Prepared By Tom Langan for
STEVEDORES, MARINE TERMINALS & VESSEL SERVICES COMMITTEE
CASE LAW UPDATE - MLA FALL 2017 MEETING
Thursday, October 19, 2017, 12 Noon
The Silverado Resort, Napa, CA

Legislative

On July 13, 2017. Senator John McCain (R-AZ) introduced the Open America's Waters Act of 2017 (S.1561) to repeal the Jones Act restrictions on coastwise trade, and for other purposes. Senator McCain issued a press release explaining the measure.

Representative Byrne (R-AL) introduced a bill the Longshore and Harbor Workers' Compensation Clarification Act of 2017 (H.R. 2354) to amend the Longshore and Harbor Workers' Compensation Act to provide a definition of recreational vessel for purposes of such Act.

On May 2, 2017, Representative Gene Green (D-TX) introduced the Domestic Maritime Centers of Excellence Act of 2017 (H. R. 2286) to authorize the Secretary of Transportation to designate certain entities as centers of excellence for domestic maritime workforce training and education, and for other purposes. Representative Green issued a news release explaining the measure.

Regulatory

Effective October 1, 2017, the new NAWW is $735.87, a 2.46% increase over last year. This means that the new maximum weekly compensation rate under the Longshore Act is $1,471.78 (twice the NAWW), and the new minimum weekly compensation rate is $367.94 (one-half the NAWW). Additional information can be found at the Department Of Labor website.

Department of Labor

The Chief Administrative Law Judge has issued Administrative Orders 2017-MIS-00007 & 2017-MIS-00004 postponing OALJ hearings, and tolling hearing related deadlines, for cases impacted by Hurricanes Irma and Harvey.

The U.S. Department of Labor, Office of Administrative Law Judges, has recently published an article entitled, "Medical Benefits Under Section 7 of the LHWCA." This article, authored by the Senior Attorney for Longshore, Yelena Zaslavskaya, is likely to be relied upon by the Administrative Law Judges and District Directors in resolving medical disputes under the Act.

The Solicitor of Labor filed a brief in the case of *Ports America Louisiana, In v. Director, OWCP, et al.* [Scott], currently pending at the Fifth Circuit Court of Appeals, arguing that the relevant statutes and regulations gave the district director discretion to order a change of physician and an independent medical examination, and to charge the cost of the examination to the employer.

Supreme Court of the United States

On October 2, 2017, the U.S. Supreme Court denied the p[etition for certiorari in the case of *Price v. Director, OWCP* [Longnecker Properties], Docket No. 16-1523. The question presented was, “Did the three tribunals below -- the Administrative Law Judge, the Benefits Review Board, and the Fifth Circuit Court of Appeals -- employ the proper legal standard to evaluate the Claimant's prima facie cases under section 20(a) of the Act?" The Petition involves the interpretation and application of the presumption that is contained within section 20(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950.

On October 2, 2017, the U.S. Supreme Court denied the petition for certiorari in the case of *Dallas v. United States of America*, Docket No. 16-1434. The question presented was whether the Judicial Branch overreached its authority by ignoring the language that Congress inserted into 5 U.S.C. §8116(c) that exempted "a master or member of the crew of a vessel" from FECA's exclusive remedy provision? This was a case in which the Fifth Circuit affirmed the district court’s holding that FECA precluded Jones Act and general maritime claims by civil service employees of the United States.

On September 7, 2017, a petition for certiorari was filed with the U.S. Supreme Court, in the case of *Touchet v. Estis Well Service, LLC, et al.* [a.k.a. McBride] Docket No. 17-346. The questions presented are, “whether seamen may recover punitive damages for their employer's willful and wanton breach of the general maritime law duty to provide a seaworthy vessel, as held by the Washington Supreme Court and the Ninth and Eleventh Circuits, or whether punitive damages are categorically unavailable in an action for unseaworthiness, as held by the Fifth, First, and Sixth Circuits and the Texas Supreme Court. Whether the Jones Act, 46 U.S.C. § 30104, "prohibits the recovery of punitive damages in actions under that statute," a question explicitly left open by this Court in Atlantic Sounding Co. v. Townsend, 557 U.S. 404, 424 n.12 (2009).”

On September 22, 2017, a petition for a writ of certiorari was filed with the U.S. Supreme Court in the case of *American Triumph, LLC, et al. v. Tabingo*, Docket No. 17-449. The question presented is, “Whether punitive damages may be awarded to a Jones Act seaman in a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.”

On June 12, 2017, the U.S. Supreme Court denied the petition for certiorari in the case of *Tanner Services, LLC v. Guidry*, Docket No.16-1280. The two questions presented in the case were, “Do the duties of a land-based worker, who is welding a bulkhead for a dock, “take him to sea” when his work extends no farther from land than the welding leads to his pick-up truck or the leads from a docked barge, contrary to the decisions of this Court, the Ninth Circuit, the Eleventh Circuit, and the Maryland courts?, and Can a worker who spends only 5 percent of his employment with his employer on vessels satisfy the 30 percent rule of thumb for the duration test when he had not undergone a permanent change in his essential duties, contrary to the decisions of this Court and the Fifth Circuit?”

Circuit Courts

3rd Circuit

THIRD CIRCUIT ADDRESSES BARE-METAL DEFENSE IN MARITIME CLAIMS
IN RE: ASBESTOS PRODUCTS. LIABILITY. LITIGATION

Roberta G. Devries and Shirley McAfee were the widows of deceased husbands who served in the United States Navy. Each couple filed a complaint in Pennsylvania state court alleging that the husband contracted cancer caused by exposure to asbestos. Each named a number of defendants, of which manufacturers were a subset. The manufacturers each made their products "bare metal," in that if they manufactured an engine, they shipped it without any asbestos-containing insulation materials that would later be added. Both complaints alleged claims of negligence and strict liability. The manufacturers removed to complaints to federal court and invoked the “bare metal” defense in support of their respective summary judgment motions, arguing that because they shipped their products bare metal, they could not be held liable for the sailors' injuries. The district court agreed and granted the manufacturers summary judgment motions. Devries and McAfee each appealed separately, raising an issue as to whether the district court's decision addressed their negligence claims. The appellate court considered the question of the “bare metal” defense's availability, concluding that a plaintiff would be permitted to recover, at least in negligence, from a manufacturer of a bare-metal product when the facts showed that the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's conduct, at least in the context of a maritime negligence claim and in view of the maritime law's special solicitude for the safety and protection of sailors. The court declined to address the manufacturers' two alternative arguments, but left them to be dealt with on remand. The appellate court summarily remanded with instructions that the district court address the negligence issue and also consider a split in authority as to whether a bright-line rule or a fact-specific standard governed the bare-metal defense's availability. The district court’s decision was affirmed as to plaintiffs' strict liability claims. (3rd Cir, October , 2017) 2017 U.S. App. LEXIS 19118)

5th Circuit

LIMITS OF OCSLA JURISDICTION
UNITED STATES V. MOSS

A fatal welding accident occurred on an offshore oil platform in the Gulf of Mexico. Three years after that incident, the government indicted the owner and operator of the platform and several oil platform contractors, charging criminal violations of the Outer Continental Shelf Lands Act (OCSLA) and the Clean Water Act, as well as involuntary manslaughter. The defendants moved to dismiss. The district court left all of the charges in place except for the OCSLA charges against the contractor defendants, appellees Grand Isle Shipyards, Inc., Don Moss, Christopher Srubar, and Curtis Dantin, which it dismissed for failure to state an offense. The government timely appealed. The appellate court found that the district court properly dismissed the criminal violations brought against the oil platform contractors under regulations adopted pursuant to the OCSLA given the consistency of over 60 years' prior administrative practice in eschewing direct

regulatory control over contractors, subcontractors, and individual employees. Because the OCLSA regulations did not apply to these appellees, the judgment of the district court was affirmed. (5th Cir, September 27, 2017) 2017 U.S. App. LEXIS 18665

FIFTH CIRCUIT ADDRESSES LAST RESPONSIBLE EMPLOYER RULE
BOLLINGER SHIPYARDS, INC., ET AL. V. DIRECTOR, OWCP, ET AL. [WORTHEY]

Kenneth Worthey worked on and off at Bollinger Shipyards for about fifteen years. He was a welding supervisor, a job that involved exposure to welding fumes, sandblasting dust, industrial cleaning solvents, and other fumes and chemicals. In 2008, his physician told him that he could no longer wear a respirator due to airway obstruction. Following a medical release to fix some knee and shoulder problems, Worthey sought to return to work for Bollinger in March 2010. Bollinger required him to be examined before returning and was diagnosed with chronic obstructive pulmonary disease, told he could not return to work, advised to see a pulmonologist, and recommended that he apply for social security disability. Instead, Worthey applied to work for Thoma-Sea Shipbuilders. Worthey passed Thoma-Sea's pre-employment physical and worked as a welding supervisor from March 29 through May 18, 2010, when he was fired for sleeping on the job. Worthey subsequently filed claims under the LHWCA seeking compensation for, among other health problems, his respiratory condition. The main question in Worthey's administrative proceeding was which employer would be responsible for paying his benefits and medical expenses. An administrative law judge initially concluded that Bollinger was solely liable because it failed to rebut the Act's presumption that it caused Worthey's pulmonary disease. The Benefits Review Board remanded the case, however, requiring the ALJ to also determine whether Thoma-Sea could rebut the Act's presumption and to more closely identify the date of the onset of Worthey's disability. After undergoing the required analysis, the ALJ reaffirmed its earlier conclusion that Bollinger was solely liable, and the Board affirmed. Bollinger sought judicial review of the administrative ruling. The appellate court began its analysis by noting that the ALJ found that Bollinger was the last responsible employer under *Cardillo*, which mandates the responsible employer in an occupational disease case is the last employer during whose employment the claimant was exposed to injurious stimuli, prior to the date the employee became aware that he was suffering from an occupational disease arising from the employment. Bollinger attempted to rely on a complication that has arisen in applying this "last responsible employer" rule, asking the appellate court to apply the First Circuit's rule that focuses solely on the date of disability in determining the last responsible employer. The appellate court declined to decide how to deal with the situation when the diagnosis and disability dates are different, because the ALJ found that both of these events occurred on March 22, 2010 when Worthey was examined for re-employment at Bollinger's request. Bollinger tried to challenge the timing of the disability finding on appeal, but did not do so before the Board so that argument was forfeited. In any event, there was more than substantial evidence to support the finding that the doctor's diagnosis in March, which included recommending that Worthey apply for disability, is the date on which Worthey was disabled. That Worthey worked for a number of weeks after that date did not dictate a contrary conclusion. To implicate Thoma-Sea, Bollinger pointed to Worthey's later tests showing a decline in his pulmonary function after working for Thoma-Sea. But the ALJ considered this evidence before concluding that Thoma-Sea did not contribute to Worthey's disability. The ALJ was more convinced by other evidence that implicated Bollinger. The Board was therefore correct in concluding that the ALJ relied on substantial evidence in finding that liability rested solely with Bollinger, the employer for whom Bollinger worked for several years as opposed to the one for whom he worked less than two months. The petition for review of the decision of the Benefits Review Board was denied. (5th Cir, May 17, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 8842

EMPLOYER PAYING LHWCA BENEFITS & EMPLOYEE SUES FOR DISCRIMINATION
EGLAND V. DIRECTOR, OWCP, ET AL. [P.C. PFEIFFER COMPANY, INC.]

Joseph R. Egland filed a claim against P.C. Pfeiffer Company under the LHWCA, alleging that, in violation of Section 48a of the Act, P.C. Pfeiffer refused to allow him to return to work. The ALJ Found that Egland was still disabled per the 2010 LHWCA decision awarding benefits, which had not been modified; therefore, pursuant to Section 48a Egland could not establish a discriminatory act by Pfeiffer, nor could he be reinstated to his job. Accordingly, the ALJ denied the discrimination claim. Egland appealed and the Board initially remanded the case, finding that the ALJ erred in failing to properly consider a modification in the temporary partial disability award under §922, based upon Egland's allegation at his hearing that he was capable of returning to work. In his decision on remand, the ALJ found that he could not grant modification under Section 22 because any request therefor was not timely. The ALJ found Egland entitled to a presumption of discrimination under Section 48a but that employer rebutted the presumption. The ALJ then found, based on the totality of the evidence, that Egland did not establish that Pfeiffer committed a discriminatory act against him motivated by his filing a compensation claim. Accordingly, the ALJ denied the claim of discrimination under Section 48a. Egland took a second appeal to the BRB, which affirmed the ALJ's denial of Egland's Section 48a claim. Egland appealed the BRB's decision affirming the ALJ denial of Egland's claim. In a short *per curiam* opinion, the appellate court found that the ALJ weighed the evidence and determined that Egland set forth a *prima facie* case and that he was entitled to a presumption of discrimination under Section 48a. But the ALJ then determined that Pfeiffer rebutted Egland's presumption of discrimination and that Egland failed to meet the burden of persuasion for his claim. The BRB held that substantial evidence supported the ALJ's conclusion that Egland did not establish that employer's action in not allowing claimant to return to work was motivated by Egland's filing a compensation claim. Finding no error, the appellate court affirmed the decision of the BRB. (5th Cir, May 2, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 7772

