Prepared By Tom Langan for
STEVEDORES, MARINE TERMINALS & VESSEL SERVICES COMMITTEE
CASE LAW UPDATE - MLA FALL 2016 MEETING
Thursday, October 27, 2016
King, Krebs & Jurgens, 201 St. Charles Ave., 45th Fl., New Orleans, LA

Regulatory

On August 26, 2016, OWCP published a Notice of Proposed Rulemaking and Request For Comment, proposing rules to implement the Longshore and Harbor Workers' Compensation Act's maximum and minimum compensation provisions. Some of these provisions, which cap the amounts of compensation and death benefits payable to entitled claimants and provide a floor below which compensation may not fall, have become the topic of litigation. The proposed rules would clarify how the Department interprets and applies these provisions. In addition, the proposed rules would implement the Act's annual compensation-adjustment mechanism for permanent total disability compensation and death benefits. Specifically, the proposed rule would:

- Implement a U.S. Supreme Court and two courts of appeals' decisions interpreting the act's maximum compensation provisions.
- Clarify how the Act's minimum compensation provisions apply.
- Outline the relationship between maximum and minimum compensation rates and the act's annual adjustment provision, which is designed to prevent time from eroding the compensation's value.

Written comments must be received by October 25, 2016.

Effective October 1, 2016, the new NAWW is $718.24, a 2.17% increase over last year. This means that the new maximum weekly compensation rate under the Longshore Act is $1,436.48 (twice the NAWW), and the new minimum weekly compensation rate is $359.12 (one-half the NAWW).

On July 1, 2016, the U.S. Department of Labor issued interim final regulations to adjust the amounts of civil penalties assessed or enforced in its regulations under the Longshore & Harbor Workers Compensation Act, in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The new penalty levels are effective no later than August 1, 2016. The Inflation Adjustment Act affects the penalties outlined below.

- Section 14(g) of the LHWCA: Failure to Report Termination of Payments
  The penalty amount has increased from $110 to $275.
- Section 30(e) of the LHWCA: Penalty for Late Report of Injury or Death
  The maximum penalty amount has increased from $11,000 to $22,587.
- Section 49 of the LHWCA: Discrimination Against Employees Who Bring Proceedings
  The penalty amount has increased from a $1,000 minimum and a $5,000 maximum to a $2,259 minimum and $11,293 maximum.

Industry Notice 158 which is available on the Office of Workers' Compensation (OWCP), Division of Longshore and Harbor Workers' Compensation (DLHWC) website outlines the adjustments in detail.

The Coast Guard has released a new version of the CG-2692 form (series), covering reports of marine casualties, commercial diving casualties, or outer continental shelf-related casualties. This form is the result of an extensive initiative to overhaul the previous form, which had remained unchanged for nearly 40 years. The new version of the form encompasses several changes, including, but not limited to:

- Revised addendum forms for barge involvement, personnel casualties, witnesses and chemical testing;
- Streamlined data fields to align with statutory and regulatory language; and
- Ability to be filled out entirely electronically, including the use of a digital signature.

Department of Labor

District Director Richard V. Robilotti has recently announced that he will be retiring on October 31, 2016. Mr. Robilotti started working for the United States Department of Labor on January 15, 1973, and has been the epitome of the Longshore program here in the New York metropolitan area for the last 43 years. In all those years, Mr. Robilotti has demonstrated dedication and passion to his job. Not only has he stood fast as a protector for claimants, his outreach and sway with stakeholders is legendary. Within the last few years, the New York office has been tasked with the additional challenge of administering claims from the Iraq and Afghanistan Wars. The New York office was (and is) responsible for all international foreign claims, and has successfully handled those claims, without any expense to the timely administration of all local Longshore claims. When leadership in the National Office recently saw a 100% turnover, Mr. Robilotti became a conduit and source of institutional knowledge that helped the national team get up to speed quickly. They continue to turn to him for both practical and legal advice and have entrusted the New York office, under Mr. Robilotti's leadership, with the responsibility for the creation of all Longshore cases nationwide. Just recently, Mr. Robilotti was awarded the Mark D. Falk Regional Award for Public Service, for his demonstrated caring and concern for all his employees. On August 21, 2015, an assailant with two handguns entered the building that houses the New York Longshore offices. The assailant killed one of the security guards and then came to the elevator bank just as Mr. Robilotti was exiting the elevator. After seeing the dead guard, Mr. Robilotti had two choices: run for the exit like everyone else; or go back upstairs to warn his staff. Mr. Robilotti obviously chose the later alternative, the safety of his employees being the uppermost on his mind at that moment. I personally have had the pleasure of working with Mr. Robilotti throughout my entire 26 year career in the Longshore industry and have been honored to do so. I wish him well in his retirement years and trust he will remain a wealthy resource to the Longshore community notwithstanding his departure from the active Longshore duty roster.

It is with profound sorrow that I report on the passing of Honorable Henry B. Lasky, Administrative Law Judge (retired). As those that knew him can attest, Judge Lasky was well

respected and extremely admired by many on both sides of the LHWCA bar during his tenure on the bench and later, as a mediator.

Supreme Court of the United States

On June 27, 2016, a petition for certiorari was filed with the U.S. Supreme Court in the case of *Servicio Marina Superior, LLC v. JAB Energy Solutions II, LLC*, Docket No. 16-6. The question presented is: "Are sophisticated businesses in maritime transport contracts now wards of the Court; or will they be allowed to continue contractually allocating the risk of seaworthiness?"

Circuit Courts

3rd Circuit

AUTHORITY OF NEW YORK HARBOR WATERFRONT COMMISSION UPHELD
NY SHIPPING ASSOC., INC. V. WATERFRONT COMM'N OF NY HARBOR, ET AL.

This appeal delved deep into the hiring practices and procedures utilized on the New York/New Jersey waterfront and gave a refresher course on the years of criminal activity and corrupt hiring practices on the waterfront were first brought to light in 1949. So as "to investigate, deter, combat and remedy" this criminality and corruption, the states of New Jersey and New York entered into the Compact in 1953, which created the Waterfront Commission to, among other things, eliminate corrupt hiring practices on the waterfront. One way the Compact sought to rein in the corruption associated with hiring on the waterfront was by requiring the Commission to regulate longshoremen and stevedores. Further, the Compact gave the Commission the authority to license stevedoring companies that wanted to operate at the Port. The prevalence of containerization in the shipping industry also led to the creation of a new class of dock worker: longshoremen who did not load or unload ships, but instead performed services that were incidental to those tasks. This new class of longshoremen were registered with the Commission and commonly referred to as "A-registrants," to distinguish them from deep sea longshoremen. The dispute prompting this appeal arose from the Commission's decision to open the longshoremen's register in December of 2013. The New York Shipping Association (NYSA), an organization representing marine terminal operators, stevedoring companies and ship operators in the Port of New York and New Jersey, along with the MMMCA, and the International Longshoremen's Association, AFL-CIO (ILA), filed a complaint against the Commission in November of 2013. The NYSA and the ILA had, three months earlier, asked the Commission to add, on its own initiative, more than 600 employees to the deep sea register. The Commission subsequently issued Determination 35 in December of 2013 which, among other things, stated that the Commission would open the Register to accept applications for 225 new positions, requiring each selection to include a certification that the selection was made in a fair and nondiscriminatory basis in accordance with the requirements of the laws of the United States and the States of New York and New Jersey dealing with equal employment opportunities. The plaintiffs sued the Commission, asking for declaratory and injunctive relief and a preliminary

injunction prohibiting the Commission from implementing its anti-discrimination certification requirements. The district court denied the request for a preliminary injunction, finding that the plaintiffs failed to show irreparable harm and a likelihood of success on the merits. The Commission then filed a motion to dismiss. Plaintiffs then amended their complaint, which the District Court ultimately dismissed. The dismissal was timely appealed, questioning the validity of the anti-discrimination certification procedure and arguing that the Commission was unlawfully interfering with collective bargaining rights. The NYSA, ILA and ILA Locals further claimed that the Commission violated their due process rights in promulgating its certification amendment. Like the district court, the appellate court also concluded that Count I of the Amended Complaint failed to state a claim as matter of law because one of the purposes of the Compact was the elimination of racial discrimination in hiring. Section 5-p's certification requirement furthers this purpose and was thus, constitutional. Compact Section 5p-(5)(b) clearly provided that A-registrants may be included in the deep-sea register under such terms and conditions as the Commission may prescribe. Therefore, the appellate court found that the district court did not err in dismissing Count II of the Amended Complaint for failure to state a claim. The appellate court also affirmed the district court's dismissal of Counts III, IV, and VII of the Amended Complaint, noting that, taken together, these three counts accuse the Commission of unlawfully interfering with the appellants' collective bargaining rights by implementing the nondiscrimination certification provisions. The appellants also maintain that the Commission's actions violate national labor policy by dictating the terms of their collective bargaining agreements. The appellate court firmly rejected both such contentions, noting that the Compact was not designed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and though labor organizations or other representatives of their own choosing. Appellants' due process arguments were also rejected, because the Commission's actions were legislative and procedural due process does not extend to legislative action. The appellate court affirmed the district court ruling that defendant Waterfront Commission was within its statutory authority to require shipping companies and other marine employers to certify that prospective employees had been referred for employment pursuant to federal and state nondiscrimination policies and had not unlawfully interfered with collective bargaining rights. (3rd Cir, August 30, 2016) 2016 U.S. App. LEXIS 15995

5th Circuit

CLAIM SIMPLY LACKS ANY REASONABLE CREDIBILITY
WOODS V. DIRECTOR, OWCP, ET AL. [HELMERICH & PAYNE]

Charles Woods claimed that he was injured while working on a deep-water oil drilling rig, and sought compensation for his injury. Woods fell approximately six feet out of his top bunk onto the floor. He reported the incident, but did not fill out an accident report. Woods continued to work his scheduled twelve-hour shifts for the next fourteen days. After Woods filed his formal claim for compensation, the ALJ found that Woods made a *prima facie* case of a compensable injury related to his falling from his bunk, but held that Woods' employer successfully rebutted the presumption by presenting credible evidence that no physician had linked Woods' bunk fall to any condition or surgical need. Rather, the ALJ concluded that credible evidence showed that

Woods was not a credible witness and did not sustain any severe injuries from his bunk bed fall. The ALJ denied Woods's claim as lacking merit, and Woods appealed to the Benefits Review Board (BRB), which affirmed. Woods sought further review in the circuit court. The appellate court affirmed the BRB, finding that substantial evidence supported the BRB's decision. Put simply, the facts cited by the BRB in its decision "throw factual doubt" on Woods's claim that any back or hip pain he may have suffered was caused by his fall from his bunk. Therefore, for the reasons cited by the BRB, the decision of the BRB was affirmed. (5th Cir, September 20, 2016, UNPUBLISHED) 2016 U.S. App. LEXIS 17195

TENSION LEG PLATFORM NOT A VESSEL & DOESN'T SATISFY OCSLA NEXIS TEST
BAKER V. DIRECTOR, OWCP, ET AL. [GULF ISLAND MARINE FABRICATORS, LLC]

James Baker worked as a marine carpenter at Gulf Island Marine Fabricators, LLC's waterside marine fabrication yard. He was allegedly injured1 while building a housing module designed for use on a tension leg offshore oil platform (TLP). Baker filed a claim for disability benefits under the LHWCA, arguing that he was covered by the LHWCA directly as a shipbuilder and, alternatively, was covered under the LHWCA as extended by the Outer Continental Shelf Lands Act (OCSLA). An ALJ held a formal hearing on Baker's disability claims; afterwards, he issued a decision and order denying benefits. The ALJ determined that Baker was not covered by the LHWCA because he was not engaged in maritime employment as a shipbuilder, based on his determination that the TLP was not a "vessel" under the LHWCA. The ALJ next denied Baker's claim for coverage under the OCSLA, concluding that there was no significant causal link between Baker's alleged injury and operations on the OCS. Baker appealed the ALJ's decision to the Benefits Review Board, which affirmed the ALJ's decision. Baker timely filed an appeal to the circuit court, alleges that he met the requirements for coverage under the LHWCA and that both the ALJ and BRB erred in holing otherwise. The appellate court initially noted that the ALJ and BRB both concluded that the TLP was not a vessel, and agreed with that finding. Like the floating home in *Lozman*, the TLP had no means of self-propulsion, had no steering mechanism or rudder, and had an unraked bow. The TLP could only be moved by being towed through the water, and when towed to its permanent location, the TLP would not carry items being transported from place to place (e.g., cargo), but only mere appurtenances. While required to carry a captain and crew when towed, the crew will only be present to ensure the TLP's transport to its permanent location on the OCS and would not be used to transport equipment and workers over water in the course of its regular use. In fact, the TLP was only intended to travel over water once in the next twenty years-the voyage to its operational location on the OCS. Given these undisputed facts, "a reasonable observer, looking to the TLP's physical characteristics and activities, would not consider it designed to a practical degree for carrying people or things over water. Baker also challenged the ALJ's determination that his activities as an employee of Gulf Island did not have a sufficiently substantial nexus to OCS operations such that he was entitled to compensation under the LHWCA as extended by the OCSLA, arguing that he was injured as the result of operations on the OCS because he was injured while constructing living quarters, which would ultimately be integrated into and placed on the OCS. The appellate court found that Baker's job of constructing living and dining quarters was too attenuated from the TLP's future purpose of extracting natural resources from the OCS for the OCSLA to cover his injury. Baker's particular job did not require him to travel to the OCS at all, making his work geographically distant from the OCS. And although Gulf Island manufactured the living quarters for the TLP,

the company had no role in moving it, installing it, or operating it once placed on the OCS. Based on the specific facts of Baker's employment, the appellate court concluded that his injury did not satisfy the substantial nexus test and was not covered under the LHWCA as extended by the OCSLA. The decision of the BRB denying Baker's claim was affirmed. (5th Cir, August 19, 2016)2016 U.S. App. LEXIS 15297

SUMMARY JUDGMENT AFFIRMED ON UNSUPPORTED §905(B) CLAIM
KITCHENS V. STOLT TANKERS BV., ET AL.

