Prepared By Tom Langan for
STEVEDORES, MARINE TERMINALS & VESSEL SERVICES COMMITTEE
CASE LAW UPDATE-MLA SPRING 2015 MEETING
Thursday, April 30, 2015
10:00 AM -12:00 Noon
Holland & Knight, 31 West 52nd Street, 12th Floor, NY, NY

Legislative

On January 21, 2015, Representative Wasserman Schultz (DFL) introduced the *Longshore and Harbor Workers' Compensation Clarification Act of 2015* (H.R. 436) to amend the Longshore and Harbor Workers' Compensation Act to provide a definition of recreational vessel for purposes of such Act.

House Bill 3396 has been introduced into South Carolina's 121st General Assembly 1st Regular Session. The bill would amend the code of laws of South Carolina by adding section 42-1-378 so as to provide that an employee covered by the Longshore & Harbor Workers' Compensation Act, or any of its extensions, or the Merchant Marine Act would be exempt from South Carolina's state workers' compensation laws. The bill passed the House, by a vote of 84 Yeas and 24 Nays, and was sent to the Senate on April 15, 2015. A similar Senate bill, S 0016 introduced by Senators Gregory, Peeler, Grooms, Campbell and Verdin, is already pending in the Senate.

Regulatory

On March 12, 2015, the Office of Workers' Compensation Programs, Longshore Division, published a Proposed Rule (http://www.gpo.gov/fdsys/pkg/FR-2015-03-12/pdf/2015-05100.pdf) in the Federal Register, concurrently with a Direct Final Rule, meaning the rule will go into effect without further need to publish a final rule, unless the agency receives significant adverse comment within the specified comment period. The proposed rule is meant to broaden the acceptable methods by which claimants, employers, and insurers can communicate with OWCP and each other. Comments on this proposed rule must be received by midnight Eastern Time on May 11, 2015. The Direct Final Rule will become effective June 10, 2015, without further action, unless OWCP receives significant adverse comment. The new rules essentially incorporate procedures currently put in place by Industry Notices 138, 144 and 148, and proposes to revise the regulations to: (1) Remove bars to using electronic and other commonly used communication methods wherever possible; (2) provide flexibility for OWCP to allow the use of technological advances in the future; and (3) ensure that all parties remain adequately apprised of claim proceedings.

MEDICAL TRAVEL REIMBURSEMENT RATE DECREASED

IRS DECREASES MILEAGE REIMBURSEMENT RATE EFFECTIVE 1/1/15

On December 10, 2014, the Internal Revenue Service released the optional standard mileage rates to use for 2015 in computing the deductible costs of operating an automobile for business, charitable, medical or moving expense purposes. Beginning January 1, 2015, the standard mileage rates for the use of a car (including vans, pickups or panel trucks) will be:

- 57.5 cents per mile for business miles driven
- **23 cents per mile** driven **for medical** or moving **purposes**
- 14 cents per mile driven in service of charitable organizations

The charitable standard mileage rate is set by law. The standard mileage rates for business, medical and moving purposes are based on an annual study of the fixed and variable costs of operating an automobile. The rate for business miles driven during 2015 increases .5 cent from the 2014 rate. The medical and moving rate is also down .5 cent per mile from the 2014 rate. ***The Office of Government-wide Policy, GSA also sets mileage reimbursement rate for use of a privately owned automobile (POA) on official travel. GSA has not yet published their 2015 rates. However, by law, GSA may not exceed the standard mileage reimbursement rate for a privately owned automobile (POA) established by the Internal Revenue Service (IRS) Which rate should you be using to reimburse travel under the Longshore Act? That is a question you may want to consult with your attorney on.***

Department of Labor

Greg J. Buzzard was appointed as a Member of the Benefits Review Board and Administrative Appeals Judge in December 2014. Prior to his appointment, Judge Buzzard spent eight years as an advisor in various capacities to U.S. Senator John D. Rockefeller IV. As General Counsel, Judge Buzzard was the chief legal advisor to Senator Rockefeller on numerous legislative and regulatory issues, including mine and workplace safety, black lung disease and workers' compensation programs, federal and state justice systems, and immigration reform. He also oversaw ethics and compliance issues for a staff of forty. He is a graduate of the West Virginia University College of Business and Economics and the West Virginia University College of Law.

Chief Judge Steven Purcell retired on October 31, 2014. Associate Chief Judge Stephen R. Henley is the Acting Chief Judge of the Office of Administrative Law Judges.

On October 31, 2014, OWCP Longshore announced the launch of the Secure Electronic Access Portal (SEAPortal), located at https://seaportal.dol-esa.gov/portal/. SEAPortal is an optional web-based application that will allow any stakeholder with internet access the ability to upload documents directly into a case file. Users do not need to register or enroll to use the SEAPortal. Users simply need the OWCP case number and the injured worker's last name, date of birth and date of injury. SEAPortal allows same-day delivery to the appropriate case file and OWCP

employee and the elimination of postal and parcel costs associated with traditional delivery methods. While you can upload any case-related document, the case must already have been assigned an OWCP case number. Otherwise, Central Case Creation procedures must still be filed. SEAportal cannot be used to submit document directly to the OALJ or the BRB. See Industry Notice No. 148 for more important information about this new service.

Supreme Court of the United States

On April 9, 2015, a petition for certiorari was filed with the U.S. Supreme Court in the case of *BP Exploration & Production, Inc. v. United States of America*, Docket No. 14-1217. The question presented is, "Whether the Fifth Circuit erred by giving mere lip service to the rule of lenity and penal canon when imposing Clean Water Act civil fine liability under 33 U.S.C. §1321(b)(7) on the owners of an offshore well, where oil discharged to federal waters not from the well itself but from a vessel and its associated equipment connected to the well."

On February 23, 2015, the U.S. Supreme Court denied the petition for writ of certiorari in the case of *Naquin v. Elevating Boats, LLC*, Docket No. 14-306. The question presented to the Court was, "Whether a land-based repair supervisor and land-based crane operator, who performs routine maintenance and repair on boats that are docked in a shipyard service canal, and who has spent less than one percent of his work time on any vessel in navigation or on open water, is a 'seaman' under the Jones Act."

On February 10, 2015, a petition for certiorari was filed in the case of *Pysarenko v. Carnival Corporation*, Docket No. 14-1004. The question presented for review is, "May a cruise line based in the United States use an arbitration clause in a seaman's contract of employment as a device to exempt itself from all liability under the Jones Act?" Five *amicus curiae* briefs in favor of the petitioner have been filed to date. A response brief has yet to be filed and the case has not been set for conference.

On December 8, 2014, the U.S. Supreme Court denied the petition for certiorari in the case of *BP Exploration & Production v. Lake Eugenie Land & Development* , Docket No. 14-123. The question presented by the petition was: "Whether the court of appeals erred in holding--in conflict with the Second, Seventh, Eighth, and D.C. Circuits--that district courts can, consistent with Rule 23 and Article III, certify classes that include numerous members who have not suffered any injury caused by the defendant."

On December 24, 2014, a petition for certiorari was filed in the case of *McBride, et al. v. Estis Well Services, LLC*, Docket No. 14-unassigned. The question presented for review is, "Whether seamen may recover punitive damages for their employer's willful and wanton breach of the general maritime law duty to provide a seaworthy vessel, as held by the Ninth and Eleventh Circuits, or are punitive damages categorically unavailable in an action for unseaworthiness, as held by the First, Fifth, and Sixth Circuits and the Texas Supreme Court?" Thus far, three *amicus curiae* briefs have been filed in favor of the petitioner and the response in opposition to the

petition for certiorari was filed on April 6, 2015. The petition has not yet been scheduled for conference.

On November 17, 2014, the U.S. Supreme Court denied the petition for rehearing in the case of *Dize v. Association of Maryland Pilots*, Docket No. 13-1268. This litigation involved seaman status and the question presented by the petition was: "When applying the Chandris 30-percent rule, may a court consider the time a maritime worker spends in the service of a vessel in navigation that is moored, dockside, or ashore, as the Third, Fifth, Sixth, and Ninth Circuits have held, or must a court categorically exclude such time, as the Eleventh Circuit and the Maryland Court of Appeals have held?"

On November 17, 2014, the U.S. Supreme Court denied the petition for certiorari in the case of *Schlumberger Technology Corp. v. Arthey*, Docket No. 14-331. The question presented was, "whether Texas can abrogate federal maritime jurisdiction for the express reason that they do not believe there should be difference in the law when the wrongdoing (here, the over serving of alcohol) occurs upon the navigable waters of the United States as opposed to when it occurs upon Texas soil where Texas law protects the wrongdoer? This was the case in which the Texas Supreme Court held that drinking on a fishing boat did not satisfy the *Grubert* tests for maritime jurisdiction.

Circuit Courts

2nd Circuit

EXPERIENCED LONGSHOREMEN KNOW SUGAR & WATER MIX IS SLIPPERY
GIGANTI V. POLSTEAM SHIPPING CO.

Michael Giganti allegedly sustained an injury while working aboard a vessel owned *pro hac vice* by Polsteam Shipping Co. Giganti was a longshoreman at the time, who was employed by non-party American Sugar Refining Inc. While discharging cargo consisting of raw sugar, it began to rain lightly. Giganti allegedly slipped on a mixture of rainwater and raw sugar present on the vessel's starboard side, striking his tailbone on the deck. Giganti thereafter commenced a §905(b) action under the LHWCA. The defendants moved for summary judgment, which the district court granted. The district court found that, even if Polsteam was aware of the slippery deck condition, a reasonable jury could not find that the subject condition was so clearly unsafe that Polsteam should have intervened and stopped the loading operation. The court found that the rainwater/sugar mixture that occurred on the vessel was a common occurrence and that a competent longshoreman would anticipate such condition in the performance of his duties. The district court held that a cognizable negligence claim required a showing that a defendant's alleged breach of its duty of care proximately caused Giganti's injuries. The court found that Giganti had failed to demonstrate that there is a genuine issue of material fact as to whether the vessel owner breached any *Scindia* duty owed to him. Giganti appealed the district court's ruling that he failed to raise a material question of fact as to whether Polsteam breached its duty to

intervene. The appellate court affirmed for substantially the same reasons set forth in the district court's opinion, holding that Giganti had not met his burden of demonstrating a genuine dispute of facts regarding Polsteam's alleged duty to intervene that would have required trial. The appellate court pointed out that the *sine qua non* of a ship's liability for an obviously dangerous condition arising during the process of loading or unloading is reasonable anticipation that the longshoremen will not be able to avoid it. In Giganti's case, there was no question of fact that a stevedore experienced in unloading sugar would be aware that sugar regularly falls on deck during the offloading process, and that sugar mixed with water is slippery. (2nd Cir, January 7, 2015, UNPUBLISHED) 2015 U.S. App. LEXIS 172

2ND CIRCUIT OVERTURNS *KRALJIC*, TAKING CAP OFF PUNITIVE DAMAGES *HICKS V. TUG PATRIOT, ET AL.*

Ciro Charles Hicks was employed by Vane Line Bunkering, Inc. as a deckhand on a tug, when he allegedly sustained a shoulder injury while on deck handling heavy towing gear. Hicks eventually underwent surgery for a rotator cuff tear. Vane Line initially acknowledged its maintenance and cure obligation but, after surreptitiously obtaining surveillance of Hicks planting a small tree and playing with his grandson, Vane Lines terminated benefits after showing the video to Hicks' doctor and suggesting that Hicks' job only entailed light duty. Based on the video and the suggestion (which was false) that Hicks' job required only light lifting, the doctor determined that Hicks was fit for duty. Despite being recommended for another surgery, due to a recurrent rotator cuff tear, Hicks was forced to return to work, still injured, due to financial pressure caused by the $15 dollar maintenance rate that Vane Lines had paid him, compared to his actual costs of $69.67 per day for food and lodging. During this time, Hicks' house was put into foreclosure and he was unable to pay for health insurance. Hicks brought a seaman's suit against Vane Lines, asserting causes of action under the Jones Act and general maritime law, including a demand for punitive damages and attorney fees. The jury found that Vane Lines had not been negligent and the tug was seaworthy, but that Vane Lines had breached its obligation of maintenance and cure by paying Hicks an insufficient amount and prematurely ceasing payments. The jury awarded $77,000 in compensatory damages for past maintenance and cure; $16,000 in future maintenance and $97,000 in future cure; and $132,000 in compensation for past pain and suffering. The jury also found that appellant's failure to pay maintenance and cure was unreasonable and willful and awarded $123,000 in punitive damages. Based on the finding of willfulness, the district court, upon a motion under Fed. R. Civ. P. 54(d), granted Hicks an additional $112,083.77 in attorney's fees. Vane Lines moved, unsuccessfully, for judgment as a matter of law or a new trial. Vane Lines appealed, arguing that the evidence that its acts and omissions caused Hicks's pain and suffering was insufficient as a matter of law. Vane Lines also objected to the award of punitive damages in addition to and/or in excess of the amount of attorney's fees. In arguing that the evidence was insufficient as a matter of law to support an award for pain and suffering, Vane Lines relied heavily on statements by Hicks that his condition did not significantly improve after the initial injury, and contending these statements demonstrated that Hicks's pain and suffering were entirely attributable to the original injury and not to Vane Lines' failure to fulfill its maintenance and cure duties. The appellate court rejected this argument, noting that the law of the circuit did not require a plaintiff to show

an additional discrete injury or illness resulting from the failure to pay maintenance and cure. Rather, the prolonging or worsening of a condition as a result of the employer's breach will sustain a pain and suffering damages award. The appellate court observed that the jury could easily have found that Vane Lines' discontinuation of maintenance and cure benefits caused injuries to Hicks, both physical and otherwise. Based on the evidence, the appellate court found that the district court did not abuse its discretion in holding that the jury acted reasonably in its award for pain and suffering. Turning to the issue of attorney fees and punitive damages, the appellate court reexamined its prior holding in ***Kraljic***, which held that, in maintenance and cure cases, the amount of punitive damages was limited to the amount of reasonable attorneys' fees. The appellate court acknowledged that ***Kraljic***'s limitation of punitive damages to counsel fees was an outlier, expressly rejected by some courts. Noting that the landscape of Supreme Court case law had been substantially altered since ***Kraljic***, the appellate court concluded it was no longer governing law in the circuit, because it did not survive ***Atlantic Sounding v. Townsend***. The appellate court agreed that punitive damages, as traditionally available under the common law, are available in claims arising under federal maritime law, including claims for maintenance and cure and punitive damages are not limited to the amount of attorney's fees. The district court's judgment awarding both punitive damages and attorney fees was affirmed. (2nd Cir, April 17, 2015) 2015 U.S. App. LEXIS 6372

While not a Longshore case, I included this recent circuit court opinion in the presentation, because of its significance, and recognizing that many committee members handle both Longshore and general maritime law cases. In this case the 2nd Circuit threw out prior precedent in the Circuit and found that punitive damages were no longer limited to attorney fees in maintenance and cure cases.

ON THE WATERFRONT, MEANS YOU'RE UNDER OUR JURISDICTION
CONTINENTAL TERMINALS, INC. v. WATERFRONT COMMISSION OF NY HARBOR

In August 1953, the States of New York and New Jersey entered into an interstate compact to address pervasive corruption in New York Harbor. The Act created the Waterfront Commission of New York Harbor to govern operations at the Port of New York-New Jersey. Continental Terminals, Inc. sued the Waterfront Commission of New York Harbor for a declaratory judgment that its operations at a warehouse in Jersey City, NJ were outside the Commission's jurisdiction. As part of its operations there, large cranes that sit on stringpieces lift containers of coffee from ships and move them to the Container Yard at the Global Marine Terminal. Continental then picks up the containers from the Container Yard and transports them to its Jersey City warehouse. Once the containers arrive at the warehouse, Continental unloads them and removes their contents. The Commission advised Continental that it was required to obtain a stevedore license for its operations. Continental disputed that determination. The Commission responded, concluding that Continental's property line and warehouse were within 1,000 yards of a pier and that its determination was final and therefore subject to judicial review. After Continental filed its declaratory judgment action, the Commission filed a counterclaim seeking a declaratory judgment that Continental's warehouse operations fell within its jurisdiction. The district court issued a memorandum order denying Continental's motion for summary judgment and granting the Commission's motion. Continental appealed the district court's ruling, arguing that it was not required to be licensed as a stevedore under the Act for its activities at its warehouse because its "primary function" was regular warehousing, and that any stevedoring activity was "incidental to its warehouse function." Continental also argued that its warehouse was not an "other waterfront terminal" because it is not located within 1,000 yards of a "pier."