COURT AWARDS BIG DAMAGES IN §905(B) CASE (CONT.)
KOCH, ET AL. V. UNITED STATES OF AMERICA

Ricky Koch alleged sustaining a personal injury while descending an allegedly dimly lit stairwell aboard a vessel owned by the Maritime Administration of the United States Department of Transportation. Koch boarded the vessel on behalf of Economy Iron to submit bids on areas of the vessel in need of repair. There were six other contractors present, all of whom were taken by the vessel's chief engineer on a "walkthrough" of the vessel. After inspecting various areas on the vessel, the parties arrived at a stairwell, where the fluorescent lights did not fully illuminate. Each contractor had a flashlight, but Koch did not use his flashlight, choosing instead to use both hands to hold handrails on opposite sides of the stairwell. Koch fell backwards and struck the bulkhead or some other piping behind him, immediately complaining of discomfort in his knees, neck, and back. Koch later underwent multiple surgeries and was eventually found to be permanently and totally disabled. Koch and his wife filed suit under §905(b) of the LHWCA, with the wife claiming that the stress of working a full-time job and taking care of her husband has taken its toll and the stress has adversely affected the marital relationship. The court initially noted that the United States had waived sovereign immunity to admiralty suits through the Public Vessels Act and the Suits in Admiralty Act, and the Kochs' claims were governed by the PVA. Because the lights above the stairwell not fully illuminate, the court found that the United States failed to exercise reasonable care to prevent injuries, thereby breaching a duty owed to Koch. Because Koch undoubtedly suffered personal injury, the remaining question was whether the negligence of the United States caused his injuries. The United States argued Koch could not

establish causation, because all of his injuries resulted from pre-existing conditions and because Koch failed to use reasonable care under the circumstances. The court rejected both arguments, holding that the United States had failed to carry its burden of establishing Koch's damages were caused by pre-existing conditions and that Koch acted with reasonable care under the circumstances. The court awarded total damages in the amount of $2,833,337.09, which included $150,000 for loss of consortium. The Government filed a timely notice of appeal, contending that, prior to his accident, Koch had become disabled by his painful chronic osteoarthritis in both his knees, as well as the degenerative disc disease in his cervical spine and carpal tunnel syndrome. Although Koch's preexisting conditions were undisputed, the district court rejected the Government's argument that Koch had been disabled by them prior to his accident. The appellate court found that the record showed that, prior to his accident, and despite multiple pre-existing injuries, Koch was an active, convivial man who enjoyed going to work. Although he frequently experienced pain while working, particularly in his knees, Koch performed his work activities with vigor and without restriction. Koch was equally active at home. The district court found that as a result of the injuries he sustained aboard the U.S. vessel and the treatment he had received and would receive for those injuries, Koch would never work again. The appellate court affirmed this factual finding by the district court as not clearly erroneous. The appellate court concluded that the district court did not apply the wrong legal standard in the case with regard to Koch's preexisting medical conditions. The "eggshell skull" rule was not limited to cases involving only latent or unmanifested preexisting conditions. A review of the entire record in the case did not leave the appellate court with a definite and firm conviction that a mistake had been committed, so that it could characterize as clearly erroneous the district court's finding that Koch had not been disabled by his deteriorating spinal condition and his osteoarthritic knee condition prior to his accidental fall aboard the U.S. vessel. Finally, the Government asserted that the district court erred by unfairly limiting the testimony of its expert, and by crediting the testimony of Koch's treating physicians over that of its expert because of that limitation. After a thorough review of the record, the appellate court was satisfied that the district court did not abuse its discretion in ruling to exclude the additional testimony by the Government’s expert. The judgment of the district court was affirmed. (5th Cir, May 12, 2017) 2017 U.S. App. LEXIS 8486

9th Circuit

BIG JURY AWARD AFFIRMED IN §905(B) ACTION
MURRAY V. SOUTHERN ROUTE MARITIME SA, ET AL.

Roger Murray, a longshore worker, was working aboard a vessel, owned by Southern Route Maritime SA and Synergy Maritime Pvt. Ltd., when he allegedly experienced an electrical shock when a piece of rebar he was holding came into contact with a floodlight provided by the vessel owner. Murray sued under §905(b) of the LHWCA, alleging that the vessel owner had been negligent in turning over the ship with a faulty floodlight. A jury awarded Murray over $3.3 million for his injuries and awarded his wife $270,000 for loss of consortium. The district court denied the vessel owner's motions for judgment as a matter of law, new trial, and remittitur. Unwilling to go down with its ship, the vessel owner appealed, asserting a flawed jury instruction and two errors related to the admission of testimony by Murray's experts. Notwithstanding a strong dissent regarding the admissibility of expert testimony, the majority of the panel held that the district court properly instructed the jury that the vessel owner owed a duty to Murray as a longshore worker to turn over the ship and its equipment in a reasonably safe condition, which necessarily required the vessel owner to take reasonable steps to inspect the ship and equipment before turnover. The majority also held that the district court did not abuse

its discretion in allowing Murray's key scientific expert to describe his theory of electrical injury because the court adequately assessed the reliability of his theory and fulfilled its gatekeeping function under Federal Rule of Evidence 702 and ***Daubert***. The district court also did not err in admitting the medical experts' testimony. The majority affirmed the district court's in favor of Murray. (9th Cir, August 31, 2017) 2017 U.S. App. LEXIS 16760

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

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

benefits for injuries incurred from a suicide attempt when there is a direct and unbroken chain of causation between a compensable work-related injury and the suicide. The appellate court held that evidence that a claimant planned his suicide does not necessarily preclude compensation under the Act because the proper inquiry is whether the claimant's work-related injury caused him to attempt suicide. The panel held that the claimant need not demonstrate that the suicide, or attempt, stemmed from an irresistible suicidal impulse. The panel concluded that the ALJ erroneously applied the irresistible impulse test, and remanded for the Benefits Review Board to apply the chain of causation test or to remand to the ALJ so that the ALJ may have the first opportunity to do so. On remand, the ALJ concluded that, while the evidence did not support a finding that Kealoha's injury caused him to develop a mental condition that caused him 'to become devoid of normal judgment," it did support a finding that the results of the accident exacerbated his already weak impulse control. The ALJ found that added stressors resulting from Kealoha's work accident, coupled with his low IQ, aggravated his pre-existing poor impulse control and led to his suicide attempt. The ALJ concluded that there was a chain of causation between the work accident and the suicide attempt. The ALJ awarded temporary total disability benefits from the date of Kealoha's suicide attempt in 2003 and continuing, as maximum medical improvement had not been demonstrated. Leeward appealed, challenging the ALJ's finding that there was a chain of causation between claimant's September 2001 work injury and his February 2003 suicide attempt. The BRB found that the ALJ applied the "chain of causation" test to the evidence, rationally concluded that Kealoha met his burden of establishing that the work injury aggravated his pre-existing condition and thus was a cause of claimant's suicide attempt, and that the injuries resulting from that attempt were compensable under the Act. Therefore, the Board affirmed the award of benefits the order denying reconsideration. Leeward appealed the Board's decision, arguing that the Board erred when it affirmed the ALJ's decision on remand to award benefits to Kealoha. Contrary to Leeward's argument, the appellate court pointed out that the first time the case was before it, the court did not specifically narrow the "chain of causation test."Instead, on remand the ALJ was entitled to rely on general tort principles. The appellate court found that the ALJ did not err by relying on the aggravation rule to find that Kealoha had established that the accident was a causative factor in his attempted suicide and that a direct and unbroken causal chain was shown. The appellate court found that substantial evidence supported the ALJ's finding that the accident exacerbated Kealoha's already weak impulse control and led, in part, to his attempted suicide. Because the ALJ did not err in its causation finding and substantial evidence supported the decision, the Board did not err by affirming the decision to award benefits. The court denied Leeward's petition for review. (9th Cir, August 16, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 15397

APPELLATE MAJORITY DISAGREES WITH ALJ'S AWW CALCULATION
DALTON V. MARITIME SERVICES CORPORATION, ET AL.

Longshoreman, Michael Dalton, allegedly suffered severe injuries while working on a ship for Maritime Services Corporation. He applied for permanent total disability benefits under the LHWCA. Although Maritime Services agreed to pay Dalton's benefits, the parties couldn't agree on when Dalton became disabled and how much money he deserved. The ALJ found that Dalton became disabled on March 4, 2004, and was entitled to compensation based on an average weekly wage of about $560. The Benefits Review Board affirmed, and Dalton timely appealed the Board's decision, arguing that the ALJ assigned the wrong disability date and the wrong compensation rate. The appellate court found that substantial evidence supported the disability date, but not the compensation award. Notwithstanding a vigorous dissent, the majority of the panel found that there wasn't substantial evidence to support the ALJ's findings on the weekly

wage. The ALJ used Dalton's two-year work history immediately preceding his injury to calculate his weekly wage. That calculation was too limited because one of those years was the worst in maritime's history and Dalton worked substantially less than usual. The effect of using that aberrant year for half the calculation unfairly lowered Dalton's compensation. The appellate court ordered that, on remand, the ALJ should recalculate Dalton's compensation based on earnings from March 21, 1999, through March 20, 2000. The petition was granted in part, denied in part and remanded. (9th Cir, August 11, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 14932

ZONE OF SPECIAL DANGER EVEN APPLIES IN CLAIMANT'S HOME COUNTRY
CHUGACH MANAGEMENT SERVICES, ET AL. V. JETNIL, ET AL.

Edwin Jetnil was a citizen of the Republic of the Marshall Islands, who resided on Third Island, an island in the remote Kwajalein Atoll that is approximately 2,400 miles southwest of Honolulu, Hawaii. Third Island has no telephone service, no mail delivery, no airstrip, and no electricity except that which is provided by portable generators. The Kwajalein Atoll houses the U.S. Army Space and Missile Defense Command's Ronald Reagan Ballistic Missile Defense Test Site. Jetnil worked for contractors that provided services for the U.S. Army on the Kwajalein Atoll. Chugach Management Services hired Jetnil as a painter. Jetnil traveled to Gagan Island with two coworkers to paint and repair the Gagan Island pier. Chugach arranged for a boat to transport Jetnil and his coworkers to Gagan Island. Chugach had a policy prohibiting reef fishing during work hours. Nevertheless, Jetnil went reef fishing, slipped and cut his right foot on the coral while fishing. Despite the cut between his fourth and fifth toes, Jetnil continued to work. After returning from Gagan Island, Jetnil sought treatment for his cut and was eventually diagnosed him with a severe infection and possible gas gangrene. Jetnil's right leg had to be amputated below his knee. Jetnil filed a claim for compensation under the DBA extension of the LHWCA. Chugach controverted the claim, arguing that the injury leading to Jetnil's present status did not arise within the scope and the course of his employment. The case was ultimately referred to an ALJ, who issued a decision and order awarding medical benefits and compensation for total temporary disability benefits to Jetnil. Though Jetnil's injury was not directly caused by his employment, the ALJ, relying on *O'Leary v. Brown-Pacific-Maxon, Inc.*, determined that the unconventional conditions of Jetnil's employment "placed him in an environment with unique risks, which created a zone of special danger that led to his amputation." Chugach had argued that Jetnil was not subject to the zone of special danger doctrine because that doctrine applies only to employees sent to work abroad, and Jetnil was a citizen of RMI, where he was injured. The ALJ rejected this argument and concluded that the zone of special danger is not negated because the place of employment is not an overseas locale. Chugach filed a notice of appeal with the BRB but the ALJ's decision was affirmed. In applying the zone of special danger doctrine to Jetnil, the BRB concluded that substantial evidence supported the ALJ's conclusion that Jetnil's injury arose out of the reasonable and foreseeable risks associated with the obligations and conditions of Jetnil's employment. In an issue of first impression, the Ninth Circuit was charged with determining, for the first time, whether the judicially created "zone of special danger doctrine" can be applied to local nationals who are employed in their home country under employment contracts covered by the LHWCA, as extended by the DBA. The panel held that the judicially created zone of special danger doctrine could be applied to local nationals employed in their home country under an employment contract covered by the LHWCA. The panel further held that the administrative law judge and the BRB did not commit legal error by applying the zone of special danger doctrine to Jetnil, who was employed by a Defense Base Act-covered contract in his home country. The panel concluded that substantial evidence supported the ALJ and BRB decision and the award of

temporary total disability benefits to Jetnil. Chugach's petition for review was denied. (9th Cir, July 21, 2017) 2017 U.S. App. LEXIS 13139

PLAINTIFF'S ATTORNEY UNABLE TO DEFEND HIS $400 PER HOUR RATE
MCDONALD V. NAVY EXCHANGE SERVICE COMMAND, ET AL.