Larry Kitchens was employed as an Operations Supervisor for Westway Terminal, where he supervised various activities involving cargo operations between vessels and the terminal. At times, Kitchens' duties as supervisor required him to board vessels that were docked in the terminal. Stolt Tankers, B.V. and Stolt Focus, B.V., (collectively, "Stolt"), owned and operated a vessel that was conducting cargo operations at the terminal. Kitchens boarded the vessel, stepped off of the stairs to the main deck, he took a couple of steps and then slipped and fell. Kitchens then left the vessel without assistance. Neither Kitchens nor any of the witnesses to the accident reported observing any type of foreign substance on the part of the deck where Kitchens fell. The record reflects that, after the accident, Kitchens failed to submit a company-mandated accident report and also waived his right to file a claim for compensation and benefits under the LHWCA. Kitchens eventually filed suit in state court against Stolt alleging negligence claims under §905(b) of the LHWCA. Stolt removed to the case federal district court pursuant to 28 U.S.C. §1333 and moved for summary judgment. The district court granted summary judgment in favor of Stolt and dismissed Kitchens' claims, concluding that Kitchens failed to prove that Stolt breached its "active control" and "turnover" duties under §905(b) of the Act. Kitchens then filed this appeal, contending that the district court erred in dismissing his "active control" claim, arguing that the vessel's walkway where he was injured was dimly lit and extremely slick. The appellate court pointed out that, as the district court correctly noted, liability under the active control duty was premised on the presence or existence of a "hazard" under the active control of the vessel. The record reflected that neither Kitchens nor any of the eye witnesses to the incident observed any type of foreign substance-open, obvious, or otherwise-on the area where Kitchens slipped, before or after the accident. Moreover, subsequent to his fall, Kitchens was unable to gather any direct or circumstantial evidence that there was a hazard on the walkway where he slipped. There was no evidence submitted that any of Stolt's cargo leaked, dripped, or spilled at any time prior to the incident, or that any person tracked any type of slippery substance onto the walkway of the vessel. In light of his failure to produce any evidence of a hazard on the walkway, the appellate court concluded that the district court did not err in concluding that Kitchens failed to show that there was a genuine issue of material fact with respect to his active control claim, thereby entitling Stolt to summary judgment as a matter of law. The district court's summary judgment grant in favor of Stolt was affirmed. (5th Cir, August 2, 2016, UNPUBLISHED) 2016 U.S. App. LEXIS 14010

COURT DENIES REMAND ON FRAUDULENTLY PLED JONES ACT CASE (CONT.)
SKINNER V. SCHLUMBERGER TECHNOLOGY CORP., ET AL.

Richard Skinner, was hired by Coil Tubing Services, a subsidiary of Schlumberger Technology Corporation, as a Field Specialist Trainee, who worked onshore, offshore on platforms and

vessels and on inland waters. Skinner initially spent eleven days undergoing paid, onshore training and did not work from any vessels until two months later, when he was allegedly injured during an offshore job while on board a lift boat owned and operated by Hercules Liftboat Co., LLC, while the vessel was jacked up and servicing a fixed platform well. Skinner filed suit in state court, asserting claims under the general maritime law and a claim under the Jones Act against his employer, Schlumberger, who removed the action to federal court, claiming Skinner fraudulently pled his Jones Act claim. The court had previously entered an order denying Skinner's motion to remand as the record before it did not support Skinner's claims as a Jones Act seaman. Schlumberger then moved for summary judgment on Skinner's Jones Act claim, arguing that Skinner worked for Schlumberger, for at least 189 days, and that the longest possible time he spent in service of a vessel or identifiable fleet of vessels was 42 days. Skinner worked sporadically with eight different vessels, which were not under common ownership. Skinner failed to oppose the motion. The court granted Schlumberger motion for summary judgment based upon its statement of undisputed material facts. Skinner subsequently moved for a new trial, stating that his intention to file an opposition in response to the motion for summary judgment was hindered by counsel for Schlumberger and submitted a memorandum as to what would have been his response. The court granted the motion for new trial and ordered both parties to fully brief the issues. Schlumberger maintained that all of the evidence in the case supported its position that Skinner could not meet the seaman duration rule-that an employee seeking Jones Act seaman status must be able to demonstrate he spends at least thirty percent of his work in service of a vessel in navigation. Skinner argued the coiled tubing work he performed constituted a new assignment and his seaman status should be evaluated using only the total hours he worked during that period of time. The court found that the evidence clearly established that, regardless of whether or not Skinner was working under a new assignment when he was injured, or whether his seaman status calculations are based on the number of days or the number of hours he worked on board vessels, he could not show that at least 30% of his time was spent in the service of a vessel or an identifiable fleet of vessels under common ownership or control, and therefore, he could not prove seaman status. Therefore, the court granted Schlumberger's motion for summary judgment and Skinner's claims were dismissed with prejudice. Thereafter, three motions for summary judgment were filed by EPL Oil & Gas, Inc., Hercules Lift Boat Company, LLC and Greene's Energy Group, LLC, all contending that they were independent contractors that had no employees overseeing or working in connection with Skinner's job activities on the date of the alleged incident. The court found that there was no genuine issue of material fact that neither EPL nor Greene's exercised operational control over the Schlumberger's work. Additionally, the court could not find that any duty Hercules owed to Skinner encompassed the risk that Skinner would be injured performing an action that Skinner himself, an experienced tubing worker, chose to perform. Thus, Skinner's claims against Hercules failed to establish a breach of duty. The motions for summary judgment were granted. Skinner appealed the district court's denial of his motion to remand and the district court's grants of summary judgment. Finding no error in the district court's ruling, the appellate court agreed with the district court's holding that Skinner was not a seaman as a matter of law, because he had the same job and essential duties when he worked on land jobs and on the water, so there was no change in assignment and he had an insufficient connection from his employment as a whole with Schlumberger. The appellate court also affirmed all of the summary judgments as the energy defendants gave no instructions on how Schlumberger should perform its work and Hercules had no duty to prevent Skinner from performing an unsafe action. The decision of the

district court was affirmed. (5th Cir, July 8, 2016, UNPUBLISHED) 2016 U.S. App. LEXIS 12626

5TH CIRCUIT ADDRESSES OCSLA AND CHOICE OF LAW (CONT.)
PETROBRAS AMERICA, INC., ET AL. V. VICINAY CADENAS, S.A.

This case involved a damage claim, and a dispute between an offshore platform operator and the manufacturer of an underwater tether chain, as to whether the tether chain broke on a free-standing hybrid riser system to move crude oil from wellheads on the seabed to floating production storage and offloading facility on the surface of the sea. The manufacturer pled the economic loss rule under maritime law, and the insurers for the owner opposed the motion, but did not contend that Louisiana law, not maritime law, applied. After losing the argument, the underwriters argued that Louisiana law applied and the maritime economic loss rule was not applicable. The manufacturer then argued that the insurer waived the right to argue that Louisiana law applied by not raising it in its pleadings or opposition to the motion for summary judgment. The district court denied the motion and this appeal followed. The Fifth Circuit rejected the waiver argument, holding that the choice of law in the OCSLA was mandatory by statute and was consequently not waivable by the parties. The appellate court held that state law applied to a tether chain connecting the floating buoyancy can to the rise, which in turn was affixed to the seabed—a fixed structure erected on the seabed, there was minimal risk to commercial shipping when the structure fell to the sea floor, and the structure had nothing to do with traditional maritime activity. The appellate court reversed and remanded the case for application of state law. After receiving a petition for rehearing *en banc*, the panel made an effort to clarify its previous opinion. The holding announced in its prior opinion, concluding that Vicinay did not waive its choice of law argument under the OCSLA, necessarily depended upon the unique statutory scheme created by OCSLA. Through OCSLA, Congress legislated the trichotomy of federal law, state law, and residual maritime law for disputes arising on the Outer Continental Shelf. Consequently, the holding did not address waiver of a choice of law argument outside of the OCSLA context and did not disturb authorities holding that, in other contexts, a choice of law argument may be waived. Finally, the panel noted that the appeal arose in admiralty in an interlocutory posture because the choice of law argument was raised in a motion for leave to amend a complaint, and a claim technically remained pending before the district court. Consequently, the panel opinion did not opine on different scenarios, such as where a party raises a choice of law argument under OCSLA for the first time after trial and judgment. (5th Cir., July 22, 2016) 2016 U.S. App. LEXIS 13416

9th Circuit

TENUOUS RELATION MARITIME EQUIPMENT CREATES MARITIME EMPLOYMENT
KNUTSON TOWBOAT COMPANY, ET L. V. WAKELEY, ET AL.

Alfred Wakeley didn't work on a boat or load or unload boats, nor for that matter, did he even typically work on the docks. He was a handyman who allegedly injured himself while repairing the roof of a building that was located near the docks. The issue before the ALJ was whether Wakeley qualified as a longshoreman and, as such, entitled to claim benefits under the LHWCA.

The question was whether the building Wakeley was working on was somehow connected with maritime work. The ALJ originally found that Wakeley was injured on a maritime situs under the Longshore Act, but he had not satisfied the status requirement, denying the claimant's request for benefits. Wakeley appealed to the BRB and that body reversed the administrative law judge's finding that Wakeley was not a covered employee because a worker who maintains structures involved in maritime activities is a maritime employee. The Board, therefore, remanded the case to the ALJ for consideration of the other issues in dispute. On remand, the ALJ found that Wakeley sustained a work related injury and awarded compensation benefits. In its second appeal to the BRB, the employer challenged the Board's affirmance of the ALJ's finding that Wakeley was injured on a maritime situs and its reversal of the ALJ's determination that Wakeley was not a covered employee. The BRB rejected the appeal and affirmed its prior holding. Knutson petitioned for review of the BRB order, arguing that substantial evidence did not support a finding by the ALJ that tools used to repair maritime equipment were stored inside the building that Wakeley was working on. Knutson also argued that Wakeley lacked status under the LHWCA. The appellate court denied the petition for review, finding that substantial evidence supported the ALJ's finding that tools used to repair the log broncs and LeTourneau were stored inside the building, noting that Wakeley testified before the ALJ that the tools were stored there. The appellate court declined to disturb this finding because a reasonable mind might accept Wakeley's testimony as adequate to support the ALJ's finding. In light of this evidence, the BRB did not err when it affirmed the ALJ's finding that Wakeley's injury occurred on a covered situs. Additionally, Wakeley's job duties included construction work on the building, such as remodeling a tool or parts room. The BRB did not err when it concluded that Wakeley was a covered employee based on this construction work. (9th Cir, September 23, 2016, UNPUBLISHED) 2016 U.S. App. LEXIS 17421

IS JOSH LOSING HIS TOUCH? CONCURRENT PTD AND PPD REMAIN UNAVAILABLE
FENSKE V. SERVICE EMPLOYEES INTERNATIONAL, INC., ET AL.

James Fenske was a truck driver for a United States government contractor in Iraq during the Iraq War, when a suicide bomber in a vehicle collided head on with the truck Fenske was driving. The bomb did not explode, but Fenske allegedly suffered severe injuries to his lower back from the collision, which ended Fenske's tour in Iraq. Fenske sought compensation under the Act for his injuries. An ALJ awarded Fenske temporary total disability benefits, followed by permanent partial disability benefits. The ALJ later granted Fenske's petition to modify the award, granting him permanent total disability benefits, rather than partial disability benefits. During the proceedings, Fenske also presented an audiogram, which showed hearing loss in both ears. The parties stipulated to a 9.7% permanent loss of hearing and the ALJ found that the hearing loss was caused by Fenske's work in Iraq. The ALJ held that under the Board's precedent, concurrent payments for the hearing loss were unavailable because Fenske was already receiving compensation for total disability. Fenske appealed to the Board, which upheld the ALJ's decision denying concurrent payments. Fenske petitioned the 9th Circuit for review of the Board's decision. Fenske argued that he should be paid a concurrent award based on the appellate court's holding in *Price*. seeking to extend *Price*'s holding beyond permanent partial disabilities under §908(c)(21) to scheduled losses. The appellate court declined to address this issue, noting that a prerequisite for applying the *Price* theory was that the partial disability preceded the total disability. Because Fenske's hearing loss did not precede his back injury, *Price*

did not apply. Fenske requested that if the full measure of concurrent payments were not available, he should at least be provided a decreased award capped at two-thirds of his wage under *ITO Corp. of Baltimore v. Green*. The appellate court found the argument provided no additional rationale for allowing concurrent payments and declined to provide the requested relief. Fenske's petition for review was denied. (9th Cir, August 26, 2016) 2016 U.S. App. LEXIS 15791

FEE AWARD UPHELD ON APPEAL. SO WHAT ELSE IS NEW?
SSA TERMINALS, LLC, ET AL. V. BELL, ET AL.

In this case SSA Terminals and its insurer challenged the Benefits Review Board's decision granting employee Ronnie Bell attorney's fees under the fee-shifting provisions of the LHWCA, which upheld the ALJ's determination of his counsels' hourly rates. Bell allegedly injured his knee in a work-related accident and, notwithstanding a favorable OWCP recommendation, SSA declined to pay Bell any benefits within thirty days of receiving notice of his claim. More than one year after Bell sustained his alleged injury, SSA Terminals paid him some of the retroactive disability benefits it owed to him, set up a schedule to pay him the remaining outstanding benefits, and later agreed to pay Bell ongoing future permanent partial disability benefits in order to compensate him for his permanent partial injury, leaving only issues concerning attorney's fees remaining before the ALJ. In an order on reconsideration modifying fee award, the ALJ awarded Bell's counsel $34,372.00 in fees and costs. SSA appealed the award and the BRB affirmed. On further appeal, SSA initially averred that the BRB erred in determining that Bell's claims were properly before it because Bell raised fee-shifting claims that related only to the interests of his counsel but did not include his attorney as a party to the litigation in the case's caption, which caused it harm because, by the time it realized that attorney's fees were in issue, the deadline for filing a cross-appeal had lapsed. The appellate court rejected this argument noting since Bell's counsel was adversely affected by the ALJ's decision, he was a party-in-interest and therefore included as a party to the litigation regardless of whether his name was in the case caption. Because the only issues before the ALJ were fee-related, SSA Terminals could not have been unfairly surprised. The appellate court also rejected SSA's argument that it should not be liable for Bell's attorney's fees after the date on which SSA paid Bell some of the benefits it owed to him, noting that §928(a) of the LHWCA allows for a successful employee to recover reasonable attorney's fees when the employer failed to pay the claim outright within thirty days of receiving notice of it. Finally, the appellate court held that the BRB did not err in upholding the ALJ's determination of counsel and co-counsel's market rates. Because the ALJ relied on the evidence Bell submitted and explained its determination of the prevailing hourly rates it assigned, it did not abuse its discretion in reducing the rates Bell requested. (9th Cir, June 27, 2016, UNPUBLISHED) 2016 U.S. App. LEXIS 11721

LHWCA CLAIM 21 YEARS AFTER TRAUMATIC INJURY HELD TIMELY
SSA TERMINALS, ET AL. V. CARRION, ET AL.

