IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN DAVIS	:	CIVIL ACTION
	:	
v.	:	
	:	
PAN OCEAN SHIPPING CO., LTD.	:	NO. 96-6103

MEMORANDUM

Giles, C.J. March ___, 1999

Plaintiff, Norman Davis ("Davis") brings this action against defendant, Pan Ocean Shipping Co. ("Pan Ocean"), seeking damages for negligence under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b), for injuries suffered while working as a longshoreman aboard a ship owned by Pan Ocean. Now before the court is Pan Ocean's Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56(b). For the reasons that follow, the motion is granted.

Factual Background

Davis is an experienced longshoreman, having worked at the waterfront at the Port of Wilmington in Wilmington, Delaware since 1976. In 1996, Pan Ocean owned the M/V Auto Diana, a ship designed to transport cars to other ports. On February 22, 1996, the Auto Diana was docked at the Port of Wilmington. At 7:20 a.m., it was turned over to the control of the Christina Service Company ("Christina") to begin loading operations. Longshoremen working for Christina began driving cars from a parking area onto the ship at approximately 8:00 a.m. Davis was among the longshoremen working for Christina that morning. Although he did not normally work for Christina, he was entitled to be hired as an extra for any company working on the waterfront.

In performing loading operations, Davis and other longshoremen would drive a car from a parking area about a quarter of a mile from the dock onto the ship, where another longshoreman would instruct him as to which of several levels of the ship to park and stow the car. Davis would then walk down a ramp or staircase on either the portside or offshore side of the ship to the main deck and down the gang plank onto the dock, catch a bus back to the parking area, pick up another car, and repeat the procedure.

It began raining sometime after loading operations started on the morning of February 22. Such weather conditions generally do not require the longshoremen to cease loading operations. Davis admitted that the process of loading cars in the rain often results in water to varying degrees being brought onto the ship by the tires or other parts of the cars and from the longshoremen's clothes and shoes. As a result, the deck walking surface could become slippery. There also was testimony from Benjamin Petty ("Petty"), the gang boss on the Auto Diana on February 22, 1996, that cars often are run through a sprinkler prior to being driven onto the ship, that water often drips off the cars onto the deck, and therefore that longshoremen know to watch out for water being dripped onto the deck.

The essential facts of the February 22 accident are clear and uncontested. Davis had parked his fifth car of the day on the upper deck of the ship, descended a stairwell on the port side of the ship for the first time that day,[1] walked through a door onto the main deck, and slipped and fell on the wet floor. The floor in that area was smooth, painted, non-corrugated steel. (Davis concluded that the floor was wet because he observed that his clothes were wet

[1] Davis had used a staircase on the offshore-side of the ship after stowing the previous four cars. He testified that the fifth car was parked closer to the port side staircase, while the previous four cars had been closer to the offshore side of the ship.

after the fall. The area of the main deck where he fell was enclosed and still on the inside of the ship and thus not exposed directly to the elements. Davis injured his right hand when he tried to brace himself with his hands in the fall. No crew members, supervisors, or longshoremen were in the area at the time and no one witnessed Davis fall.

Far less clear is certain critical background information surrounding loading operations and the accident. The record is entirely devoid of any evidence as to how the water got on the deck where Davis slipped, when it came to be there, and whether any complaints or alerts about the wet conditions on the main deck had been reported that day either to the ship's crew or to the stevedore. There is no evidence indicating whether or not the water was on the floor of the main deck when the Auto Diana arrived in Wilmington, when it was turned over to Christina, or when loading operations began. Davis testified in his deposition that he did not know the condition of the deck at any of those points in time. Davis asserted in a subsequent affidavit submitted in opposition to the defendant's motion for summary judgment that he was the first longshoreman to use the portside stairwell that day (Davis Aff. ¶ 4), although the basis of that assertion is not apparent from the record or from the affidavit.[2]

There also are conflicts on the record before the court, all created by Davis himself through an affidavit that is, in parts, contradictory of or inconsistent with, his prior deposition testimony. Davis testified at his deposition that he did not recall the lighting conditions in the

[2] Davis had left the ship after parking the four previous cars and taken the bus back to the car lot. Thus he was not on the ship, much less in the area of the portside staircase and main deck, throughout the entire course of loading operations and cannot testify as to what other longshoremen were doing or where they were throughout the course of loading operations. Moreover, Davis testified at his deposition that he had not been in that area of the ship at any time prior to his fall. He therefore cannot know that he was the first longshoreman to use that stairwell that day. Certainly the basis of his knowledge is not clear from the affidavit.

area where he fell; in his affidavit he asserted that the area was dimly and inadequately lit. In his deposition, Davis testified that he did not know how, when, or how much, water came to be on the deck; in his affidavit he asserted unequivocally that the automobiles and his shoes were not the source of the wetness and that the accumulation of water was more than a coating.