Cathy McDonald filed claims under the Act seeking benefits for back injuries sustained in the course of her work for employer. The parties reached a settlement pursuant to Section 8(i) of the Act, wherein employer agreed to pay claimant $95,699.88 for release of her claims. The settlement agreement was approved by the administrative law judge. Thereafter, McDonald's counsel filed fee petitions for an attorney's fee of $161,496, representing 403.74 hours of attorney work at an hourly rate of $400, plus $27,805.24 in costs. Employer filed objections, to which claimant's counsel filed two reply briefs; employer filed a sur-reply brief. After making reductions in the requested hourly rate, the number of hours and costs, the administrative law judge approved an attorney's fee, payable by employer, totaling $101,368.26, representing 245.49 hours of attorney work at $305 per hour, and $26,493.81 in costs. On appeal, claimant's counsel challenged the administrative law judge's hourly rate determination, as well as his reduction in the number of compensable hours. Employer responded, urging affirmance of the administrative law judge's attorney's fee award. Upon review of the ALJ's reductions in the requested hours, the BRB agreed with counsel that the ALJ erroneously denied 5.5 of the 11 hours claimed by counsel to prepare for, and attend the hearing. However, the Board also found that the ALJ sufficiently explained his reasons for the other reductions made to the requested hours. The board concluded that counsel has not demonstrated an abuse of the ALJ's discretion with regard to these reductions. The ALJ's attorney fee order was modified to reflect inclusion of 5.5 hours for work relating to the hearing. In all other respects, the ALJ's attorney fee order was affirmed. McDonald timely moved for reconsideration of the Board's decision and order, contending that the Board erred by not modifying the administrative law judge's attorney's fee award to include an additional $2,440 in fees, representing 8 hours of time at the hourly rate of $305, which was inappropriately disallowed by the ALJ. The Board reviewed the ALJ's decision which reflected that while he explicitly awarded counsel a fee for 8 hours relating to a doctor's deposition, he nevertheless also denied the entire 16 hours claimed by counsel for such work. In light of this inconsistency, the Board modified its earlier decision to reflect counsel's entitlement to a fee for 8 hours of work on the deposition which the ALJ approved, but did not include, in his award of an attorney's fee. In all other respects, the Board's decision and order was affirmed. McDonald then petitioned the circuit court for review of the Board's decision, which largely affirmed the ALJ's attorney's fee order, arguing that the Board acted arbitrarily and capriciously and abused its discretion in upholding the ALJ's calculation of her attorney's fee. The appellate court McDonald's contentions of error, finding that the record supported the Board's Decision that counsel did not carry his burden of establishing that his proposed rate of $400 was in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. The appellate court also agreed that the ALJ was within his right to disallow the hours that counsel claimed for his "Reply to Opposition to Fee Application," which greatly exceeded the scope of counsel's "Amended Application for Attorneys' Fees and Costs," and, in any event, failed to establish a reasonable hourly rate. The petition for review was denied. (9th Cir, May 25, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 9150

11th Circuit

APPELLATE COURT AFFIRMS DEFENSE HOLDING IN §905(B) FATALITY CASE
DIXON V. NYK REEFERS LTD., ET AL.

A crane unloading a vessel's cargo lowered a metal tray onto longshoreman Robert L. Dixon, killing him. Decedent's spouse, Antoinette Dixon, sued the vessel and the vessel's charterer, alleging negligence. On summary judgment, the district court held that the vessel's owner and charterer were not negligent because they owed no duty to intervene where there was no evidence of a defect in the vessel or its gears. On appeal, the plaintiff argued that the district court erred by interpreting a vessel's duty too narrowly and that material issues of fact existed regarding the crew's knowledge of the stevedoring operations such that a jury could find defendants owed a duty to intervene in those operations and breached that duty. The issue before the appellate court was solely whether defendants breached the third Scindia duty-the duty to intervene. The dangerous conditions alleged by the plaintiff fit into two categories: (1) negligent actions of the stevedore and (2) allegedly unsafe equipment provided by defendants. The appellate court concluded that neither set of allegations triggered a duty to intervene. Plaintiff also unsuccessfully argued that it was defendants' custom to monitor the stevedoring operations, triggering the duty to intervene. Defendants were entitled to rely upon the stevedore to unload the cargo properly without supervision. Additionally, the lack of an audio or visual warning system on the cranes, a condition that existed prior to turning over the vessel, was not a dangerous condition that triggered the duty to intervene. There was no evidence that defendants were notified that the absence of warning devices was a problem or that the longshoremen failed to remedy the problem. Finally, the evidence did not support a finding that defendants customarily monitored cargo operations such that they would have discovered the dangerous conditions alleged.,There was no dispute that negligence led to decadent’s tragic death. But the defendants were not the negligent parties. Defendants were entitled to rely on the stevedore to perform his task properly without supervision. The appellate court concluded that the district court did not err in granting summary judgment in favor of the vessel. The appellate court affirmed the district court's grant of summary judgment. (11th Cir, August 3, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 14225

State Appellate Courts

Alaska

INJURED WORKER’S EFFORT TO VOID SETTLEMENT FAILS
ROSALES V. ICICLE SEAFOODS, INC. ET AL.

Hugo Rosales was allegedly injured on a fish-processing ship and eventually entered into a global settlement of both his workers' compensation claim and his maritime lawsuit. As part of the workers' compensation settlement he waived future medical benefits. The Alaska Workers' Compensation Board approved the settlement after a hearing. Rosales later asked the Board to set aside the settlement, but it refused to do so. After unsuccessful appeals to the Alaska Workers' Compensation Appeals Commission and this court, the worker again tried to set aside the settlement and reopen his workers' compensation case, alleging he had been denied due process in the course of the first set-aside proceeding. The Board decided the *res judicata* doctrine applied to bar the second set-aside claim. The Commission affirmed the Board's decision, concluding the worker had a full and fair opportunity to litigate the issues he raised. Rosales proceeded with his pro se appeal to the state Supreme Court, arguing that the Commission erred in affirming the Board's refusal to set aside a compromise and release

agreement between Rosales and Icicle Seafoods, Inc. The appellate court found that the Board and the Commission both decided that *res judicata* prevented Rosales from again litigating the question of setting aside the settlement and reopening his claim. Rosales's main contention on appeal is that the arguments he made in his first attempt to set aside the settlement were either misunderstood or ignored and that he therefore should not be subject to *res judicata* because he did not have a full and fair opportunity to litigate his case. He maintained his due process and equal protection rights were violated. The appellate court affirmed the Commission's decision affirming the Board's decision. (Alaska Sup. Ct., July 19, 2017) 2017 Alas. LEXIS 87

Minnesota

STATE SUPREME COURT ADDRESSES CONCURRENT JURISDICTION WITH LHWCA
ANSELLO V. WISCONSIN CENTRAL, LTD., ET AL.

Daniel Ansello was employed by Wisconsin Central, Ltd., when he allegedly suffered a low-back injury while performing longshoreman work. Ansello began medical treatment for his injury the day after his accident and had his first low-back surgery approximately 1 month later. Ansello was off work for about 8 months following the surgery. After returning to his longshoreman job, Ansello's back condition progressively worsened over the next few years and eventually led to a second low-back surgery. Ansello received indemnity and medical expense benefits under the LHWCA from Wisconsin Central and its insurance carrier, Signal Mutual Indemnity Association, for all the medical treatment he received from the date of the injury through the second surgery and rehabilitation from that surgery. Ansello returned to work a year after his second surgery, but again his low-back symptoms worsened, and he aggravated his back in August 2014. The following month, Ansello underwent a third surgery. Signal Mutual denied payment for the third surgery based on an independent medical examiner's opinion that the surgery was not reasonable or necessary treatment. But Signal Mutual continued to pay for certain medical expenses following the third surgery, including periods of physical therapy. Ansello filed a request with the Minnesota Office of Administrative Hearings seeking payment of medical treatment expenses under the Minnesota Act from Wisconsin Central and its insurance carrier under the Minnesota Workers' Compensation Act. The compensation judge dismissed Ansello's claims, concluding that Ansello could not seek benefits under the Minnesota Act because the LHWCA could fully compensate him. The judge dismissed Ansello's claims for lack of jurisdiction. The judge also invoked *sua sponte* the doctrine of *forum non conveniens,* reasoning that proceeding under the LHWCA would provide a more convenient forum for Ansello's claims than Minnesota's workers' compensation courts. This appeal arose from the compensation judge's dismissal of Daniel Ansello's request for benefits under the Minnesota Workers' Compensation Act. The compensation judge concluded that the Longshore and Harbor Workers' Compensation Act provided Ansello's exclusive remedy and that the case should be dismissed in any event under the doctrine of *forum non conveniens*. The Workers' Compensation Court of Appeals (WCCA) reversed, holding that the compensation judge's dismissal for lack of jurisdiction was contrary to the law. The WCCA also determined that the compensation judge lacked authority to dismiss Ansello's claims under the doctrine of *forum non conveniens*. The WCCA further held that, even if the judge had this authority, the judge misapplied the law in concluding that the Minnesota workers' compensation courts were an inconvenient forum. Wisconsin Central and its insurer filed a petition for a writ of certiorari challenging the WCCA's decision, arguing that the WCCA erred in concluding that the compensation judge had

jurisdiction over Ansello's claims and contended that the WCCA erred in reversing the compensation judge's dismissal based on the doctrine of *forum non conveniens*. Citing *Sun Ship* and *Jacobson*, the appellate court agreed with the WCCA that the compensation judge had jurisdiction to hear the claims Ansello brought under the Minnesota Act and that the judge abused his discretion by dismissing Ansello's claims under the doctrine of *forum non conveniens*. Because there was no persuasive basis to exclude a Minnesota resident who was injured in Minnesota and is covered by the Minnesota Act from pursuing benefits in Minnesota's workers' compensation courts, the appellate court held that the compensation judge abused his discretion in dismissing Ansello's claims on *forum non conveniens* grounds. The decision of the WCCA was affirmed. (Minn . Sup. Ct., August 9, 2017) 2017 Minn. LEXIS 487

New York

ASBESTOS RELEASE DOES NOT HOLD UP FOR MESOTHELIOMA CLAIM
IN RE: NEW YORK CITY ASBESTOS LITIGATION

Mason South, now deceased, and South's wife, commenced this action alleging that South's mesothelioma resulted from his exposure to asbestos during his 37-year career in the Merchant Marine. They claimed that Texaco manufactured, produced, sold, supplied, merchandised and/or distributed asbestos-containing products that were located on the ships South worked on. The claims were brought under the Jones Act. South's wife asserted derivative claims and was substituted as plaintiff after South died of mesothelioma. Texaco moved for summary judgment dismissing the complaint as against it. The basis for Texaco’s motion was a release that South had given to it in connection with an earlier lawsuit, also in connection with his exposure to asbestos on merchant ships. In that Jones Act action, filed in 1997, South alleged that as a direct and proximate result of said exposure to asbestos aboard the said vessels as well as secondary or passive smoke that hung still in the atmosphere free from dissipation for lack of adequate ventilation, South suffered cancerphobia, traumatic stressful fear of affliction and worsening of pneumoconiosis as well as exacerbation of existing diseases; and suffers anatomical disorder, structural changes, pulmonary diseases inclusive of asbestosis/mesothelioma/lung cancer/pneumoconiosis/chronic obstructive pulmonary disease/colon cancer/stomach cancer/rectal cancer/kidney cancer/pancreas cancer/pharynx cancer/brain cancer/other anatomical cancer, either singularly or in combination thereof; and, moreover, South suffered harm in the form of necessity to be monitored for other asbestotic diseases including lung cancer. The release also pertained to South's executors, administrators, and heirs. South acknowledged that he had read the full release, discussed it with his attorney, and was signing it with full knowledge of its contents, and that he would be legally bound by it. In return for furnishing the release, South was paid $1,750. In opposition to the motion, plaintiffs argued that the release did not preclude the claim for mesothelioma, based on section 5 of the Federal Employers' Liability Act, which requires strict scrutiny of releases and prohibits agreements that exempt common carriers from liability. Under that standard, plaintiffs asserted that at the time South signed the release, he did not have mesothelioma and was not aware of the risk of mesothelioma as a potential injury from his asbestos exposure. The court denied Texaco's motion. The trial court held that, under 45 U.S.C. §55, part of FELA, the 1997 release executed by a South did not preclude his claim for mesothelioma, as there was no evidence that he had any manifestation of his asbestos exposure at the time he executed the release. On appeal, Texaco argued that the release should be enforced because it represented a compromise of a known claim, not an

exemption from liability for a future unknown claim. It contends that because the release resolved an action arising out of South's exposure to asbestos, it applied to additional injuries that might later manifest themselves as a result of the same exposure. Texaco notes that the 1997 complaint asserted a claim for possible diseases stemming from his exposure, and mentioned mesothelioma as one of those diseases. Subjecting the release to the high level of scrutiny required by ***Wicker***, the appellate court found that the release did not pass muster. To tease out the true intent South had when he signed the release, it is necessary to consider the context in which he did so. To be sure, it mentioned a devastating pulmonary disease Plaintiff now suffers and an exhaustive grab-bag of asbestos-related diseases, from asbestosis to mesothelioma to brain cancer. However, it was impossible to conclude from the complaint that South had actually received a diagnosis. Accordingly, the risk of contracting an actual asbestos-related disease remained hypothetical to South, and the appellate court declined to read the release as if South understood the implications of such a disease but chose nonetheless to release Texaco from claims arising from it. As there was no evidence that South had any manifestation of his asbestos exposure at the time he executed the release, it could not be said that Texaco carried its burden of proving that the release was enforceable. Notwithstanding a strong dissent, the appellate court affirmed the denial of Texaco's motion. (Sup. Ct. 1st NY, August 29, 2017) 2017 N.Y. App. Div. LEXIS 6325

Georgia

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

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. Following the jury's verdict, the court took up GPA's immunity claim. In considering the issue of immunity, the court primarily relied on ***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. After considering the ***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. GPA appealed the trial court's judgment, arguing that the trial court erred in finding that the GPA was not an instrumentality of the State and therefore was not entitled to immunity from suit under the Eleventh Amendment to the United States Constitution. Additionally, the GPA contended that the trial court erred in denying its motion for a directed verdict on Lawyer's maritime claim because Lawyer failed to come forward with any evidence that his injury occurred on navigable waters. The appellate court pointed out that it was bound by the Georgia Supreme Court's holding that the GPA is not entitled to immunity under the Eleventh Amendment, and affirmed the trial court's denial of the GPA's motion to dismiss Lawyer's maritime claim. In its second enumeration of error, GPA contended that the trial court erred in denying its motion for directed verdict on Lawyer's maritime claim because he failed to present any evidence that the accident in question occurred on navigable waters. The appellate court found that this argument ignored the admissions contained in the GPA's answer to Lawyer's complaint. Accordingly, the appellate court found no error in the trial court's denial of the GPA's motion for a directed verdict on Lawyer's claim under federal maritime law. The appellate court affirmed both the denial of the GPA's motion to dismiss for lack of subject matter jurisdiction and the denial of its motion for a directed verdict. (Ga. 5th App. Ct., June 28, 2017) 2017 Ga. App. LEXIS 325