Robert Carrion allegedly sustained a knee injury while working as a chassis mechanic. Carrion tore his right medial meniscus and right anterior cruciate ligament in January 1987 while working for Matson Terminals, Inc. Although Carrion returned to his physically demanding job and worked for the next fifteen years, his knee allegedly continued to deteriorate. After Carrion's

injury, SSA Marine Terminals took over Matson. Carrion became an SSA employee, but Matson continued paying for his knee treatments. Carrion took early retirement in 2002, when his pain allegedly became so great that he could walk only with difficulty. Four years later, Matson stopped authorizing payments for Carrion's knee treatments. In the spring of 2008, Carrion filed claims against both Matson and SSA seeking benefits under the LHWCA. He listed the date of his cumulative knee injury as February 28, 2002, his retirement date. Carrion's treating physician advised him that he would eventually require a total knee replacement, but recommended that Carrion forgo the surgery until his symptoms worsened. Medical experts hired by Matson and SSA also both concluded that Carrion would require a total knee replacement. Following a formal hearing on his claim, an ALJ determined that Carrion did not learn of the causal connection between his work for SSA and his cumulative trauma injury until he received the 2008 report from Matson's expert, holding that Carrion thus filed his claim against SSA within the one-year statute of limitations governing claims under the LHWCA. The ALJ concluded that Carrion's disability was temporary, reasoning that Carrion was contemplating knee replacement surgery, which his doctors agreed would likely alleviate his symptoms. SSA appealed the ALJ's timeliness determination to the Benefits Review Board, and Carrion cross-appealed the ALJ's finding that his disability was temporary. The BRB affirmed the ALJ on both issues. SSA appealed the BRB's decision, arguing it erred in holding Carrion's claim timely. Rather than focusing on the date of the original traumatic injury, the appellate court expressed its interpretation that § 913(a) contemplates an impairment of earning power, and thus an employee only becomes aware of an injury for statutory purposes when he becomes aware of the full character, extent, and impact of the harm done to him. The appellate court held that both the ALJ and the BRB correctly applied this standard by looking to the date when Carrion became aware that his work for SSA caused a second, cumulative traumatic injury resulting in an impairment of his earning power. The BRB's decision upholding the ALJ's conclusion that Carrion timely filed his claim against SSA was affirmed. The appellate court then turned to Carrion's cross-appeal for permanency, initially observing that the Longshore Act does not define "temporary" or "permanent," although the classification issue arises on a continuing basis. The question is whether the disability will resolve after a normal and natural healing period. If the answer is yes, the disability is temporary. If the answer is no, the disability is permanent. Neither the permanent nor the temporary classification is necessarily static. The appellate court cited to ***Benge***'s logic to answer the question of whether the prospect of future surgery rendered Carrion's disability temporary. Absent the contingency of future surgery, Carrion's disability would unequivocally be permanent. From the time of his injury until his hearing, Carrion lived with constant, debilitating pain. He had no hope of normal or natural healing, only an expectation of further deterioration and the theoretical possibility of improvement through a still-distant surgery. Even the ALJ
acknowledged that if Carrion decided to forgo the surgical option and live with the knee pain indefinitely, he would be found permanently disabled. The appellate court held that a covered employee should be classified as permanently disabled where he has incurred a protracted period of disability and faces the prospect of hypothetical future surgery that may possibly alleviate some of his disability. The impact of a future knee replacement should be assessed after the surgery, not in anticipation of such a contingency. SSA's petition was denied and Carrion's cross-petition was granted. (9th Cir, May 11, 2016) 2016 U.S. App. LEXIS 8637

Updater Note: Only in the land of fruit and nuts, folks. IMHO, this is a completely bastardized interpretation of section 13 of the Act. We might as well just do away with the statute of limitations altogether.

SECTION 20 PRESUMPTION WAS PROPERLY REBUTTED
COMPTON V. DYNCORP INTERNATIONAL, INC.; ET AL.

Ronald Compton was hired by Dyncorp International, Inc. to work as a solid waste manager at Kandahar Air Field in Afghanistan. Shortly thereafter, claimant traveled, at employer's request, to Dubai where he experienced weakness and breathing difficulties. An evaluation at the American Hospital in Dubai, revealed severe mitral regurgitation, moderate tricuspid regurgitation and severe pulmonary hypertension. Compton underwent open heart surgery to repair a mitral valve rupture and was eventually terminated due to his health condition. Compton complained of post-surgical arm and wrist pain and he was diagnosed with rheumatoid arthritis. Compton returned to the United States and filed a claim under the Defense Base Act extension of the LHWCA in which he alleged he sustained work-related heart valve failure and rheumatoid arthritis. The administrative law judge found Compton entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his heart ailments and rheumatoid arthritis to his working conditions. The administrative law judge found that employer rebutted the presumption with substantial evidence showing that Compton's heart condition was due to congenital mitral valve disease and that Compton's employment did not aggravate the condition. The administrative law judge also found that employer presented substantial evidence that claimant's rheumatoid arthritis was not a consequence of his open heart surgery or aggravated by his work. The administrative law judge determined, based on the record as a whole, that claimant's heart condition and rheumatoid arthritis were not caused or aggravated by his employment. Accordingly, the administrative law judge denied the claim for compensation under the Act. The BRB affirmed the ALJ's denial of the claim and Compton took a timely appeal of the BRB's affirmation, challenging the ALJ's finding that employer established rebuttal of the Section 20(a) presumption. The appellate court found that the BRB correctly concluded that substantial evidence supported the ALJ's determination that DynCorp rebutted the presumption of compensability. First, the "zone of special danger" doctrine was not relevant because it governs whether an injury occurs in the course of employment, an issue not in dispute. The issue was whether Compton suffered injuries "arising out of" that course of employment, which the "zone of special danger" doctrine does not answer. Second, to rebut the presumption, DynCorp was not required to provide evidence sufficient to "rule out" the possibility that Compton's employment caused or aggravated his injuries. That standard was inconsistent with the statutory requirement that the presumption be rebutted with "substantial evidence to the contrary." Third, the testimony offered by DynCorp's medical experts was substantial evidence that Compton's heart failure resulted from a degenerative condition and was not caused or aggravated by his employment. DynCorp's experts also presented substantial evidence that Compton's rheumatoid arthritis was not caused by his employment. The BRB decision was affirmed and the petition for review was denied. (9th Cir, May 27, 2016, UNPUBLISHED) 2016 U.S. App. LEXIS 9738

11th Circuit

VALIANT EFFORT TO TERMINATE LONG-TERM NARCOTIC USE FAILS
FEDERAL MARINE TERMINALS, INC., ET AL. V. DIRECTOR, OWCP [SCHOFIELD]

Jeremy Schofield allegedly injured his back while working for Federal Marine Terminals, Inc. He subsequently underwent three back surgeries, the first two of which were unsuccessful. To

deal with his alleged chronic pain related to his injury, Schofield began seeing a pain-management physician and continues to receive pain-management treatment. Schofield filed a formal claim for compensation under the LHWCA and, as part of an approved settlement agreement Federal Marine and its insurer, Signal Mutual agreed to pay Schofield $325,000 in settlement of his compensation claim and to remain liable for Schofield's future medical treatment related to the injury. Two years later, Federal Marine notified Schofield that they would no longer authorize narcotic-based pain-management treatment, and they requested an informal conference on that medical-benefits issue. The matter was referred to an ALJ, who conducted a formal hearing. After the hearing, the ALJ issued a decision and order finding that Federal Marine was obligated to pay for Schofield's narcotic medications because such treatment was medically reasonable and necessary for his continued care. Federal Marine appealed the ALJ's decision to the Benefits Review Board, which affirmed the ALJ's decision. Federal Marine took further timely appeal, contending that Schofield's positive drug tests for illicit or non-prescribed drugs, such as marijuana, render continued use of narcotic therapy unreasonable, citing guidelines from the American Pain Society. Federal Marine also relied on evidence that several other physicians advised against continuing treatment with narcotics due to Schofield's positive drug tests and the long-term consequences associated with using opioid medications to treat chronic pain. The appellate court began its review by noting that disputes over whether the treatment obtained was reasonable and necessary are factual matters within the administrative law judge's authority to resolve. Accordingly, the appellate court's review was for substantial evidence the ALJ's determination that continued use of narcotic medications is medically reasonable and necessary to treat Schofield's chronic pain. The appellate court concluded that substantial evidence supported the ALJ's determination that continuing use of narcotic pain treatment was reasonable and necessary. The ALJ extensively reviewed the evidence presented at the hearing and issued a thorough order explaining the decision. Specifically, the ALJ found that Schofield credibly testified that he experienced pain on a daily basis as a result of his work-related injury and that he would not be able to function without the use of his narcotic medications. In support of the decision, the ALJ reasonably relied on the opinions of Schofield's treating pain-management physicians, who both testified that narcotic medications were medically necessary to treat Schofield's chronic pain. While the record did contain evidence that was favorable to Federal Marine's position, the appellate court found that Federal Marine had not shown that it was unreasonable for the ALJ to conclude that the treatment prescribed by the pain management physicians was reasonable and necessary. The appellate court affirmed the decision of the Board, which affirmed the ALJ's decision, and denied Federal Marine's petition for review. (11th Cir, June 3, 2016, UNPUBLISHED) 2016 U.S. App. LEXIS 10090

State Appellate Courts

New York

STATE OF NEW YORK COURT OF CLAIMS
ROBINSON V. STATE OF NEW YORK

Donald Robinson moved for summary judgment on his NY Labor Law §240(1) claim. In response Weeks Marine, Inc., on behalf of the State of New York, cross-moved for an order

granting it summary judgment and dismissing Robinson's NY Labor Law §200, §240(1), as well as § 241(6) claims. Robinson alleged he was employed as a dockbuilder by Weeks on a bridge construction project, which the New York State Department of Transportation had contracted with Weeks to perform the rehabilitation work. Robinson was allegedly injured when he stepped into a hole referred to as a "hook hole" while he was walking on a float stage at the job site. The work being performed by Weeks involved the reinforcement of concrete pilings that supported the bridge. In order to access the area where they were assigned to work, the dockbuilders were provided with float stages, which formed a temporary floating pathway, that were laid out in such a manner so that the dockbuilders could walk on them to travel from the barge out to the bridge piles. Weeks had some of the hook holes covered with plywood but did not cover all of them due to a lack of plywood. The court initially noted that the application of §240(1) recognizes that the various tasks for which devices enumerated in that section are customarily needed or used all entail risk because of the relative elevation at which the task must be performed or at which materials and loads must be positioned or secured. In order to prevail on a claim under §240(1), a claimant must demonstrate that defendant violated its statutory duty to provide adequate safety devices and that the statutory breach proximately caused claimant's injuries. The court found that the specific facts of the case did not support the finding of liability pursuant to Labor Law §240(1). It was clear that at the time of his accident Robinson was subjected to an elevation related risk which required the use of a safety device, the float stage. The court found that Robinson had established that it was the deficiency of the float stage which caused his fall. However, it was the risk of falling off or through the float stage into the water that was the hazard that brought about the need for the safety device in the first instance. The facts clearly established that Robinson was never in danger of falling off or through the float stage. Thus, Robinson failed to satisfy his *prima facie* showing of entitlement to summary judgment on the issue. On its cross motion, Weeks made a *prima facie* showing of entitlement to judgment as a matter of law on the issue of liability on claimant's Labor Law §240 (1) cause of action. In opposition, Robinson failed to raise a triable issue of fact. Defendant argues in its cross motion that it has no liability under Labor Law §200 or common law since it did not perform any of the work itself and that it did not exercise supervision or control over the means and methods of the work being performed and had no notice of any alleged unsafe condition that would cause such an accident or injury. The court found defendant failed to establish its *prima facie* burden that it did not have the authority to control the means or methods by which the work was performed and that it did not have notice of any alleged unsafe condition, noting that conflicting deposition testimony raised triable issues of fact on this issue. Defendant also sought summary judgment dismissing claimant's Labor Law §241(6) claim, which imposes a non-delegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed. The court agreed with the majority of the defendants arguments, gutting Robinson's §241(6) claim by finding that all but one of the Industrial Code sections relied upon by Robinson did not support his claim. The only Industrial Code section surviving the summary judgment motion was section 23-1.7(e)(1). Robinson's motion seeking partial summary judgment pursuant to NY Labor Law §240 (1) was denied. Defendant's cross motion is granted to the extent that claimant's claims pursuant to Labor Law §240 (I) and certain portions of claimant's §241(6) claims stated herein were dismissed. Defendant's motion was denied in all other respects. (NY State Ct. Of Claims, July 5, 2016) Claim No. 121015

Georgia

GEORGIA PORTS AUTHORITY NOT ENTITLED TO 11TH AMENDMENT IMMUNITY
LAWYER V. GEORGIA PORTS AUTHORITY

This lawsuit arose out of Bruce Lawyer's claim for damages based his alleged injury while in the course of his employment as a longshoreman working aboard a vessel docked at a Georgia Ports Authority (GPA) facility. Lawyer contended his injuries arose out of the negligent acts of a GPA employee, who negligently operated a crane while loading the cargo onto the ship. As a result of this negligence, a heavy metal twist lock was knocked off a container and struck Lawyer in the head, causing alleged injuries to Lawyer. Mr. Lawyer subsequently brought this suit against GPA, stating causes of action for negligence under both state law as well as federal admiralty and maritime law. GPA moved to dismiss Lawyer's claims brought under maritime and admiralty law, claiming it was entitled to Eleventh Amendment immunity from suit on such claims. The court deferred ruling on the motion because, in addition to the disputed maritime and admiralty claims, Lawyer was also seeking relief under state law for the same tortious conduct, and it was undisputed that there was a limited waiver of state conferred immunity up to $1,000,000.00 for these state law claims brought under the Georgia Tort Claims Act. Following a trial, the jury rendered a verdict in favor of Lawyer and against GPA in the amount of $4,500,000.00, with 100 percent of the fault apportioned to GPA. Thus, the only remaining issue was whether GPA had immunity from the federal claims. In considering the issue of immunity, the court primarily relied on the analyses set forth in *Hines v. Georgia Ports Authority* and *Misener Marine Construction. Inc. v. Norfolk Dredging Co.*, which both utilized the same analysis in order to determine the key question of whether GPA was an "arm of the state" such that it was entitled to Eleventh Amendment immunity from federal maritime and admiralty tort claims brought in state court; or whether it was a "lesser entity" that is not an "arm of the state" and not entitled to Eleventh Amendment immunity. In looking at the spectrum of where GPA derives its funds as provided by statute including O.C.G.A. § 52-2-1, et seq. (the Georgia Ports Authority Act); as well as considering the evidence in the record; and in further attempting to interpret GPA's financial statements in the record; the court found that GPA's funds primarily are provided from multiple sources. These sources of funds include: funds from the state in the form of non-repayable general obligation bonds; funds derived from revenue bonds issued by GPA or any other borrowed sources that are required to be repaid; and net funds derived from GPA's operating income and non-operating income derived from GPA's operations. The evidence failed to show that GPA was either entirely reliant on the state or entirely self-sufficient. The court also acknowledged GPA's arguments that the state treasury and GPA were intertwined because loss of GPA funds might impair upstream payments back to the state for general obligation bonds. In any case, the court found this was a mixed issue, and the factor weighed in favor of immunity. However, beyond the origination of the funds, the court noted that it must also consider whether the state would be liable for GPA's outstanding tort judgments themselves if it were not entitled to immunity. GPA argued in the affirmative, contending that the state pays any and all judgments entered against GPA. The court found that the record showed that while GPA had underlying coverage provided by Georgia's Department of Administrative Services under a self-insured policy, GPA pays premiums for these policies that go into a fund. The state's liability is limited under the policies and is strictly circumscribed by the fund's limits. Beyond that, judgments would be covered by excess insurance. The Court concluded that the state has no additional exposure for judgments other than what it had agreed to for all tort claims and, as a practical

matter, that judgments beyond that amount would not be paid by the state. Furthermore, it appeared a judgment would be covered by insurance, not from GPA's funds. The court thus concluded this judgment issue was mixed and did not weigh in favor of immunity. After considering the remaining *Hines* factors, the court found that none of them weighed in favor of immunity. In considering the purpose of Eleventh Amendment immunity and in balancing the appropriate factors, the court found that the evidence failed to show that GPA was an arm of the state that was entitled to Eleventh Amendment immunity. Thus, the court concluded that GPA was not entitled to immunity and was instead subject to suit for federal maritime and admiralty tort claims. GPA's motion to dismiss was denied and the court entered judgment against GPA for the full amount of the jury's $4,500,000.00 verdict. (Ga. Chat Cnty, June 17, 2016) STCV1300276SA

Updater Note: My sincere thanks to Brian McElreath, of Lueder, Larkin & Hunter, LLC, Mt. Pleasant, SC, for sharing this important decision with me.