Discussion

Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Crop. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). In order to avoid summary judgment, disputes must be both 1) material, meaning over facts that are relevant and necessary and that might affect the outcome of the action under governing law and 2) genuine, meaning the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. Celotex, 477 U.S. at 322-23. In such a case, there can be but one reasonable conclusion as to the verdict under the governing law and judgment must be awarded in favor of the moving party. Anderson, 477 U.S. at 250 (noting that the standard is the same as on a motion for judgment as a matter of law under Fed. R. Civ. P. 50(a)).

The party seeking summary judgment bears the initial responsibility of informing the

court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving party is not required to produce any evidentiary materials to negate the opposing party's claim. Id. The burden then shifts to the nonmoving party to designate, through the use of affidavits and other evidentiary materials of record, specific facts showing that there is a genuine issue for trial. Id. at 324; Fed. R. Civ. P. 56(e). The evidence of the nonmoving party is to be believed and this court must draw all reasonable and justifiable inferences in his favor. Anderson, 477 U.S. at 255. However, it is clear from the rules and Supreme Court decisions that the nonmoving party must present to the court some competent evidence from which the court can draw such inferences.

Moreover, the evidence must be in a form that would be reduceable to admissible evidence at trial. See Celotex, 477 U.S. at 324. Thus affidavits submitted on a summary judgment briefing must be made on personal knowledge and show affirmatively that the affiant is competent to testify to the statements made in the affidavit. See Fed. R. Civ. P. 56(e). The court may disregard defective or insufficient affidavits from its consideration of summary judgment. Moreover, the court may disregard an affidavit submitted by a nonmovant where that affidavit contradicts the nonmovant's prior deposition testimony. Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991); Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703, 705-06 (3d Cir. 1988). When a party was carefully questioned on an issue, had access to the relevant information at the time, and does not satisfactorily explain the contradiction, the subsequent affidavit does not create a genuine issue of material fact for summary judgment purposes. Martin, 851 F.2d at 706.

Longshoreman and Harbor Workers Compensation Act

Davis's claim is governed by the LHWCA, 33 U.S.C. § 901 et seq., which creates a

comprehensive workers' compensation scheme for longshoremen and their families. Howlett v. Birkdale Shipping Co., 512 U.S. 92, 96 (1994). A cause of action for negligence against a shipowner may be brought under 33 U.S.C. § 905(b), which provides, in relevant part that in "the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party." That section was part of the 1972 Amendments to the LHWCA, which fundamentally changed the statutory scheme by eliminating the right to recover for unseaworthiness, a strict-liability theory, but locking in the right to recover for the vessel owner's negligence. See Scindia Steam Navigation Co. v. de Los Santos, 451 U.S. 156, 165 (1981). Section 905(b) does not specify the acts that would constitute negligence or the duties owed by shipowners. Instead, Congress intended that the scope of a shipowner's liability would evolve under "the application of accepted principles of tort law and the ordinary process of litigation." Scindia Steam, 451 U.S. at 165-66; see also Serbin v. Bora Corp., Ltd., 96 F.3d 66, 70 (3d Cir. 1996) (stating that Congress intended the scope to evolve under general common law principles); Kirsch v. Plovidba, 971 F.2d 1026, 1028 (3d Cir. 1992) ("Congress left the matter for the courts to resolve.").

Importantly, the statutory changes shifted more of the responsibility for compensating injured longshoremen away from the vessel owner by no longer subjecting the vessel to suit for injuries that could be anticipated and prevented by a competent stevedore. Howlett, 512 U.S. at 97. Section 905(b) assumes an expert and experienced stevedore, not an ordinary person. This "implies that certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around them." Kirsch, 971 F.2d at 1029-

30 (quoting Bjaranson v. Botelho Shipping Corp., Manila, 873 F.2d 1204, 1208 (9th Cir. 1989). A vessel owner may be negligent only when it should have expected that an expert stevedore could not or would not avoid the hazard and conduct cargo operations reasonably safely. Kirsch, 971 F.2d at 1031.