The appellate court found that Continental engaged in stevedoring activities under the Waterfront Commission Act, N.Y. Unconsol. Laws § 9905(1)(b) and (1)(c), where it picked up the cargo from local steamship piers, took it back to its facilities, stored it, and provided the following services: cargo storage; weighing, strapping, crating, labeling, marking, inspecting, and sampling cargo; and unloading containers with freight that had been carried by a carrier of freight by water. Continental's stevedoring services were more than incidental. Additionally, the appellate court agreed that the fence line at the container yard was the point of measurement for an other waterfront terminal under N.Y. Unconsol. Laws § 9806 and Continental's warehouse was an "other waterfront terminal" as it was less than 1,000 feet from the pier, and Continental was within the jurisdiction of the Commission. The judgment of the district court was affirmed. (2nd Cir, April 3, 2015) 2015 U.S. App. LEXIS 5382

4th Circuit

CLAIMANT FAILS TO MEET HIS BURDEN OF PROOF IN DISCRIMINATION CLAIM
THOMAS V. GENERAL SHIP REPAIR CORPORATION, ET AL.

John C. Thomas was employed by General Ship Repair Corporation, as a welder, when he allegedly experienced low back and groin area pain while lifting an empty gas cylinder at work. Thomas visited the facility's medical clinic, was diagnosed with back and groin strains, and was advised to take time off work. Thomas received temporary total disability compensation , under the LHWCA, while he was off work. After Thomas returned to work, the employer's safety agent engaged Thomas in a conversation regarding his use of an employer-provided fire-retardant life vest rather than using his personal non-fire-retardant life vest. Following this conversation, Thomas was directed to report to employer's vice-president, who also met with Thomas to discuss his use of an employer-issued life vest. At the conclusion of this meeting, Thomas's employment with General Ship Repair was terminated for insubordination and disrespectful conduct. Thomas subsequently requested and was allowed a meeting with employer's president. Following this meeting, the company President concurred with the decision to terminate Thomas's employment. Thomas filed a discrimination complaint, under §948a of the LHWCA, alleging that he was terminated because of his disability claim. Following a formal hearing, the ALJ discussed at length the testimony of all of the parties involved in the events which culminated in Thomas's termination, and found that General Ship Repair's discharge of Thomas did not violate §948a of the Act. Thomas appealed to the BRB, contending that the ALJ's finding in this regard were erroneous and that the evidence of record supported the inference that General Ship Repair had a discriminatory motive, because it confronted claimant regarding his use of the employer-issued life vest on his first day back after his injury, and terminated him the following day. The BRB noted that Thomas bore the burden to demonstrate a discriminatory act and animus by the employer. The ALJ set forth in detail the evidence presented by the parties and, based on the that evidence, rationally found that Thomas was terminated by employer for insubordination and disrespectful conduct, specifically claimant's refusal to comply with employer's requirement that he wear an employer-issued fire-retardant life jacket. The ALJ's finding that Thomas was treated no differently than other employees was supported by substantial evidence. The administrative law judge's conclusion that claimant failed to establish a discriminatory act motivated by discrimination animus was rational, supported by substantial evidence, and in accordance with law. Accordingly, the BRB affirmed the decision and order of the administrative law judge. Thomas sought further appellate review of the decision and order of the BRB affirming the decision of the ALJ dismissing his

discrimination claim. The appellate court's review of the record disclosed that the BRB's decision was based upon substantial evidence and was without reversible error. Accordingly, the appellate court denied the petition for review, without allowing oral argument, because the facts and legal contentions are adequately presented in the record and argument would not aid the decisional process. (4th Cir, November 7, 2014, UNPUBLISHED) 2014 U.S. App. LEXIS 21478

5th Circuit

LONGSHOREMAN TURNED SEAMAN NOT COVERED UNDER P&I POLICY
ANOTHER LONGSHOREMAN CLAIMING TO BE A SEAMAN (CONT.)
NAQUIN V. ELEVATING BOATS, LLC

Larry Naquin, Sr. worked for Elevating Boats, L.L.C.'s as a repair supervisor, where he oversaw the repair of lift boats and cranes. Naquin often worked on board the vessels, which were usually either jacked up or moored at a dock, depending on the specific repair required. At the time of his alleged injury, Naquin was operating a land-based crane, when the pedestal snapped, sending the crane toppling to the ground. As a result of the accident, Naquin allegedly suffered injuries to both his left ankle and right heel, which required surgery. Elevating Boats reported the injuries to the OWCP District Director and began paying benefits under the LHWCA. However, Naquin filed suit asserting claims under the Jones Act, and in the alternative, reserving his claims and benefits under the LHWCA. Elevating Boats moved for summary judgment, arguing that the undisputed facts show that Naquin was not a Jones Act seaman, but a longshoreman. However, the court found the totality of Naquin's duties sufficient to raise a triable issue of fact as to whether Naquin satisfied the second *Chandris* prong, observing that the nature of Naquin's employment fell somewhere between the dichotomous extremes of a land-based longshoreman and a Jones Act seaman, where reasonable minds could draw different conclusions and denied the motion for summary judgment. The case was tried before a jury, who found Naquin to be a seaman, that Elevating Boats had been negligent, and that its negligence was the cause of Naquin's injuries. The jury awarded Naquin a total of $2,560,000.00 in damages and the court entered judgment in accordance with the jury's verdict. The court later amended the judgment to reflect a credit in the amount of $89,600.00 for payments made to Naquin pursuant to the LHWCA. The court denied the motion for a new trial or remittitur of Naquin's general damages award. Elevating Boats appealed, challenging multiple legal conclusions and factual determinations of the district court, including Naquin's seaman status, the sufficiency of evidence to establish its negligence, and the district court's error of admitting evidence of Naquin's relative's death to support his emotional damages claim. The appellate court affirmed the judgment of the district court as it related to liability, but vacated the judgment of the district court as it related to damages and remanded for a new trial on damages. The U.S. Supreme Court denied the petition for certiorari. The case went back to the district court on motion filed by Elevating Boats' P&I insurer, State National Insurance Company (SNIC), arguing that it has not breached its insurance contract nor acted in bad faith, because Elevating Boats was not entitled to coverage under the P&I policy, as coverage did not extend to the land-based incident in question and Elevating Boats failed to comply with the requisite notice requirements imposed by the policy. The court found that SNIC had carried its burden in showing Elevating Boats' inability to prove that the coverage of the P&I Policy extended to Elevating Boats' liability for the incident at issue, agreeing with SNIC's position that the term "as owner of the vessel" limited the coverage of the policy to liability for incidents related to Elevating Boats' activity as owner of a vessel. Because the incident was land-based, having occurred when a crane toppled over, the

court concluded that the policy's coverage did not apply. Elevating Boats argued that the language of the policy's term "any casualty or occurrence," stood for the proposition that the policy covered any incident for which Elevating Boats may be found liable, regardless of whether the occurred during its role as a vessel owner or otherwise. While the crane involved in Naquin's injury may have had the capability of supporting Elevating Boats' fleet of vessels, it was being used in no such way at the time of the incident. While acknowledging that the line maybe a wavy one, between coverage and non-coverage, the court nevertheless found that there must be at least some causal operational relationship between the vessel and the resulting injury. Due to the fact that there appeared to be no relation to Elevating Boats' ownership of vessels and its operation of the crane, the evidence did not support a finding that the P&I policy's coverage extended to Elevating Boats' liability. Because summary judgment was appropriate on Elevating Boats' claims for breach of contract and bad faith, the court found it unnecessary to address SNIC's arguments regarding prescription and Elevating Boats' alleged breach of the conditions of the P&I policy. SNIC's motion for summary judgment was granted. (USDC EDLA, March 18, 2015) 2015 U.S. Dist. LEXIS 33586

The result in this case is a glaring testament to the argument that the Fifth Circuit simply got it blatantly wrong, when they affirmed the jury's holding that this land-based worker was, instead, a seaman. How can a "seaman," who must have a connection to a vessel (or fleet of vessels), which is substantial in terms of both nature and duration, not have coverage under the marine policy that is specifically designed to provide coverage for an individual who meets that substantial connection test? This is just another Fifth Circuit-created maritime law mess, like the one they created in Winchester, and warrants immediate correction before many more maritime employers are denied the coverage they paid for.

EMPLOYER HAS NO RESPONSIBILITY FOR PAYMENT OF §928(C) ATTORNEY FEE *ALBE V. DIRECTOR, OWCP, ET AL*.[Simmons]

Warren Simmons attorney, Joseph Albe, moved the ALJ to hold Northrop Grumman Ship Systems, Inc. personally liable for paying his fees and costs awarded to him pursuant to §928(c), after the District Director issued an Award of Attorney's Fee, finding that Northrop did not owe fees to Simmons' attorney but granted Albe fees of $3,562.50 as a lien under §928(c) on Simmons' benefits, which Simmons agreed to. Subsequently, the ALJ issued a Consent Order Awarding Attorney Fees of $17,685.43 pursuant to §928(c) which Simmons' counsel was authorized to recover from Simmons' future benefits. Albe contended that Northrop refused to enforce the lien, continued to pay Simmons the full amount of the benefits awarded him, amounting to $57,000, and, as a result of Simmons' death, Albe was not able to collect his fee as a lien on future benefits. Accordingly since Northrop did not protect this lien, Albe contended Northrop was responsible for the unpaid fees. Finding no precedent to support Albe's argument, the ALJ found that fees awarded under §928(a)(b) are paid by an employer as opposed to §928(c) which are to be paid by claimant. The ALJ noted that if Albe wanted to enforce his lien he should have instituted timely proceedings against Simmons who entered into a contract with him. Northrop was not responsible for enforcing a contract between Simmons and his attorney to which it was not a party. Albe appealed the ALJ's ruling to the BRB, which affirmed. On further appeal, the appellate court, in a cursory *per curiam* opinion, noted that it had previously upheld the denial of employer-paid attorneys' fees pursuant to §928(a) or (b) [*see February 2013 Longshore Update*]. The appellate court noted that Albe's new claim stemmed from his contention that in addition to an approved fee contract with Simmons, he had a lien on the compensation benefits, and Northrup became obliged to deduct fees from its payments to

Simmons. Noting that the BRB had rejected Albe's new claim in a succinct and clear opinion, which pointed out that Albe did not fulfill his duty to have the district director and ALJ fix in the award approving the fee, such lien and manner of payment, the appellate court found no error of law in the BRB's interpretation of Albe's duty to perfect, or have "fixed" a lien against the employer's payment of benefits. The petition for review of the judgment of the BRB was denied. (5th Cir, April 17, 2015, UNPUBLISHED) 2015 U.S. App. LEXIS 6368

9th Circuit

9TH ADOPTS CHAIN OF CAUSATION TEST VS. IRRESISTIBLE IMPULSE TEST (CONT.)
KEALOHA V. DIRECTOR, OWCP; ET AL. [LEEWARD MARINE]

While working as a ship laborer, William Kealoha fell about 25 to 50 feet from a barge to a dry dock, landing on a steel floor. He suffered blunt trauma to the head, chest, and abdomen; a fractured rib and scapula; and knee and back pain. Kealoha later resumed work at his employer, Leeward Marine Inc., but after a while, left Leeward. He filed a workers' compensation claim under the Longshore Act for the injuries from his fall. Kealoha subsequently shot himself in the head, causing severe head injuries. He sought compensation for these injuries under the Longshore Act, alleging his suicide attempt resulted from his fall and the litigation over that claim. He supported his claim by offering the testimony of an expert psychiatrist, who diagnosed Kealoha with major depressive disorder due to multiple traumas and chronic pain, post-traumatic stress disorder, and a cognitive disorder. The psychiatrist opined that chronic pain from the fall and stress from the resulting litigation caused Kealoha to become increasingly depressed, angry, and anxious, and worsened his already poor impulse control such that he impulsively attempted suicide. An ALJ denied Kealoha's claim for benefits, finding that Kealoha's suicide attempt was not the "natural and unavoidable" result of his fall because other, more significant factors led to the attempt. Rather than accepting the findings of Kealoha's medical expert, the ALJ instead credited the testimony of Leeward's retained expert, who opined that the suicide attempt was not an episode of "impulse dyscontrol." Alternatively, the ALJ found that Kealoha's injuries were not compensable because §3(c) of the Act precludes compensation for an injury occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. Kealoha appealed, arguing that the BRB has recognized an exception to the §3(c) bar, holding that when a worker's suicide attempt results from an "irresistible impulse" caused by a work-related injury §3(c) does not bar compensation because such a suicide attempt is not "willful" under the Act. The Board reversed, holding that instead of applying the "naturally and unavoidably" standard, the ALJ should have afforded Kealoha a presumption under §20(a) that his suicide attempt was causally related to his fall. Additionally, the Board held that the ALJ erred by failing to address whether Kealoha's illness was "so severe that he was unable to form the willful intent to act." The Board instructed the ALJ that planning of the claimant's suicide attempt alone is not enough to show 'willful intent. On remand, the ALJ held that Kealoha established that his fall was a cause of his suicide attempt, and that Leeward failed to rebut this presumption. Nevertheless, the ALJ found that compensation was barred because Kealoha's suicide was "intentional" and not the result of an "irresistible impulse." The ALJ found that Kealoha spoke about committing suicide the night before, made comments to his wife the morning of his suicide attempt that indicated he was thinking about suicide, and threatened to commit suicide six hours before he actually shot himself. The ALJ found that Kealoha's actions were "consistent with a planned, and intentional action," and therefore his suicide attempt could not have been the result of an irresistible suicidal impulse. The Board affirmed. On further

appeal, Kealoha argued that the ALJ and Board should have assessed whether his fall caused his suicide, rather than whether his fall led Kealoha to attempt suicide out of an "irresistible impulse." Kealoha and Leeward disagreed on the proper test to determine a compensable suicide. Leeward argued that the ALJ applied the correct test, while Kealoha argued that the ALJ improperly assumed that because Kealoha planned his suicide, it was not compensable. The appellate court ruled that a claimant under the LHWCA may be entitled to benefits for injuries incurred from a suicide attempt when there is a direct and unbroken chain of causation between a compensable work-related injury and the suicide. The appellate court held that evidence that a claimant planned his suicide does not necessarily preclude compensation under the Act because the proper inquiry is whether the claimant's work-related injury caused him to attempt suicide. The panel held that the claimant need not demonstrate that the suicide, or attempt, stemmed from an irresistible suicidal impulse. The panel concluded that the ALJ erroneously applied the irresistible impulse test, and remanded for the Benefits Review Board to apply the chain of causation test or to remand to the ALJ so that the ALJ may have the first opportunity to do so. On remand, the ALJ concluded that, while the evidence did not support a finding that Kealoha's injury caused him to develop a mental condition that caused him 'to become devoid of normal judgment," it did support a finding that the results of the accident exacerbated his already weak impulse control. The ALJ found that added stressors resulting from Kealoha's work accident, coupled with his low IQ, aggravated his pre-existing poor impulse control and led to his suicide attempt. The ALJ concluded that there was a chain of causation between the work accident and the suicide attempt. The ALJ awarded temporary total disability benefits from the date of Kealoha's suicide attempt in 2003 and continuing, as maximum medical improvement had not been demonstrated. (Case No. 2003-LHC-02564, January 30, 2015)

Also see Huff-Garrett v. Overseas Administration Services, Ltd., et al. under the Significant ALJ Decision Section at the end of this paper.

State Appellate Courts

Louisiana

ANOTHER LONGSHOREMAN TRYING TO BE A JONES ACT SEAMAN
ARMAND V. TERRAL RIVER SERVICE, INC.