Tennessee

COURT HOLDS CHILD SUPPORT MAY BE PAID FROM LHWCA BENEFITS
STATE OF TENNESSEE V. GONZALEZ-PEREZ

Jose Ramon Gonzalez-Perez and Deedra Climer Bass are the parents of the minor child Claudia Christina Gonzalez. In September of 1998 an order was entered directing Gonzalez to pay $436.46 per month in child support. Gonzalez was injured on the job, and as a result of those injuries Gonzalez receives monthly compensation benefits of $2,263.73 under the Longshore and Harbor Workers' Compensation Act. At some point, the State became involved in the case, pursuant to Title IV-D of the Social Security Act, and brought a contempt action against Gonzalez, arguing that although benefits under LHWCA are not assignable under §916, the defendant was and is able to pay child support and willfully refused to pay. The allegations of the petition were sustained and Gonzalez was held in contempt for failure to pay child support. Gonzalez appealed the juvenile court order finding him in contempt for non-payment of child support. Gonzalez argued that the compensation receives pursuant to the LHWCA is exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt under §916 of the LHWCA. Gonzalez argued that all of his compensation funds are shielded by the LHWCA. The appellate court found this argument to be without merit. Following the logic of Gonzalez's argument, none of his living expenses could be paid by the funds obtained through the Act, as they are "debts" he accrues. The LHWCA may shield Gonzalez's funds from collection through an income assignment order, but at no time was Gonzalez relieved of his duty to support his only child. The appellate court found that Gonzalez's funds had been shielded only by the discretion of Gonzalez and his Trustee, and the support order was a valid order. The appellate court found and held that although the benefits

Gonzalez receives are exempt from levy, execution, attachment, etc., Gonzalez may be found guilty of contempt, because the LHWCA does not preempt the inclusion of the benefits Gonzalez receives from the calculation of child support and Gonzalez had the present ability to pay child support and willfully failed to do so making Gonzalez guilty of contempt. The appellate court affirmed the order of the juvenile court finding Gonzalez in contempt for non-payment of child support. (Tenn. App Ct, May 19, 2017) 2017 Tenn. App. LEXIS 334

Virginia

DUAL CAPACITY DOCTRINE INVOKED INCORRECTLY
PRIDEMORE V. HRYNIEWICH, ET AL.

The City of Norfolk entered a contract with Willard Marine, Inc. to make certain improvements and repairs to the City's 29-foot SAFE Boats police patrol boat. The contract further provided that, in preparation for Willard's redelivery of the SAFE boat to the City, Willard must perform sea trial with a Norfolk Harbor Patrol representative to demonstrate that the contract work was complete. Richard J. Hryniewich, a Norfolk police officer, was at the helm of the boat during the required sea trials. Plaintiffs, Timothy B. Pridemore and David L. Glover, who are Willard employees, were on board during the sea trials as Willard representatives. At approximately three-quarters throttle, Hryniewich initiated a turn, and the boat suddenly and violently capsized. As a result, plaintiffs allegedly sustained injuries. Plaintiffs filed personal injury actions against defendants pursuant to maritime law, alleging negligence and gross negligence. Defendants in turn filed third-party complaints against Willard, alleging breach of contract, contractual indemnity, breach of the warranty of workmanlike service, equitable or common law indemnity and contribution, unseaworthiness, and general maritime negligence. Willard filed Special Pleas in Bar against defendants/third party plaintiffs Hryniewich and the City, alleging that the Longshore and Harbor Workers' Compensation Act provides the exclusive remedy for any injuries Pridemore and Glover incurred while under Willard's employ and therefore barred the causes of action and recovery sought in defendants' third party complaints. Although defendants acknowledged that the LHWCA ordinarily provides exclusive relief to injured employees and prohibits a negligent vessel from shifting liability to an employer, they asserted that they nevertheless were entitled to indemnity and/or contribution from Willard for negligence pursuant to the maritime "dual capacity doctrine." Defendants also respond that their breach of contract claim is unrelated to any LHWCA limitation. The court held that the City, as a shipowner, could not invoke the dual capacity doctrine against a non-vessel owner and because Willard was not a vessel for purposes of the doctrine and did not adopt a distinct non-employer persona, the dual capacity doctrine could not be invoked against it. The court found, however, that defendants had sufficiently alleged a breach of contract claim. The court therefore sustained in part and overruled in part Willard's Pleas in Bar. (Va. Cir Ct., May 19, 2017) 2017 Va. Cir. LEXIS 83

Washington

SETTLEMENT OF LHWCA CLAIM DOES NOT BAR FILING OF JONES ACT CLAIM
GIBSON V. AMERICAN CONSTRUCTION COMPANY, INC.

American Construction Company, Inc. employed Gibson as a mechanic in its marine

construction department. Gibson fell through a hatch while working on a crane barge moored at American's dock. He was treated for head, back, neck, arm, and leg injuries. Gibson continued to receive medical treatment over the next nine months and received medical payments from American. Gibson quit working and filed a claim under the LHWCA. American paid Gibson disability and medical benefits under the LHWCA from May 2014 to December 2015. In December 2015, the parties agreed to settle the LHWCA claim, signed a settlement agreement, and submitted an application to the district director for approval. The parties agreed that Gibson contended that he suffered a work related injury, the claim was subject to the LHWCA, that a speedy resolution was in his best interest, and that by paying the agreed amount, American discharged its liability for the LHWCA claim. The district director approved the agreed settlement and signed a final compensation order, closing Gibson's LHWCA claim. In March 2016, Gibson filed a Jones Act complaint against American for negligence, unseaworthiness, and vessel owner negligence for his injuries, which had already ben compensated under the LHWCA. In his complaint, he alleged that he was both a sea-based and land-based maritime worker. American filed a motion to dismiss based on failure to state a claim upon which relief can be granted and submitted declarations. American argued that the LHWCA compensation order precluded Gibson from bringing a Jones Act claim and asserted election of remedies, equitable estoppel, and collateral estoppel. Gibson responded that the compensation order did not resolve his maritime worker status because his status was never adjudicated in a formal hearing under the LHWCA. The superior court denied the motion to dismiss. American filed a motion for reconsideration, asserting the same arguments. The superior court granted American's motion for reconsideration and dismissed Gibson's Jones Act claims with prejudice. Gibson appealed, arguing that the trial court erred in dismissing his Jones Act claims because under *Gizoni*, the issue of his maritime worker status, non-seaman or seaman, was never adjudicated and the compensation order did not expressly resolve this issue under the LHWCA, any LHWCA recovery he has received will be credited to his employer if he is successful in his Jones Act claims, and election of remedies, equitable estoppel, and collateral estoppel did not apply to bar his Jones Act claims. The appellate court initially noted that the case presented an issue of first impression in Washington State - whether an injured maritime worker who accepts voluntary benefits and settles his claim under the LHWCA, when there is no adjudication of his status as a non-seaman under the LHWCA, is barred from pursuing claims against the vessel owner for personal injuries under the Jones Act. The appellate court held that, because Gibson's maritime worker status as a non-seaman was never adjudicated under the LHWCA and the compensation order did not expressly resolve this issue under the LHWCA, under *Gizoni*, Gibson's Jones Act claims were not barred, and election of remedies, equitable estoppel, and collateral estoppel did not apply. The appellate court reversed the superior court's summary judgment dismissal order of Gibson's Jones Act claims, and remanded for further proceedings consistent with this opinion. (Wash. App. Ct., September 26, 2017) 2017 Wash. App. LEXIS 2217

District Courts

Arkansas

BORROWING EMPLOYER ALLEGATION DENIED ON SUMMARY JUDGMENT (CONT.)
NIEVES V. COOPER MARINE & TIMBERLANDS CORPORATION, ET AL.

Two wrongful death cases were consolidated for discovery because the decedents, Juan Nieves and Nicolas Perez Hernandez, were killed in the same accident while unloading steel coils from a barge as workers for Kinder Morgan Bulk Terminals, Inc. In addition to three Kinder Morgan entities, the decedents' estates sued the manufacturer of the steel coils, the company that loaded the steel coils onto the barge, and the company whose tug took custody of the barges and delivered them to a Kinder Morgan Marine Services fleet terminal in Arkansas. The defendants other than the Kinder Morgan entities have asserted third-party claims against two staffing agencies that supplied Nieves and Hernandez to Kinder Morgan. The staffing agencies moved for summary judgment. Temps Plus, Inc. and Dawson Employment Service, Inc. supplied workers at the request of Kinder Morgan. Both Nieves and Hernandez remained on the payrolls of the respective staffing agencies while continuing to work for Kinder Morgan until the incident that caused their deaths. Kinder Morgan's agreement with both agencies provided for Kinder Morgan to pay at markup rate for longshore and harbor positions. Temps Plus was never informed by Kinder Morgan that Nieves was working on a barge or in any other capacity that required coverage under the LHWCA. Dawson, in contrast, had a record showing that Hernandez's classification was changed, and he was moved to a position that required coverage under the LHWCA. The contracts between Kinder Morgan and the staffing agencies provided that no worker placed by the staffing agencies with Kinder Morgan would be deemed an employee of Kinder Morgan, and the workers were paid and insured by the staffing agencies. The steel coils that were being unloaded weighed more than thirty tons each. The first barge was unloaded without incident. At some point while the second barge was being unloaded, one or more of the coils rolled to a side, which caused the barge to list and then to sink, and Nieves and Hernandez were killed. Dawson and Temps Plus filed substantially similar motions for summary judgment, arguing that they were immune from liability as employers of Nieves and Hernandez under the LHWCA. In the alternative, they argued that they had no common-law duty to train Nieves and Hernandez. Logistic Services and Steel Dynamics disagreed, arguing the Act permits only one immune employer for each employee and contended that genuine disputes of material fact remain as to whether Kinder Morgan was the employer entitled to immunity under the Act or whether the staffing agencies were. Kinder Morgan previously filed a motion for summary judgment asserting as a matter of law that it was a borrowing employer entitled to immunity under the Act. The court denied that motion because Kinder Morgan failed to show that there was not a genuine dispute of material fact as to whether it was a borrowing employer. Steel Dynamics and Logistic Services argued that since the Act permits only one immune employer for an employee, and since the court had previously determined that a genuine dispute of material fact existed as to whether Kinder Morgan was a borrowing employer, the motions for summary judgment filed by Temps Plus and Dawson must be denied. The court noted that neither Steel Dynamics nor Logistic Services had cited a case holding that there can be only one immune employer under the LHWCA. The common-law rule acknowledges that an employee may have two masters if the service to one does not involve abandonment of the other. Temps Plus employed Nieves and provided compensation as required by §904. Dawson did the same for Hernandez. Temps Plus and Dawson were therefore immune from tort liability and were entitled to summary judgment. The court also held that the staffing agencies also prevailed under their alternative argument that they owed no duty to train Nieves and Hernandez on how to unload steel coils from barges or ensure that they were qualified to do so. The motions for summary judgment filed by Temps Plus and Dawson were granted. Kinder Morgan renewed its previously denied motion for summary judgment, arguing that it was a borrowing employer of Nieves and therefore entitled to immunity from liability under §905(a) of the LHWCA. The court pointed out that the relevant facts had been adequately set forth in the court's prior opinions, adding only

that Kinder Morgan now contended that new evidence had surfaced that was sufficient to warrant a reversal of the court's previous ruling. This new evidence consisted of time sheets reflecting that Nieves worked on the "coil dock" for three years leading up to the accident and an accompanying affidavit testifying that the time sheets reflected reality. The court had previously stated that Kinder Morgan contractually agreed that it was not Nieves's employer. Although Kinder Morgan is correct to say that the contract, alone, was insufficient to avoid a finding that Nieves was its borrowed employee, the court noted it had never said to the contrary. Nonetheless, the fact that Kinder Morgan contractually agreed that Nieves was not its employee made it difficult for Kinder Morgan to argue that there is no genuine dispute of material fact and that Nieves was its borrowed employee as a matter of law. The new evidence established how long Nieves had worked on the coil dock-near the water-but not how long Nieves had been loading and unloading barges-which was the critical issue with respect to acquiescence. The court found the new evidence was insufficient to show that Nieves acquiesced in the work he was performing on the date of his death. Kinder Morgan's renewed motion for summary judgment was denied. (USDC EDAR, July 31, 2017) 2017 U.S. Dist. LEXIS 119224

In a separate decision in this same case, the court addressed separate motions filed by Cooper Marine, Logistic Services, Steel Dynamics, and Kinder Morgan, who all moved for summary judgment on Kassandra Nieves's claim for damages under Arkansas state law. These same defendants also moved for summary judgment on Nieves's claim for punitive damages under both general maritime law and Arkansas law. Cooper Marine and Logistic Services moved for summary judgment on Nieves's claim for non-pecuniary damages under general maritime law. Finally, Cooper Marine and Kinder Morgan Marine Services moved for summary judgment on any claim based on the unseaworthiness of their vessels. After considering the arguments of the parties and all of the evidence, the court addressed all of the pending motions, denying them in part and granting them in part. The court found that any claims based on the unseaworthiness of the vessels of Cooper Marine or Kinder Morgan Marine Services were to be dismissed with prejudice. Nieves's claims for recovery of mental anguish were also dismissed with prejudice. Nieves's claims on behalf of non-dependent beneficiaries were dismissed with prejudice. Nieves's claim for loss of life damages was dismissed with prejudice. Nieves's claims for punitive damages were dismissed with prejudice. Finally, Nieves's claims for loss of society damages under general maritime law were not dismissed. (USDC EDAR, August 11, 2017) 2017 U.S. Dist. LEXIS 127487

TURNOVER DUTY NOT IMPLICATED IN DEATH CLAIM
NIEVES V. COOPER MARINE & TIMBERLANDS CORPORATION, ET AL.