Pennsylvania

LHWCA IS YOUR EXCLUSIVE REMEDY FOR INJURY OVER WATER IN PA
SAVOY V. WORKERS' COMPENSATION APPEAL BOARD [GLOBAL ASSOCIATES]

Christopher Savoy was employed by Global Associates as an electrician assigned to work on United States Navy vessels at the Philadelphia Navy Yard. Savoy was walking along a vessel passageway when he tripped and twisted his right knee. Savoy filed a claim petition stating he had sustained a torn right lateral meniscus, seeking temporary total disability benefits under Pennsylvania state workers' compensation law. Employer filed a timely answer denying the material allegations in the claim petition. The matter was assigned to a Workers' compensation judge (WCJ). At the hearing, the parties stipulated that Savoy had been receiving benefits for his injury under the LHWCA. The matter was bifurcated to address whether Savoy was entitled to concurrent compensation under the Workers' Compensation Act (WCA), or whether the Longshore Act benefits were exclusive. Savoy asserted that there was concurrent jurisdiction, entitling him to benefits under the WCA. The WCJ found Savoy was on the navigable waters of the United States at the time of his work injury. Based on this testimony, the WCJ held that Savoy's claim fell exclusively within the federal Longshore Act and that he was not entitled to benefits under the WCA. Savoy appealed and the Board affirmed the WCJ's decision, holding that Savoy's testimony established the crucial fact that the ship was "on the water" at the time of Savoy's injury, as opposed to in dry dock, which would have triggered concurrent jurisdiction under the Workers' Compensation Act. On further appeal, Savoy argued there was insufficient evidence to establish that the ship was "on the navigable waters of the United States" when he was injured, which is the prerequisite for exclusive jurisdiction under the Longshore Act. He argued that the record was unclear as to the precise location of the ship within the Philadelphia Navy Yard at the time of injury; therefore, additional evidence was required to determine whether concurrent jurisdiction under the WCA was proper. Employer responded that the record supported the WCJ's finding that the ship was "on the water" at the time of injury and, thus, the Longshore Act was exclusive. Employer maintained that Savoy was not entitled to a remand for the purpose of offering evidence that he should have produced at the first WCJ hearing. The appellate court agreed, noting that questions of credibility and weight of the evidence are within

the province of the WCJ, who is free to accept or reject the testimony of any witness. Here, the only evidence on the location of the ship when Savoy was injured was Savoy's deposition testimony. Savoy unequivocally stated that the ship was "on the water" at the time of his injury, which supported the WCJ's finding of fact on that issue. Savoy's deposition testimony regarding the location of the ship at the time of his injury supports one conclusion: Longshore Act jurisdiction is exclusive. The Board's order was affirmed. (Pa. Commw., August 25, 2016) 2016 Pa. Commw. LEXIS 368

District Courts

California

COURT FINDS COMPLAINT SORELY LACKING
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., V. DIGNITY HEALTH, ET AL.

Dwayne Washington was a longshoreman employee at the Port of Oakland working for Total Terminals International, Inc. , when he allegedly suffered a work-related injury while operating a sidepick. Total Terminal began paying worker's compensation benefits Washington, who later underwent disc-replacement surgery at Dignity Health Hospital. Dr. David Cohen performed the surgery and Dr. Cohen, Dr. Clement Jones, and hospital staff performed the post-operative care. On the third post-operative day, Washington died. Signal Mutual Indemnity Association, Ltd. filed this lawsuit in federal court against Dignity Health St. Francis Memorial Hospital, Dr. Jones, and Dr. Cohen, alleging that preventable medical error was the cause of death and arguing it would not have been required to pay compensation to decedent's heirs, pursuant to the terms of the LHWCA, were it not for the negligence of the defendants. Defendants moved to dismiss the complaint under FRCP 12(b)(1), 12(b)(6), and 12(e). The court granted defendants' motion with leave to amend. The court instructed that Signal's amended complaint should identify a basis for jurisdiction and delineate the causes of action and basis in law for each, so that the court and defendants were properly notified of the specific legal claims and theories in the case, finding that Signal's current complaint was lacking in that regard. The court found that the current complaint did not establish a basis for subject-matter jurisdiction. Additionally, while Signal maintained that the court had admiralty jurisdiction under 28 U.S.C. §1333, the court disagreed. Given that the allegations in the complaint failed to establish how the tort claims, both the sidepick malfunction and defendants' alleged negligence at the hospital, could satisfy the locality test, maritime jurisdiction did not apply. Defendants' motion to dismiss the complaint was granted with leave to amend. (USDC NDCA, July 19, 29016) 2016 U.S. Dist. LEXIS 94123

Florida

LHWCA IS YOUR EXCLUSIVE REMEDY AGAINST DEFENDANTS
DIXON V. NYK REEFERS LTD., ET AL.

A crane unloading cargo from a NYK Reefers, Ltd. vessel lowered a metal basket onto and killed Robert L. Dixon, a longshoreman aboard the vessel. As personal representative of the deceased, Antoinette Dixon, his wife, sues both NYK Reefers, the vessel owner, and Cool

Carriers AB, who chartered the vessel at the time of the incident. Dixon sued under the LHWCA and under the Florida Wrongful Death Act. The defendants moved to dismiss, arguing that the complaint failed to state a claim under the LHWCA, that an "exclusivity provision" of the LHWCA preempted the claim under the Florida Wrongful Death Act; and that the complaint's request for an attorney's fee was improper. First, the defendants argue that the complaint failed to state a claim against Cool Carriers under the LHWCA, as claiming that Cool Carriers negligently "operated" the vessel, because the defendants argued that only the owner, not a time charterer, "operates" a vessel. The court agreed with Dixon, who responded that the complaint claimed that NYK Reefers, the owner, negligently "operated" the vessel but that Cool Carriers, the time charterer, negligently managed the unloading of the vessel. Defendants also argued that the complaint failed to state a claim against NYK Reefers under the LHWCA, as claiming that NYK Reefers owes a duty to protect Dixon, because only a vessel's charterer and not a vessel's owner owes a duty to protect the longshoremen from injury. The court again agreed with Dixon's response, that the complaint, rather than claiming that NYK Reefers owed a duty to protect Dixon, claimed that NYK Reefers breached the duty to intervene, which is one of the three duties that a vessel's owner owes to a The court found that the defendants correctly argued that the "exclusivity provision" of §905(b) of the LHWCA preempted the claim under the Florida Wrongful Death Act. The court also found that defendants' argument was correctly asserted in a response to a motion for an attorney's fee but not in a motion to dismiss. The defendants' motion to dismiss was granted in part and denied in part. Dixon's claim under the Florida Wrongful Death Act was dismissed. Dixon's claims under the LHWCA remained viable. (USDC MDFL, August 4, 2016) 2016 U.S. Dist. LEXIS 102457

Hawaii

SOUNDS LIKE A BUNCH OF BULL TO ME
MELLO V. YOUNG BROTHERS, LTD., ET AL.

Denis G. Mello, a longshoreman employed by Young Brothers, Ltd., claimed that he was injured by a bull that had escaped on Pier 39 in Honolulu Harbor. The bull allegedly caused injuries to Mello's head, neck, lower back, left shoulder, hips, and pelvis. Mello further claimed that he suffered emotional distress, depression, insomnia, and anxiety as a result of his encounter with the bull. Mello received workers' compensation benefits under the LHWCA from Young Brothers' insurer, Signal Mutual Indemnity Association. Subsequently, Mello filed suit under §905(b), invoking the court's admiralty jurisdiction, alleging that Levi C. Rita d.b.a. Lazy L Ranch and his employee Shelby Rivera (collectively, the "Ranch defendants") were liable for his injuries as the consignee of the bull. He also alleges that either Young Brothers or Saltchuk Resources, Ltd. was liable as possible owners of the barge that brought the Bull to Pier 39. Mello further named the barge itself as an additional defendant. The Ranch defendants moved to dismiss Mello's complaint for lack of subject matter jurisdiction. Mello claimed that the court had admiralty jurisdiction over his various tort claims because of the location of the incident, coupled with the activity that was going on at the time of the incident.. Mello further contended that the court had federal question jurisdiction under 33 U.S.C. §905(b), as well as supplemental jurisdiction over those claims that arise under Hawaii state law. The court disagreed. Because the Ranch Defendants' tortious acts did not occur on navigable water, and no vessel on navigable water otherwise caused the injury, the court lacked admiralty jurisdiction over Mello's claims against the Ranch Defendants. Furthermore, Mello failed to state a federal claim against the

barge or the barge defendants; as such, the court could not exercise supplemental jurisdiction under 28 U.S.C. §1367(a) over Mello's state law claims. The court therefore held that it lacked subject matter jurisdiction. The court granted the Ranch defendants' motion and dismissed Mello's complaint. (USDC DHI, October 4, 2016) 2016 U.S. Dist. LEXIS 137958

Louisiana

§905(B) CAUSE OF ACTION DISMISSED ON SUMMARY JUDGMENT
JOHNSON V. VOLUNTEER BARGE & TRANSPORT, INC.

Shawn Johnson, a longshoreman employed by Coastal Cargo Company, Inc., was allegedly injured while Johnson was working in the cargo hold of an unmanned barge. At the time of the accident, Volunteer Barge & Transport, Inc. was the manager and owner *pro hac vice* of the barge, which had been demise chartered from Jaymar Barge LLC. Johnson was a part of a stevedoring team that was hired to offload the cargo of pre-bundled aluminum plates. Specifically, Johnson was working on the floor of the barge, unhooking the bundles of aluminum plates that had been lowered into the barge by a crane. Johnson had just unhooked a bundle of the aluminum plates when a stack of four bundles that had been set down on the floor of the barge toppled and fell, striking Johnson's left leg, ankle, and foot. Johnson filed his §905(b) suit under the LHWCA in state court, alleging that Volunteer provided an unsafe and unseaworthy vessel, failed to provide a safe place to work, failed to properly maintain the vessel, and failed to properly warn of the unsafe conditions of the vessel. Thereafter, Volunteer removed the case to federal court. Volunteer then moved for summary judgment, arguing there was no genuine issue of material fact supporting Johnson's claim that a defective condition in the barge, namely the uneven nature or "wash boarding" of the barge floor, caused the accident; and second, even assuming that the uneven nature of the floor was a defective condition that caused the accident, this condition was open and obvious. While the court found that Johnson had presented evidence regarding the cause of accident and the allegedly defective nature of the barge floor, there was no evidence suggesting that the dips or "potholes" in the floor were not open and obvious to the stevedoring team. In fact, all parties presented evidence that the condition of the floor was both visible to the naked untrained eye, and was a condition that stevedores expect to encounter when working on barges. Given the extensive deposition testimony evidencing the stevedoring team's awareness of the dips in the floor, the court concluded that Volunteer had met its burden in showing that the unevenness of the floor was an open and obvious condition of the barge. Furthermore, the risk of stacking aluminum bundles on an uneven floor was an open and obvious hazard. Therefore, the combination of the dips within the barge floor and the act of stacking the aluminum plates as high as four bundles was an obvious hazard to the members of the stevedoring team working within the barge. The court also noted that Johnson had failed to point to evidence suggesting that there were reasonable alternatives to loading the cargo onto that particular barge floor. Therefore, the court was not persuaded that there were no reasonable alternatives to loading the cargo onto this barge floor based upon the evidence presented by the parties. Volunteer's motion for summary judgment was granted and Johnson's §905(b) cause of action was dismissed with prejudice. (USDC EDLA September 21, 2016) 2016 U.S. Dist. LEXIS 128739

FECA REMEDY PRECLUDES JONES ACT & GENERAL MARITIME CLAIMS
DALLAS V. UNITED STATES OF AMERICA

Robert Dallas was a civil service employee of the United States and served as the master of the vessel M/V Bienville. Dallas recovered federal worker's compensation benefits under the Federal Employees Compensation Act (FECA) for injuries suffered in the course of employment. Nonetheless, Dallas also brought suit against the United States under the Jones Act and the general maritime law. The United States moved to dismiss, arguing, among other things, that the FECA set out the exclusive remedy for Dallas's injuries. The court agreed, noting that both Supreme Court and Fifth Circuit precedent were unequivocal that a seaman injured in the course of his employment as a federal employee was limited to the benefits provided under the terms of the FECA and may not maintain a suit for damages against the Government. Therefore, even though Dallas requested that the court "correct" Supreme Court precedent, the court was constrained to conclude that it lacked subject-matter jurisdiction to consider Dallas's claims. Because the court dismissed Dallas's claims for lack of subject-matter jurisdiction, it did not reach the arguments regarding the statute of limitations. The government's motion to dismiss was granted and all claims were dismissed with prejudice. (USDC EDLA, September 15, 2016) 2016 U.S. Dist. LEXIS 125534

COURT REFUSES TO LET SHIPYARD OUT OF LAWSUIT
GRANGER V. BISSO MARINE, ET AL.