Albert Ross Armand worked for Terral River Service Inc. for approximately eight months, when he was injured on the job and suffered the partial amputation of his right thumb. Armand had been hired by Terral as an operator/deck hand. His work duties included activities both on shore and over water. His on-shore duties included loading fertilizer onto trucks and using an excavator to move sand. Armand's duties over water were primarily on a floating, fixed work platform located at the Terral facility. The work platform was tied securely with cables to a dolphin, a marine structure moored to the river bottom downstream of the work platform. The work platform was also attached to the river bottom by two sets of three pipes, bound together, and attached at the bow and the stern of the work platform with a system of chains and cables. The pipes holding the work platform were driven deep into the river bottom. The platform had no navigational function and was fixed in place. Armand estimated in his deposition testimony that approximately sixty to seventy percent of his working time was spent on the work platform. Armand required two surgeries for his thumb injury and timely began receiving benefits under the LHWCA. However, Armand subsequently filed suit against Terral seeking money damages

as a Jones Act seaman. Terral then discontinued Armand's Longshore benefits, and, as he had not reached MMI, began paying Armand maintenance and cure under the provisions of the Jones Act while his damage claim was pending. Terral filed a motion for summary judgment claiming that . Armand was not a Jones Act seaman and argued that Armand would be unable to meet his burden at trial to prove that the work platform at the Terral facility was a "vessel in navigation." The trial court heard the motion and granted summary judgment in favor of Terral, finding, that the work platform did not constitute a vessel. Armand timely appealed the trial court's ruling, arguing that the trial court erroneously applied Louisiana Civil Code of Procedure article 966 in light of the contradictory testimony and /or evidence. The appellate court noted that the work platform on which Armand spent sixty to seventy percent of his time while working for Terral was permanently affixed not only to the river bottom, but also to the river bank. Its primary purpose was to provide a working platform to unload the barges bringing fertilizer, rocks, and sand to the Terral facility. The appellate court concluded that the work platform was not designed (to any practical degree) to serve a transportation function and did not do so, and did not qualify as a "vessel in navigation" for the purpose of allowing Armand to maintain his Jones Act claim. Nothing in the record before the trial court or the appellate court raised a material issue of fact concerning the vessel status of the work platform and Armand's assignment of error was held to be without merit. The motion for summary judgment granted by the trial court in favor of Terral was affirmed and all costs of the appeal were assessed to Armand. (La. App. 3rd Cir, December 10, 2014) 2014 La. App. LEXIS 2920

Mississippi

DOES SUBCONTRACTOR HAVE PROPER COVERAGE UNDER THE LHWCA?
KIMBROUGH V. FOWLER'S PRESSURE WASHING, LLC, ET AL.

James Kimbrough was allegedly injured in an on-the-job slip and fall, while working for Fowler's Pressure Washing LLC, cleaning vessels. At the time of the incident, Fowler's was a subcontractor to Patriot Environmental Services Inc. As a result of his fall, Kimbrough allegedly injured his left knee, which required surgery. While in physical therapy for his knee injury, Kimbrough allegedly injured his back. Fowler's insurer initially began paying Kimbrough state workers' compensation benefits. Kimbrough subsequently filed a claim for compensation under the LHWCA against Patriot. Upon learning that Kimbrough had filed a claim under the LHWCA, Fowler's insurer discontinued payment of state workers' compensation benefits. Kimbrough filed a petition to controvert and a motion to compel payment of benefits with the Mississippi Workers' Compensation Commission. After a review of all the pleadings, the administrative judge found that the Mississippi Workers' Compensation Act (MWCA) did not apply to maritime employment and that Fowler's did not assume coverage of Kimbrough by virtue of having paid for a state workers' compensation insurance policy. The AJ stayed the case until the United States Department of Labor determined whether Kimbrough was engaged in maritime employment. Kimbrough appealed to the Commission, and the Commission affirmed. Kimbrough then appealed to the Mississippi, which dismissed the appeal for lack of a final order. The parties then sought entry of a final order from the AJ, who dismissed Kimbrough's state compensation claim because Kimbrough was engaged in maritime employment at the time of his injury. The Commission affirmed. Kimbrough appealed again, asserting that the Commission erred in finding that Fowler had not assumed coverage of Kimbrough's injury and, because his injury did not occur over the navigable waters of the United States, case law relied on by the Commission did not apply. The Appellate court held that the effect of the holding in

Valley Towing was to preclude concurrent jurisdiction. Because Kimbrough was found to be engaged in transportation or maritime employment and accepted benefits under the LHWCA, the rule precluding concurrent jurisdiction applied and Kimbrough's issue in this regard was without merit. The appellate court also held that the section of the MWCA relied on by Kimbrough applied to "employees within the coverage of this chapter"; however, since it had already been determined that Kimbrough fell within the transportation and maritime-employments exclusions, his reliance on this section of the MWCA was also without merit. Judgment of the Commission was affirmed and costs of the appeal were assessed against Kimbrough. (Miss. App. Ct, March 10, 2015) 2015 Miss. App. LEXIS 116

New York

YOU CHOSE THE METHOD OF ACCESSING THE VESSEL
SCHNAPP V. MILLER' S LAUNCH, INC.

Wayne Schnapp was allegedly injured while boarding a vessel owned and operated by Miller 's Launch, Inc., and chartered by Schnapp's employer, nonparty Weeks Marine, Inc., to transport workers and equipment to and from job sites. Schnapp claimed Miller's negligence, including its vessel's inadequate equipment and unsafe condition and inadequate warnings, caused his injury. Schnapp was employed by Weeks Marine as a surveyor working on a bridge rehabilitation project at the time of his alleged injury, and was transported to shore on board Miller's vessel. Schnapp, who was not involved in the unloading or loading of equipment, disembarked by climbing up to the pier. When reboarding the vessel, he injured his leg by jumping down from the pier onto the deck while reaching forward in an attempt to grab the shoulder of another Weeks Marine employee as an anchor standing on the vessel a few feet in front of plaintiff. Schnapp did not notify the captain when reboarding nor request assistance in reboarding and admits that he decided to jump down to the deck. Schnapp collected LHWCA benefits from his employer after the incident, but later filed a §905(b) action against Miller's, who moved for summary judgment dismissing Schnapp's complaint because the undisputed facts established that Miller's conduct did not amount to negligence under the LHWCA. Miller's further insisted that Schnapp's claim of the vessel' s negligence in failing to provide him a safe means to board or disembark constituted a claim against the vessel owner for unseaworthiness, barred under LHWCA. In opposition Schnapp claimed he was a passenger on Miller's chartered vessel, so that Miller's owed him a duty of reasonable care and was negligent in failing to provide him a safe means of egress from and access to the vessel. By virtue of Schnapp's own election to pursue his action under §905(b), classifying himself as an employee engaged in maritime employment to collect workers' compensation benefits from his employer under the LHWCA, the court noted that the standards applicable to maritime employees' claims against vessel owners under *Scindia* governed his claims against Miller's. After docking its vessel, Miller's was required to exercise reasonable care under the circumstances to turn over the vessel and its equipment in a reasonably safe condition to Weeks Marine and to warn of latent hazards that were or ought to have been known to the vessel and were neither obvious to nor to be expected by a competent stevedore. The parties did not dispute that the distance of approximately four feet between the pier and the deck of Miller's vessel was open and obvious, so that both the captain and Schnapp, when he elected to jump down to the deck, were aware of the height difference. Thus, since this condition was not a latent hazard in accessing the vessel, Miller's owed no duty to warn of the condition. Schnapp admitted that, even though Weeks Marine kept gangways or ladders available for his use at its facility where Miller's vessel docked, he never requested any

form of assistance from any source to board the vessel, and he had no intention to make such a request. The record revealed no evidence that Schnapp's means to reboard the vessel was limited to jumping down onto the deck or that requesting a safer alternative to board would have been unduly impractical or time consuming. Nor did Schnapp present any evidence that the distance between the pier and the deck was a condition that an experienced stevedore would not expect to encounter or that such a condition would prevent the stevedore from carrying out its cargo operations with reasonable safety. Based on the open, obvious distance down from the pier to the deck, the court held that Miller's was entitled to rely on Schnapp's experience working at his employer 's facility, his familiarity with the conditions there and the process of boarding from the pier to the vessel, and hence his reasonable steps to avoid or remedy such a hazard. Since Schnapp failed to identify any viable breach of Miller's *Scindia* duties, the court granted Miller's motion for summary judgment, dismissing Schnapp's claim of negligence under §905(b). (NY Cnty. Sup. Ct. December 19, 2014) Index No. 115059/2008

Pennsylvania

LHWCA BENEFIT MAY BE ATTACHED TO SATISFY ALIMONY OBLIGATIONS
UVEGES V. UVEGES

Betty (wife) & Samuel Uveges (husband) were married on June 3, 1972, and later divorced on August 1, 2011, entering into an agreement wherein husband would pay to wife the sum of $2,500.00 per month for permanent alimony, modifiable only by remarriage, cohabitation, or the receipt by wife of social security disability payments. Wife filed a petition to enforce the agreement alleging husband's failure to make any of the required alimony payments after January 1, 2012. Following a hearing, the court entered an order, which among other things provided for the attachment of husband's monthly benefits under the LHWCA. The court also found the husband in contempt and issued a bench warrant. A petition for special relief was filed by Consolidated Coal Company, husband's previous employer, which claimed that benefits payable to beneficiaries under the LHWCA are exempt from attachment. The lower court initially vacated that portion of the order that called for attachment of husband's LHWCA benefits but, later, following a renewed motion by the wife, concluded that the law permits an ex-spouse in wife's position to attach the LHWCA retirement or disability benefits of an ex-husband who has been found to be in contempt. Husband appealed, arguing that the lower court erred and that his LHWCA benefits were not subject to attachment pursuant to §916 of the LHWCA. Citing *Thibodeaux v. Thibodeaux*, husband argued that wife could attach his LHWCA benefits since it was Congress's intent that the benefits should go to the disabled worker directly, without any attachment. In concluding that husband's LHWCA benefits could be attached, the trial court declined to accept the rationale of *Thibodeaux*, citing instead *Parker v. Parker*, in which the Pennsylvania appellate court concluded that a similarly worded anti-attachment clause in the statute governing the husband's service-connected disability Veterans' Administration benefits did not preclude the trial court from considering those monthly payments as a source of income for alimony *pendente lite* purposes. The appellate court also pointed out that the *Moyle* court further noted that the Office of Personnel Management promulgated a regulation that expressly provides that LHWCA benefits are subject to garnishment pursuant to the SSA Garnishment provision. *Moyle* found that LHWCA disability benefits could be considered as "remuneration for employment," because the SSA Garnishment provision defines that term to include "workers' compensation benefits paid or payable under Federal or State law. The appellate court affirmed the trial court's determination that the husband's disability benefits may be attached to pay the

husband's alimony obligation. The appellate court concluded that, because husband's LHWCA benefits were paid to him pursuant to federal law, and because wife was not a "creditor" and husband's alimony obligation was not a "debt" under §916, the LHWCA benefits may be attached. (Penn. Supr. Ct., November 5, 2014) 2014 PA Super 251; 2014 Pa. Super. LEXIS 3954

Texas

JUDGMENT FOR LONGSHOREMAN REVERSED FOR IMPROPER JURY INSTRUCTION
IRIKA SHIPPING S.A., ET AL V. HENDERSON

Quinton Henderson, a longshoreman, alleged that he sustained injuries when he fell while he was working on the deck of a vessel, managed by Irika Shipping S.A. and owned by Prosperity Management S.A. The vessel involved was a bulk carrier that transports cargo, including but not limited to petcoke. Henderson's employer, Kinder Morgan, was acting as a stevedore at the time of his accident and Henderson was monitoring the loading of petcoke via a loading arm into the holds of the vessel. Henderson claimed he slipped and fell in a mixture of petcoke and water in an area that was freshly painted, slippery when dry and did not have non-skid paint. Henderson filed suit against both Irika and Prosperity pursuant to §905(b) of the LHWCA for negligence, alleging that Prosperity and Irika owed him a duty of care, that they were negligent and breached their duty of care, and that he was injured as a result thereof. A jury found that the negligence of Irika, Prosperity, and Henderson proximately caused the occurrence in question, allocated a percentage of negligence to each party, and awarded Henderson $1,734,943.00 in damages. Irika and Prosperity appealed the final judgment, arguing that (1) the trial court erred as a matter of law in failing to dismiss the claim because the entire action is a proscribed claim for unseaworthiness; (2) there is insufficient evidence to support the jury's verdict; and (3) the trial court erred in submitting the charge to the jury. The appellate court initially found that Henderson's negligence claim was not solely based on the lack of non-skid paint between the hatches or a "design defect," but was also based on the slippery deck created by the accumulation of water and petcoke dust, and the presence of fresh paint on the deck's surface. There was sufficient evidence to establish that Henderson was asserting a negligence claim that fit within one or more of the *Scindia* duties. Accordingly, the trial court could reasonably conclude that Henderson's negligence claim was not an attempt to invoke the unseaworthiness remedy and therefore the trial court properly denied the motion for directed verdict. The appellate court also found that there was evidence in the record that the vessel defendants were negligent and breached one or more of the *Scindia* duties. Although the defendants disputed the evidence and had controverting testimony from other witnesses, the appellate court concluded that the evidence was legally sufficient to support a jury finding that appellants were negligent for either failing to turnover a vessel on which longshoremen could work in reasonable safety, for breaching the active control duty pertaining to the areas of the deck still under the control of the vessel defendants, or for failing to intervene. Furthermore, appellate court concluded that the jury's apportionment of fault between the parties was not legally insufficient, because there was some evidence in the record that would support a finding allocating the percentages of fault that the jury assigned to Irika, Prosperity, and Henderson. Accordingly, the appellate court overruled the appellants' legal sufficiency challenge. Regarding the alleged jury charge error, appellants contended that the trial court erred in defining negligence for purposes of comparative fault under §905(b) cases, and omitted the recognition that appellants did not owe plaintiff the duty to provide a seaworthy vessel. However, the appellate court found that appellants failed to make timely objections to the charge and never brought the issues to the trial court's attention,

accordingly, these complaints were not preserved for appeal. Appellants also complained about the trial court's erroneously asking the jury to separately quantify the fault of the vessel owner and the vessel operator. However, the appellate court found that this issue was not properly preserved for appeal. The defendants' final argument regarding charge error pertained to omitted language in the instruction regarding the duty to intervene. Defendants had requested Fifth Circuit Pattern Jury Instruction No. 4.11, which the trial court failed to include in its entirety. Although the appellate court noted that the defendants did not explain or state specifically why the omitted language was necessary, under the facts and circumstances of the case, the specific grounds were apparent from the context and content of the omitted language. Appellants argued that by omitting the requested instruction the charge erroneously omits language regarding the stevedore's primary duty to provide a safe workplace for its employees. The appellate court agreed. The instruction the defendants requested related to one of the three duties recognized by *Scindia*, and clearly concerned a contested, critical issue. Considering the pleadings of the parties and the nature of the case, the evidence presented at trial, as well as the charge in its entirety, the appellate court concluded that the refusal to give the requested instruction was reasonably calculated to and probably did cause the rendition of an improper judgment. Because the appellate court's decision clarified the manner in which Henderson's §905(b) claim should have been submitted to the jury, it sustained issue three in part, concluding that the interests of justice required a remand for a new trial. The appellate court reversed the trial court's judgment and remanded for a new trial. (Tex. 9th App, December 18, 2014) 2014 Tex. App. LEXIS 13513; 2014 Tex. App. LEXIS 13550

District Courts

California

LONGSHOREMAN PREVAILS AGAINST UNITED STATES ON §905(B) ACTION
STRAUSS V. UNITED STATES OF AMERICA

Douglass Strauss brought a negligence action, pursuant to the Public Vessels Act, the Suits in Admiralty Act, the Longshore and Harbor Worker's Compensation Act, against the United States of America based on an alleged accident that occurred aboard a Navy vessel. Strauss, who was employed by National Steel & Shipbuilding Company (NASSCO), as a Machinery General Supervisor II, was allegedly injured while boarding the Navy vessel, when he stepped down from the brow onto a plastic pallet that was being used as a stair. When he stepped on the pallet, it bowed, and his foot slipped forward and caught on the lip of the pallet. Strauss's right knee buckled, and he stumbled onto the deck. The pallet did not have non-skid on it, and it was slippery with morning dew. The sea conditions were calm, and the ship was not moving. Strauss underwent several surgeries, but eventually lost his job and was undergoing vocational training at the time of trial. Strauss succeeded in striking the testimony of the defense medical expert at trail, which opined that with a total knee could return to his full duties at NASSCO, since this opinion had not been properly disclosed prior to trial. At trial, the court found that, at the time of Strauss's alleged accident, the vessel was manned by active duty service members of the Navy, who maintained a gangway watch on the vessel, and the entire boarding device was under the control of Navy. The court found that the use of the plastic pallet, and the manner of its placement, did not provide a safe step for the use of civilian repair workers employed by private contractors in accessing the ship because it did not provide a solid, uniform and non-slip surface.