Kassandra Nieves commenced this action to recover damages for the death of Juan Nieves, who died when the barge on which he was working sank. Cooper Marine & Timberlands Corporation was the owner *pro hac vice* of the barge and was also the owner of a tug that had custody of the barge for part of its voyage. Kinder Morgan Marine Services, LLC, owned a tug that also had custody of the barge for some time. Cooper Marine and Kinder Morgan were the only vessel-owner defendants. Both vessel owners moved for summary judgment. Part of Nieves's argument was that Cooper Marine was negligent in selecting an open hopper barge to transport the steel coils. Nieves primarily argued, however, that Cooper Marine and Kinder Morgan breached their turnover duties by failing to reject the barge or warn Kinder Morgan of latent hazards. Nieves offers various reasons why these defendants had the duty to reject the barge or warn Kinder Morgan Bulk Terminals, but the reasons were premised on these defendants owing

a duty to determine whether the steel coils were properly and adequately secured. Nieves's argument that Cooper Marine was negligent to provide an open hopper barge fell under the first facet of the turnover duty. According to Nieves, Cooper Marine breached its duty to exercise ordinary care to have the barge and its equipment in such condition that Kinder Morgan could carry on its cargo operations with reasonable safety when it failed to reject the barge. Nieves emphasizes that an open hopper barge is, by design, not suitable to transport steel coils. Nieves then argued that Cooper Marine was in charge of selecting and providing the vessel and that no one else was in any position to make this determination. The court pointed out that Nieves' argument was caught on the horns of a dilemma. If, as Nieves argued, that the inadequate stowage conditions of the steel coils should have been apparent to everyone, then there was no duty to warn Kinder Morgan. An obvious hazard is not latent and so does not implicate a vessel owner's duty to warn. If, on the other hand, the stowage of the steel coils presented a latent hazard, the vessel owners still had no duty to warn Kinder Morgan. Nieves did not allege that either Cooper Marine or Kinder Morgan Marine Services had peculiar knowledge that the coils were loaded or secured improperly. Instead, Nieves argued that the arrangement of the coils and the dunnage used created a latent hazard. But any latent hazard in the proper stowage of cargo would be known by the stevedore or should be known by a reasonably competent stevedore before a vessel owner would be charged with such knowledge. Nieves's final argument was that custom imposed a duty on Cooper Marine and Kinder Morgan to inspect the cargo visually and reject the barge because the steel coils were improperly stowed and inadequately secured. This responsibility, though, does not include a duty to ensure that the stevedores have properly loaded the cargo. The court concluded that Cooper Marine and Kinder Morgan did not breach their turnover duty by failing to reject the barge or by failing to warn Kinder Morgan of the steel coils' stowage condition. Nieves failed to demonstrate that either defendant owed an additional duty beyond the limited turnover duty. Summary judgment was granted to Cooper Marine and Kinder Morgan on Nieves's claims of vessel negligence under section 905(b). Kinder Morgan owned the tug that was pushing a scrap barge upriver at the time of the accident. Nieves alleged no vessel negligence against Kinder Morgan on that basis. Cooper Marine, Logistic Services, and Steel Dynamics, however, have asserted cross-claims for contribution against Kinder Morgan, arguing that the Kinder Morgan’s tug and scrap barge passed unreasonably close to the docked barge, and the wake from the tug and scrap barge contributed to the accident. Whether the wake contributed to the accident is a question of causation for the jury to determine. For the foregoing reasons, Cooper Marine's motion for summary judgment was granted, and Kinder Morgan’s motion for summary judgment was granted in part and denied in part. (USDC EDAR, August 17, 2017) 2017 U.S. Dist. LEXIS 131304

BORROWING EMPLOYER ALLEGATION DENIED ON SUMMARY JUDGMENT (CONT.)
IN RE: COOPER MARINE & TIMBERLANDS CORPORATION

Two wrongful death cases were consolidated for discovery because the decedents, Juan Nieves and Nicolas Perez Hernandez, were killed in the same accident while unloading steel coils from a barge as workers for Kinder Morgan Bulk Terminals, Inc. In addition to three Kinder Morgan entities, the decedents' estates sued the manufacturer of the steel coils, the company that loaded the steel coils onto the barge, and the company whose tug took custody of the barges and delivered them to a Kinder Morgan Marine Services fleet terminal in Arkansas. The defendants other than the Kinder Morgan entities have asserted third-party claims against two staffing agencies that supplied Nieves and Hernandez to Kinder Morgan. The staffing agencies moved for summary judgment. Temps Plus, Inc. and Dawson Employment Service, Inc. supplied

workers at the request of Kinder Morgan. Both Nieves and Hernandez remained on the payrolls of the respective staffing agencies while continuing to work for Kinder Morgan until the incident that caused their deaths. Kinder Morgan's agreement with both agencies provided for Kinder Morgan to pay at markup rate for longshore and harbor positions. Temps Plus was never informed by Kinder Morgan that Nieves was working on a barge or in any other capacity that required coverage under the LHWCA. Dawson, in contrast, had a record showing that Hernandez's classification was changed, and he was moved to a position that required coverage under the LHWCA. The contracts between Kinder Morgan and the staffing agencies provided that no worker placed by the staffing agencies with Kinder Morgan would be deemed an employee of Kinder Morgan, and the workers were paid and insured by the staffing agencies. The steel coils that were being unloaded weighed more than thirty tons each. The first barge was unloaded without incident. At some point while the second barge was being unloaded, one or more of the coils rolled to a side, which caused the barge to list and then to sink, and Nieves and Hernandez were killed. Dawson and Temps Plus filed substantially similar motions for summary judgment, arguing that they were immune from liability as employers of Nieves and Hernandez under the LHWCA. In the alternative, they argued that they had no common-law duty to train Nieves and Hernandez. Logistic Services and Steel Dynamics disagreed, arguing the Act permits only one immune employer for each employee and contended that genuine disputes of material fact remain as to whether Kinder Morgan was the employer entitled to immunity under the Act or whether the staffing agencies were. Kinder Morgan previously filed a motion for summary judgment asserting as a matter of law that it was a borrowing employer entitled to immunity under the Act. The court denied that motion because Kinder Morgan failed to show that there was not a genuine dispute of material fact as to whether it was a borrowing employer. Steel Dynamics and Logistic Services argued that since the Act permits only one immune employer for an employee, and since the court had previously determined that a genuine dispute of material fact existed as to whether Kinder Morgan was a borrowing employer, the motions for summary judgment filed by Temps Plus and Dawson must be denied. As to the staffing agencies' alternative argument, Steel Dynamics and Logistic Services contend that the contracts between Kinder Morgan and the staffing agencies obligated the staffing agencies to train Nieves and Hernandez, and that those contractual obligations gave rise to a common-law duty that was breached. The court noted that neither Steel Dynamics nor Logistic Services had cited a case holding that there can be only one immune employer under the LHWCA. The common-law rule acknowledges that an employee may have two masters if the service to one does not involve abandonment of the other. The court also noted that, in ***Spinks***, the Fifth Circuit has held that under the Jones Act a staffing agency that provided an employee to an oil company remained an employer under the Jones Act even though the employee was the borrowed servant of the oil company. Holding dual employers jointly and severally liable guarantees that an injured employee will not go without compensation benefits while the employers battle to determine which is liable. Here, Temps Plus employed Nieves and provided compensation as required by section 904. Dawson did the same for Hernandez. Temps Plus and Dawson were therefore immune from tort liability and were entitled to summary judgment. The court also held that the staffing agencies also prevailed under their alternative argument that they owed no duty to train Nieves and Hernandez on how to unload steel coils from barges or ensure that they were qualified to do so. The motions for summary judgment filed by Temps Plus and Dawson were granted. (USDC EDAR, June 8, 2017) 2017 U.S. Dist. LEXIS 87996

Updater Note: This was a very interesting case, in that it addressed a question that has gone unanswered by the courts for some time . . . can a LHWCA employee have both a nominal and and borrowing employer? While this case is certainly not a definitive answer, it definitely

seems to point in the affirmative direction.

California

COURT FINDS COMPLAINT SORELY LACKING (CONT.)
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. Signal filed its first amended complaint, following the Court's order granting the motion to dismiss its original complaint. Signal alleged that, as a result of Washington's death, it became liable to pay death benefits under the LHWCA to his heirs, which Signal has paid and continues to pay, and that it also became obligated to pay funeral and medical expenses related to Washington's death and may be liable for other payments under the LHWCA. Signal argued that, but for defendants' negligence, it would not have been required to make such payments. The court found that Signal's negligence claim was barred because Signal lacked standing to bring a wrongful death claim. Additionally, Signal's negligence claim was barred by the applicable statute of limitations, which is one year. Thus, Signal's negligence claim failed on both standing and statute of limitations grounds. Signal's breach of contract claim failed on two independent grounds. First, Signal's allegations could not plausibly demonstrate the existence of a contract between Signal and the defendants regarding the medical care and treatment of Washington. Second, Signal's allegations could not plausibly show that such a contract included an implied warranty of workmanlike performance that defendants breached. Consequently, Signal's breach of contract claim failed. Signal's claim for implied contractual entity was premised on the existence of contracts between Signal and defendants. However, Signal failed to allege facts plausibly showing the existence of any contract between Signal and defendants, which was fatal to Signal's claim for implied equitable indemnity. Finally, the court found that Signal failed to state a claim for equitable indemnity. The court granted defendants' motions to dismiss without leave to amend. (USDC NDCA, September 21, 2017) 2017 U.S. Dist. LEXIS 154471

Hawaii

COURT REFUSES TO DISMISS THIRD PARTY IN LIMITATION ACTION
IN RE: HEALY TIBBITTS BUILDERS, INC.

These consolidated admiralty limitation-of-liability petitions brought under 46 U.S.C. §§30501-30512 arise from an incident at Pearl Harbor, where two Healy Tibbitts Builders, Inc.

construction employees were killed and several others allegedly were injured. Third-party defendant Owl International, Inc., d/b/a Global Government Services moved to dismiss the third-party complaint filed by Truston Technologies, Inc., citing ***Twombly*** and ***Iqbal***, and arguing that the third-party complaint failed to allege sufficient facts that establish Global's duty, because Global did not own the buoy involved in the fatalities and alleged injuries, and Global's contract did not require Global to "maintain" the buoy. Truston responded to the motion by pointing out that Rule 14(c)(2) regarding admiralty claims applied, and required third-party defendant Global to be responsive not only to Truston's indemnity/joint liability claims, but also to claims of the plaintiffs. The court found that Truston responded on the merits with ample evidence creating a genuine issue of material fact as to Global's alleged actions and duties. For example, the evidence specifically indicates that the Navy contracted with Global to inspect, repair and refurbish the buoys. At minimum, there was a question of fact as to whether Global's duties include "maintaining" the buoys. The court was not persuaded by Global's attempt to cabin its admitted duty to "inspect, repair and refurbish" as not including a duty to "maintain" buoys. Construing the evidence in the light most favorable to the non-moving parties, Global's motion to dismiss was denied. (USDC DHI, June 15, 2017) 2017 U.S. Dist. LEXIS 92278

Louisiana

PLAINTIFF HELD A BORROWED SERVANT WITH LHWCA HIS EXCLUSIVE REMEDY
MOSLEY V. WOOD GROUP, PSN INC. ET AL.

Dwayne Mosley alleged that he sustained a back injury when he slipped and fell in hydraulic fluid on the deck of a fixed platform on which he was working. Specifically, he contended that while a transformer was being moved, it was damaged and began to leak hydraulic fluid. The leak was initially contained in a bucket, but later, an employee of Wood Group PSN, Inc. allegedly opened the spigot on the transformer and allowed hydraulic fluid to run out onto the deck. The next morning, Mosley alleged that he slipped and fell while walking through the area. Mosley brought suit against Wood Group and Fieldwood Energy LLC, the owners and/or operators of the platform, as well as Linear Controls, Inc. and Linear Controls Operating, Inc.'s for their negligence in moving the transformer. Each Defendant has filed a separate motion for summary judgment seeking dismissal of the claims against it. Fieldwood argued that Mosley was its borrowed employee and therefore his exclusive remedy was the LHWCA and his tort claims against it could not prevail. Wood Group alleged that both Mosley's supervisor, and the Wood Group employee who allegedly opened the spigot were also borrowed employees of Fieldwood, and it therefore could not be vicariously liable for their negligence. Finally, Linear Controls argued that it could not be liable for Mosley's injuries because the alleged negligent act was a superseding event, and the hazard was open and obvious. After considering the nine ***Ruiz*** factors, the court agreed with Fieldwood and Wood Group’s arguments that Mosley, his supervisor and Wood Group’s nominal employee were the borrowed servant’s of Fieldwood, finding that each factor weighed heavily in favor of a finding that each of the payroll employees involved were the borrowed employees of Fieldwood. The court also agreed that Mosley’s excusive remedy was the LHWCA, applicable by virtue of OCSLA. The court then tuned to Linear Controls allegation that the claims against it should be dismissed because Mosley could not show that it caused the accident. The court foundthe argument compelling, noting that the evidence showed that Mosley allegedly slipped in hydraulic fluid that had leaked from a transformer that had been disconnected and moved by Linear Controls the day before. The transformer was not leaking

before the move but began leaking at some point either during or after the move. The court concluded that even if Linear Controls was negligent in causing the transformer to leak, Mosley would not have been injured without the intervening negligence of Wood Group's payroll employee. Linear Controls certainly could not have foreseen that someone would remove the bucket and allow hydraulic fluid to leak on to the deck. Accordingly, Mosely could not succeed on his claim of negligence against Linear Controls. Defendants' motions were granted and Mosley's claims against all defendants were dismissed with prejudice. (USDC EDLA, October 3, 2017) 2017 U.S. Dist. LEXIS 164232

COURT REJECTS ***BERTRAND*** EXCEPTION FOR SEAMAN STATUS (CONT.)
LEBRUN V. BAKER HUGHES INC., ET AL.