This case involved an alleged trip and fall accident aboard a pipe-laying barge, owned by Bisso Marine. At the time of the incident, Steven Granger was an employee of Power Dynamics, LLC, (PDI). PDI was hired by Bisso Marine to perform the installation of hydraulic/mechanical systems on the barge. Granger was a member of the crew assigned to the hydraulic/mechanical systems project. Bisso Marine also contracted with Bollinger Shipyards to perform renovations and modifications to the barge in preparation for upcoming jobs. The barge was berthed at Bollinger's shipyard while the two contractors performed the work. There was no legal relationship between PDI and Bollinger other than that of fellow-contractors hired to perform separate services aboard the barge. On the date of the accident, PDI and Bollinger were both performing work in the vicinity of four separate welding stalls on the barge. Granger came aboard the barge in order to install plumbing in each of the welding stalls in his capacity as a PDI employee. Granger allegedly sustained injuries after he tripped while walking from the roof of Stall Two towards the roof of Stall Three. Granger filed suit alleging that the replacement of the Stall Three roof and the resulting height differences between the two adjacent roofs created a trip hazard, and claimed he caught his foot in the gap. Yet in his deposition, Granger stated that he believed the thing that contributed to his accident was the angle iron on Stall Two not being removed properly, and denied that the height difference between the two stall roofs contributed to the fall. Later in the deposition, Granger stated that he did not know whether or not his foot went into the gap between the Stall Three roof and the angle iron. At a third point in the deposition, Granger stated that he could not conceive of any activity by Bollinger which caused or contributed to his injury. Bollinger moved for summary judgment, claiming there is no question of material fact as to the circumstances of the injury. Bollinger distinguished between the duties owed to plaintiffs by barge owners and contractors, noting that while vessel owners owe longshoremen legal duties pursuant to the LHWCA, contractors working aboard vessels owe fellow-contractors only a duty of reasonable care. Bollinger claimed that any duty to inspect and warn contractors about tripping hazards on the vessel belonged to owner Bisso alone.

Therefore, Bollinger asserts that it owed no duty to inspect Bisso's vessel to ensure there were no tripping hazards in the area Granger and his co-employees were working. Both Bisso and Granger opposed Bollinger's motion for summary judgment. The court found that Bollinger was responsible as a matter of law for properly repairing the roof of Stall Three, and a genuine issue of material fact existed as to whether Bollinger negligently increased the gap between Stall Two and Stall Three, and thereby exacerbated the danger posed by the angle iron. Additionally, there were questions of material fact regarding whether Bollinger removed a safety barrier allowing access over the two stalls, thereby creating a duty to inform Bisso of any potential tripping hazards. The facts indicated that Granger tripped on the angle iron, and while Bollinger did not place the angle iron or enter into a relationship with either Granger or Bisso where it owed a duty to remove the angle iron, it may have had a duty to alert Bisso that either the angle iron or the height difference between the roofs created a tripping hazard if and when it re-opened the walkway. Bollinger's motion for summary judgment was denied. (USDC EDLA, September 6, 2016) 2016 U.S. Dist. LEXIS 119866

COURT FINDS INTERVENTION BY INSURER TO BE IMPROPER
LOVEALL, ET AL. V. NORDIC UNDERWATER SERVICES, INC., ET AL.

Dale E. Loveall, Jr. filed a lawsuit for injuries that he allegedly sustained working aboard a vessel. Loveall claimed that he was a Jones Act seaman and he filed his suit under the Jones Act and general maritime law against his employers, Nordic Underwater Services and AMI Consulting Engineers. In the event that the court were to find that Loveall was not a Jones Act seaman, Loveall pleaded in the alternative a claim for benefits under the LHWCA. Nordic's LHWCA carrier is American Longshore Mutual Association (ALMA). MEL Underwriters is Nordic's maritime employer's insurer. MEL Underwriters voluntarily paid maintenance and cure to Loveall even though it disputed whether Loveall was actually a Jones Act seaman. Neither Loveall nor any defendant brought either of these insurers into the case. Instead, MEL Underwriters was granted leave to Intervene and file its Third Party Complaint against ALMA, who moved to dismiss the intervention and third party demand arguing that MEL Underwriters improperly intervened and that the court lacked subject matter jurisdiction over MEL Underwriters' claim against ALMA. The court agreed, noting that MEL Underwriters may potentially benefit from an adverse ruling on seaman status. However, MEL Underwriters' interest in the main demand was indirect, solely economic in nature, and completely tangential to the main demand. This was borne out by the fact that MEL Underwriters insinuated itself into this case not to assert a claim against any existing party but rather to pursue a new independent claim against a non-party. Simply, MEL Underwriters was an interloper in the case and the intervention was not proper. The court granted ALMA's motion to dismiss the intervention. (USDC EDLA, August 19, 2016) 2016 U.S. Dist. LEXIS 110656

COURT DECLINES TO OUTRIGHT DISMISS TORT ACTION IN LHWCA CASE
LAFOSSE V. ANADARKO PETROLEUM CORP., ET AL.

Kalob Lafosse sought damages for injuries he allegedly sustained in an accident which occurred aboard a rig owned and operated by Anadarko Petroleum Corporation. Lafosse was allegedly struck in the face by a socket which dislodged when Lafosse was attempting to break out a flange bolt, while using a pneumonic unit held overhead and a swivel connection. At the time of the accident Lafosse was employed as a Torque Technician by Magnolia Torque and Testing,

Inc. Lafosse claimed that when he returned to work, after a two week rotation, Magnolia terminated him because of its exposure to recovery under the LHWCA. Lafosse claimed that he had not reached maximum medical recovery and required additional treatment. Lafosse additionally alleged that Magnolia and Anadarko were jointly and severally liable in tort and under the LHWCA due to the controlling language of the master service agreement in place between them. With respect to Anadarko, Lafosse alleged that the pneumonic unit lacked an emergency kill switch, and that the Anadarko person in charge knew or should have known that the unit was faulty and had been tagged for repair, but nevertheless approved its use. Magnolia moved to dismiss Lafosse's tort claim against it, claiming his exclusive remedy was compensation under the LHWCA. Lafosse argued that he had the right to elect a tort remedy under the LHWCA. Under §905(a) of the LHWCA, an injured worker is ordinarily barred from bringing a civil action against his or her employer. When an employer fails to secure compensation in accordance with §932 of the LHWCA, however, §905(a) provides that an employee "may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death." Contrary to Lafosse's argument, §905(a) does not permit a covered employee to elect a tort remedy against his employer when that employer has secured insurance coverage as required under §932 of the LHWCA. Lafosse did not allege that Magnolia failed to secure workers compensation insurance coverage as required under the LHWCA. Lafosse alleged only that Magnolia had not paid medical expense benefits he believes are due to him. He therefore seeks benefits, penalties and medical expenses until he reaches maximum medical recovery. This type of claim is exclusively relegated to the administrative processes of the LHWCA. As alleged, the court found that Lafosse had failed to state a claim upon which relief may be granted by the court. However, the court noted that when a plaintiff's complaint fails to state a claim, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner which will avoid dismissal. Therefore, the court denied Magnolia's motion to dismiss without prejudice to Magnolia's right to re-assert the motion after amendment, and that Lafosse be given the opportunity to amend his complaint to state a valid claim against Magnolia for damages other than the remedies afforded under the benefits provisions of the LHWCA. If such a claim cannot be made within the parameters of FRCP 11, plaintiff should dismiss his claims against Magnolia Torque and Testing, Inc. lest he be subject to sanctions under that rule. (USDC WDLA, June 6, 2016) 2016 U.S. Dist. LEXIS 86026

COURT HOLDS AMENDED PLEADING SUFFICIENT TO WITHSTAND DISMISSAL
VALENTINE VERSUS L & L SANDBLASTING, INC. CORPORATION

Valdon Valentine filed his complaint under the Jones Act, asserting that he was injured while working as a sandblaster for L&L Sandblasting, Inc., which provided services for the energy industry in the Gulf of Mexico. Valentine alleged that he served 70% of his temporal position as a sandblaster and seaman aboard a vessel serving as a sandblasting staging area. Valentine was allegedly injured when an 8-ton unit sand hopper owned by L&L exploded while he was working on the top of a fixed platform owned by Arena Oil & Gas. L&L and its insurer moved to dismiss Valentine's complaint, arguing that Valentine is not entitled to seaman status because he was employed as a sandblaster, and therefore exclusively covered by the Longshore and Harbor Workers' Compensation Act and Valentine lacked the necessary connection to a vessel or fleet of vessels. The court acknowledged Valentine's allegations that L&L recruited him as a sandblaster and painter to work as a seaman aboard a fleet of vessels which were leased or

chartered by L&L for sandblasting purposes. He stated that he directly contributed to the mission of the vessels, as the vessels were chartered primarily for sandblasting and painting purposes. Additionally, he asserts that he served 70% of his temporal position as a sandblaster and seaman aboard a vessel serving as a sandblasting staging area. He further indicated that during the time that he was temporarily assigned to the fixed platform on which he was injured, he was using the same equipment that would have been used aboard the vessels on which he normally worked. Based on the facts pleaded in the amended complaint, the court could not definitively find that Valentine's work as a sandblaster precluded him from seaman status. Additionally, at this stage of the proceedings, the court found that Valentine's amended complaint sufficiently states a connection to a vessel or fleet of vessels for Jones Act purposes. Accordingly, defendants' motion to dismiss Valentine's Jones Act claim was denied. (USDC WDLA, July 1, 2016) 2016 U.S. Dist. LEXIS 86333

NO OWNERSHIP INTEREST NO BASIS FOR §905(B) CLAIM
SCHEXNAYDER V. MD NIGERIA, LLC, ET AL.

Brandon Schexnayder claimed that he sustained an injury while employed as a rigger aboard an Megadrill Services Limited rig. Schexnayder filed suit in state court against MD Nigeria, LLC, later added Megadrill as a defendant, alleging he was injured because of Megadrill's negligence. Schexnayder asserted claims against MD Nigeria and Megadrill under 33 U.S.C. §905(b) of the LHWCA. Megadrill removed the case to federal court, pursuant to 28 U.S.C. §1332, claiming complete diversity existed because Megadrill was an alien corporation and MD Nigeria was improperly joined to the suit. Schexnayder moved to remand, but the court deferred and granted his alternative request for jurisdictional discovery. Following the completion of the allowed discovery, Schexnayder filed a second motion to remand based on lack of diversity. After considering the evidence, the court determined that MD Nigeria was improperly joined and denied the second motion to remand. MD Nigeria then moved to dismiss. The LHWCA provides a cause of action for a worker injured by the negligence of a vessel against the vessel's owner. In his motions to remand, Schexnayder asserted that MD Nigeria was a proper party under the LHWCA because MD Nigeria and Megadrill were in a joint venture, and therefore both were owners of the rig where he was allegedly injured. MD Nigeria responded that no joint venture existed and that it had been improperly joined. The court took judicial notice of the prior ruling and found that because there was no joint venture between MD Nigeria and Megadrill, MD Nigeria was not the owner of the rig at the time of the incident. Thus, Schexnayder had failed to state a claim under the LHWCA against MD Nigeria that was plausible on its face. MD Nigeria's motion to dismiss was granted without prejudice. (USDC WDLA, July 13, 2016) 2016 U.S. Dist. LEXIS 91686

INSUFFICIENT FACTS TO PROVE BORROWED SERVANT ON SUMMARY JUDGMENT
SINGLETON, ET AL. V. FIELDWOOD ENERGY, LLC, ET AL.

Darrel J. Singleton, Jr. worked as a rigger on one of Fieldwood Energy, LLC platforms pursuant to a Master Service Contract between Singleton's employer, Acadian Contractors, Inc. and Fieldwood. Singleton filed this lawsuit after he allegedly slipped and fell due to oil or other foreign substance on the premises during the course of his work on the Fieldwood platform, alleging that Fieldwood's negligence injured him. Fieldwood moved for summary judgment on the basis that Singleton was its borrowed employee, rendering Fieldwood immune to tort liability. In opposition, Singleton disputed Fieldwood's characterization of the chain of command

at the Fieldwood facilities and the relationship between Fieldwood and Acadian Contractors, Inc., his nominal employer. Singleton also contended that Fieldwood waived the basis for its motion by failing to plead it as an affirmative defense in its answer. The court was not persuaded, noting that, in its answer, Fieldwood asserted as its ninth affirmative defense that Singleton's claims against Fieldwood are barred by the exclusive remedy provisions of the LHWCA. After weighing the Ruiz factors, with respect to borrowed servant status, on the record presented to the court, the second, sixth, seventh, eighth, and ninth factors weigh in favor of finding that Singleton was Fieldwood's borrowed employee. However, there were unsettled factual issues with respect to the first, third, fourth, and fifth factors. On the record before it, the court found insufficient basic factual ingredients to decide the borrowed employee issue on summary judgment. Fieldwood's motion for summary judgment was denied. (USDC EDLA, July 19, 2016) 2016 U.S. Dist. LEXIS 93834

ASBESTOSIS CASE WINDS UP IN FEDERAL COURT AND STAYS THERE
LINDSAY V. PORTS AMERICA GULFPORT, INC., ET AL.

This case arose out of decedent Earl T. Lindsay's alleged occupational exposure to asbestos and contraction of lung cancer. Plaintiffs, two of Lindsay's surviving children, alleged that Lindsay worked as a longshoreman for several stevedoring companies in the Port of New Orleans from 1954 to 1979, during which time Lindsay was allegedly exposed to airborne asbestos fibers during the loading and off-loading of cargo that included raw asbestos and asbestos-containing products and materials. Plaintiffs allege that Lindsay developed lung cancer as a result of this exposure and later died from the disease. Plaintiffs filed suit in state court against Lindsay's employers, various vessel owners and vessel repair contractors associated with his employment, two insurance companies, and other firms, asserting claims for, among other things, negligence, strict liability, intentional tort, and premises liability. Plaintiffs also asserted claims under the Jones Act against two of the entities named as defendants, Industrial Development Corporation (IDC) of South Africa, Ltd. and South African Marine Corporation. One day after filing suit, plaintiffs filed a motion to dismiss all claims asserted against IDC and South African Marine with prejudice. The state court took no action on the motion for three weeks and, in the meantime IDC removed the case to federal court, after Cooper/T. Smith Stevedoring Company, Inc. filed a third-party demand seeking contribution and/or indemnification from IDC and South African Marine for any damages Cooper/T. Smith owed to plaintiffs in the suit. Plaintiffs now move to remand the case to state court or, in the alternative, to sever Cooper/T. Smith's third-party claims and remand the main action. The court denied plaintiffs' motion to remand, finding that IDC was entitled to invoke the removal provision of the Foreign Sovereign Immunities Act and ordered IDC to file its motion to dismiss Cooper/T. Smith's third-party claims against it within twenty-one days of entry of its order. (USDC EDLA, July 14, 2016) 2016 U.S. Dist. LEXIS 91649

EXCLUSIVE REMEDY PROTECTION FOR BORROWING EMPLOYER
TODD V. CAMERON INTERNATIONAL CORP.