As a result, Strauss sustained a full thickness chondral fracture of his right patella when he slipped on the plastic pallet. The injury was a traumatic injury, and was not a preexisting injury or a cumulative injury. Strauss was injured as a result of the Navy's negligence in failing to provide a safe means of access to the vessel. Strauss was exercising reasonable care when boarding the vessel and did not cause and was not contributorily at fault for the incident or his injuries. The court also found that Strauss would require a total knee replacement surgery in the future, which was also caused by the Navy's negligence. The court held that, as a result of the Navy's negligence, Strauss sustained damages including past and future wage loss, past and future medical expenses, and past and future pain and suffering, and awarded damages totaling $1,855,149.67. The parties stipulated to the amount NASSCO had paid as compensation and medical expenses under the LHWCA, so the court found that NASSCO was entitled to recover its full lien of $250,834.79. (USDC SDCA, March 2, 2015) 2015 U.S. Dist. LEXIS 25101

ARE TURNBUCKLES & LASHING RODS SHIP'S EQUIPMENT OR PART OF CARGO?
ALLEN V. MAERSK LINES LIMITED

Darin Allen was working as a longshoreman aboard a vessel owned and operated by Maersk Lines Limited, employed by stevedore Ports America. Allen's duties involved working with a partner to unsecure certain cargo containers on the vessel so that they could be removed from the vessel. While plaintiff's partner was twisting the turnbuckle attached to one of the lashing rods, it broke free from its casting and struck Allen in the head, allegedly causing injuries. Allen filed a §905(b) action, under the LHWCA, in state court. Maersk removed the case to federal court pursuant to the court's diversity jurisdiction under 28 U.S.C. §1441(b). Maersk subsequently moved for summary judgment, arguing the evidence would show that Maersk did not violate its *Scindia* turnover duty. Allen conceded in her opposition that her cause of action under §905(b) only implicated the turnover duty. The court initially noted that Allen had adduced no evidence that Maersk had actual knowledge of a hazardous condition. Therefore, in order to prevail at trial, Allen must show (a) that Maersk should have known of the hazardous condition in the exercise of reasonable care, and (b) it was not a hazard that should have been anticipated by a reasonably competent stevedore. The parties disputed whether the hazard that caused Allen's injury was part of the cargo stow or the ship's equipment. Allen argued that lashing rods and turnbuckles are equipment provided by the ship owner. Maersk contended that the gear is connected to the storage containers, and should thus be construed as being part of the ship's stowage. The court found that there was a genuine issue of fact as to whether the hazard emanated from the ship's cargo area or equipment. The court also found that genuine issues of fact existed as to whether the accident was caused by a defect to the lashing rod, whether Maersk should have known of the hazardous condition, and whether an experienced stevedore should have been able to anticipate and mitigate the hazardous condition. Accordingly, the court denied Maersk's motion for summary judgment. (USDC NDCA, January 21,2015) 2015 U.S. Dist. LEXIS 7412

Colorado

DISCRIMINATION ACTION UNDER DEFENSE BASE ACT
MARSHALL V. EXELIS SYSTEMS CORPORATION, ET AL.

In this employment discrimination action, Rashanna Marshall alleged that defendants discriminated against her on the basis of race during her employment in Afghanistan. Defendants

moved for summary judgment, contending that the Defense Base Act (DBA) barred Marshall's outrageous conduct claim, both the DBA and the LHWCA contain exclusivity provisions that preempt all state law claims. Marshall did not contest that the DBA provides an exclusive remedy for a covered injury. Instead, she argued that because she sustained injuries after her termination, her claim did not fall within the scope of the DBA because her injuries did not arise out of and in the course of employment. Specifically, Marshall alleged that, following her termination, she lost her housing and dining privileges, she was required to immediately leave her post, and Exelis attempted to improperly obtain her medical information after she visited an on-base clinic with chest pains. Exelis argued that Marshall's employment termination, questions about ability to evacuate, and loss of company housing after demobilizing arose from the zone of danger created by Marshall's employment in Afghanistan. The court agreed that Marshall's claims arose from the obligations and conditions of her employment. Therefore, to the extent Marshall asserted these facts as evidence of an injury that forms the basis of her outrageous conduct claim, the court determines that it fell within the ambit of the DBA and was preempted. However, there were disputed issues of material fact relating to whether Exelis' personnel attempt to obtain Marshall's medical records, after she provided documentation that she was placed on bed rest in order to evacuate her from her post and, thus, brought that conduct within the zone of special danger because it related to the obligations and conditions of her employment. Therefore, the court reserved ruling on this issue until evidence was presented at trial. The court also concluded that a reasonable juror could determine, upon finding clinic staff more credible than Exelis' personnel, that it was beyond the bounds of decency for an employer to attempt to obtain medical information about an employee in order to verify whether she was appropriately placed on medical leave to provide a post-hoc justification for the manner and timing of her termination. It was for the jury to resolve factual disputes regarding allegations that Exelis' personnel attempted to improperly procure Marshall's medical records. The court next considered Exelis' argument that some of the allegedly discriminatory acts should be excluded from consideration because they are time-barred. In response, Marshall argued that ever if some discriminatory acts fell outside the covered period, failing to exhaust administrative remedies did not bar an employee from using the prior acts as background evidence in support of a timely claim. The court acknowledged this argument, but found that Marshall had not met her burden of demonstrating the acts in question were not time-barred. As such, those claims based on discriminatory acts were time-barred and would not be allowed. However, the court also acknowledged that there were genuine disputes of material facts relating to Marshall's claims of race discrimination and retaliation. Therefore, the court limited Marshall's claims to the extend they were time barred and denied Exelis' motion in all other respects. Exelis's motion for summary judgment was granted in part and denied in part. (USDC DCO, March 26, 2015) 2015 U.S. Dist. LEXIS 38425

Connecticut

ASBESTOSIS DUE TO SHIPYARD EXPOSURE CLAIMS ARE DISMISSED
BRAY, ET AL. V. INGERSOLL RAND CO., ET AL.

Debra Bray, executrix of the estate of Edgar St. Jean, and Marilyn St. Jean (collectively, "the plaintiffs") brought this action in Connecticut Superior Court asserting claims for product liability, loss of consortium, and punitive damages. The decedent, Edgar St. Jean, served in the

military from 1953 to December 1956. He then joined Electric Boat Corporation, a division of General Dynamics Corporation, as an outside machinist and later, as a general foreman, from approximately 1956 to April 1980. The plaintiffs alleged that the defendants manufactured products used in Electric Boat's shipbuilding and repair business, and that St. Jean was exposed to when using or installing those products. St. Jean died of mesothelioma and asbestosis, which the plaintiffs allege was caused by St. Jean's exposure to and inhalation of asbestos fibers throughout his military and shipbuilding career. Defendants timely removed the case to federal court under the federal officer and military contractor defenses, 28 U.S.C. §1442. At the close of discovery, defendants moved for summary judgment, asserting that the plaintiffs had failed to meet their evidentiary burden on all claims. In support of their opposition to the defendants' motions for summary judgment, the plaintiffs offered a brief affidavit by the decedent, executed two days before his death; a list of ships upon which St. Jean worked, an affidavit by the plaintiffs' proffered expert witness, and some deposition testimony. The court concluded that the evidence proffered by plaintiffs was insufficient to meet the plaintiffs' evidentiary burden on all claims. The court declined to decide whether the case was governed by Connecticut's product liability statute or whether it fell within the ambit of general maritime law, since the plaintiffs had failed to meet their evidentiary burden under either standard. Plaintiffs had simply attempted to bolster the lack of identifying information with materials that were either inadmissible or that invited speculation. Consequently, the court held the plaintiffs had failed to meet their evidentiary burden on the issue of causation, and they had not offered evidence from which a reasonable jury could find a causal link between the defendants' products and St. Jean's exposure to asbestos. The court granted defendants’ motion for summary judgment, dismissing all claims with prejudice. (USDC DCT, February 19, 2015) 2015 U.S. Dist. LEXIS 19523

Florida

OPEN AND OBVIOUS HAZARDS DO NOT VIOLATE TURNOVER DUTY
IN RE: M/V SEABOARD SPIRIT SEABOARD SPIRIT, LTD.

Seaboard Spirit Ltd., the owner of the M/V Seaboard Spirit, Seaboard Marine Ltd., the operator and owner *pro hac vice* of the Seaboard Spirit, and Seaboard Ship Management, Inc., the vessel manager of the Seaboard Spirit (collectively "petitioners") petitioned for exoneration from and limitation of liability for personal injury and property damages arising from the death of longshoreman, Ossie Hyman, under the Limitation of Liability Act. Hyman sustained fatal injuries aboard the Seaboard Spirt, when he was pinned between a cargo container and the ship's bulkhead when the cargo container shifted. The claims of Hyman's survivors were brought against petitioners under §905(b) of the LHWCA. Petitioners argued that Hyman's death was not caused or contributed to by any fault, design, neglect or want of care on the part of petitioners or the vessel and the resulting loss and/or damages were occasioned or incurred without their privity or knowledge. The issues of whether petitioners were negligent and whether petitioners had privity or knowledge of that negligence were tried before the court. At trial, claimants argued that petitioners breached their turnover duty by turning over the Seaboard Spirit with defective and/or overly-tensioned lashing chains, without wheel chocks, and with the cargo stowed improperly on a ramp. However, claimants conceded that each of the hazards they cited as a breach of the turnover duty-the allegedly defective lashing chains, the failure to use chocks, and the placement of the cargo container on the ramp-was an open and obvious condition of which a reasonably competent longshoreman, which Hyman undoubtedly was, would have been aware. Consequently, the court observed that claimant could only succeed in showing petitioners'

negligence if the court found the exception to the "open and obvious" exception applied and it would have been impractical for Hyman to avoid the hazard and/or the vessel owner should have known that Hyman would confront the hazard. The court declined to recognize the exception to the exception put forth by claimants where the Supreme Court clearly has stated that the turnover duty with respect to cargo stow attaches only to latent hazards, defined as hazards that are not known to the stevedore and that would be neither obvious to nor anticipated by a skilled stevedore in the competent performance of its work. As none of the hazards cited by claimants were latent hazards, the court held that petitioners did not breach the turnover duty and consequently were entitled to exoneration from liability. Alternatively, the court concluded that, even if it were to find an exception to the exception, claimants had not met their burden to show that it was impractical for Hyman to avoid the conditions they identified as hazards, and/or that petitioners should have known that he would confront those hazards. Because the court concluded that claimants had failed to demonstrate petitioners' negligence, it declined to address whether or not petitioners had privity or knowledge. The court found in favor of petitioners. (USDC SDFL, April 15, 2015) 2015 U.S. Dist. LEXIS 49491

Louisiana

COURT FINDS LOUISIANA OILFIELD ANTI-INDEMNITY ACT INAPPLICABLE (CONT.)
TETRA TECHNOLOGIES, INC. ET AL. VERSUS VERTEX SERVICES, LLC, ET AL.

Five plaintiffs, Abraham Mayorga, Josue Armijo, Kyle Ivy, Jose Ponce-Zuniga, and Charles Bourque, Jr., filed suit seeking damages for personal injuries they allegedly sustained offshore while assisting in a crane operation to remove a dismantled bridge that had connected two sections of an oil production platform. Maritech Resources, LLC owned the platform and Maritech and Tetra Technologies, Inc. were engaged in decommissioning the platform, including removal of the bridge. Three of the plaintiffs were Tetra employees and crew members of its derrick barge. A fourth plaintiff was the employee of a welding subcontractor. Mayorga was alleged to have been an employee of Vertex Services, LLC, who worked as a rigger, and was assigned to work from Tetra’s derrick barge. Plaintiffs alleged they were directed by their Tetra supervisors to make various cuts to the supporting structures of the bridge. While the plaintiffs were on the bridge, the north end of the bridge collapsed, and the straps gave way. The bridge and everyone on it fell 70 to 80 feet. The plaintiffs filed suit against Tetra and Maritech, alleging that their injuries were caused by the negligence of Tetra and Maritech and the unseaworthiness of the derrick barge. Tetra and Maritech then filed an indemnity action against Vertex and its insurer, Continental Insurance Company, alleging that Vertex was obligated to defend and indemnify them against Mayorga's claims based upon a Master Service Agreement. The parties filed cross motions for summary judgment on the indemnity claim. Tetra and Maritech's Motion for Summary Judgment on Third Party Demand, was denied in part, in that it was denied with respect to additional insured coverage under the policy to the extent that Mayorga's injuries arose out of Tetra's and/or Maritech's ownership, maintenance, or use of the derrick barge, and granted in part in all other respects. Continental’s Motion for Summary Judgment was granted in part, in that it was granted with respect to additional insured coverage under the policy to the extent that Mayorga's injuries arose out of Tetra's and/or Maritech's ownership, maintenance, or use of the derrick barge, but was denied in all other respects. Since that order, the court entered final judgment in favor of Tetra and Maritech and against Vertex and Continental. Continental appealed and the Fifth Circuit dismissed the appeal for lack of jurisdiction because the Circuit

found that there was no final dispositive judgment. Since the dismissal, the parties have stipulated that Exclusion g, contained in the Marine Services Liability Policy issued by Continental to Vertex, does not apply. The parties also stipulated as to the amount ($784,202.76) and reasonableness of Tetra's damages relating to the costs of defending and settling Mayorga's claim. Tetra moved for summary judgment claiming that Vertex and Continental were liable to reimburse Tetra in the amount of $784,202.76 as well as an additional $64,741.42, the amount Tetra spent prosecuting its claim for defense and indemnity against Vertex and Continental. To the contrary, Continental argued, in its motion, that it did not owe the original sum of $784,202.76 under Exclusion d of the Policy. Furthermore, Continental asserted it did not owe the additional amount of $64,741.42 based on Exclusion b of the Policy. The court granted Tetra's motion in part, in that Vertex and Continental were held liable for defense and indemnification costs expended in defending the Mayorga claim, totaling $784,202.76, and denied it in part, to the extent that Tetra sought summary judgment against Continental and Vertex for fees and expenses associated with pursuing its indemnification claim. The court found there was nothing in the Policy indicating that fees incurred pursuing indemnity or defense were covered, and in fact, the court found that the Policy language specifically and clearly precluded coverage for the type of claim Tetra was asserting against Continental. Continental's motion was also denied. (USDC EDLA, April 20, 2015) 2015 U.S. Dist. LEXIS 52199

BORROWED SERVANT FINDING GETS NOMINAL EMPLOYER OUT OF SUIT
CRAWFORD V. BP CORPORATION NORTH AMERICA INC., ET AL.

This maritime action arose on a platform located on the Outer Continental Shelf, when Charles Crawford, an employee of BP America Production Company, allegedly sustained personal injury when another worker dropped a vacuum pump on his back. Crawford filed suit against the other worker's employer Danos & Curole Marine Contractors, LLC. Danos responded with a motion for summary judgment, arguing that its alleged employee was a borrowed employee of BP America, also filing a cross-claim against BP America. BP America intervened as a plaintiff, seeking subrogation for payments made to Crawford under the LHWCA. After weighing the Ruiz borrowed servant factors, the court concluded that every factor but the sixth (which was neutral) weighed in favor of borrowed employee status. In light of the undisputed facts in the case, the court found as a matter of law that Danos's nominal employee was BP America's borrowed employee. Accordingly, the court found that Crawford had no cause of action against his nominal employer, Danos. Since Crawford's claims against Danos failed, so too did BP America's intervening claims for subrogation. Danos's motion for summary judgment was granted and Crawford's claims against Danos and BP America's subrogation claims were dismissed with prejudice. (USDC EDLA, March 16, 2015) 2015 U.S. Dist. LEXIS 32104

OCSLA JURISDICTION NOT SIMPLY A MATTER OF GEOGRAPHICAL PROXIMITY
LEWIS V. HELMERICH & PAYNE INTERNATIONAL DRILLING CO, ET AL.