The Supreme Court has fleshed out three general duties that the vessel owner owes to the longshoreman, which apply at different points in the timing of cargo loading operations and at different points of control over an area or instrumentality. Serbin, 96 F.3d at 70. The first of these is the "turnover duty," which relates to the condition of the ship upon the commencement of stevedoring operations. Howlett, 512 U.S. at 98. The second, the "active operations duty," applies once stevedoring operations have begun and in areas or for tasks that remain under the active control of the vessel. Id. The third is the "duty to intervene," which concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore. Id.

Davis argues that Pan Ocean breached the first and second of these duties; the court considers each in turn.

Turnover Duty

The turnover duty comprises both a duty to provide safe conditions to longshoremen and a corollary duty to warn of known, nonobvious hazards. Kirsch, 971 F.2d at 1028. The vessel owner is obligated at least to exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property." Scindia Steam, 451 U.S. at 166-67. The corollary duty requires the vessel to warn the

stevedore 1) of any hazards on the ship or with respect to its equipment, so long as the hazards 2) are known to the vessel or should be known to it in the exercise of ordinary care, 3) would likely be encountered by the stevedore in the course of his cargo operations, and 4) are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in his performance. Howlett, 512 U.S. at 98-99 (citing Scindia Steam, 451 U.S. at 167); Kirsch, 971 F.2d at 1028-29. The shipowner's basic duty is only to provide a workplace where skilled longshore workers can operate safely. Kirsch, 971 F.2d at 1029; see Scindia Steam, 451 U.S. at 176 (stating that the vessel's justifiable expectation that the stevedore would perform its duties is a relevant inquiry). Davis has not satisfied his evidentiary burden to raise an issue of fact as to a violation of the turnover duty for several reasons.

First and foremost, Davis has produced no evidence that the water on which Davis slipped was present at the time the ship was turned over. Davis explicitly testified at his deposition that he did not know how or when the water came to be on the deck or the condition of that area of the deck when the ship arrived at port, when it was turned over, or when loading operations began. Obviously one essential element of a turnover duty claim is that the hazard was present when the vessel was turned over from the owner to the stevedore; Davis's failure to produce evidence sufficient to establish the existence of such an essential element is fatal to his claim. Celotex, 477 U.S. at 322.

Davis asks the court to infer that the water was present at the time the vessel was turned over, based on the following points: a) his statement that he was the first person to use that portside stairwell; b) the area in question was not exposed to the elements; and c) the defendant has presented only conjecture as to the conclusion that the liquid came from the automobiles or

from the clothing and shoes of the longshoremen. However, Davis has offered no competent evidence from which this court could draw such inferences. The basis of Davis's knowledge as to his being the first person to use that stairwell and that area of the main deck is unknown. Davis testified that he left the ship four times to pick up cars prior to his fall and by his own admission he had not been in that area of the ship at any time prior to the fall. He thus has no basis to say in his affidavit that he was the first longshoreman there all day, that all other longshoremen at all other times used only the offshore-side stairwell, or that no gang boss or other supervisor had been in that area at any time earlier that day.[3] The affidavit is defective as to this point and this court may and does disregard it. As to the fact that Pan Ocean only has speculated as to the source of the water, defendants are not required to do anything more. The plaintiff trying to establish a breach of the turnover duty bears the burden of proving that the hazardous condition was present when the vessel was turned over to the stevedore, which Davis has not done; on summary judgment defendants need not produce any evidence to negate that claim. See Celotex, 477 U.S. at 323.