Collier Investments, LLC, a franchise of the temporary employment agency Manpower, hired Robert Elton Todd and referred him to Cameron International Corp., to work as a temporary employee at one of Cameron's machine shops. Todd never performed any work for Collier before it referred him to Cameron. While working in Cameron's machine shop, Todd's glove caught in the lathing machine, yanking him out of his chair and around the machine before

another employee was able to turn it off. Todd sued Cameron for negligence and Cameron, in turn, moved for summary judgment, arguing that it was immune to Todd's negligence claim under Louisiana worker's compensation law because Todd was working for Cameron as its borrowed employee at the time of the accident. Cameron also sought summary judgment on Todd's intentional tort claim. The court noted that in order to determine whether section §23:1031 and, by implication, the exclusive-remedy provision of section 23:1032 applied to an employer, courts employed a ten-factor ***Ruiz*** test. After analyzing those factors as they applied to Todd, the court found that seven of the ten factors supported a finding that Cameron was a special employer and the remaining three factors were neutral. Therefore, the court found that Cameron was Todd's special employer under § 23:1031 at the time of Todd's injury. Consequently, Cameron was immune from any claim of negligence stemming from Todd's alleged injury. The court therefore granted Cameron's motion for summary judgment on Todd's negligence claim. Cameron also argued that it was entitled to summary judgment on Todd's intentional tort claim, which was not subject to the exclusive-remedy provision of Louisiana's worker's compensation law. Todd argued his injury was nearly inevitable because Cameron instructed him to work on the complicated lathing machine with gloves despite only training him on its use for five minutes, and the pre-injury warning that wearing gloves while using a lathing machine was dangerous. Even taking all of the facts that Todd had alleged as true, the court found there was no evidence that his injury on the lathing machine was nearly inevitable. The court therefore granted Cameron's motion for summary judgment on Todd's intentional tort claims. (USDC WDLA, July 7, 2016) 2016 U.S. Dist. LEXIS 89025

LHWCA INSURANCE ISSUE DOES NOT CREATE FEDERAL JURISDICTION
LOUISIANA WORKERS' COMPENSATION CORP. V. AMERICAN INTERSTATE INS. CO.

This case involved a primary employer, Original USA General Labor, LLC and a secondary employer, A-Port. Original USA was insured by American Interstate Insurance Company in accordance with the Longshore and Harbor Workers' Compensation Act (LHWCA). A-Port was insured by Louisiana Workers' Compensation Corporation (LWCC). The two employers entered a contract in which Original USA acted as a hiring agency, supplying A-Port with employees. The contract between the employers declared Original USA the provider of General Liability and Workers' Compensation Insurance for all Original USA employees. The contract included an "Alternate Employer Endorsement" stating that Original USA's policies applied as though the alternate employer-A-Port-was also insured by American Interstate. American Interstate agreed to not ask any other insurer of the alternate employer to share a loss covered by the alternate employer endorsement. Subsequent to the contract, Original USA employed and insured Willie Walton. While alternately employed by A-Port, Walton was involved in an accident on A-Port property. Walton brought a tort claim against A-Port and others and A-Port sought immunity from Walton's tort claim under the Alternate Employment Endorsement. The trial court awarded A-Port borrowed employer status. As a borrowed employer, A-Port received immunity from the tort claim and was dismissed from the suit. Following A-Port's dismissal, American Interstate demanded A-Port and LWCC reimburse the benefits paid under the LHWCA and assume liability for all future benefits. LWCC filed a declaratory judgment action to determine if the Alternate Employer Endorsement covered A-Port as a LHWCA borrowed employer. American Interstate moved for dismissal of LWCC's declaratory judgment action for lack of federal question subject matter jurisdiction, or alternatively, it moved the court abstain from ruling on the case. The court found that LWCC did not assert a federal cause of action arising under the LHWCA. Instead, LWCC argued that a substantial federal question arose because its right to

relief depended on a resolution of a substantial federal question. According to LWCC, the reference to the Alternate Employer Endorsement created a federal issue, and the LHWCA necessarily raises a federal question because it preempted state law. The court found that the LWCC had failed to demonstrate how the contract interpretation issues presented by the case created a federal issue under the LHWCA. Additionally, although LWCC cited to an unpublished Fifth Circuit case for the proposition that the LHWCA completely preempted state law in the field, and therefore the complaint necessarily creates a federal question, the court noted that the cases cited by LWCC merely stand for the proposition that the LHWCA preempts any state law remedies that an aggrieved employee might have against his employer or insurer because the LHWCA provides the exclusive remedy and not for the proposition that the LHWCA necessarily creates federal question jurisdiction in a dispute between insurers over the interpretation of a contract. Because LWCC failed to carry its burden of proving there was a federal issue, the court found it did not have subject matter jurisdiction and does not have authority to hear the case. American Interstate's motion to dismiss was granted. (USDC MDLA, June 15, 2016) 2016 U.S. Dist. LEXIS 77845

BORROWED SERVANT STATUS AFFORDS TORT IMMUNITY
POSEY V. NATIONAL OIL WELL VARCO, LP

Kevin Posey claimed he was injured while working for Original USA General Labor, LLC, at National Oilwell Varco, LP's (NOV) facility, when a piece of unsecured floor grating gave way, causing him to become pinned between the hole in the grating and a large drum. Posey filed suit against NOV, arguing that, as a result of the incident, he sustained disabling injuries including, but not limited to, a right femoral shaft fracture, torn medial meniscus and injuries to his lumbar spine. NOV moved for summary judgment, seeking the dismissal of Posey's action with prejudice, contending Posey was a borrowed employee of NOV at the time of the incident in which he was injured, which renders NOV immune from tort liability under the Longshore Harbor Workers Compensation Act (LHWCA). Posey opposed the motion, arguing summary judgment was inappropriate because genuine issues of material fact remained in dispute with respect to the borrowed-employee issue. After reviewing the facts associated with Posey's employment with NOV in conjunction with the nine ***Ruiz*** factors, the court found that all nine ***Ruiz*** factors weighed in favor of borrowed-employee status. The court found as a matter of law that Posey was a borrowed employee of NOV at the time of his injury. NOV was thus vested with tort immunity, and Posey's claims against NOV were dismissed with prejudice. An intervention claim by the LHWCA carrier was also dismissed. (USDC EDLA June 21, 2016) 2016 U.S. Dist. LEXIS 81235

LACK OF COMMON OWNERSHIP DEFEATS SEAMAN STATUS CLAIM
HEWITT ET AL. V. NOBLE DRILLING US, LLC, ET AL.

Walter Hewitt alleged that he was a seaman working as a tong operator aboard a drilling vessel, when a gust of wind caused the lid of a tool box to close on his head, injuring him. At the time, Hewitt was employed by Frank's International, LLC. The drilling vessel was owned by Noble Drilling U.S., LLC and operated by Shell Offshore, Inc. Hewitt alleged that the tool box lacked certain safety measures, specifically a hydraulic closure system, which would have prevented it from closing on his head. He brought claims under the Jones Act and general maritime law for unseaworthiness, maintenance and cure, and punitive damages for failure to pay maintenance and cure. He also brought a claim under §905(b) of the LHWCA. Hewitt's wife, who probably

hasn't had sex with him in twenty years, brought a claim for loss of consortium. All parties cross-moved for summary judgment on Hewitt's status as a seaman. The defendants did not dispute that Hewitt met the first prong of the *Chandris* test; however, they argued that Hewitt could not meet the second prong of the seaman test because he cannot show a connection with a particular rig or fleet of rigs under common ownership. Hewitt argued that the law does not require that he work aboard a fleet of vessels under common ownership or operational control in order to be classified as a seaman, citing to the Fifth Circuit's opinion in *Barrios v. Louisiana Construction Materials Co*. The court found that the *Barrios* case failed to address the issue at hand. Hewitt worked for Franks as a tong operator and member of the casing crew. He testified that he worked two-to-three-week jobs aboard various rigs as assigned by Franks. He had worked aboard upwards of 15 different vessels owned and operated by various different companies. The court found Hewitt's situation much more akin to the facts of *Deshazo v. Baker Hughes Oilfield Operations Inc.* in which the plaintiff was found not to have attained seaman status because he worked aboard four different rigs that were owned by three different companies and were not under common operational control. Accordingly, the court found that Hewitt failed to satisfy the second *Chandris* prong required to show seaman status and Hewitt was not a seaman under the terms of the Jones Act. Hewitt's summary judgment motion was denied and defendants' motions were granted. Hewitt's claims for Jones Act negligence, unseaworthiness, and maintenance and cure were dismissed with prejudice. (USDC EDLA, May 5, 2016) 2016 U.S. Dist. LEXIS 59892

LONGSHOREMAN'S §905(B) CLAIMS ARE ALSO DISMISSED
HEWITT ET AL. V. NOBLE DRILLING US, LLC ET AL.

In a subsequent ruling in the same case as above, the court addressed Shell Offshore's and Noble Drilling's respective motions for summary judgment on Hewitt's §905(b) LHWCA claim, brought against Noble Drilling as owner of the drilling vessel and Shell Offshore as the operator. In their separate motions, Noble and Shell argued that they cannot be held liable for Hewitt's injury under the LHWCA because they did not own or control the tool box that caused the injury or have a duty to inspect or supervise the work done by Franks. Franks had constructed and shipped the box to be loaded aboard the vessel prior to beginning its work. Hewitt opposed the motions, arguing that because the toolbox was incorporated as part of the vessel, it was a defective appurtenance causing the vessel to be unsafe and that Noble and Shell should be liable for this hazardous condition. Hewitt further contended that the *Scindia* duties did not apply to his case because he was not engaged in the traditional stevedoring operations of loading and unloading. The court rejected that later argument, noting that the Fifth Circuit has explicitly held that although *Scindia* arose in the context of stevedoring operations, the duties it enumerates are not limited to stevedores. Finding that the movants did not breach any of the three duties that they owed to Hewitt as owners and operators of the vessel aboard which he was injured, the court concluded they could not be liable for negligence under § 905(b) of the LHWCA. The motions for summary judgment were granted, and Hewitt's LHWCA claims against Shell Offshore and Noble Drilling were dismissed with prejudice. (USDC EDLA, May 13, 2016) 2016 U.S. Dist. LEXIS 63497

POURED OUT YET AGAIN
HEWITT ET AL. V. NOBLE DRILLING US, LLC ET AL.

Finally, in yet another subsequent ruling in this matter, the court addressed Frank's motion for

summary judgment, who argued that Hewitt could not succeed on his §905(b) claim because Franks did not own the drilling vessel aboard which Hewitt was injured. Hewitt offered no evidence to the contrary. Since it was undisputed that the drilling vessel was owned by Noble and operated by Shell, the court concluded Hewitt could not succeed on a § 905(b) claim against Franks. The motion for summary judgment was granted and Hewitt's LHWCA claim against Franks was dismissed with prejudice. (USDC EDLA, May 17, 2016) 2016 U.S. Dist. LEXIS 64834

DISCRIMINATION CLAIM DISMISSED AND MOTION TO AMEND DENIED
STUBBERFIELD V. HERCULES OFFSHORE

Jonathan Stubberfield is an African American who worked for Hercules Offshore as a galley hand on a Hercules' rig. Hercules terminated Stubberfield and his supervisor, head cook Bidal Faragosa, after the two had a physical altercation that allegedly stemmed from Faragosa's derogatory treatment of Stubberfield. Despite the discharge of Faragosa, Stubberfield claimed that the cook was later re-hired by Hercules. Seventeen months after being terminated, Stubberfield filed the instant suit against Hercules, claiming discriminatory discharge in violation of the Louisiana Employment Discrimination Law ("LEDL"), La. R.S. §23:301 et seq. Hercules moved for dismissal of the lawsuit, or, alternatively, for summary judgment, arguing that Stubberfield's claims were prescribed and that he failed to satisfy the notice requirement set forth in Section 23:303(C) of the LEDL. It was undisputed that Stubberfield failed to comply with the literal terms of §23:303(C). While the statute provided no express penalty for violating its notice provision, courts have routinely held that a plaintiff's failure to provide timely notice of intent to sue warrants dismissal of an LEDL claim, with there being a narrow exception to this rule reserved for those plaintiffs who instead filed an EEOC charge of discrimination within the appropriate period of time. The court found that Stubberfield waited until the eleventh hour to sue. By that time, Stubberfield could no longer spare thirty days to provide written notice to Hercules, so he elected to send a demand letter and file his complaint on the same day. Then, in an artful attempt to remedy this obvious deficiency, he waited more than thirty days to initiate service. Without citing any authority, Stubberfield essentially argued that, by waiting to effect service, he complied with the spirit of the statutory notice provision such that the he should be excepted from having to fulfill its literal terms. The court disagreed, finding that Stubberfield neither filed an EEOC charge nor observed the mandatory waiting period before suing. Therefore, the §23:303(C) exception was inapplicable, and Stubberfield's LEDL claims were premature. The court declined this request, noting that for Stubberfield to assert a viable Jones Act claim, virtually the entire complaint would have to be rewritten. Anything less than a transformative amendment would be futile. Therefore, the request for leave was denied. Hercules' motion to dismiss was granted. (USDC EDLA, May 16, 2016) 2016 U.S. Dist. LEXIS 64177

COURT HEARS WRITTEN OFF MEDICAL AND SUBSEQUENT REMEDIAL MEASURES
THIBODEAUX V. WELLMATE, ET AL.