Jonathan Lebrun was employed by Baker Hughes Oilfield Operations, Inc. as a field service specialist, whose job duties were to collect mud samples from shale shakers and deliver the mud samples to on-site data engineers and geologists for analysis. Baker Hughes assigned Lebrun to work a 28 day rotation aboard a drillship, owned and operated by Transocean Offshore Deepwater Drilling, Inc. Baker Hughes notified Lebrun he would spend at least two work shifts on the drillship, where he would also sleep and eat. However, after completion of his first rotation, Lebrun was terminated by Baker Hughes , due to a company-wide reduction in force necessitated by the severe downturn in the oil & gas exploration industry. Lebrun brought this suit to recover for back injuries he allegedly incurred during his assignment to the drillship. Lebrun asserted claims under the Jones Act and general maritime law for unseaworthiness and maintenance and cure. Both parties filed cross motions for summary judgment of the sole issue of whether Lebrun was a seaman for purposes of the Jones Act. The court previously found that Lebrun was not a Jones Act seaman as he did not demonstrate a connection to a vessel in navigation (or to an identifiable group of such vessels) that was substantial in terms of both its duration and its nature. In his second amended complaint, Lebrun alleged a claim for unseaworthiness as a ***Sieracki*** seaman as well as for negligence and gross negligence under the general maritime law. Alternatively, Lebrun alleged an action under the LHWCA and the general maritime law. Lebrun then moved for summary judgment on his claims for ***Sieracki*** seaman status, which defendants opposed, arguing that any such injury alleged by Lebrun would be covered under the LHWCA. The court noted that, in order to qualify as a ***Sieracki*** seaman, a plaintiff must show that he is doing a traditional seaman's work and incurring a seaman's hazard. Lebrun's work as a sampler was not traditional seaman's work such that he incurred a seaman's hazard. Rather than performing traditional navigational chores and/or contributing to the function, mission, or maintenance of the vessel, Lebrun performed oilfield services that were developed on land and transferred to the sea when oil and gas was discovered beneath the sea floor. Based on the court's determination that Lebrun did not meet the standard required to be classified as a ***Sieracki*** seaman as well as the fact that the drillship was not located in foreign waters during the period Lebrun worked on board, the court will denied Lebrun's motion for summary judgment. (USDC WDLA, September 18, 2017) 2017 U.S. Dist. LEXIS 151042

COURT LETS UNSEAWORTHINESS QUESTION GO TO THE JURY
RINEHART V. NATIONAL OILWELL VARCO L.P., ET AL.

Donald Rinehart, Jr. allegedly sustained injuries while he was employed as a seaman by Starfleet Marine Transportation Inc. aboard their vessel. Rinehart alleged that he was ordered by the vessel's captain to assist with loading pallets aboard a docked ship. National Oilwell Varco, L.P.

(NOV) owned the mobile crane and hook used in loading the pallets and employed the crane operator. Rinehart claimed he was injured when a pallet fork slipped from the crane's hook onto the back of his head while loading pallets onto the vessel's deck. Rinehart was flown by helicopter for emergency medical treatment and has since undergone multiple complex surgical procedures with alleged residuals such as permanent scarring; severe headaches with substantial neurological deficits, including memory loss and a severely-diminished reading ability; and the inability to swallow normal food, relying on a feeding tube surgically-implanted into his stomach. Rinehart filed suit under the Jones Act and general maritime law. In response, Starfleet asserted a number of defenses, including that Rinehart's injuries were caused by his own negligence or by third parties, that his claims are prescribed, and that Starfleet is entitled to limited liability pursuant to 46 U.S.C. § 30501, et seq. NOV also asserted a number of defenses, including that Rinehart's injuries were caused by his own negligence or by third parties, that Rinehart failed to mitigate his damages, and that his claims are barred by prescription or by either the LHWCA or the Louisiana Workers' Compensation Act. Rinehart and Starfleet filed cross motions for summary judgment pertaining to the seaworthiness of vessel. Rinehart contended that the accident itself, or the alleged broken crane hooks, made the Starfleet vessel unseaworthy because the broken hooks allowed a 460-pound steel palette lifter to slip off and injure him. Starfleet asked the court to dismiss Rinehart's unseaworthiness claim because the shore-based crane was owned and operated by a third party, NOV. The court found that both parties' arguments failed to satisfy summary judgment standard. Regarding Rinehart's argument, the court noted that the accident itself did not establish a cause for unseaworthiness, as an isolated personal negligent act of the crew is not enough to render a ship unseaworthy. As for Starfleet's point, the fact that the defective crane equipment did not belong to Starfleet also did not alter the fact that the vessel had become unseaworthy. Because the crane was used during loading and unloading operations, it was closely related and has a substantial relationship to a traditional maritime activity. Accordingly, the instant issue boiled down to questions of fact best left for the jury. Both motions for partial summary judgment were denied. (USDC EDLA, September 5, 2017) 2017 U.S. Dist. LEXIS 142941

COURT ADDRESSES OCSLA BORROWED SERVANT CLAIMS
WASHINGTON V. FIELDWOOD ENERGY LLC

Donald Washington alleged that he was injured when he slipped and fell on unsecured stairs while carrying steaks. while working aboard an oil and gas production platform located on the Outer Continental Shelf. Washington was a cook employed by Taylors International, and assigned to the platform. Washington filed suit, alleging that Fieldwood Energy LLC and Fieldwood Energy Offshore LLC were liable to him under the OCSLA, as the owner/operator of the platform. In addition, Washington alleged that Wood Group PSN, Inc. was vicariously liable to him for the negligence of its employees, arguing that an employee of Wood Group working as a production operator on the platform, had prior knowledge that the stairs on which he fell were unsecured but nothing was done to repair them. Fieldwood moved for summary judgment, arguing that Washington was a borrowed employee of Fieldwood and thus his exclusive remedy was under the LHWCA. Wood Group also moved for summary judgment, arguing that its employee was also a borrowed employee of Fieldwood, and it therefore could not be vicariously liable for his actions. The court initially addressed Fieldwood's claim that Washington was a borrowed employee of Fieldwood at the time of his accident and therefore his exclusive remedy arises under the LHWCA, applicable by virtue of OCSLA. After examining the evidence and considering all of the ***Ruiz*** factors, the court concluded that all but factors one, two, and three

weighed in favor of a borrowed employee finding. Factors one and three, however, presented material issues of fact such that summary judgment would be inappropriate. A determination of control and the parties' understanding was best left to the fact finder at trial. Fieldwood's request for summary judgment on the borrowed employee issue was denied. Fieldwood next argued that Fieldwood Energy Offshore, LLC was a wholly owned subsidiary of Fieldwood with no employees, and therefore Washington had not assigned any negligence or fault to Fieldwood Offshore Energy, LLC. Washington did not oppose the dismissal of Fieldwood Offshore Energy, LLC. Accordingly, all claims against it were dismissed. Finally, the court addressed Wood Group's allegation that its employee was the borrowed employee of Fieldwood. After again considering all of the evidence, and weighing it against the Ruiz factors, the court found that Wood Group's employee was clearly a borrowed employee of Fieldwood, and Washington's vicarious liability claims against Wood Group were precluded. Fieldwood's motion for summary judgment was granted in part and Washington's claims against Fieldwood Energy Offshore LLC were dismissed with prejudice. Wood Group's motion for summary judgment was granted, and Washington's claims against Wood Group were dismissed with prejudice. (USDC EDLA, August 1, 2017) 2017 U.S. Dist. LEXIS 120536

YOU WIN SOME YOU LOSE SOME. PUNITIVES SHOULD HAVE BEEN DISMISSED
HANCOCK, ET AL. V. HIGMAN BARGE LINES, INC., ET AL.

Darrell Hancock took his son, Ethan Hancock, on a frogging trip in a sixteen foot mudboat. After they were finished frogging, their mudboat ran out of fuel in a canal near the Gulf Intercoastal Waterway (GIW). Darrell Hancock attempted to manually pilot the mudboat across the GIW in order to reach a docking area where they could await more fuel. A tugboat owned by Higman Barge Lines, Inc. attempted a rescue, but Darrell Hancock grabbed Ethan and jumped from the mudboat into waters of the GIW. The father and son were both sucked under one of the barges being pushed by the tug and they were separated from each other. Darrell Hancock pleaded for help from the captain and crew of the tug, which stopped its forward movement and pushed the barges away. Ethan Hancock's body was not found until the next morning underneath one of the barges. Hancock filed suit, alleging negligence and unseaworthiness on the part of Higman, seeking compensatory and punitive damages, and brought a wrongful death and survival action on behalf of Ethan Hancock. Higman moved for judgment on the pleadings, requesting to dismiss Hancock's claims for breach of the duty of seaworthiness, claims for lost wages and future wage earning capacity made pursuant to the wrongful death and survival death actions on behalf Ethan Hancock, and claims for punitive damages. In opposition to the motion, Hancock argued that the duty of seaworthiness has been extended to third parties and that they qualified for such an extension, but made no argument that Ethan Hancock was a ***Sieracki*** seaman. The court found that than Hancock was neither a Jones Act seaman nor a longshore worker covered by the LHWCA, meaning Hancock's unseaworthiness claim against Higman must fail. Hancock's complaint made a claim for loss of wages and wage earning capacity. Higman argued that this relief is not available under Louisiana law or general maritime law. In opposition, Hancock argued that Louisiana law allows for loss of support claims irrespective of whether the decedent had earnings. Higman argued that any claim for loss of wages and wage earning capacity made pursuant to the survival action should be dismissed, as a survival action only allows for recovery for the damages suffered by the victim from the time of injury to the moment of death. Ethan Hancock's body was located early the next morning. The court found that Hancock had not alleged that enough time elapsed between the incident and Ethan Hancock's death to provide for an award for loss of earnings. More importantly, the complaint alleged that

Ethan Hancock was five years old at the time of the accident incident and makes no allegation that he had been earning an income prior to this death. For these reasons, Hancock's claim for loss of wages and wage earning capacity pursuant to the survival action were dismissed. The court also found that Hancock had not stated a claim for loss of support under the wrongful death action, which is required in order to seek loss of wages and wage earning capacity. Thus, the claim for loss of wages and wage earning capacity was dismissed. Higman argued that Hancock's claims for punitive damages should be dismissed, as Hancock's allegations did not fall within the narrow subset of actions for which Louisiana law recognizes the availability of punitive damages. Higman also argues that Hancock failed to allege facts that satisfied the standard for punitive damages under maritime law. The court agreed that any claim for punitive damages made pursuant to Louisiana law must be dismissed. However, the court also found that Hancock had alleged facts sufficient to make a claim for punitive damages under general maritime law. At this stage in litigation, the court was not prepared to declare that these allegations, taken as true, failed to state a claim for which punitive damages may be appropriate under maritime law. Higman's motion was granted in part and denied in part. (USDC EDLA, August 18, 2017) 2017 U.S. Dist. LEXIS 132312

ANOTHER REMOVAL ACTION BITES THE DUST
TEMPLET V. AVONDALE INDUSTRIES, INC., ET AL.

Robert Templet, Sr. alleged that he suffered exposure to asbestos and asbestos-containing products that were designed, manufactured, sold, and/or supplied by a number of defendant companies while Templet was employed by Avondale Industries, Inc. Templet files suit in state court, but a couple of the defendants removed the case to federal court, alleging that removal was proper because this was an action for or relating to conduct under color of federal office commenced in a state court against persons acting under one or more federal officers within the meaning of 28 U.S.C. §1442(a)(1). Templet moved to remand the case back to state court. Avondale argued that it is a corporation and therefore a "person" within the meaning of 28 U.S.C. §1442(a)(1), and that its former executive officers are "persons" within the meaning of the statute as well. Avondale further asserted that Templet worked on the Coast Guard Cutters and Navy Destroyer Escorts pursuant to contracts between Avondale and the United States government. Moreover, Avondale avers that the use of asbestos-containing materials from which Templet causes of action arise was required by the contractual provisions and design specifications mandated by the federal government, and that the federal government oversaw the construction process to ensure compliance. Therefore, Avondale contended that it was "acting under" an "officer . . . of the United States or agency thereof" within the meaning of §1442(a)(1), as it was performing a task that the federal government would otherwise have had to perform. In his motion, Templet argued that remand of this case involving only state law negligence claims was proper, as Avondale was not "acting under" the direction of a federal officer and cannot show a "causal nexus" between a federal officer's "direct and detailed control" over Avondale's operations, safety activities, or handling of asbestos and Avondale's ability to comply with its state law obligations to warn and protect Plaintiff; and Avondale's LHWCA defense does not provide an independent basis for removal, and, regardless, the LHWCA supplements state law remedies rather than supplanting them. The Court found that Avondale has sufficiently shown that it is a "person" within the meaning of the federal officer removal statute. However, the court also found that Avondale had not shown the second prong of the federal officer removal statute was met, in that a causal nexus existed between its actions under color of federal office and the plaintiff's claims. Based on the foregoing, the court found that

removal pursuant to 28 U.S.C. §1442(a)(1) was improper, as Avondale had not shown that the necessary causal nexus between Avondale's actions under color of federal office and Templet's negligence claims existed. Avondale has not pointed to any evidence that the government controlled Avondale's safety procedures or safety department such that its alleged failure to warn or protect Plaintiff from the dangers of asbestos was related to" its actions under color of federal office. Templet's motion to remand was granted. (USDC EDLA, August 4, 2017) 2017 U.S. Dist. LEXIS 123216

FEDERAL OFFICER REMOVAL ACTION FAILS
MAYEAUX V. TAYLOR-SEIDENBACH, INC., ET AL.