Davis instead argues that the controlling point is not the presence or absence of water on the floor, but rather the fact that the area of the fall was dimly lit and the floor was painted, non-corrugated, and therefore inherently slippery. However, the 1972 Amendments to the LHWCA eliminated a longshoreman's right to recover based upon the ship's unseaworthiness, a strict-liability theory that focused on structural and design defects that made the vessel unsafe, regardless of proof of fault by the owner. See Scindia Steam, 451 U.S. at 164-65. The inquiry

[3] Davis did testify that no one else was in that area at the time of his fall, but that is a different point which does not support the inference that no one had been there at any time on February 22 prior to his fall.

now focuses solely on the vessel owner's negligence and Davis presents no evidence that Pan Ocean was negligent in allowing the floor to be in that condition--no evidence of other accidents or problems because of the painted, non-corrugated floor either on that day or previously, no expert evidence that a non-skid floor was inherently slippery and unsuitable for purposes of loading cars in the rain, or that Pan Ocean knew or should have known that fact. This court agrees with the analysis of the district court in Thompson v. Cargill, Inc., 585 F. Supp. 1332 (E.D. La. 1984), in which the court took judicial notice of the fact that "experienced and expert stevedores have frequent occasion to perform their work on the decks of vessels which may not have non-skid surfaces." Id. at 1334. This court similarly rejects the argument that the non-skid surface by itself is a non-obvious hazard that warrants liability, absent some evidence that the defendant should have known that such a non-skid surface created the risk of accidents and that an experienced stevedore never would have worked on such a non-skid surface. No such evidence has been offered. To do otherwise would permit a plaintiff to proceed improperly on an unseaworthiness theory. Id. at 1334 n.1.

Finally, as noted, supra, the standard under § 905(b) assumes an expert and experienced stevedore, not an ordinary person, and imposes liability relating only to non-obvious hazards. There is evidence on the record that longshoremen often load vehicles in the rain and continue working despite the weather; therefore an expert and experienced stevedore would and should anticipate that cars will be loaded while wet and that the surface will become wet and slippery during the course of such operations. Davis acknowledged in his deposition that, on a rainy day such as February 22, it would be usual for the wet conditions to be tracked onto the ship from the

shoes and clothing of the workers, making the surface of the ship slippery.[4] In addition, Petty, the gang boss on the Auto Diana, testified that cars often are run through a sprinkler prior to loading, which also can track water onto the surface of the ship and leave the deck slippery. He stated that it becomes wet on the deck of the ship, that he knows to look out for the water when he is walking on the ship, and that other experienced longshoremen should look out for the water as well. In short, a wet deck surface is an obvious hazard that a competent stevedore could and should anticipate when loading vehicles, particularly in the rain as was the case on February 22, 1996.

Active Operations Duty

The active operations duty focuses on the vessel owner's conduct once operations have begun. Howlett, 512 U.S. at 98. A vessel owner breaches this duty if it "actively involve[d] itself in the cargo operations and [1] negligently injure[d] a longshoreman or [2] [failed] to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." Serbin, 96 F.3d at 71 (quoting Scindia Steam, 451 U.S. at 167).

As a threshold to triggering the active operations duty, the vessel owner must have

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[4] Davis argues that there is no evidence in the instant case that the water on which he slipped came from the cars or from the clothes and shoes of himself or other longshoremen. That is not the point on this aspect of the turnover duty. The question is whether an experienced longshoreman could and should anticipate that the surface would be slippery given such weather conditions and the fact that, under such conditions, water frequently can be tracked onto the deck on the workers' clothes and shoes. Davis conceded that to be the case and Petty corroborates the point. Moreover, as discussed supra, Davis bears the burden of showing through competent evidence that the water likely came from some source, prior to turnover of the vessel, in order for this court to infer that the water did not come from the cars or clothes. Davis's conclusory affidavit stating that the water did not come from the cars or from his shoes does not satisfy that evidentiary requirement and also contradicts his earlier deposition testimony.

substantially controlled or been in charge of, for present purposes, the area in which the hazard existed or the specific activities the stevedore undertook. Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532, 540 (3d Cir. 1994). The plaintiff bears the burden of proof on that issue. The evidence on the record shows that no one from the Auto Diana crew was involved in the loading operations. Davis testified that longshoremen told him where to park each car and that no one from the crew directed him as to where to park or otherwise gave him any instructions or orders. Gang boss Petty also testified that, as a general matter, crew members are uninvolved in the process of loading vehicles onto the vessel.