Robert Lewis, Jr. was working on a welding job on a tension-leg fixed platform, as an employee of Bay LTD, a subsidiary of Berry G.P. Lewis claimed that, while he was carrying a fifty-pound plate up a set of stairs to the welding project, he slipped on the oily deck and then tripped on a pile of materials, allegedly injuring his left elbow and cervical spine and lumbar spine. Lewis filed suit under the Outer Continental Shelf Lands Act (OCSLA) and the Longshore and Harbor Workers' Compensation Act (LHWCA). The parties agreed that the substantive law for injuries

occurring on fixed offshore oil platforms located on the OCS is the law of the adjacent state. However, they disagreed as to which state qualifies as the "adjacent state." Helmerich & Payne International Drilling and Shell Exploration and Production Company moved for partial summary judgment on the issue of which state was "adjacent" to the fixed platform at issue, arguing that Alabama was the adjacent state, thus its law governed the dispute. Lewis responded in opposition, arguing that Louisiana was the adjacent state, thus its state law applied. The court found that the Fifth Circuit's reasoning in ***Samedon*** was instructive as to the issue in dispute. Turning to the four-factor ***Samedon*** test, the court concluded that the factors indicated Alabama was the adjacent state, for the purposes of determining the substantive law applicable to this platform. While acknowledging Lewis's argument that the platform was geographically closer to Louisiana because of the state's peculiar boot shape, the court held that factor alone was not enough to overcome the other factors weighing strongly in favor of Alabama as the adjacent state. Under the multi-factor test, the court held that Alabama was the adjacent state to the platform, and Alabama law governed under the OCSLA. Defendants' motion for partial summary judgment was granted. (USDC EDLA, March 10, 2015) 2015 U.S. Dist. LEXIS 29380

GO TRY YOUR FRAUDULENT JONES ACT CLAIM IN STATE COURT (CONT.)
LANDERMAN V. TARPON OPERATING AND DEVELOPMENT, LLC, ET. AL.

Jerry Landerman filed his lawsuit in state court against six defendants: Tarpon Operating and Development, LLC; Shamrock Energy Solutions, LLC; Nabors Offshore Corporation; Rene Offshore, LLC; Pan Ocean Energy Services, LLC; and Hoplite Safety, LLC, asserting claims under the Jones Act and general maritime law based on injuries he allegedly sustained while working on an offshore platform. Landerman was working for Pan Ocean as a welder/cutter on the platform, owned by Tarpon and Shamrock, with Hoplite serving as a safety consultant for operations on the platform. Landerman was being transferred from the platform to Rene's vessel by means of a personnel basket, when the basket allegedly tipped over, causing Landerman's alleged injuries. Landerman claimed that his injuries were a direct result of the unseaworthiness of the Rene vessel and the negligence of all defendants. In addition to the Jones Act and general maritime law causes of action, the complaint also invoked as possible theories of recovery the OCSLA, LHWCA, and the general negligence laws of Louisiana. Defendants removed the suit to federal court and Landerman moved to remand. The district court denied Landerman's motion to remand in part and severed the Jones Act claim and remanded it to state court. In deciding Landerman's earlier motion to remand, the court held that it had jurisdiction over this case under the Outer Continental Shelf Lands Act (OCSLA). Tarpon and Nabors moved for summary judgment on Landerman's claims. As there was no conflict between federal law and the applicable Louisiana law, the court applied Louisiana general negligence and custodial liability law to Landerman's claims against Tarpon. The court noted that for Landerman to prevail on his negligence claim against Tarpon, he must be able to prove, among other things, causation. The only causation argument Landerman made in his opposition to Tarpon's motion was that the crane and/or condition of the platform contributed to causing the accident. But the court found the evidence put forward by Landerman did not support the inference that anything about the crane caused the accident, and Landerman failed to put forth any evidence about the platform. For Landerman to prevail on his custodial liability claim, he had to be able to prove, among other things, causation. For the reasons that Landerman's negligence claim failed on causation, his custodial liability claim failed on causation as well. Nabors also asserted that it should receive summary judgment on Landerman's negligence claim because Landerman could not prove that Nabors owed Landerman a duty of care, or that any action or omission by Nabors

caused his injuries. Nabors also argued that no genuine issue of material fact existed as to its custodial liability, because there was no evidence that any defect in the crane caused the accident. The court agreed. The court granted Tarpon's and Nabors's motions and dismissed Landerman's claims against both defendants. (USDC EDLA, February 4, 2015) 2015 U.S. Dist. LEXIS 13563

NO SUMMARY JUDGMENT ON DUTY, BREACH, OR BORROWED SERVANT
BASS V. SUPERIOR ENERGY SERVICES, INC. ET AL.

Joshua Bass, who worked as a roustabout for Nabors Offshore Services filed an OCSLA suit in state court against Superior Energy Services, a co-contractor on a "gravel pack operation" that the two companies were performing for Energy XXI on Energy XXI's offshore platform. Energy XXI removed the case to federal court. Bass was seeking damages for injuries he allegedly sustained while moving heavy equipment on that platform. After a hose had been partially moved so that one end sat on the floor of the platform's pipe rack area and the other end remained elevated, Bass, who was in the pipe rack area, attempted to move the hose by manually pulling on it. The hose weighed over one thousand pounds, and Bass allegedly injured his neck as he attempted to move the hose. Superior moved for dismissal of Bass's negligence claims against it arguing, as a matter of law, it owed no duty to Bass. Superior asserted that an independent contractor could not be held liable under the Bass's theory of "temporary supervision" because the independent contractor did not have "supervisory authority" over Bass by virtue of Bass helping its employees. Bass admitted through his own testimony that his immediate supervisor at all times remained a Nabors employee and Bass was under no obligation to follow instructions from Superior personnel. Superior further argued that it was entitled to summary judgment in its favor because, even if it were assumed that Bass could establish the existence of a duty, Bass would be unable to establish that Superior breached any such duty. Superior denied that any of its employees requested that Bass move the hose. Bass also asserted that the failure to provide adequate instructions was a breach of Superior's duty to him. In rebuttal, Superior noted that Bass asserted that Superior exercised supervisory control over him by requesting that he move the hose. In claiming that Superior controlled and supervised him, Superior asserted that Bass was admitting that he was a borrowed employee of Superior within the scope of the "borrowed employee doctrine" of the LHWCA, which in turn entitled Superior to tort immunity under the LHWCA. The court initially noted that, since OCSLA applied, either Louisiana law or the LHWCA controls the outcome of the case. In light of Superior's briefing on its borrowed servant argument, the court was unable to determine, as a matter of law, how the application of the nine ***Ruiz*** factors required it to find that Bass was Superior's borrowed employee. Taking the asserted facts and drawing all inferences in Bass's favor, genuine issues of material fact existed and the court could not conclude, as a matter of law, that Bass was Superior's borrowed employee. The court also found that Louisiana appellate courts had held that independent contractors owe third parties, at the very least, the duty to refrain from gross, willful, or wanton negligence, and at most, the duty to refrain from creating an unreasonable risk of harm or a hazardous condition. Although duty is a question of law, the court pointed out that Louisiana courts caution that summary judgment is proper only where no duty exists as a matter of law and no factual or credibility disputes exist. In light of the factual disputes still present in this case, the court declined to conclude, as a matter of law, that Bass will be unable to establish that Superior owed him a duty. Additionally, having been presented with no applicable authority on point, the court could not find, as a matter of law, after taking all facts in the light most favorable to Bass and after drawing all inferences in Bass's favor, that Superior was entitled to

summary judgment on the issue of breach. Accordingly, the court denied Superior's motion for summary judgment. (USDC EDLA, February 3, 2015) 2015 U.S. Dist. LEXIS 12794

BP PREVAILS ON SUMMARY JUDGMENT MOTION
WOLZ V. BP EXPLORATION AND PRODUCTION, INC., ET AL.

Rickey Wolz was employed by DXP Enterprises, Inc., a company which had been hired as an independent contractor by BP to provide services aboard its platform, which was owned and operated by BP. DXP sent Wolz to the platform to diagnose and repair a malfunctioning vertical caisson pump, used to pump sea water up to the rig. In anticipation of the examination and repairs of the malfunctioning pump, a chain hoist was attached to the pump, and a nylon strap was tied to the shaft coupling. Wolz decided to untie the nylon strap, while a rigger was unrigging the chain hoist in an effort to lift the pump, and the pump crashed down onto Wolz's hand, which was located directly underneath the pump. Wolz subsequently underwent numerous surgeries and eventually filed suit, naming multiple defendants. Wolz contended that BP's negligence served as the proximate cause of his injuries. Specifically, Plaintiff claims that BP's conduct constituted negligence by failing to provide a reasonably safe place to work, failing to take precautions for his safety, and failing to provide adequate personnel for the job in question. BP moved for summary judgment, on the basis that it was not liable to Wolz. In his opposition, Wolz did not dispute that he was an independent contractor of BP or that the pinch point posed by the pump was open and obvious. However, Wolz maintained that BP should be found liable for the negligent acts of its site lifting specialists, whom he alleged were directly employed by BP and who developed and approved the lift plan. Wolz also asserted that BP owed him a duty to exercise reasonable care to ensure his safety, which it breached by allowing him to handle the rigging of the pump when he was not one of the certified riggers authorized to do so. As an initial matter, the court found that Louisiana law applied to Wolz's claims, in accordance with the OCSLA. The court then found that Wolz had failed to rebut BP's independent Contractor defense and failed to provide the court with any evidence to support a finding that BP exercised operational control or ordered him to handle the rigging which ultimately caused his injury. The master agreement between BP and DXP clearly provided that DXP would serve as an independent contractor of BP and would control the performance of its work and accept responsibility for its results. Therefore, the court found Wolz had failed to submit sufficient evidence to defeat summary judgment on the issue of whether BP may be found liable for Wolz's negligent acts that may have contributed to his injuries. Due to the lack of evidentiary support and conclusory nature of Wolz's other allegations, the court found that Wolz had failed to satisfy his burden to defeat summary judgment on his claims for BP's liability arising from the conduct of its lifting specialists. Because Wolz was unable to set forth any substantial evidence to show that a genuine issue of fact existed regarding BP's liability, the court found that summary judgment in favor of BP on Wolz's claims was warranted and granted summary judgment in favor of BP. (USDC EDLA, February 25, 2015) 2015 U.S. Dist. LEXIS 22961

COURT REJECTS ARGUMENT THAT LHWCA CREATES FEDERAL JURISDICTION
CASHMAN EQUIPMENT CORP. V. PERMANENT WORKERS, LLC, ET AL

Cashman Equipment Corporation filed suit in state court seeking a declaration as to the enforceability of its indemnity agreement with Permanent Workers, LLC. Cashman's DJ action arose from an alleged injury sustained by Kenneth McDonald, a Permanent Workers laborer, who was working at Cashman's facility. Permanent Workers, through its insurer, paid

McDonald's LHWCA medical and indemnity benefits. Subsequently, Permanent Workers' insurer made demand upon Cashman and initiated an LHWCA administrative proceeding seeking reimbursement of all benefits paid to McDonald, as well as a finding that Cashman was McDonald's borrowing employer and liable for all future LHWCA benefits that may be owed. Permanent Workers and its insurer removed the case to federal court on the basis of diversity jurisdiction and federal question jurisdiction under the LHWCA. Cashman moved to remand the action to state court, asserting that diversity jurisdiction was not a proper basis for removal in this matter pursuant to 28 U.S.C. §1441(b)(2) and the resolution of Cashman's contractual claims was determined by Louisiana state law and did not involve the LHWCA, nor any federal statute. Defendants did not contest that diversity jurisdiction did not exist, but argued that the LHWCA ALJ would determine whether Cashman should be considered McDonald's borrowing employer and because this issue was so clearly federal in nature there was no question that the court had jurisdiction under 28 U.S.C. 1331. The court noted that Cashman's petition only sought a declaration as to the enforceability of an indemnity agreement and a waiver of subrogation and did not seek resolution of any issues related to the application or interpretation of the LHWCA. The court found that defendants had failed to meet their burden of establishing the facts necessary to show that federal jurisdiction existed. Cashman's motion to remand was granted. (USDC WDLA, February 23, 2015) 2015 U.S. Dist. LEXIS 22933

LONGSHOREMAN FAILS TO ABIDE BY SETTLEMENT AGREEMENT
LEWIS V. S M/V BALTIC PANTHER, ET AL

Nathan Lewis filed a complaint for damages under §905(b) of the LHWCA and general maritime law against multiple defendants. He was represented by Joshua Koch. The complaint was supplemented, amended and restated on two different occasions. At the request of Lewis the trial setting was continued and reset. Lewis failed twice to attend an examination with defendants' orthopedic surgeon and also failed to appear for a functional capacity assessment. Lewis subsequently discharged Koch, and attorney David E. Kavanagh enrolled on behalf of Lewis. The parties subsequently participated in private mediation, resulting in a settlement of all claims for $60,000. Lewis, without counsel, later notified the court that he had not settled his case. Lewis discharged Kavanagh and Kavanagh was granted leave to intervene. Defendants moved to enforce the settlement. The joint motion of defendants to enforce the settlement was granted. Lewis's claims against them were dismissed with prejudice. Defendants were awarded reasonable attorneys' fees and the quantum of the fees to be awarded was referred to the court. Lewis's former counsel, Koch and Kavanagh, filed a joint motion for summary judgment for attorneys' fees and costs. Lewis was granted an extension of time to file his opposition to the request for fees, but the order stated that there would be no further extensions of Lewis' deadline for any reason. Lewis again requested additional time, claiming he needed additional time to retain counsel. The court denied the request, noting that Lewis had been given ample time to prepare and file an opposition and that his primary complaint was that, notwithstanding his signature and initials on the settlement agreement, he did not agree to settle his case. The court noted that, while Lewis may suffer from buyer's remorse, the issue of whether he settled his case was previously resolved. The court awarded the defendants attorney fees of $3,834.50 and $2,115.00 respectively, for work performed on their behalf because of Lewis's refusal to honor his settlement agreement. The motion of the intervenors, Koch and Kavanagh, for summary judgment was denied in part as to their request that defendants pay them directly their fees and costs and denied in part without prejudice to their right to re-file the motion after defendants deposited the net amount of their contributions to the settlement into the registry of the court.

(USDC EDLA, December 8, 2014) 2014 U.S. Dist. LEXIS 179463

COURT REJECTS THIRD PARTY'S ATTEMPT TO SHIFT TO LIABILITY TO EMPLOYER
POINDEXTER V. ROWAN COMPANIES, INC.