Joel C. Thibodeaux brought claims against Pentair Water Treatment OH Company under the Louisiana Products Liability Act, for injuries he sustained after the bladder in a water pressure tank, manufactured by Pentair, ruptured on a platform operated by Chevron USA Inc. Chevron, Thibodeaux's employer, filed a complaint in intervention, alleging it has paid indemnity and medical benefits to or on behalf of Thibodeaux under the Longshore and Harbor Workers'

Compensation Act as a result of his injuries. Chevron, Thibodeaux, and Pentair stipulated to the court that, as of December 15, 2015, Chevron had paid $244,702.87 in medicals to or on behalf of Thibodeaux in connection to the accident. The balance of the medical bills was not paid because the medical providers accepted the lower amounts as payment in full. Nevertheless, Thibodeaux sought past medical damages of $626,529.68, which allegedly constitutes the total amount billed for Thibodeaux's medical treatment. Pentair filed a motion *in limine* to limit the amount of past medical damages Thibodeaux may recover to the amount actually paid and to exclude any evidence of portions of medical bills that were not paid and are not owed (the difference between the total amount billed and the amount actually paid, referred to in cases as the "write-off" amount). Pentair argued the collateral source rule was inapplicable because Thibodeaux's patrimony had not been reduced in any way with regard to Chevron's payment of the medical bills and Thibodeaux did not give consideration for the compensation benefits. The court noted that the Fifth Circuit has explained that, for the collateral source rule to apply to write-off amounts of medical expenses that were billed but not paid because a third-party negotiated a lesser amount, the plaintiff must give some consideration for the benefit obtained or otherwise suffer a diminution of patrimony. There was no evidence that Thibodeaux suffered any diminution of patrimony. Rather, the crux of Thibodeaux's argument was that, even though he did not suffer a reduction in his patrimony, the policy goal of tort deterrence justifies his recovery of the full amount billed. Because Thibodeaux also provided no consideration for the benefits paid pursuant to the LHWCA, the collateral source rule was inapplicable, and the court held that Thibodeaux could not recover past medical expenses billed but "written off" by the medical provider and thus not paid by Chevron. The court noted that it would allow Thibodeaux to inform the jury of the total amount billed, including the "write-off" amounts, finding that evidence of the total amount of past medical expenses billed had some probative value that was not substantially outweighed by any risk of unfair prejudice. Pentair’s motion in limine was granted in part and denied in part.(USDC EDLA, May 22, 2016) 2016 U.S. Dist. LEXIS 67407

In another ruling in the same case, the court entertained Pentair’s motion *in limine* regarding evidence of subsequent remedial measures, including design changes to Wellmate tanks following the date of manufacture of the subject tank, and warning signs and procedures applied to water pressure tanks by Chevron after Thibodeaux's accident. Thibodeaux opposed this motion as well. Pentair argued that admitting such evidence would be unfairly prejudicial to Pentair by incorrectly suggesting that the post-manufacture modifications demonstrate that the original design was defective. The court noted that the Fifth Circuit had made clear that Rule 407 does not apply to evidence of changes, even remedial measures, made before the accident giving rise to the litigation. By definition, the rule excludes only post-accident remedial measures. The admission of evidence of changes made merely to improve a product, as distinguished from remedial measures that make an injury or harm less likely to occur, is not barred by the rule. Accordingly, evidence of Pentair's design changes to Wellmate tanks before Thibodeaux's accident was not inadmissible under Rule 407, and Pentair's motion *in limine* with respect to evidence of Wellmate's design changes was denied. Pentair next argued that evidence of warning signs and procedures with respect to water pressure tanks, that were implemented by Chevron after the accident, was neither relevant nor admissible. Thibodeaux argued that evidence of Chevron's post-accident warnings and policies was relevant to the inadequacy of Pentair's warning system because, if the warnings Pentair allegedly applied to the water tank were adequate, then Chevron would have been less likely to take the steps needed to improve the warnings on every water tank on all of its platforms. The Court found that evidence of the warning system and procedures Chevron implemented after Thibodeaux's accident risked

confusing the jury and that its limited probative value was substantially outweighed by dangers of prejudice, confusing the issues, and misleading or confusing the jury. Pentair's motion *in limine* regarding evidence of Chevron's post-accident implementation of warnings and procedures with respect to water pressure tanks was granted. Pentair's motion *in limine* was granted in part and denied in part.(USDC EDLA, May 22, 2016) 2016 U.S. Dist. LEXIS 67412

PREEMPTION UNDER THE LHWCA MUST BE PLED AND PROVEN
MANSON GULF LLC V. MODERN AMERICAN RECYCLING SERVICE INC. ET AL.

This litigation arose out of the death of James LaFleur. Manson Gulf LLC filed a complaint seeking exoneration from or limitation of liability, alleging that it was the bareboat charterer of the barge being used to transport a decommissioned drilling platform to a salvage yard. LaFleur, an independent contractor working for Modern American Recycling Service Inc. (MARS), was fatally injured when he fell through a hole in the drilling platform aboard the barge. Angie LaFleur, individually and on behalf of her minor children, and the Estate of James LaFleur filed an answer and claim to the complaint of limitation. Subsequently, MARS answered the complaint for limitation and asserted a cross-claim against the LaFleur Interests. The LaFleur Interests answered the cross-claim and asserted a counterclaim against MARS, asserting wrongful death and survival actions against MARS under the general maritime law and Louisiana Civil Code articles 2315, 2315.1, and 2315.2. MARS moved to dismiss pursuant to FRCP 12(b)(1) & (6) and the LaFleur Interests opposed the motion. MARS contended that the counterclaim should be dismissed on the basis that Angie LaFleur was not "the real party in interest" under Rule 17(a), because LaFleur was not the decedent's personal representative, arguing it was well settled that only the personal representative of the decedent has standing to bring an action for wrongful death or survival under the general maritime law. The court disagreed, noting that the Fifth Circuit has explained that this rule does not cut off the right of the parties seeking recovery for the death of the decedent to obtain appointment of a personal representative and, thereafter, the filing by such personal representative of an amended claim growing out of the death of the decedent in the limitation of liability proceeding. The court pointed out that the 23rd Judicial District Court, Parish of Assumption, State of Louisiana, had confirmed Angie LaFleur as the Administratrix of the Succession of James Patrick LaFleur three weeks after the counterclaim was filed and only two days after MARS filed its motion to dismiss. Thereafter, the LaFleur Interests filed a motion to amend, solely for the purposes of alleging that Angie LaFleur was appointed as administratrix of the decedent's estate. In the interest of justice, the court will granted the motion to amend and permitted substitution of Angie LaFleur in her capacity as personal representative of the decedent's estate, with regard to the wrongful death and survival claims under general maritime law. MARS also argued that the LaFleur Interests' state law claims were preempted by the general maritime law and the Longshore and Harbor Workers' Compensation Act. The court held that the applicability of the LHWCA's exclusivity provision presented an issue of federal preemption, which a defendant must plead and prove. MARS' motion to dismiss was denied as moot. (USDC EDLA, May 26, 2016) 2016 U.S. Dist. LEXIS 69248

Michigan

LHWCA CLAIM MAY GO FORWARD, BUT YOUR JONES ACT CLAIM IS OUT
LEWAN V. SOO MARINE SUPPLY, INC.

Eric Lewan worked for nearly four years as a warehouseman/deckhand for Soo Marine Supply. Lewan claimed that he slipped and fell while placing pallets of frozen food in a workplace refrigerator, allegedly injuring his back in the process. He sued, claiming that he was hurt as a result of the negligence of his employer. As a result, Lewan argued, Soo was liable under, alternatively, the LHWCA or the Jones Act. The parties submitted the question of which of the two statutes Soo might be liable under, as a preliminary issue of fact to be decided by the court based upon the evidence garnered during discovery. Soo is a ship chandler, in the business of supplying freighters, tankers, and other ships that pass through the Soo Locks with various provisions and goods. To accomplish this task Soo operates a single 60-foot motor-operated, commercially-licensed vessel, requiring a crew of three. Lewan's function as a warehouseman/deckhand was to aid in the movement of supplies around the Soo facility and to the vessel. Additionally, the warehouseman/deckhand would occasionally need to set out on the vessel to make deliveries to passing vessels, which consisted of the "deckhand" portion of the job. The vessel did not have a permanent crew, so for any given delivery a warehouseman/deckhand may be called upon to assist with a delivery. Lewan was also required at times to perform maintenance work on the vessel. The parties agreed that Lewan met the first prong of the *Chandris* test, but disputed whether he met the 30% threshold. Lewan's hours on the vessel, as calculated by Soo, rise to only 17.7% of Lewan's total time with Soo. Lewan encouraged the court to adopt a vessel days approach, rather than a vessel hours approach. However, the court found that Lewan had not presented any authority under *Chandris* or its progeny that limits a court's inquiry to the days an individual is connected to a vessel. Because a more accurate measure of time is available, it is appropriate to use it. Under the vessel hours approach, Lewan fell well short of the 30% threshold. The court rejected Lewan's arguments that his duties required a deviation from the 30% rule of thumb, as having no merit. Based on the evidence produced by the parties, the court concluded that Lewan did not qualify as a seaman under the Jones Act. (USDC EDMI, August 1, 2016) 2016 U.S. Dist. LEXIS 99944

Mississippi

LHWCA CLAIM CLASHES WITH ELIGIBILITY QUALIFICATIONS UNDER THE ADA
BLACKMON V. HUNTINGTON INGALLS

Eric D. Blackmon was working for Huntington Ingalls, at its shipyard in Pascagoula, Mississippi, when he was allegedly injured on the job when he was walking down a passageway and hit his head (wearing a hard hat) on a speaker hanging down. Blackmon was allegedly unable to complete his work shift and was sent home. As a result of his injury, Blackmon was on medical leave for various periods of time from October 30, 2012 until August 12, 2014. During this time period, Blackmon returned to work at the shipyard for certain intervals, subject to varying temporary and permanent restrictions placed on him by his physicians. Blackmon was reinstated to work on August 12, 2014, with certain permanent restrictions defined by his physician, including lifting limited to 45 pounds and performing only occasional bending, kneeling, stair climbing, stopping, overhead reaching, and ladder climbing. In the late summer

and early fall of 2014, the shipyard transitioned from using respirators made by U.S. Safety to respirators made by 3M. Blackmon failed to cooperate with the respirator fit test, claiming he could not move his head from side to side, even though there were no medical restrictions from Blackmon's physician which limited his neck movement. Because Blackmon did not have any medical documentation stating that he could not complete the test or that his refusal was based on his October 2012 injury, he was placed on non-industrial leave, effective October 17, 2014,]and given a packet that allowed him to apply for short-term disability benefits. At some point before Blackmon went on medical leave in October 2014, he filed a claim for workers' compensation related to his October 22, 2010, injury under the LHWCA and finally settled the claim before an ALJ. Blackmon then filed a charge of discrimination against Huntington Ingalls with the United States Equal Employment Opportunity Commission ("EEOC"). On January 30, 2015, the EEOC issued its Dismissal and Notice of Rights to Sue. Blackmon then filed his complaint in federal court, naming Huntington Ingalls as the sole defendant, and advancing claims of disability discrimination against under the Americans with Disabilities Act, alleging that Huntington Ingalls failed to accommodate him in violation of the ADA. Huntington Ingalls moved for summary judgment, arguing that Blackmon's failure to accommodate claim failed for three reasons. Blackmon had failed to offer evidence that he was a qualified individual, that personnel who placed him on medical leave were aware of his disability, or that Huntington Ingalls failed to provide a reasonable accommodation. Huntington Ingalls argued that, because Blackmon represented to the ALJ and confirmed in his deposition that he was totally disabled and unable to work during the relevant time period, Blackmon was not a "qualified individual" under the ADA. The court agreed, finding that Blackmon had indeed taken two inconsistent positions in his LHWCA proceeding and his ADA proceeding. The court also agreed that, even if Blackmon was a qualified individual with a disability during the relevant time, Blackmon had not pointed to competent summary judgment evidence showing that his disability and its consequential limitations were known by Huntington Ingalls. Therefore, the court granted Huntington Ingalls' motion for summary judgment and dismissed Blackmon's claim with prejudice. For the foregoing reasons, the Court will grant Defendant's Motion for Summary Judgment, and will dismiss Plaintiff's claims with prejudice. (USDC SDMS, July 28, 2016) 2016 U.S. Dist. LEXIS 98783

New Jersey

DOCKBUILDER TURNED SEAMAN (CONT.)
COLLICK V. WEEKS MARINE, INC., ET AL.

Joseph Collick was employed by Weeks Marine, Inc. as a dockbuilder involved in the construction of a Navy pier, when he fell twelve to fifteen feet to the deck of the pier. In the fall, Collick suffered a pilon fracture dislocation of his right ankle. Immediately after Collick's injury, Weeks began voluntarily paying him medical and compensation benefits under the LHWCA. Collick then brought an action stating that he was a seaman and asserting claims under general maritime law and the Jones Act. As Collick had attained MMI, Weeks discontinued paying LHWCA benefits to Collick and controverted the claim based upon Collick's assertion that he was a member of the crew of a vessel, precluding coverage under the LHWCA. Upon receiving Collick's demand for maintenance and cure benefits under general maritime law, Weeks refused to pay maintenance and cure benefits, contending that Collick had already attained maximum medical improvement. Collick moved the court for an injunction to

preliminarily enjoin Weeks from failing to pay maintenance and cure benefits under general maritime law. Collick contended that he was “assigned to the crew” of a spudded down barge that served as a work platform at the pier construction project. Despite numerous factual disputes, the court granted Collick’s request for preliminary injunction. The court also found that Collick had shown a substantial likelihood of success on the merits of his claim that he is a seaman entitled to maintenance and cure benefits and that he would suffer irreparable harm if the preliminary injunction was not granted with respect to both maintenance and cure. Weeks appealed the grant of a preliminary injunction in favor of Collick, contending that it was an abuse of discretion on the part of the district court. The appellate court agreed, holding that Collick failed to meet the burden required to qualify for a mandatory preliminary injunction because it could not be concluded that he met the first prong of the standard, namely, that he had shown a reasonable probability of success on his claim for maintenance and cure. For him to meet that prong, he had to demonstrate that he would most likely be able to prove he is, in fact, a seaman. The district court's order was vacated, and the case was remanded for the court to proceed to trial, forthwith, on Collick’s complaint. Weeks next moved for summary judgment against co-defendant, Haztek, Inc., seeking complete indemnity in accordance with the contractor indemnification agreement (CIA) it had executed in Weeks’ favor, and requested that the court enter an order requiring Haztek to defend and to indemnify Weeks. Haztek opposed the motion. The court concluded there was a genuine issue of material fact, precluding summary judgment and denied Weeks' summary judgment motion. Weeks next moved before the Magistrate Judge for leave to amend its third-party complaint to conform to the facts disclosed during the parties' discovery, i.e., to formally reference the 2006 Package Policy of third-party defendant, Evanston Insurance Company, in the third-party complaint. Weeks’ motion to amend was denied by the magistrate judge, who held that Weeks failed to show good cause to modify the scheduling order. Weeks appealed the magistrate’s recommendation to the district court. On appeal of the magistrate’s ruling, the district court affirmed the magistrate’s memorandum, because the magistrate judge did not commit any mistake or misinterpret or misapply any applicable law. Weeks moved for reconsideration of the court's order affirming the magistrate judge's recommendation, which denied Weeks' motion for leave to amend its third-party complaint to conform to facts disclosed during discovery, on the ground that the court erred by completely overlooking Weeks' argument that an amendment of the third-party complaint was not necessary in the first place. The court denied the motion for reconsideration. Weeks then moved for summary judgment as to all claims asserted against it. Collick cross-moved for summary judgment against Weeks on Collick's status as a Jones Act seaman and Weeks' liability to Collick for Jones Act negligence. The court simply chose to find that, in the court’s opinion, there remained questions of fact as to all issues, that were better left for the jury’s resolution. The court denied the parties' cross-motions for summary judgment on the issue of Collick's status as a Jones Act seaman, Jones Act negligence, and the general maritime remedies of maintenance, cure, and unseaworthiness. The court also denied Weeks' motion for summary judgment on the issue of liability under §905(b) of the LHWCA. (USDC DNJ, July 22, 2016) 2016 U.S. Dist. LEXIS 95643

New York

COURT RESOLVES INDEMNIFICATION ISSUE
IN RE BRIDGE CONSTRUCTION SERVICES OF FLORIDA, INC.