As to Pan Ocean being in charge or control of the area, Davis argues that the defendant has not presented evidence to substantiate that the portside stairwell and main deck area in which Davis fell had in fact been turned over to the stevedore and was not under control of the vessel. However, Pan Ocean bears no such burden. Rather, Davis must present evidence to indicate that the area remained under Pan Ocean's control, which he has not done. Ship records show that cargo loading work on the morning of February 22 commenced at 7:20 a.m. and Davis testified that he began his work approximately at 8 a.m. Davis concedes that turnover had occurred as to all areas involved in or relating to cargo operations. Davis tries to argue that only the specific area where he fell had not been turned over and therefore remained under Pan Ocean's control. In essence, Davis asks the court to infer that the portside stairwell and main deck remained under Pan Ocean's control based on the lack of evidence that the specific area was under the stevedore's control. This turns summary judgment and the active operations duty on their heads and the court declines to do that.

Absent some competent evidence to the contrary, which Davis has not provided, the

reasonable inference from the ship's records is that all areas of the ship involved in or relating to cargo operations had been turned over. Davis argues that because no cars were being parked on the main deck by the portside stairwell, that area was not involved in loading operations. However, the portside stairwell lead from the upper decks on which cars were parked (and which Davis concedes were under stevedore control) to the point from which longshoremen left the ship to board a bus back to the parking lot and therefore necessarily would be used as part of loading operations. Petty testified that after a longshoreman parks a car on the upper deck, he descends a ramp either on the portside or offshore side of the ship, depending on which side of the ship he is on. Davis claimed that he used the portside stairwell precisely because it was closer to the spot where he parked the last car, indicating that the stairwell and main deck were involved in and related to cargo-loading operations. Presumably other longshoremen could and would do the same.[5] As a logical matter, the areas involved in or relating to cargo-loading operations, and thus under the control of the stevedore, must include those parts of the vessel that longshoremen will use to get to and from the areas in which cargo actually is stowed; the portside stairwell and main deck is one such area, at least on the record before this court.

Once the control threshold is crossed, the Third Circuit has established a prima facie test for showing a breach of the active operations duty. Plaintiff must show:

> (1) that the vessel appreciated, should have appreciated, or with the exercise of reasonable care would have appreciated, the condition;
> (2) that the vessel knew, or should have known, that the condition

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[5] Davis tries to get around this problem by asserting in his affidavit that he was the first longshoreman that day to use the portside stairwell and main deck. However as discussed, supra, he has no basis from which to make those statements because he never was in that area of the ship prior to his fall and he could not know who had used that stairwell at other times that morning.

> posed an unreasonable risk of harm to a longshore worker; (3) that a longshore worker foreseeably might fail to (i) either discover the condition or apprehend the gravity and probability of the harm, or (ii) protect himself or herself from the danger; and (4) that the vessel failed to take reasonable precautionary or remedial steps to prevent or eliminate the dangerous condition.

Serbin, 96 F.3d at 71 (quoting Davis, 16 F.3d at 541).

Because Davis in the instant case has presented no evidence to raise an issue of fact as to whether Pan Ocean maintained substantial control over the operations or the area, he has failed to meet the threshold requirement of the active operations duty and summary judgment is proper without reaching this part of the prima facie case. However, the court notes that, as the discussion of the turnover duty made clear, supra, the danger of a wet and slippery deck during the loading of cars in the rain was not a hazard which an experienced longshoreman might be unable to discover or from which he would be unable to protect himself. Thus even assuming arguendo that Pan Ocean somehow maintained control over this one stairwell and main deck leading, Davis's claim would fail under that prong of the prima facie test and summary judgment still would be appropriate.

Conclusion

For the foregoing reasons, the plaintiff has failed to present evidence sufficient to create a genuine issue of material fact and summary judgment is granted in favor of the defendant and against the plaintiff.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN DAVIS	:	CIVIL ACTION
	:	
v.	:	
	:	
PAN OCEAN SHIPPING CO., LTD.	:	NO. 96-6103

JUDGMENT

AND NOW, this ___ day of March 1999, upon consideration of the Motion for Summary Judgment of Pan Ocean Shipping Co., and the arguments of the parties, for the reasons stated in the attached memorandum, it hereby is ORDERED that the motion is GRANTED. Further, it hereby is ORDERED that judgment is entered IN FAVOR of Defendant and AGAINST Plaintiff.

BY THE COURT:

_____
JAMES T. GILES C.J.

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to