George K. Mayeaux alleged that he suffered exposure to asbestos and asbestos-containing products that were manufactured, sold, installed, distributed, and/or supplied by a number of defendant companies while Mayeaux was employed by Avondale Industries, Inc. Mayeaux file suit in state court. Huntington Ingalls and OneBeacon America Insurance Company, the insurer of Henry Carter, a former President of Avondale, removed the case to federal court, arguing that removal was proper because the action involved claims for or relating to acts performed under color of federal office within the meaning of 28 U.S.C. § 1442(a)(1). Mayeaux moved to remand and Avondale filed a timely opposition. Mayeaux argued that remand of the case involving only state law negligence claims was proper, as Avondale cannot show that it is entitled to removal under the Federal Officer Removal Statute or the LHWCA. In its opposition memorandum, Avondale argued that the 2011 amendments to the federal removal statute signal its broad reach. Avondale also purported to assert colorable federal defenses pursuant to the government contract immunity and federal preemption under the LHWCA. In reply, Mayeaux argued that Avondale's arguments in support of the casual nexus requirement fail, because Avondale failed to offer factual proof that its asbestos safety program, or lack of it, was associated with or connected to its U.S. Navy contracts for construction of Navy vessels. The court found that removal pursuant to 28 U.S.C. §1442(a)(1) was improper, as Avondale had not shown that the necessary causal nexus exists between Avondale's actions under color of federal office and Mayeaux's negligence claims. Avondale failed to point to any evidence that the federal government controlled Avondale's safety procedures or safety department such that its alleged failure to warn or protect Mayeaux from the dangers of asbestos is related to its actions under color of federal office. Accordingly, Mayeaux's motion to remand was granted. (USDC EDLA, August 15, 2017) 2017 U.S. Dist. LEXIS 130208

LHWCA AND/ OR OCSLA DO NOT APPLY HERE (CONT.)
MAYS, ET AL. V. CHEVRON PIPE LINE CO., ET AL.

Peggy Mays (individually and as personal representative of the Estate of James Mays), Daphne Lanclos, Brent Mays and Jared Mays (collectively, "plaintiffs") brought this tort suit against Chevron Pipe Line Company and Chevron Midstream Pipelines, LLC for damages arising out of a workplace accident that resulted in the death of James Mays. Prior to Mays' death, Chevron Pipe Line and Furmanite America, Inc. (Mays' employer) entered into a Master Services Contract, whereby Furmanite agreed to provide control valve maintenance services for Chevron Pipe Line at its onshore and offshore facilities. Mays was sent by Furmanite to the Chevron platform to perform valve maintenance services. While Mays and others were removing the operator cap/bonnet cover plate from the valve, the pressure barrier was breached, causing the operator cap/bonnet cover plate and valve stem to be expelled. Mays was struck in the head by

these objects and died as a result. After suit was filed, Chevron Pipe Line moved for summary judgment arguing because the accident occurred in state waters, the LWCA applied and under that act, Chevron Pipe Line was deemed Mays' "statutory employer" and was thus immune from suit in tort. In its original ruling, the court found plaintiffs had not established a substantial nexus between Mays' death and Chevron Pipe Lines' extractive operations on the outer Continental Shelf, and therefore, plaintiffs had failed to demonstrate a material fact existed with regard to whether the LHWCA applied through the OCSLA extension. Thereafter, the court granted plaintiffs' motion for reconsideration upon additional argument supplied, and reversed its prior ruling based upon the argument presented, finding summary judgment in defendant's favor to be unwarranted. The Court found the evidence was sufficient to raise an issue of material fact for trial - namely, whether there existed a "substantial nexus" between Mays' death and extractive operations on the shelf. Chevron now moves the court to certify its Ruling and Order on reconsideration for interlocutory appeal pursuant to 28 U.S.C. § 1292 (b), arguing that the court's ruling involved a controlling question of law. The court pointed out that, like the mixed question of law and fact inherent in determining whether a sufficient nexus exists to find one a Jones Act seaman, the substantial nexus standard the Supreme Court has instituted for the OCS is, also, a mixed question of law and fact. Chevron did not explain how the court's determination that a genuine issue of material fact existed as to whether there was a substantial nexus between Mays' injury/death and Chevron's extractive operations involved a controlling issue of law, rather merely declares it to be. The ruling and order issued by the court for which Chevron sought an interlocutory appeal did not declare a legal determination as a matter of law, rather, the court found Chevron had failed to meet its burden of pointing to the absence of evidence in the record showing a significant causal link between Mays' death and Chevron's operations on the OCS. As the court's determination did not declare a controlling issue of law as required for certification under § 1292(b), Chevron's motion to certify the ruling and order for interlocutory appeal was denied. (USDC WDLA, May 16, 2017) 2017 U.S. Dist. LEXIS 75269

COURT HOLDS THAT GENERAL MARITIME LAW DOES NOT APPLY IN OCSLA CASE *GENNUSO V. APACHE CORPORATION, ET AL.*

Donald Gennuso was employed by Greene's Energy Services, LLC. Greene's entered into a contract with Apache Corporation, whereby Greene's would provide workers and equipment to flush a pipeline on an offshore platform so that an Apache oil well on the platform could be plugged and abandoned. Apache also contracted with Stella Maris, LLC to provide an individual, Brian Ray, to accompany the Greene's crew to the platform and assist with the flushing operation. Williams Field Services Group, LLC was the owner of the platform, and Eni US Operating Co. Inc. was its operator. Greene's sent a crew of five men, including Gennuso, to the platform to perform the flushing operation. Gennuso claimed that he was injured during the rigging-up procedure while lifting a three-inch joint of pipe so that another Greene's employee could connect the joint to another piece of equipment. Williams, Eni, Apache, and the other defendants all moved for summary judgment, arguing that Louisiana state law applied in this case through the operation of the Outer Continental Shelf Lands Act (OCSLA). Gennuso opposed the motion, arguing that maritime law applied. It was undisputed that the tort alleged in the case did not occur on navigable water. It was also undisputed that this "platform-located" incident was not caused by a vessel on navigable water such that the Admiralty Extension Act might apply. While Gennuso did not correctly invoke OCSLA for jurisdictional purposes, because jurisdiction is invested in the district courts by the OCSLA jurisdictional statute a plaintiff does not need to expressly invoke OCSLA in order for it to apply. The jurisdictional

statute provides federal district courts with jurisdiction over cases and controversies arising out of, or in connection with any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf. Based on the allegations of the complaint, as amended, and the undisputed facts that this Court may consider in determining its jurisdiction, there is no viable argument to counter the application of OCSLA's jurisdictional statute to vest this Court with subject-matter jurisdiction. Once it is determined that a federal court has jurisdiction under OCSLA, the court must then examine the OCSLA choice of law provision and decide whether state, federal, or maritime law applies to that particular case. Therefore, the court concluded it did not have jurisdiction under general maritime law. Considering the evidence, the law, and the arguments of the parties, the court found that Louisiana law applied to the issues presented in the case, and the motion for summary judgment filed by defendants was granted. (USDC WDLA, May 11, 2017) 2017 U.S. Dist. LEXIS 72252

Maryland

Troy Price, Jr., a longshoreman employed by Beacon Stevedoring Corporation, an affiliate of Rukert Terminals Corporation, was allegedly injured aboard a vessel owned and operated by Mos Shipping. Ltd. and Baltic Mercur Joint Stock Co. Price’s leg was allegedly injured when it was struck by a falling forklift that a fellow longshoreman had lost control of. Following his alleged injury, Price sought relief from Mos, Baltic and Atlantic Ro-Ro Carriers, Inc. (ARRC) under §905(b) of the LHWCA, alleging that defendants' negligence resulted in his personal injuries aboard a vessel they owned or operated. Defendants filed a third-party complaint against Rukert, alleging that, although Beacon was the formal employer of the longshoremen, Rukert was responsible for both maintaining the forklifts used by longshoremen aboard the vessel and training harbor workers in the correct use of machinery. The parties filed three separate motions for summary judgment. The court issued an order granting in part and denying in part the trio of motions for summary judgment, including the denial of the defendants' motion to apply Maryland's statutory cap on non-economic damages to Price's claims. Mos Shipping and Baltic Mercur then moved to certify that portion of the court’s order, refusing to apply Maryland's cap on non-economic damages to a negligence action brought under §905(b), for interlocutory appeal under 28 U.S.C. §1292(b). The court found that immediate appellate consideration of the issue would will not materially advance termination of the litigation, and denied the motion to certify the court's previous order pursuant to 28 U.S.C. §1292(b). Third-party defendant The Rukert Terminals Corporation now files a motion for summary judgment, alleging that Mos is barred by the LHWCA from pursuing a claim for indemnity or contribution against Rukert. Mos argued that Rukert waived its statutory immunity defense by failing to raise it as an affirmative defense in its answer to the complaint. The court acknowledged that Rukert allowed more than five years to lapse before raising the statutory immunity issue in its motion for summary judgment. Mos, however, had ample opportunity to respond to Rukert's arguments. The parties were allowed to conduct additional limited discovery related to the financial relationship between Rukert and Beacon and fully briefed the motion. Mos therefore had shown no unfair surprise or prejudice from consideration of the statutory immunity issue. Mos also argued that Rukert was collaterally estopped from asserting single entity status. However, the court found that collateral estoppel did not apply, and therefore it could consider whether Rukert and Beacon constituted a single entity under the LHWCA. The court concluded that the undisputed facts regarding Rukert and Beacon described two integrated companies under the centralized control

of Rukert. Accordingly, the two corporations operated as a single entity and, under the LHWCA, Mos was barred from pursuing any claims of indemnity or contribution against Rukert. The court granted Rukert's motion for summary judgment. (USDC DMD, July 7, 2017) 2017 U.S. Dist. LEXIS 104840

Mississippi

COURT FINDS PORT PROTECTED BY SOVEREIGN IMMUNITY (CONT.)
WELCH V. PROP TRANSPORT & TRADING, LLC, ET AL.

Dewey Welch filed a complaint alleging that he was injured while in the bucket of a crane working in his capacity as a barge-loading supervisor for his employer, Prop Transport & Trading, LLC. Welch alleged general negligence, maintenance and cure and punitive damages; alternatively, he brought claims under the Jones Act as a seaman, and alternatively, claims under the LHWCA. Pertinent to the instant motion, Welch also brought claims against the Greenville Port Commission, alleging that the operator of the crane was an employee of the Greenville Port Commission. Welch alleged that the Port was liable under state law for general negligence and under general maritime law for unseaworthiness. The Port moved for partial summary judgment, arguing that Welch could not state an unseaworthiness claim against it because it is not the owner or operator of the vessel upon which Welch was allegedly injured. The Port further argued that it was entitled to the protections afforded to governmental entities by the Mississippi Tort Claims Act (MTCA) as to Welch's state law claims for general negligence. The court initially found that the Port was entitled to summary judgment on Welch's claim of unseaworthiness, as there was no ground for imposing liability under general maritime law for unseaworthiness as against the Port because the Port did not own or operate the vessel in question. The MTCA governed Welch's remaining claims against the Port. The court granted the Port's Motion for partial summary judgment and dismissed with prejudice Welch's claim for unseaworthiness against the Port and Welch's claim against the Port for damages in excess of $500,000; and Welch's claim for punitive damages against the Port. Welch then moved to alter the court's order granting Greenville Port Commission's motion for partial summary judgment dated March 10, 2017, alleging that the Port was liable under state law for general negligence and under general maritime law for unseaworthiness. The court noted that, as related to the MTCA, its prior order addressed only whether that act's limitation on compensatory damages and prohibition of punitive damages in tort suits against political subdivisions applied to a state cause of action for negligence asserted in federal court. The order did not address the issue of whether the state statutory damages limitations applied to a general maritime claim for negligence. The court finds it proper to address such issue in the instant order. After examining the factors to be examined in order to determine whether state law is preempted by maritime law, the court found that the damage limitations provisions of the MTCA did not apply to Welch's claims for general maritime negligence against the Port in as much as the state law would limit his rights to the recovery otherwise available under general maritime law. As such, the damage limitations were preempted by general maritime law, since the Fifth Circuit has held that while state law may supplement federal maritime law, state law may not conflict with federal maritime law, as it would be redefining the requirements or limits of a remedy available at admiralty. The court found the Port’s arguments to the contrary to be without merit. Accordingly, the court held that the damages limitations of the MTCA did not apply to Welch's claim for negligence under general maritime law. (USDC NDMS, June 1, 2017) 2017 U.S. Dist. LEXIS 83983

In a separate ruling in the same case, the court addressed Prop Transport's amended motion to set aside default. After examining the time line, of the various motions and amended pleadings, addressing the balancing factors to determine whether to set aside the entry of default, the court found good cause to do so was present. Prop Transport contended it inadvertently, rather than willfully or intentionally, failed to timely file its answer after its motion to dismiss was denied. This assertion was certainly plausible in light of Welch's own failure to bring the omission to the court's attention for over three months while continuing to actively litigate with Prop Transport. Given both Welch's and Prop Transport's active prosecution and defense of the case, albeit while apparently both overlooking the fact that no formal answer had been filed, the court found good cause for setting aside the entry of default. Prop Transport's motion was granted. (USDC NDMS, June 1, 2017) 2017 U.S. Dist. LEXIS 83984

New Jersey

COURT FINDS RECORD WOULD NOT SUPPORT SUMMARY JUDGMENT (CONT.)
FETTER V. MAERSK LINE, LIMITED, ET AL.