Jacob Poindexter was an employee of Zadok Technologies, Inc. and was directly covered under the LHWCA while he was performing electrical wiring installation work on a Rowan Companies mobile offshore drilling unit (MODU) vessel, while it was docked at a shipyard on navigable waters. Zadok paid LHWCA benefits to Poindexter in connection with an accident and alleged injuries Poindexter sustained while aboard the Rowan MODU. A factual dispute arose between Rowan and Zadok as to whether Poindexter was employed by Zadok to either go offshore with the vessel, or to perform any work of any kind that was related to offshore drilling work for the vessel. Rowan argued that Poindexter's alleged injury during his work on the vessel was substantially connected to extractive operations on the outer continental shelf, which Rowan argued supported application of Louisiana's tort law to the third-party claims of Rowan against Zadok by way of OCSLA. Zadok moved for summary judgment seeking dismissal of all claims asserted by Rowan on the grounds that §905(a) and (b) provide immunity to Zadok against all such liability and expressly void all indemnity obligations, whether direct or indirect, from longshore employers, such as Zadok, to vessel owners, such as Rowan. The court focused on the legal issue of whether the LHWCA employer can or must be included on the jury interrogatory form for the purpose of apportioning fault. Rowan acknowledged application of the LHWCA, and the absence of any right of recovery against Zadok as Poindexter's employer, but argued its contribution claim should be permitted to allow the jury to apportion fault between all of the responsible parties in the case, including Zadok, because Zadok's negligence caused or contributed to the alleged injuries. The court noted that Rowan failed to cite any case law demonstrating that the LHWCA requires or allows the statutorily immune employer to be listed on the jury interrogatory form for the purpose *of apportioning fault against that employer*, nor has any party properly and fully briefed the issue of whether OCSLA applies in this case as Rowan argues, or whether the argument made as to application of certain state law would, in any way, be relevant. Therefore, the court declined to make a determination as to whether OCSLA and, therefore, any possible Louisiana law might apply, and whether the relief requested could, in any fashion, be allowed. The court observed that it was undisputed Zadok could not be liable to Poindexter in tort, thus, any tender of Zadok to Poindexter under Rule 14(c) for purposes *of liability* would have no merit. The LHWCA *extinguishes the right of action*, in tort, against the LHWCA employer and, no matter under what law a tort *cause of action* might arise, the *right of action* against the LHWCA employer would be extinguished and this would be the case no matter whether the LHWCA applies by way of application of the OCSLA, as Rowan argues, or in the manner applicable in this case under these facts. Zadok motion for summary judgment, seeking dismissal of Rowan's claim against Zadok for tort indemnity and/or contribution was granted and Rowan's claim was denied and dismissed with prejudice. Zadok's motion seeking dismissal of Rowan's claim against Zadok for contractual indemnity was denied as moot, such claim having been voluntarily dismissed by Rowan. Finally, Zadok's request for relief pertaining to the jury interrogatory form was denied as premature. (USDC WDLA, January 23,2015) 2015 U.S. Dist. LEXIS 8052

COURT GRANTS BORROWED SERVANT STATUS TO CRANE OPERATOR
IN RE WEEKS MARINE, INC.

Randall Harrold filed suit in state court against multiple defendants and their insurers alleging a claim under the Jones Act, claiming he was hired by Aerotek, Inc., to work on a barge, owned and operated by Weeks Marine, Inc. Harrold alleged that he was injured on the barge, when an assistant welder working for Southern Crane & Hydraulics LLC twisted the rail of a boom stop, causing the rail to fall off the boom and strike Harrold, who then fell to the deck below. The defendants subsequently removed the case to federal court and vessel-owner Weeks Marine, Inc. filed a Verified Complaint for Exoneration From or Limitation of Liability pursuant to the Limitation of Liability Act. In those proceedings, Aerotek, Southern Crane, and Liberty Insurance Underwriters, Inc. asserted claims for contribution, and/or alternatively, indemnity against Weeks, in the event any of them were liable for the damages suffered by Harrold. The court consolidated the exoneration/limitation action with the action filed by Harrold and Harrold filed his claim and answer in the limitation action. The court subsequently severed and remanded Harrold's Jones Act claim against Weeks and Aerotek, while refusing to remand the remaining claims. Harrold then filed him motion seeking to lift the restraining order implemented in the exoneration/limitation action and to administratively stay those proceedings. The court found that the stipulations filed by Harrold were insufficient, and the court denied Harrold's motion to lift the restraining order and to administratively stay the limitation proceeding. Following this ruling, the court reopened *sua sponte* Harrold's previously denied motions for remand, and granted Harrold's motion to remand, but retained jurisdiction over Weeks' limitation action and left the stay in place. Aerotek asserted a claim in the limitation action seeking reimbursement of worker's compensation and maintenance and cure benefits paid to Harrold, alleging that Weeks was Harrold's borrowing employer. Weeks opposed the motion, arguing that there were questions of fact regarding both Harrold's status as a borrowed employee as well as the correctness of amounts paid by Aerotek to Harrold for maintenance and cure and/or benefits under the LHWCA. Weeks had entered into a contract with Aerotek, a staffing service agency, agreeing to provide supplemental staffing of workers for Weeks. Harrold also signed an Employment Agreement with Aerotek in which he agreed to be assigned to work as a crane operator for Weeks, which he did for 17 days until the date of his accident. After considering the ***Ruiz*** borrowed servant factors, the court concluded that all of the factors favored the borrowed servant status of Harrold save one, and that one was neutral. Therefore the court granted summary judgment on Harrold's status as a borrowed servant of Weeks. The court then turned to Aerotek's argument that, because Weeks was the borrowing employer, Weeks was obligated to reimburse Aerotek for the $148,007.35 in medical and indemnity benefits paid to Harrold as a result of his on the job injury. Weeks argued that Aerotek attached no documentation to its motion that it has paid any benefits to Harrold and, if paid, whether they were paid under LHWCA or the Jones Act. Furthermore, there was no documentation of Harrold's injuries and, under the applicable law (whether that is LHWCA or Jones Act) no documentation that Harrold was owed any of the benefits he was allegedly paid. The court agreed, finding that Aerotek had failed to properly support its motion. Further, the court found that there were material issues of fact and law that precluded the grant of summary judgment. Accordingly, this part of Aerotek's motion was denied. Aerotek's motion for summary judgment was granted in part in that, as a matter of law, Harrold was held to be the borrowed servant of Weeks. The court also ordered that Aerotek's maintenance and cure obligation was terminated. In all other respects, Aerotek's motion was denied. (USDC MDLA, January 26, 2015) 2015 U.S. Dist. LEXIS 8489

GO TRY YOUR FRAUDULENT JONES ACT CLAIM IN STATE COURT (CONT.)
LANDERMAN V. TARPON OPERATING AND DEVELOPMENT, LLC, ET AL.

Jerry Landerman filed his lawsuit in state court against six defendants: Tarpon Operating and Development, LLC; Shamrock Energy Solutions, LLC; Nabors Offshore Corporation; Rene Offshore, LLC; Pan Ocean Energy Services, LLC; and Hoplite Safety, LLC, asserting claims under the Jones Act and general maritime law based on injuries he allegedly sustained while working on an offshore platform. Landerman was working for Pan Ocean as a welder/cutter on the platform, owned by Tarpon and Shamrock, with Hoplite serving as a safety consultant for operations on the platform. Landerman was being transferred from the platform to Rene's vessel by means of a personnel basket, when the basket allegedly tipped over, causing Landerman's alleged injuries. Landerman claimed that his injuries were a direct result of the unseaworthiness of the Rene vessel and the negligence of all defendants. In addition to the Jones Act and general maritime law causes of action, the complaint also invoked as possible theories of recovery the OCSLA, LHWCA, and the general negligence laws of Louisiana. Hoplite removed the lawsuit to federal court, alleging original jurisdiction under OCSLA. The district court denied Landerman's motion to remand in part and severed the Jones Act claim and remanded it to state court. During discovery in the case in chief, Shamrock moved to quash Landerman's subpoena seeking confidential medical records involving Shamrock's crane operator and for a protective order. Shamrock argued that the confidentiality provisions of HIPAA precluded it from disclosing employees' medical records and drug test results. Landerman argued that Shamrock is not a covered entity under HIPAA because it is not a health plan, a health care clearinghouse, or a health care provider. The court denied Shamrock's motion, finding that the HIPAA argument was of no avail. Even were Shamrock a covered entity and the drug results considered personal health information, the standards of HIPAA generally permit a health care provider to disclose nonparty patient records during a lawsuit, subject to an appropriate protective order, without giving notice to the nonparty patients. The court also found that the documents were relevant and reasonably calculated to lead to the discovery of evidence admissible with regard to Shamrock's knowledge as to its crane operator's prescription medication that might have potentially impaired his ability to operate the crane properly on the day of the accident. Shamrock's motion to quash was denied an Shamrock was order to produce the subpoenaed records. (USDC EDLA, November 10, 2014) 2014 U.S. Dist. LEXIS 158397

Maryland

LACK OF PERSONAL JURISDICTION OVER FRIVOLOUS LAWSUIT
ARMSTRONG V. NATIONAL SHIPPING COMPANY OF SAUDI ARABIA, ET AL.,

Jordan Armstrong, a longshoreman, brought suit against eight defendants pursuant to the admiralty and maritime jurisdiction of the court and common law, alleging negligence, breach of implied warranty, and liability under the LHWCA. Armstrong alleged that, while he was working as a longshoreman servicing a ship, he suffered alleged injury after being struck by a forklift that was improperly loaded on the ship. Armstrong sought to hold defendants collectively responsible for approximately $13,000,000 in damages. One of the named defendants, Shippers Stevedoring Company (SSC), moved to dismiss pursuant to FRCP 12(b)(2), claiming lack of personal jurisdiction which was supported by affidavits showing that SSC had never provided any services in the State of Maryland and never had any representatives, employees, or agents in Maryland. Nor did SSC advertise in any publications distributed in Maryland or solicit business from Maryland. SSC, which provides stevedoring services, is a Texas corporation with its principal place of business in Houston, Texas. SSC simply loaded the allegedly offending forklift onto the vessel in Houston, Texas. SSC did not direct, control or determine the destination of the

forklift. After loading and securing the forklift, SSC had no further involvement or responsibility regarding the transport or delivery of the forklift. Armstrong countered that, but for the actions of SSC placing the forklift onto the vessel, the forklift would not have left the State of Texas and traveled to the State of Maryland where Armstrong suffered his injuries. Armstrong opposed the motion on numerous grounds. Even assuming that SSC's out-of-state actions caused Armstrong to be injured in Maryland, the court observed that SSC did not derive revenue from its actions. Rather, as SSC argued, it was paid for its loading services, which were rendered in Texas, not Maryland, and its fees are earned without regard to the destination of the vessels. After observing that the remainder of the facts in the case weighed against a finding of personal jurisdiction, the court found that the only remaining question was whether Armstrong's claim against SSC should be dismissed or, instead, transferred to a court with personal jurisdiction over SSC. In his opposition, Armstrong had requested permission to "transfer the above-captioned case, or any necessary part thereof, to the proper jurisdiction" if the court determines that it lacks personal jurisdiction. Although the court noted that it was satisfied that it lacked personal jurisdiction as to SSC it, nevertheless, held SSC's Motion in abeyance pending amplification of plaintiff's request to transfer. The court noted that if no motion to transfer was filed within the time provided, it would enter an order dismissing the case as to SSC, without prejudice. (SDC DMD, February 20 2015) 2015 U.S. Dist. LEXIS 20329

STATE LIMIT ON DAMAGES CANNOT BE APPLIED TO §905(B) ACTION (CONT.)
PRICE V. ATLANTIC RO RO CARRIERS, ET AL.

Troy Price, Jr., a longshoreman employed by Beacon Stevedoring Corporation, an affiliate of Rukert Terminals Corporation, was allegedly injured aboard a vessel owned and operated by Mos Shipping. Ltd. and Baltic Mercur Joint Stock Co. Price's leg was allegedly injured when it was struck by a falling forklift that a fellow longshoreman had lost control of. Following his alleged injury, Price sought relief from Mos, Baltic and Atlantic Ro-Ro Carriers, Inc. (ARRC) under §905(b) of the LHWCA, alleging that defendants' negligence resulted in his personal injuries aboard a vessel they owned or operated. Defendants filed a third-party complaint against Rukert, alleging that, although Beacon was the formal employer of the longshoremen, Rukert was responsible for both maintaining the forklifts used by longshoremen aboard the vessel and training harbor workers in the correct use of machinery. The parties filed three separate motions for summary judgment. The court issued an order granting in part and denying in part the trio of motions for summary judgment, including the denial of the defendants' motion to apply Maryland's statutory cap on non-economic damages to Price's claims. Mos Shipping and Baltic Mercur then moved to certify that portion of the court's order, refusing to apply Maryland's cap on non-economic damages to a negligence action brought under §905(b), for interlocutory appeal under 28 U.S.C. §1292(b). The court found that immediate appellate consideration of the issue would will not materially advance termination of the litigation, observing that even if the Fourth Circuit reversed the court's prior order, Price would still be entitled to seek non-economic damages up to $695,000, the statutory cap. The applicability of that cap would thus do nothing to eliminate the need for a trial, to streamline the presentation of proof, or to limit the scope of discovery. Mos Shipping and Baltic Mercur urged a more flexible reading of the 28 U.S.C. §1292(b), one that would permit certification of questions that might facilitate settlement, citing *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535 (7th Cir. 2012). The court noted that *Sterk* did not entirely support the defendants' reading of it. The prospect of facilitating settlement was, at best, a secondary observation in that case, neither necessary nor sufficient to its resolution. Therefore, the court denied the motion to certify the court's previous order pursuant to 28 U.S.C.

§1292(b). (USDC DMD, December 22, 2014) 2014 U.S. Dist. LEXIS 175943

Mississippi

OCSLA NOT A FACTOR AND COMPLETE DIVERSITY IS NOT SHOWN
HAMMOND V. PHILLIPS 66 COMPANY, ET AL.

Wendell Hammond filed suit against Phillips 66 Company and numerous other defendants in state court, alleging injury as a result of being exposed to asbestos while working in the oil industry from approximately 1968 until 1979. Hammond sued under the Jones Act, general maritime law and Mississippi law. Hammond did not claim that he was employed by any named defendant. Hammond's general maritime claims were dismissed by the state court. Chevron Phillips Chemical Company LP, as successor in interest to Phillips 66 Company removed the proceeding to federal court, predicated on OCSLA jurisdiction and diversity of citizenship. Hammond moved to remand, challenging the existence of federal jurisdiction under OCSLA and 28 U.S.C. §1332. Hammond relied on the well-pleaded complaint rule in support of remand and argued that federal jurisdiction is lacking because, following the dismissal of his maritime claims, he only seeks to impose liability against the defendants under Mississippi state law. The court found that Hammond's reliance on the well-pleaded complaint rule was misplaced because a plaintiff does not need to expressly invoke OCSLA in order for it to apply. More pertinent to the merits of OCSLA jurisdiction, Hammond asserted that the majority of his alleged exposure to asbestos-containing drilling mud products manufactured and sold by the defendants in this case occurred while he was employed on land-based rigs. Hammond claimed that out of the ten years he worked in the oil industry, he only spent approximately nine months working offshore. The court was unable to conclude that a “but-for” connection existed between Hammond's claimed injury, asbestosis, and his nine-month period of offshore employment. Chevron as the party invoking federal jurisdiction, offered no facts, arguments, or evidence enabling the court to conclude that Hammond would have developed asbestosis from the nine months he worked offshore regardless of the approximate nine years he worked on land-based oil rigs. As a result, resolving all doubts regarding the propriety of removal in favor of remand, the court determines that Chevron had failed to show that Hammond's injury would not have occurred but for his offshore employment. Hammond also argued that complete diversity of citizenship between the parties did not exist because two of the defendants were non-diverse. Chevron contended that the two defendants in question had been improperly joined, since Hammond had no possibility of recovery against them under Mississippi law. Resolving all ambiguities in Hammond's favor, the court found that Hammond’s deposition testimony left open the possibility that Hammond had a viable claim against at least one of the defendants in question. Hammond's motion to remand was granted. (USDC SDMS, February 12, 2015) 2015 U.S. Dist. LEXIS 17227

Missouri

ANOTHER REMOVAL ACTION BITES THE DUST
SCHAFFER V. AIR & LIQUID SYSTEMS CORPORATION

Ann Schaffer, the surviving spouse of Nicholas Schaffer, is proceeding with a suit filed before her husband’s death resulting from alleged asbestos-related mesothelioma, which claims that Nicholas Schaffer injuries and ultimate death were the result of inhaling asbestos-containing

products during his work as a ship repairman at the Newport News Shipbuilding and Drydock Company. Schaffer filed suit in state court, alleging NNSDC's negligence resulted in his inhalation of asbestos dust that caused him to contract mesothelioma and asserted a State law claim of strict liability, a State law claim of negligence, a State law claim for willful and wanton misconduct - aggravated circumstances, State law conspiracy claims, a State law claim of fraudulent misrepresentation, a State law claim of battery and common law and/or maritime negligence under §905(b) of the LHWCA against Exxon Mobil Corporation, which included a loss of consortium cause of action. Exxon removed the case to federal court under the federal LHWCA and §905(b), asserting federal question jurisdiction and admiralty jurisdiction, citing 28 U.S.C. §§1331, 1333. Schaffer moved to remand the case to state court, arguing there was no legitimate basis for Exxon's removal action. The court noted that the case involved a Missouri common law action, and there was no law cited in the petition that created a federal cause of action. Moreover, a case with a general maritime nature requesting common law remedies failed to provide a ground for federal jurisdiction. Accordingly, the court found general federal question jurisdiction did not exist in the case. Exxon cited the Federal Courts Jurisdiction and Venue Clarification Act of 2011, as providing a basis for its removal action. The court noted that, prior to the 2011 amendment to 28 U.S.C. §1441(b), it was settled law that removal of an *in personam* maritime action, such as Schaffer's, required a "separate basis of jurisdiction" such as diversity jurisdiction. The parties disagreed as to whether §1441(b) now gives the court jurisdiction. After considering the arguments and case law presented, the Court found the 2011 amendment to §1441 did not permit maritime claims to be removed to federal court without an independent basis for jurisdiction. The court granted Schaffer's motion to remand. (USDC EDMO, April 10, 2015) 2015 U.S. Dist. LEXIS 46971