Jose Ayala fell off a barge at the Tappan Zee Bridge into the Hudson River. At that time, Tutor Perini was the general contractor on a project to rehabilitate the bridge. In order to perform the work, Tutor Perini chartered various barges from Hughes Bros., Inc. that were used as floating work platforms. Various workers, including electricians, worked on the barges on which their tools, equipment, and supplies were also stored. Tutor Perini entered into several subcontracts with various entities to perform work on the project. Tutor Perini entered into a subcontract with Bridge Construction Services of Florida, Inc. to provide, among other things, a tug and other boats needed for the project. Tutor Perini also entered into a subcontract with Tri-State Electrical to provide electricians and materials that were needed on the project. Ayala, who was employed by Tutor Perini, was the sole deckhand on the Hughes barge, when he fell into the river. Both Tutor Perini and Bridge claimed that Ayala's fall was due to the fault of the other party. Bridge claimed that Tutor Perini was responsible for the fall because, among other reasons, Ayala slipped on the icy surface of the barge, Tutor Perini failed to keep the barge clear of ice, Ayala should have cleared the ice, and Ayala ignored his training and was not properly trained. Tutor Perini claimed that Bridge was responsible for Ayala's fall because the tug was under the command of an unlicensed captain who failed to maintain sufficient communication with Ayala and who was responsible for bumping the barge and causing Ayala's fall. Both Bridge and Tutor Perini eventually settled with Ayala and now seek indemnification from the other party. Following a bench trial, the court concluded that the Tutor Perini-Bridge Subcontract required Bridge to indemnify Tutor Perini for any liability arising from Bridge's negligence. The court found that Bridge breached its legal duty to both Ayala and Tutor Perini to perform the safe navigation of the tugboat and barge at the Tappan Zee Bridge project by having an unlicensed captain operate the tugboat. The court also noted that the elements of the *Pennsylvania* Rule were met. The credible evidence supported the conclusion that the tug's impact with the barge was a cause of Ayala's fall. Furthermore, Bridge's spoliation of evidence, namely the destruction of a log book warranted an adverse inference that the evidence contained in the log book would have been unfavorable to Bridge, and, conversely, favorable to Hughes and Tutor Perini. The court found that Bridge was required to indemnify Tutor Perini for the liability caused by Bridge's negligence. The sum already paid to Ayala was for the total amount of damages he suffered, in the amount of $794,448.97. The court concluded that Bridge's negligence caused 40% of Ayala's damages and Tutor Perini's negligence caused 60% of Ayala's damages, namely $476,669.38. Because Tutor Perini already paid an amount exceeding its percentage of fault, Bridge is required to indemnify Tutor Perini for the excess damages Tutor Perini paid to Ayala, namely $62,779.59. Accordingly, Bridge was ordered to pay Tutor Perini $62,779.59. (USDC SDNY, May 13, 2016) 2016 U.S. Dist. LEXIS 63411

Washington

PILE DRIVER WANTS TO BE CONSIDERED A SEAMAN (CONT.)
WARD V. EHW CONSTRUCTORS, ET AL.

EHW Constructors hired Perry Ward through Ward's local union for pile drivers. Ward had been a pile driver for 36 years. Ward was working on a skiff supporting the a floating piece of equipment known as the Ringer II. Ward claimed that he suffered injuries that day as he was helping lift a generator from the skiff to the Ringer II. It is undisputed that neither Ward nor any other employee completed an injury report or a near-miss report. Moreover, the foreman's daily report for the date in question, which was initialed by Ward, states that Ward was not injured on

his alleged injury date. The parties disputed the type of work Ward performed and whether he qualified as a seaman. Ward contended that his work was always completely out on the water, working on vessels doing the pile driving on piles out in the open, navigable waters. On the other hand, EHW contended that Ward was part of a construction crew instead of a seaman. Ward filed a complaint against EHW, American Bridge Company, JV, Nova Group, Inc., and Skanska USA Civil Southeast, Inc. (collectively "EHW") *in rem* and *in personam* for personal injury. Ward later filed an amended complaint alleging that EHW had failed to pay mandatory maritime benefits. Ward then moved for summary judgment on his claims for maintenance and cure and for dismissal of some of EHW's affirmative defenses. EHW argued that there were material issues of fact regarding whether Ward was ever even injured while working for EHW. Ward countered that EHW had failed to submit actual evidence countering Ward's version of the events. The court noted that Ward failed to recognize that EHW was not obligated to submit a declaration specifically contesting Ward's version of the events, and there was plenty of evidence to raise a reasonable inference that Ward was not hurt. Therefore, the court denied Ward's motion on the issue of whether Ward actually suffered an injury. Although there was evidence tending to show that Ward was a seaman, the court declined to consider it until EHW was afforded an opportunity to respond. Therefore, the court reserved ruling on the issue. Ward also moved for summary judgment on thirteen of EHW's affirmative defenses. The court granted in part and denied in part. Ward again moved or summary judgment on his status as a seaman. EHW opposed the motion, contending that Ward was part of a construction crew instead of a seaman. The construction crews were responsible for the actual construction of the wharf. The wharf was an extension of land and while the construction crew utilized the crane barges and skiffs to complete their tasks, they were not assigned to operate or maintain the vessels, although they spent considerable time on them because of the type of work they did. The court initially found that Ward had shown that his duties contributed to the function and mission of the crane barge and its support skiffs and that the majority of Ward's work consisted of construction or setting piles aboard the vessel or a support skiff. Turning to the substantial connection test, the court found that, given the similarity of ***Gipson*** and ***Scheuring*** to the case, it was unable to conclude that reasonable jurors could find other than for Ward. A reasonable juror could find his connection was not substantial in nature or duration. While Ward had cited some out-of-circuit cases for the proposition that the law has become more inclusive of marine-based workers, the cases at most supported the conclusion that it is often inappropriate to take this question from the jury. Therefore, the court denied Ward's motion for summary judgment on the seaman status issue. (USDC WDWA, May 25, 2016) 2016 U.S. Dist. LEXIS 68836

BRB Decisions

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE
EDWARDS V. MARINE REPAIR SERVICES, __ BRBS __ (2016)

The Board grated employer's motion for reconsideration of its decision in *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015).In its original decision, the Board concluded that, since it was undisputed that claimant had complied with §33(g)(2) by giving employer notice of his third-party settlement, but did not comply with the prior written approval provision of §33(g)(1), the ALJ had to determine on remand which subsection of §33(g) applies. In its motion for reconsideration, employer clarified that it did not concede to claimant's assertion that he had complied with the notice provision in

§33(g)(2). Accordingly, the Board vacate its prior conclusion that claimant complied with §33(g)(2). The Board modified the remand order to instruct the ALJ to determine whether the §33(g)(2) notice provision has been satisfied, such that, if claimant's third-party settlement was for an amount greater than or equal to his compensation entitlement under the Act, the ALJ would be able to state whether the §33(g)(2) bar.

FACTORS AFFECTING/NOT AFFECTING EMPLOYER'S BURDEN (RETIREMENT)
MOODY V. HUNTINGTON INGALLS, INC., __ BRBS __ (2016)

The Board reversed the ALJ's award of temporary total disability (TTD) compensation to a claimant who had voluntarily retired and later underwent surgery for his work-related shoulder injury, rendering him unable to work during the period of recuperation. The Board held that claimant is not entitled to post-retirement TTD, because his work injuries did not preclude his return to his usual work at the time of his voluntary retirement. In August 2011, claimant notified employer that he intended to retire, and, pursuant to company policy, his last day of work was on October 31, 2011. He sustained a work related shoulder injury during the interim, but was able to continue working. He first received medical treatment for his injury in November 2011, and he underwent shoulder surgery in December 2011. The ALJ awarded claimant TTD compensation for his recuperative period. The ALJ rejected claimant's contention that his retirement was "involuntary," i.e., due to his work-related injuries. In particular, the ALJ rejected as not credible claimant's assertion that his driving duties aggravated his 2001 work-related back injury and caused his retirement. Rather, the ALJ found that claimant retired due to his displeasure at having to work the second shift. However, the ALJ found that, pursuant to *Harmon v. Sea-Land Service, Inc.*, claimant's retirement prior to the time of his surgery was irrelevant; claimant need show only that his physical disability is due to the work injury and need not also establish a loss of wage-earning capacity due to the injury. The Board disagreed. The Board reasoned that §2(10) of the LHWCA provides that: "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the, time of injury in the same or any other employment. The Board concluded that in a traumatic injury claim for post-retirement disability compensation, the only relevant inquiry is whether claimant's work injury precluded his return to his usual work at the time of his retirement such that the loss of earning capacity was 'because of injury. In reaching this conclusion, the Board contrasted *Harmon* with *Hoffman v. Newport News Shipbuilding & Dry Dock Co.* In *Harmon*, the Board held that a claimant who suffered a work-related traumatic injury and became unable to perform his usual work prior to his longevity retirement remained "disabled" following his retirement. That is, because the claimant's work injury precluded his return to his usual work prior to or at the time of retirement, it was immaterial that he retired due to eligibility. In contrast, in *Hoffman*, a claimant suffered a traumatic knee injury, returned to light-duty work with his employer which was deemed suitable, and retired three years later by accepting the employer's early retirement package. After claimant's retirement, his knee condition worsened and his physician increased his permanent impairment rating and later performed surgeries, rendering him unable to work. Thus, his loss of WEC was not caused by his injury but was due to his retirement and, although he was entitled to increased benefits under the schedule as a showing of lost WEC is not required for such benefits, he was not entitled to permanent total disability benefits. Contrary to the ALJ's statement, the

issue concerning the reason for claimant's retirement is central to this case because resolution of that issue determines whether claimant's disability is "because of injury" pursuant to §2(10). The Board affirmed the ALJ's finding that claimant's retirement was "voluntary. Moreover, claimant did not contend that his shoulder injury precluded his continued work for employer. While claimant asserted that he is entitled to benefits because his surgery was rescheduled to a date after his retirement, this factual contention had no support in the record. Thus, claimant continued working in a suitable position until he voluntarily retired.

ALJ Decisions

SOME CLAIMANTS JUST LITIGATE THEIR RIGHTS AWAY
MAYS V. HUNTINGTON INGALLS, INC.

This case has a long history, involving multiple motions for reconsideration, appeals, and remands, petitions for section 33(f) and (g) relief, and modification requests. Tom Mays, while working for employer on March 18, 1991, sustained a blow to the head and a fracture of the right cheek when he was kicked during an altercation. Employer voluntarily paid Mays temporary total disability compensation and medical expenses from the date of injury until August 6, 1991, at which time Mays did not comply with employer's request that he return to work immediately based on his release to work by two physicians. Instead, Mays sought continuing benefits under the Act. However, an ALJ found Mays able to perform his usual work as a welder and denied him additional disability benefits and additional medical treatment. Several appeals and remands followed. Meanwhile, Mays filed suit in Louisiana state court against the aggressor in the altercation and the aggressor's employer, which eventually resulted in a settlement. However, employer did not approve the settlement, and the Board found the gross amount of $60,000 in the settlement was more than the total disability in the amount of $5,514.68 entitled to Mays under the Act. Thus, the settlement was not barred under Section 33(g) of the Act but was subject to Section 33(f) with Employer entitled to offset of medical benefits out of the net proceeds of the third party settlement. The issue before the ALJ involved a request for modification wherein Mays alleged a mistake of fact in that he and his assailant John Gliott were co-employees, with employer serving as Gliott's borrowing employer under the guidelines set forth in ***Ruiz v. Shell Oil***, and thus preventing any application of the limitations under Sections 33(f) or (g) of the Act, and a mistake in fact or change in circumstances regarding Mays' medical condition such that he had not reached maximum medical improvement and was entitled to additional wage indemnity and/or medical treatments, and a mistake in his average weekly wage. Employer maintained that Mays never asserted that Gliott was a borrowed employee of employer and thus not subject to the application of Section 33(g) or (2) that the third party settlement was not an actual third party settlement until this present proceeding. Further, the issue of borrowed employee is purely a legal issue not subject to a Section 22 modification. Notwithstanding employer's objections, the ALJ analyzed Gliott's employment and found that, out of the nine ***Ruiz*** factors, eight factors weighed against borrowed servant status, while one concerning the nature of the work being performed (factor two) was equal. Thus, the ALJ found the preponderance of credible evidence supported the conclusion that Gliott was an employee of independent contractor International Marine and not a borrowed servant or employee of employer. Both Gliott and International Marine were properly designated third parties. The ALJ then found that the record clearly supported the conclusion that Mays entered into a settlement with a third party for an amount less than the compensation to which he would be entitled under the Act without first obtaining employer's written approval of the settlement.

Accordingly, Section 33(g) mandated forfeiture of disability and medical benefits. Therefore, Mays' request for modification was denied as lacking merit. (OALJ, July 6, 2016) 2015-LHC-1301

<u>Updater Note</u>: As many of my long-suffering readers know, I rarely review ALJ decisions. However, every so often a little gem comes along that I can't ignore. I'm told that prior to the hearing before ALJ Kennington, plaintiff's counsel was making a seven figure demand for settlement. Great outcome in this long litigated case. Thanks to Frank Towers, of Blue Williams, LLP, Metairie, LA, for sharing this decision with me.