions in their entirety, the deputy’s decision, which we quote, became the final decision of the agency.

These findings are supported by substantial evidence. Wunnenberg was a paradigmatic routine maintenance worker. See 20 C.F.R. § 701.301(a)(12)(iii)(C) (stating routine maintenance includes tasks such as “cleaning, painting, trash removal, housekeeping and small repairs”). He mowed grass, painted the property, and made repairs. His attempt to remove the canopy, which a witness characterized as an “eyesore,” was part and parcel of his routine maintenance work.

With the focus on Wunnenberg’s overall job duties, we agree with the district court that the type of equipment he used to perform those duties does not alter the analysis. See H.R. Rep. 98-570(I), at 2737 (noting for illustrative purposes that “routine maintenance” would not include such work as “construction of new buildings or additions to existing structures, excavation, and work which involves the use of heavy equipment”). While the excavator Wunnenberg used could also have been used in construction work, the presence of the excavator did not transform his routine maintenance work into construction work.

Because Wunnenberg performed routine maintenance work rather than “construction, replacement, or expansion” of the marina, he was excluded from the LHWCA’s definition of “employee” and was not covered by that act. Accordingly, the commissioner did not err in determining that Iowa’s Workers’ Compensation Act governed the matter and concluding he had subject matter jurisdiction.³

³ Bluff Harbor raises an additional argument that was not considered by the commissioner: whether Wunnenberg was “transiently and fortuitously” on navigable

We affirm the commissioner's decision.

AFFIRMED.

waters. Because the district court and our court on judicial review of agency action act in an appellate capacity only, we cannot consider matters not decided by the agency in the first instance. *See Meads v. Iowa Dep't of Social Servs.*, 366 N.W.2d 555, 559–60 (Iowa 1985). For that reason, we do not reach this issue.