New Jersey

CHINESE CONFIGURATION IS NOT NECESSARILY HAZARDOUS
WEINLEIN V. ANAPA SHIPPING LIMITED

Richard Weinlein, allegedly sustained personal injuries while in the course and scope of his employment with Delaware River Stevedores, Inc. (DRS) as a longshoreman. Weinlein was allegedly injured while discharging cargo from a vessel owned and operated by defendant Anapa Shipping Limited. Weinlein filed suit under §905(b) of the LHWCA for alleged injuries to his left knee, allegedly incurred while climbing a ladder on the vessel. Anapa moved for summary judgment, arguing that because Weinlein's alleged injury was the result of the design arrangement of the No. 2 crane ladder, there could be no evidence that Anapa breached certain duties under the LHWCA. Weinlein argued that summary judgment is not proper because Anapa failed to turn its vessel over to the longshoremen in a safe condition for unloading, and that Anapa breached its duty to correct the hazardous condition of the ladder. Anapa argued that the ship was practically brand new. The vessel was built and designed by a shipyard in China, and the four ship's cranes, including interior crane ladders, were designed, constructed and manufactured by South China Marine Machinery Co. Ltd. and installed at the shipyard. Anapa did not design or construct the vessel or the ship's cranes. Anapa noted that Weinlein had not alleged or provided evidence that the ladder was broken, improperly maintained, or missing any parts. Rather, Weinlein was simply criticizing the manner in which the ladder arrangement was designed and constructed, and that a negligent design theory of recovery is barred as a matter of law. The court initially noted that the expert report relied upon by Weinlein, which relied on ASTM, ANSI and OSHA standards, did not provide any evidence that the standards relied upon

by its expert were applicable to a cargo ship. Additionally, the court observed that, even if the standards applied, Weinlein's expert report stated that the "ladder set-up, and location...was very unusual for marine pedestal cranes." An unusual configuration is not the same as a hazardous configuration. Moreover, Weinlein had failed to present any evidence that the ladder was damaged or altered in any way, thus creating a hazardous condition. The court concluded that Weinlein had not presented sufficient evidence that Anapa breached its turnover duty. Nor had Weinlein presented sufficient evidence that Anapa breached its active operations duty. Anapa's motion for summary judgment was granted. (USDC DNJ, February 20, 2015) 2015 U.S. Dist. LEXIS 20953

New Mexico

CLAIM DISMISSED FOR FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM
GUY V. AMERICAN INTERNATIONAL GROUP, INC. ET AL.

Richard Guy allegedly suffered a knee injury while working as a truck driver in Iraq for subcontractor International American Products (IAP), which subcontracted to Kellogg, Brown, and Root (KBR) under KBR's contract with the United States military to deliver supplies to U.S. troops. After his knee injury, Guy was sent to Kuwait City for treatment for his knee, and while he was awaiting treatment, IAP lost its contract and laid off its workers, so he lost his housing. Thirty days later, he had a heart attack that required surgery, and he was sent to Germany for both the heart surgery and for surgery on his knee. IAP, through its insurer AIG, refused to compensate Guy or to pay the medical expenses for the heart surgery, but IAP/AIG agreed to compensate and treat Guy for the knee injury. Guy filed a claim for compensation under the Defense Base Act, and Guy and IAP/AIG agreed that IAP/AIG would pay Guy $5000/month while he was recuperating from the knee surgery. After two months, IAP/AIG discontinued the payments when Guy's female roommate (another IAP employee) falsely reported after an argument that Guy was working. Guy was then left to fend for himself in Kuwait and Guy alleged that he suffered PTSD from having worked in Iraq and that the stress caused his heart attack and current emotional problems. Proceeding *pro se*, Guy brought suit multiple federal defendants under the Federal Tort Claims Act (FTCA). Besides suing IAP/AIG and KBR, Guy also named Lloyd-Owen International, the United States Department of Labor, the United States Department of Defense, and the United States Army Medical Department at Landstuhl Regional Medical Center in Germany. The court initially noted that Guy failed to allege any facts to support liability of any kind regarding these defendants. After refusing to allow Guy to proceed *in forma pauperis*, the court noted that the only proper defendant in a FTCA claim is the United States, which Guy had not named. The court noted that even if it were to allow Guy to amend his Complaint to substitute the United States for the other federal agency-defendants, the United States could not be sued without its consent. Although the FTCA constituted a limited waiver of the federal government's sovereign immunity from private suit, Guy failed to allege any facts to show how his suit fell within that waiver. Further, a plaintiff suing under the FTCA must comply with the statute's notice requirements, which are jurisdictional, cannot be waived, and must be strictly construed. Guy did not allege that he had filed a formal administrative tort claim. It also appeared that the FTCA's 2-year statute of limitations applied to forever bar such a suit. Finally, the court noted that Guy had stated no facts that gave rise to any cause of action against any defendant except for IAP/AIG, and under the Defense Base Act, Guy's exclusive remedy against IAP/AIG is under the Act itself. Guy's motion to proceed *in forma pauperis* was denied and his

action was dismissed without prejudice for failure to state a cognizable federal claim and for lack of subject-matter jurisdiction. (USDC DNM, February 15, 2015) 2011 U.S. Dist. LEXIS 158639

Oregon

COURT FINDS VIOLATION OF ALL *SCINDIA* DUTIES (CONT.)
TUCKER V. CASCADE GENERAL, INC., ET AL.

Philip Tucker brought §905(b) negligence action under the LHWCA Cascade General, Inc. and the United States to recover damages for personal injury Tucker allegedly sustained aboard a dredge, which was a public vessel owned by the United States. Tucker claimed a hatch cover from the upper pump room fell through the hatch opening and struck him in the head while he was working below in the lower pump room. The United States and Cascade filed cross-claims against each other. Prior to trial, Tucker settled his claim against Cascade, and Cascade's cross-claims against the United States were dismissed, with prejudice. Following a nine-day court trial of Tucker's case against the United States, the court found the United States was 50% responsible for the harm to Tucker and, accordingly, obligated to pay that share of his resulting damages ($2,077,187 for economic damages; $8,000,000 for pain and suffering and loss of enjoyment). The court deferred ruling on the United States' contractual indemnification cross-claims against Cascade. The United States now seeks indemnification from Cascade, up to the limit of $300,000 per contract, for the total sum of $600,000, to reduce the amount the United States owed Tucker. Cascade's settlement with Tucker included a provision that Tucker would accept the risk of setoffs occasioned by the United States' cross-claims against Cascade. The United States insisted the indemnity clause in the Cascade contracts was sufficient to encompass responsibility for the injuries to Tucker resulting from the United States' negligence. Turning now to the indemnification clause in the Cascade contracts, The court found that the relevant language stated Cascade "indemnifies the Government ... against all claims, demands, or causes of actions ... arising in whole or in part from the negligence ... of [Cascade] ...." Under the circumstances of this case, and the controlling precedent, the court found the provision in the Cascade contracts did not extend indemnification for the negligence of the United States. The court relied upon the maxim that the contract should be construed most strongly against the drafter, which was the United States. Moreover, the express terms of the contract did not convey with clarity a mutual intent of the parties to shift the burden of the United States' own negligence to Cascade. The court also noted that it had previously found the United States liable for an unsafe condition. Under the terms of the indemnification clause Cascade was responsible only for the harm it caused the United States and not for harm the United States imposed upon itself. The United States' request for indemnification of the United States pursuant to its contracts with Cascade was denied. (USDC DOR, February 10, 2015) 2015 U.S. Dist. LEXIS 15847

COURT FINDS VIOLATION OF ALL *SCINDIA* DUTIES AND AWARDS BIG DAMAGES.
TUCKER V. CASCADE GENERAL, INC., ET AL.

Philip Tucker brought a §905(b) negligence action under the LHWCA against Cascade General, Inc. and the United States to recover damages for personal injury he allegedly sustained, aboard a public vessel owned by the United States, when a hatch cover from the upper pump room fell through the hatch opening and struck him in the head while he was working below in the lower pump room. The United States and Cascade filed cross-claims against each other. Prior to trial, Tucker settled his claim against Cascade; and Cascade's cross-claims against the United States

were dismissed, with prejudice. The court deferred ruling on the United States' contractual cross-claims against Cascade. Following a nine-day bench trial of Tucker's case against the United States, the court rejected the government's contention that it was absolved of responsibility to turnover the vessel in safe condition simply because some Cascade employees were aware of the dangerous nature of the hatch cover and were able devise a procedure to safely remove the plates. The court found that a preponderance of the evidence supported the conclusion the upper pump room hatch cover was a very unusual, if not unique, and hazardous design. Based upon the evidence presented at trial, the court concluded the condition of the hatch cover in the upper pump room of the vessel was not something even an experienced longshore worker would have looked for or anticipated. There was ample competent evidence at trial to show the hazard presented by the hatch cover was such that an expert and experienced stevedore would not be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property. There fore the court concluded that the United States breached its duty to exercise ordinary care and turn over the vessel in such a condition that an expert stevedore could conduct its operations with reasonable safety. The court also found that the government did not exercise due care to protect Tucker from this hazardous condition, For these reasons, the United States breached its duty to avoid exposing Tucker to harm from a hazard under the active control of the vessel. This failure, which constituted negligence, was a proximate, legal, and factual cause of Tucker's harm and resulting damages. As to the third *Scindia* factor, The court found that the stevedore had no authority to remedy the situation because the hatch cover was under the control of the government, not the stevedore. The United States was held liable to Tucker for breach of the duty to intervene as well. The court awarded damages to Tucker in the amount of $10, 077, 187, plus post-judgment interest of 4%. Based upon the substantial evidence presented at trial and the law governing Tucker's claims in this case, the United States was held 50% responsible for the harm to Tucker and, accordingly, obligated to pay that share of his resulting damages. (USDC DOR, November 13, 2014) 2014 U.S. Dist. LEXIS 160265

Rhode Island

A WET DECK DOESN'T ARISE TO §905(B) NEGLIGENCE
DIAS V. TMS SEACOD GMBH & CO. KG, ET AL.

Anthony Dias was employed as an oil inspector, by Inspectorate America Corporation, and was allegedly injured when he slipped and fell while on shipboard inspecting petroleum cargo. Diaz alleged that his injuries resulted from defendants' negligence and filed suit under §905(b) of the LHWCA. TMS Seacod GmbH & Co. KG is the owner of the ocean-going tanker. Diaz did not properly assert *in rem* jurisdiction over the tanker. Consequently, Count III, stating a negligence claim against the vessel was summarily dismissed. Count II, which asserted a claim for negligence against German Tanker Shipping GmbH & Co., KG, was dismissed by joint stipulation of the parties. TMS Seacod moved for summary judgment on the only remaining count in the complaint, claiming it did not violate any of its *Scindia* duties. The court initially observed that Dias's complaint merely stated that TMS Seacod "negligently failed to rectify the defective condition" which proximately caused his fall, and was probably insufficiently detailed to pass the Supreme Court's *Iqbal* test. During discovery and summary judgment practice, dias took the opportunity to flesh out his claim, pointing to the tanker's lack of a non-skid surface, and the absence of clearly-marked entrances to the tanks. The court found that the absence of a non-skid surface, which by Dias's own account, is not a standard feature of the ships he boards, has generally not been found to violate the vessel owner's duty of care to the stevedore. Nor does

it constitute a hidden hazard giving rise to a duty to warn the stevedore. The court noted that the tanker's lack of non-skid surface would have been apparent to Dias when he boarded the vessel and cris-crossed its deck taking samples. Dias failed to present any evidence that the tanker's design was defective. Since TMS Seacod had demonstrated that there was a lack of evidence to support Dias's claims, the burden shifted to Dias to come forward with specific facts demonstrating that there is genuine issue for trial. Instead, the court found that Dias had only produced a muddle of confusing and poorly-substantiated allegations. The court granted TMS Seacod's motion for summary judgment on the remaining count in Dias's complaint and dismissed the case with prejudice. (USDC DRI, February 5, 2015) 2015 U.S. Dist. LEXIS 14655

Texas

OCSLA PROVIDES JURISDICTION NOTWITHSTANDING FALSE JONES ACT CLAIM
VALDEZ V. ALLIANCE LIFTBOATS, LLC, ET AL.

This case involves an injury to a Performance Energy Services pipefitter, Josuel Valdez, who was hired to work on a drilling rig, owned and operated by Apache Corporation, Fieldwood Energy, LLC and/or Fieldwood Energy Offshore, LLC f/k/a Sandridge Energy Offshore, LLC (jointly Drillers), on the Outer Continental Shelf (OCS). Valdez claimed that performed some of his pipefitting work on a liftboat that was affixed to the drilling rig, which was owned and operated by Alliance Liftboats, LLC, Alliance Offshore, LLC, and/or Alliance Maritime Holdings, LLC (jointly Alliance). At the time of his alleged injury, Valdez was aboard a supply boat owned and operated by TN Marine, LLC, and engaged in an operation to transfer cargo between the supply boat and the liftboat. Valdez claimed that a wave came up under the supply boat and over its railing and as a result, Valdez was allegedly crushed between a loose box of scrap iron and another box on deck. Valdez filed suit in state court, alleging a Jones Act case against multiple alleged employers, who removed the state- filed action to federal court. Valdez moved for remand, asserting that his case could not be removed to federal court, because of his Jones Act cause of action. Defendants asserted federal removal jurisdiction under both admiralty jurisdiction and the OCSLA. The court initially observed that Valdez had not expressly pled any claim under OCSLA. Instead, he cast his claims in terms of Jones Act negligence, unseaworthiness, maintenance and cure, and simple negligence. Nonetheless, the Fifth Circuit has held that OCSLA provides original jurisdiction for removal even if the plaintiff does not plead it. The court found that defendants had adequately demonstrated that the drilling rig was a fixed platform on the OCS and all three factors for OCSLA jurisdiction were met. While defendants argued that Valdez is not a "seaman" and they are not his "employers," the court declined to reach that issue as OCSLA supplied original jurisdiction and supported removal, regardless of the theory under which Valdez had cast his claim. Valdez's motion to remand was denied. (USDC SDTX, March 13, 2015) 2015 U.S. Dist. LEXIS 30940

ANOTHER REMOVAL ACTION BITES THE DUST. OCSLA UNTIMELY PLED.
CORMIER V. CHET MORRISON CONTRACTORS, LLC, ET AL.

Nathan Cormier worked for Chet Morrison Contractors, LLC. aboard a Seacor Liftboats LLC. Offshore supply vessel, when he allegedly sustained injuries to his head, back, and neck in the course of his work. Cormier subsequently under went surgery and other medical treatment for his alleged injuries. Cormier filed suit against multiple defendants in state court, including his employer and the owners of the vessel, alleging negligence in the supervision of the crew,

maintenance of equipment, and related duties, and bringing claims under the general maritime law and the Jones Act. Apache Corporation timely removed the case to federal court, with the consent of its co-defendants, arguing that Cormier's general maritime claims fell within the scope of the removal statute, §1441(a), as amended in 2011. Cormier moved to remand his case to state court, contending that the saving to suitors clause prohibits removal of maritime cases based solely on maritime jurisdiction - independent federal question or diversity jurisdiction is required. In response to Cormier's motion, Apache asserted a previously unmentioned ground for federal jurisdiction - namely, that the record establishes that the incident occurred on a platform affixed to the Outer Continental Shelf, giving rise to jurisdiction under the OCSLA. Cormier did not contest Apache's argument that the incident occurred on the Outer Continental Shelf, but rather, argues that Apache's assertion that OCSLA provides federal jurisdiction was not included in the Notice of Removal and therefore was waived. All defendants argued that Cormier is not a Jones Act seaman and therefore removal was not thwarted by the Jones Act. The court reviewed the arguments for adopting ***Ryan***'s reasoning and came to the conclusion that the 2011 clarification of §1441 did not alter federal courts' jurisdiction over maritime claims. The court observed that the Fifth Circuit has recognized that the saving to suitors clause exempts maritime cases from removal unless defendants can demonstrate a separate jurisdictional grant. Following ***Parker***, instead of ***Ryan***, the court found that general maritime claims do not, standing alone, provide a basis for removal to federal court. The hurdle to Apache's argument for OCSLA jurisdiction was not the lack of Cormier's pleading of claims under OCSLA, but rather Apache's failure to mention OCSLA in the Notice of Removal. Apache sought to cure the defect by filing an Amended Notice, however, the court found it to be untimely. Therefore the court held that OCSLA could not serve as the grant of jurisdiction Apache requires to remove this case to federal court. Because the court lacked subject matter jurisdiction over Cormier's suit, it declined to consider the argument that Cormier's Jones Act claim was fraudulently pled. Cormier's motion to remand was granted. (USDC SDTX, February, 5, 2015) 2015 U.S. Dist. LEXIS 14325

Virginia

COURT ALLOWS §905(B) CASE TO PROCEED AGAINST EMPLOYER (CONT.)
IN RE: LYON SHIPYARD, INC.

John McCullen died while working as a machinist for Lyon Shipyard, Inc. at Great Lakes Dredge & Dock's (GLD&D) facility. McCullen was assisting in the removal of equipment from a GLD&D hopper dredge, when he was crushed between vessel equipment suspended from a crane aboard a crane barge and the side of the dredge and died from his injuries. McCullen's estate filed a §905(b) complaint, under the LHWCA, in state court, alleging that Lyon, in its capacity as owner of the crane barge, and GLD&D, in its capacity as owner of the dredge and third-party tortfeasor, failed to exercise reasonable care and negligently caused the decedent's death. GLD&D removed the case to federal court, arguing that the court had original jurisdiction pursuant to 28 U.S.C. §1333(1), and in the alternative, diversity jurisdiction pursuant to §1332(a)(1). Lyon moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the LHWCA provided plaintiff's exclusive remedy. Plaintiff moved to remand the

case to state court, arguing that his case could not be removed to the federal forum because maritime claims are not generally removable and GLD&D failed to establish fraudulent joinder or applicability of the LWHCA bar to recovery. Given a finding of a potential cause of action against Lyon in state court, the court concluded that defendants had not established that plaintiff fraudulently joined Lyon to defeat diversity jurisdiction. Accordingly, the court granted plaintiff's motion to remand and denied Lyon's motion to dismiss as moot. Following the remand, Lyon filed a limitation complaint in federal court, in which it sought exoneration from or limitation of liability, and submitted an *ad interim* stipulation for the value of the vessel in the sum of $1,200,000, plus $1,000 for costs. The court subsequently issued an injunction, staying the state court proceeding against Lyon and Great Lakes. Two parties filed answers and claims in the limitation action. Monroe filed his Answer, in which he conceded that the damages of $12,000,000 being sought would exceed the limitation fund. Great Lakes filed its Answer, seeking $161,000 in damages from loss of use of its dredge, as well as indemnification for costs and attorneys' fees incurred. Monroe then moved to enter a stipulation and lift the injunction and stay of proceedings, so he could pursue his state court action. Lyon opposed the motion, arguing that a single claimant in a multiple-claimant limitation proceeding with insufficient funds may not unilaterally draft stipulations to lift a stay of state court proceedings. The key issue before the court was whether Monroe's stipulations, in particular Stipulation 5, which gave any claim of Great Lakes priority over Monroe's claim, were sufficient to protect Lyon. The court found that they were not. The court found that the case involved two claimants, one of whom (Great Lakes), had not entered into any stipulations that would protect Lyon's right to limitation. The court found that, under Supreme Court precedent, without a stipulation by Great Lakes, the injunction and stay of state proceedings could not be lifted. (USDC EDVA, March 9, 2015) 2015 U.S. Dist. LEXIS 28446

BRB Decisions

BRB HOLDS ALJ ERRED IN NOT FINDING *PRIMA FACIE* CASE MADE
MYSHKA V. ELECTRIC BOAT CORPORATION

In this case the BRB held welder, John Myshka, made a *prima facie* case to invoke the §20 presumption of compensability for his claimed right hand carpal tunnel injury (harm and working condition elements satisfied), from Myshka's testimony that his right hand symptoms worsened while working for Electric Boat Corporation and from the parties' stipulation that Myshka sustained industrial injuries with Electric Boat on 8/26/2011. The BRB also found that the ALJ erred in finding that Myshka did not make *prima facie* case of industrial injury on 8/26/2011, and remanded for ALJ (1) to determine whether Myshka's permanent right hand impairment after date of maximum medical improvement was causally related to his work with Electric Boat, and (2) if yes, to determine extent of permanent disability and determine whether Electric Boat was entitled to credit for scheduled permanent partial disability benefits paid to Myshka for his prior industrial injury to hands and arms (with credit to be made using actual dollar amount of previous payment, not percentage of disability). (BRB No. 14-0161, January 13, 2015) 48 BRBS 79

BRB HOLDS ZONE OF SPECIAL DANGER & PHYSICAL INJURY IS A TORT CONCEPT
JACKSON V. CERES MARINE TERMINALS, INC., ET AL.

In this case, the BRB affirmed the ALJ's holding that the §20 presumption of compensability was

invoked, was rebutted, and considering evidence as whole, claim was compensable and Samuel Jackson was entitled to temporary total disability and medical treatment benefits. The BRB found Jackson was working for Ceres Marine Terminals, Inc. on March 28, 2011, operating a forklift, accidentally struck and killed co-worker, tried to move co-worker's body from underneath forklift, and witnessed subsequent rescue attempts. Jackson was later diagnosed with post-traumatic stress disorder (PTSD) resulting from the accident. Ceres evaluating psychiatrist agreed with this diagnosis and connection to the incident. OWCP also sent Jackson for an evaluation by an independent medical evaluator (IME) under § 907(e), who rendered an opinion that Jackson did not meet criteria for PTSD and was not disabled. Ceres relied on the IME's opinion to cease making voluntary temporary total disability benefits to Jackson. The BRB found that the ALJ was not required to give dispositive weight to the IME's opinions or to give greater weight to IME's opinions than to other opinions in medical record, and held that substantial evidence supported the ALJ's presumption analysis considering the record as whole and giving greater weight to opinions from Jackson's treating psychiatrist, other treating physicians, and Ceres' expert psychiatrist than to the IME. The BRB also affirmed the ALJ's findings that the "zone of danger" test presented by Ceres was a tort concept and did not apply to the LHWCA and held Jackson's psychological injury could be compensable under LHWCA with or without accompanying physical injury. Addressing Jackson's cross-appeal, the BRB affirmed ALJ's computation of Jackson's average weekly wages under §910(c) without including payments Jackson received for vacation, holiday, and container royalty, when BRB found Jackson's payments for these three types of benefits were disability credits and were not payments for services after Jackson worked the requisite number of actual hours of work and thus were not "wages" under §902(13) and ***Wright***. (BRB Nos. 14-0071, 14-0071A, November 25, 2014) 48 BRBS 71

INJURY DID NOT OCCUR ON NAVIGABLE WATERS OR ADJOINING AREA
O'DONNELL V. NAUTILUS MARINE PROTECTION, INC, ET AL.

In this case, the BRB affirmed the ALJ's holding that Daniel O'Donnell's injury at employer's temporary boom building facility was not location that satisfied maritime situs requirement of §903(a) and affirmed the ALJ's denial of claim. The BRB found employer had a project to build a boom across a river, to collect trash and other debris. The employer created a temporary facility next to the river and storm channel to build and install the boom. O'Donnell was injured at this facility, when a 30-foot container used to store tools fell and struck him, causing him loss of both legs and significant internal injuries. The employer paid benefits to O'Donnell under state workers' compensation law. The BRB held that substantial evidence supported the ALJ's findings that the river and storm channel were not "navigable waters" at the location of O'Donnell's injury or an "adjoining area" within the meaning of §903(a). (BRB No. 14-0147, November 21, 2014) 48 BRBS 67

BRB ORDERS FURTHER FACT FINDING ON STATUS AS WIDOW
JOHNSTON V. HAYWARD BAKER, ET AL.

In the case, the BRB vacated the ALJ's denial of LHWCA death benefits to Roy Johnston's putative widow and remanded for new proceedings on issues of whether the decedent's putative widow was "widow" at time of decedent's death under §§ 909(b) and 902(16), (2). The BRB also gave remand instructions to determine whether the putative widow and decedent lived apart for "justifiable cause" under §902(16) at time of decedent's death and whether the putative widow's conduct maintained or severed the continuous conjugal nexus between decedent and putative

widow. (BRB No. 14-0032, October 31, 2014) 48 BRBS 59

Significant ALJ Decisions

"IRRESISTIBLE IMPULSE" IS STILL THE STANDARD IN THE FIFTH CIRCUIT
HUFF-GARRETT V. OVERSEAS ADMINISTRATION SERVICES, LTD., ET AL.

Teressa Huff-Garrett was deployed by Overseas Administration Services, Ltd. (OAS) in Iraq, Afghanistan, and Kuwait. During her deployment, Huff-Garrett was exposed to hostile actions. As a result, Huff-Garrett allegedly suffered various mental injuries, including post-traumatic stress disorder, depression, and anxiety. OAS accepted these injuries as compensable and paid permanent total disability and medical benefits. Huff-Garrett subsequently attempted suicide. The attempt was unsuccessful and left her face scarred and disfigured. Huff-Garrett sought medical treatment relating to injuries sustained by her suicide attempt. OAS denied compensability under §903 and contended that Huff-Garrett effectively abandoned medical treatment and was capable of returning to some gainful employment. Huff-Garrett argued that §903 did not relate to her claim for medical benefits and that she could not return to work. Huff-Garrett contended that she was driven to her suicide attempt as a result of the PTSD, depression, and anxiety caused by her overseas job with OAS. At the time of her suicide attempt, Claimant was experiencing numerous stressors in her life. OAS contended that Huff-Garrett's suicide attempt was not the result of employment-related PTSD, connecting the suicide attempt instead to subsequent intervening acts in her life, including setbacks relating to her husband's infidelity. There was no dispute that she suffered injuries resulting from a suicide attempt, but only whether those injuries were compensable. Given Huff-Garrett's testimony at formal hearing and the testimony of her medical experts, the ALJ initially found that Huff-Garrett had established by a preponderance of the evidence a *prima facie* case of a compensable injury arising out of her suicide attempt. Based on unequivocal medical testimony that no relationship existed between Huff-Garrett's suicide attempt and her employment, the ALJ also found and concluded that OAS had sufficiently rebutted the 20(a) presumption. The ALJ next weighed Huff- Garrett's testimony, and the findings and opinions of her treating physician, all of which were found to be credible and supported by the evidence, against the testimony and opinions of OAS's forensic psychiatrist, and found that Huff-Garrett had established that her suicide attempt and consequential injuries were, in part, related to the PTSD, anxiety, and depression she suffered as a result of her overseas employment with OAS. Turning to the issue of the §903 bar, if the injury was occasioned solely by the willful intention of the employee to injure or kill himself or another, the court pointed out that in the Fifth Circuit, suicide bars recovery unless the employee's death does not stem from a willful act but rather is caused by an irresistible impulse resulting from an employment-related condition. The ALJ acknowledged that the Ninth Circuit, by contrast, had recently rejected the irresistible impulse rule and held that suicide and injuries from a suicide attempt are compensable where there is a "direct and unbroken chain of causation between a compensable work-related injury and the suicide attempt." Acknowledging that he was bound by the strictures of the Fifth Circuit's holdings and must apply the irresistible impulse rule to Huff-Garrett's claim, the ALJ found that the undisputed series of events leading up to Huff-Garrett's attempted suicide, lasting for months, indicated that her suicide attempt was not the result of an irresistible impulse. Based upon this legal standard, which the ALJ noted he was bound to apply, The ALJ found that the injuries Huff-Garrett sustained as a result of her attempted suicide were not compensable as her suicide was not the consequence of an irresistible impulse. Finally, the ALJ found that the record continued to show that Huff-Garrett's was

temporarily and totally disabled and OAS had not established suitable alternative employment. (OALJ, January 14, 2015) Case No. 2013-LDA-00696

This outcome is in direct conflict with the 9th Circuit's opinion in Kealoha v. Director, OWCP. I strongly suspect that we will see an appeal of this decision, in that the ALJ specifically acknowledged that, were the case within the jurisdiction of the Ninth Circuit, the ALJ would undoubtedly find for the claimant.

LACK OF TIMELY NOTICE BARS LHWCA CLAIM
MACK V. SSA COOPER LLC., ET AL.

Ham J. Mack worked as a longshoreman for 16 years and retired in 2005, when he last worked for SSA Cooper, LLC. Mack filed a claim under the LHWCA, alleging that his degenerative disc disease was an occupational disease related to his working conditions, including lashing, running a bulldozer, driving the lift squeeze and using 100 pound rods, cables, and turnbuckles. Mack testified that he stopped working in 2005 because his legs started cramping and his doctor told him he had a disc pressing against a nerve, requiring surgery. SSA controverted the claim, indicating that its first knowledge of the claim was on October 31, 2013, more than eight years after Mack's date last worked. At the formal hearing, SSA argued that Mack failed to make a *prima facie* showing because he improperly alleged an occupational disease claim and, to support such a claim, the conditions causing the harm must be present in a peculiar or increased degree by comparison with employment in general. The ALJ observed that Mack's back problems qualified as an occupational disease was immaterial to the 20(a) presumption. The medical evidence showed Mack suffered from a back condition requiring surgery, meaning Mack had established he suffered a harm. Mack's job was described as tough, heavy, physical work that included bending, stooping, and lifting heavy objects. These conditions could cause, aggravate or accelerate his condition. Thus, the ALJ held that Mack had established the *prima facie* elements and was entitled to the §20(a) presumption. The crux of the case was the statutory date of injury. Specifically, whether or not Mack was entitled to benefits under the Act depended on a determination of when he was aware or should have been aware that his employment and injury were related. The ALJ found that there was substantial evidence that Mack had not given sufficient notice to entitle him to the §20(b) presumption for Sections 12 or 13. The ALJ found Mack should have reasonably been aware that his injury was related to his work on August 8, 2005 when he sought treatment for his back condition. The ALJ also noted that the record was replete with evidence Mack was aware, or reasonably should have been aware, of a causal relationship between his injury and his work through both medical advice and loss of wage-earning capacity. In his deposition, Mack testified that he became aware in 2005 that he was disabled from longshoring because of his back surgery. Mack also said he last worked on August 8, 2005 because he is totally disabled, and he had not worked since then, and his doctor had told him there was no way possible he could return to work at the docks. These statements showed a direct causal link between Mack's work and injury as well as an immediate impact on his wage capacity. The ALJ pointed out that, regardless of Mack's proclaimed lack of awareness, the appropriate standard for determining the date of injury was not subjective, but objective. The medical advice showed Mack should reasonably have been aware of the relationship between his injury and his job in August 2005. There was nothing in the record to indicate SSA knew of Mack's injury prior to the October 15, 2013 notice. In summary, the ALJ found the record showed Mack knew or reasonably should have known his injury was related to his employment and his disability affected his wage-earning capacity. Mack failed to provide a satisfactory reason for the late notice. SSA properly raised an objection to the failure to give timely notice, and would be greatly prejudiced if the failure were excused. Accordingly, the ALJ held that

Mack's claim is time-barred and the claim was denied. (OALJ DOL, January 12, 2015) 2014-LHC-00724

As my long-suffering readers know, I rarely review ALJ decisions. However, when a gem like this one comes along, sometimes I can't help myself. Thanks to Stan Henslee, of Homeport Insurance, for sharing this case with me.