Jason Fetter was allegedly injured while performing a maintenance project, in the engine room of a Maersk Line, Limited vessel, while it as in port. Because there were various maintenance projects going on that day, Maersk hired 3MC Mobile & Mechanical Repair LLC to directly supervise the day engineers' work. Following his alleged injury, Fetter filed suit in Texas state court and the suit was subsequently removed to the Southern District of Texas and transferred to New Jersey District Court. The complaint alleged that Fetter was injured as a result of negligence on the part of Maersk and 3MC, and both Maersk and 3MC filed cross-claims against each other for indemnity and contribution. Prior to the completion of expert discovery, Maersk moved for summary judgment on the issue of whether it was immune from liability under the LHWCA. Maersk's sought summary judgment that Fetter was its employee at the time of his injury, but was not a Jones Act seaman. Thus, Maersk maintained that the LHWCA provided Fetter's exclusive remedy and that his negligence action must be dismissed. The court found that the record before it was by no means definitive on the issue of Maersk's employer-employee relationship with Fetter, as it would need to be for a summary judgment ruling in Maersk's favor. The court found that Maersk was not entitled to judgment as a matter of law on this record, and its motion was denied. Maersk then moved for reconsideration of the court's decision ,denying its motion for summary judgment that it was immunized from liability on Fetter's negligence claims pursuant to the LHWCA. Maersk argued that the court's decision rested on a clear error of law, specifically that the court overlooked Third Circuit precedent applicable to employment status and misapplied the summary judgment standard. The court disagreed. The facts Maersk relied on, including how Fetter came to get the job, and which entity was paying him, must be evaluated alongside other evidence showing that when Fetter arrived at the ship, he reported to 3MC employee Higgs, who directed him to remove the stuck injector, and whose job it was to supervise him in the completion of the task that ultimately resulted in his injury. The court found that there was no clear error in its application of the summary judgment standard to Third Circuit precedent governing the issue of Fetter's employment status. Maersk was not entitled to judgment as a matter of law on the record, and its motion for reconsideration was denied. (USDC DNJ. September 27, 2017, UNPUBLISHED) 2017 U.S. Dist. LEXIS 158909

WATERFRONT COMMISSION STILL AN ENTITY TO BE RECKONED WITH

DAGGETT, ET AL. V. WATERFRONT COMMISSION OF NEW YORK HARBOR

On the morning of January 29, 2016, longshoremen at marine terminals on the New Jersey side of the Port of New York and New Jersey stopped working. These individuals were represented by a union called the International Longshoremen's Association, AFL-CIO. As determined by an emergency arbitration in the afternoon of January 29 itself, the work stoppage violated a no-strike provision of the NYSA-ILA collective bargaining agreement. Almost immediately after the work stoppage, the Waterfront Commission of New York Harbor started serving subpoenas on ILA members for testimony relating to its investigation into the work stoppage. After months of issuing these subpoenas to rank-and-file ILA members, the Commission issued subpoenas to ILA officers. These ILA officers subsequently filed this action to quash the subpoenas because, the subpoenas purportedly lack statutory authority and violated the New Jersey Constitution. The Waterfront Commission moved to dismiss the complaint under FRCP12(b)(6). The court initially found the Commission's subpoenas were authorized under the Compact and did not improperly infringe on the Union Employees' right to engage in protected concerted activity under the NLRA. The court also found that the allegations were insufficient to support a claim for infringement on the employees' right to strike. Finally, the court found that plaintiffs failed to identify any subpoena served by the Commission on third parties or allege why such information was unavailable. Therefore, the Court found plaintiffs had failed to plead enough facts to suggest more than mere speculation, citing *Twombly*. Therefore, the court dismissed plaintiffs' complaint without prejudice. (USDC DNJ, August 24, 2017, UNPUBLISHED) 2017 U.S. Dist. LEXIS 135596

New York

LHWCA SETTLEMENT APPROVAL INSUFFICIENT FOR PERSONAL JURISDICTION
ROLLO V. ESCOBEDO, ET AL.

Robert Rollo brought this legal malpractice action against George P. Escobedo and Carabin & Shaw, P.C., in connection with a foot injury he allegedly suffered while doing construction work for a Texas-based defense contractor at Al Assad, a United States defense base in Iraq. Because of that injury, Rollo was allegedly unable to work and sought compensation under the Defense Base Act, which incorporates the provisions of the LHWCA. Seeking representation for his claim, Rollo contacted the Texas law firm, Carabin Shaw, who referred him to Escobedo. Rollo retained Escobedo to represent him for his claims after a dispute arose between Rollo and the contractor relating to the nature and extent of his benefits. The parties elected to submit the dispute to mediation, and reached a settlement, which was approved by the District Director. Nearly three years after the approval of that settlement, Rollo filed this action, claiming that Escobedo failed to adequately represent him during the mediation and settlement process, because he was unprepared for the mediation and never explained the terms of the settlement agreement to him. Escobedo and Carabin Shaw moved separately to dismiss the complaint for lack of personal jurisdiction. The court noted that Rocco, a Scottish citizen, retained a Texas attorney to represent him in Scotland for injuries that occurred in Iraq. The only argument for establishing jurisdiction rested on the requirement for formal approval by the District Director, who happened to be located in New York. But, throughout his engagement, Escobedo performed all legal work in Texas and Scotland. Nevertheless, Rollo argued that jurisdiction was appropriate because any appeal from the District Director's determination would have been

heard by the Second Circuit. However, the court pointed out that no appeal was taken. Additionally, approval of the settlement was a purely administrative task too tenuous to rise to the "the nature and quality" sufficient to subject someone to jurisdiction. Accordingly, the court concluded that it lacks jurisdiction over Escobedo. Finally, because it lacked jurisdiction over Escobedo, jurisdiction cannot be imputed to Carabin Shaw and the agency theory of personal jurisdiction necessarily failed. Defendants' motions to dismiss were granted and the complaint is dismissed without prejudice to refiling in a court where personal jurisdiction exists. (USDC SDNY, June 15, 2017) 2017 U.S. Dist. LEXIS 92415

Oregon

LONGSHOREMAN'S SECTION 905(B) CLAIM TIME BARRED BY OREGON STATUTE
SMITH V. EVRAZ INC., NA

Cecil F. Smith had been a longshoreman and marine clerk. Smith was working for Jones Stevedoring as a marine clerk when he stepped into a pothole five inches deep at a slab yard and allegedly tore his left Achilles tendon. EVRAZ Inc., NA subleased the slab yard where Smith was injured. Smith brought his lawsuit in state court, alleging negligence against EVRAZ, who timely removed the lawsuit to federal court. Smith was seeking damages for a personal injury that he allegedly sustained, when he stepped into a pothole five inches deep while working at a slab yard controlled and subleased by EVRAZ. Defendant moved for summary judgment, asserting that Smith's claim was barred by Oregon's two-year statute of limitations for negligence actions. Under Oregon law, a personal injury claim not arising on contract shall be commenced within two years of the claim's accrual. The question before the court was whether Smith's negligence claim was barred by Oregon's applicable two-year statute of limitations as a matter of law. To answer that, the court had to determine whether the Discovery Rule tolled the running of the two-year period to some date after January 7, 2013, the date of Smith's injury, within two years of the date of filing. If EVRAZ's role in causing Smith's injury was inherently discoverable on the day of the accident, the Discovery Rule did not toll the statute of limitations, and EVRAZ's motion for summary judgment had to be granted. Smith filed his complaint against EVRAZ on December 20, 2016, almost four years after the day of his accident. Smith's personal injury was immediately apparent to him on January 7, 2013. Smith argued that the Discovery Rule tolled the Oregon statute of limitations to a date within two years of December 20, 2016, because Smith did not immediately know that EVRAZ was contractually responsible for maintaining the pavement at the slab yard and Smith's investigation into which entity had the contractual duty to fix potholes at the slab yard was delayed by the complexity of the lease agreement. Based on the undisputed facts, EVRAZ argued that its role in causing Smith's injury was inherently discoverable on January 7, 2013, and that as a result, Smith's negligence claim accrued on that day, as a matter of law. The court agreed with EVRAZ that the admitted and undisputed facts were sufficient to raise a substantial possibility that each of the three elements (harm, causation, and tortious conduct) existed as to EVRAZ. The court found that every reasonable juror would agree that Smith either knew or reasonably should have known of the substantial possibility that EVRAZ was the responsible party on January 7, 2013. EVRAZ's motion for summary judgment was granted. (USDC DOR, MAY 22,2017) 2017 U.S. Dist. LEXIS 77075

Texas

ANOTHER REMOVAL ACTION BITES THE DUST
DELAGARZA V. TRAFIGURA TRADING LLC, ET AL.

Cesar Praxedis DeLaGarza worked as a marine terminal operator for Buckeye Partners, L.P. and claimed that he was injured while trying to remove a defective "belly cap" attached to a tank railcar containing the chemical petroleum naphtha. DeLaGarza sued multiple parties in state court, including Big West Oil, LLC, who removed the case to federal court on the basis of diversity jurisdiction. DeLaGarza moved to remand his case back to state court, arguing the case was improperly removed based on diversity. The court noted that, while it was undisputed that the amount in controversy met the requirement of § 1332(a), it was further undisputed that both DeLaGarza and defendant Buckeye Texas were Texas citizens for jurisdictional purposes. This lack of diversity ostensibly eliminated complete diversity, preventing removal to federal court. In removing the case, Big West asserted that because Buckeye Texas was improperly joined, its citizenship need not be considered and the case was therefore removable on the basis and that the remaining defendants were diverse. Big West's fraudulent joinder argument rested on giving dispositive force to Buckeye's responsive pleading that it had no employees. Without employees, the argument concluded that Buckeye could not be held liable for claims sounding in *respondeat superior*, could not have attained "actual possession and/or control" of the rail car containing the allegedly defective belly cap; and could not have had notice of the belly cap's alleged condition. DeLaGarza thus had no hope of establishing a negligence claim against Buckeye, making it an improper party. The court disagreed, noting that it was well-established that a bare allegation in a defendant's pleading does not constitute proof of any fact, much less a fact that the plaintiff disputes. The court rejected Big West's argument that Buckeye's pleading that it had no employees should be construed to eliminate DeLaGarza's claim against Buckeye. Even assuming for purposes of argument that Buckeye in fact had no employees, DeLaGarza alleged that he suffered his injuries as a result of negligence by, among others, "employees, agents, officers, representatives or servants of" Buckeye, a broader category than simply "employees." Because Big West failed to address liability based on the actions of these workers, its challenge was incomplete and failed to satisfy its removal burden to show no possibility of a claim against Buckeye. As another method for demonstrating improper joinder, Big West contended that DeLaGarza's claim against Buckeye was barred by the exclusive remedy provisions of §905(a) of the LHWCA and/or Texas Labor Code §408.001. DeLaGarza's pleading alleged that he filed a claim under the LHWCA, against non-party Buckeye Partners, L.P., which he identified as his employer. The caption of a deposition transcript attached to his motion for remand, however, named a different entity, Buckeye Ltd., as appearing in DeLaGarza's benefits matter.
Th court noted that nothing in the record explained the variance between the reference to Buckeye Partners in DeLaGarza's pleading, the appearance of Buckeye, Ltd. in the deposition transcript. Nevertheless, the court concluded that the record did not support a conclusion that DeLaGarza's claim was barred by either federal or state exclusive remedy provisions contained in workers' compensation statutes. For the foregoing reasons, the court concluded that Big West had not sustained its burden to demonstrate that DeLaGarza has no viable claim against Buckeye Texas and that Buckeye Texas was improperly joined. Consequently, removal based upon diversity jurisdiction was improper. DeLaGarza's motion to remand granted. (USDC SDTX, September 26, 2017)2017 U.S. Dist. LEXIS 157308

COURT INTERPRETS DBA PAY ISSUE UNDER AFGHANISTAN LAW
ALLEN, ET AL. V. FLUOR CORPORATION

This case was a putative class action by United States citizen plaintiffs seeking unpaid overtime pay under provisions of Article 67 of the Afghanistan Labor Code. Fluor Corporation contracted with the U.S. Army to provide non-combat logistical support. Plaintiffs alleged that they were past or present non-managerial, hourly Fluor employees who worked as contractors, providing civilian support in the form of construction, housing, transportation, fuel, meal, or laundry services for U.S. soldiers serving in Afghanistan. They asserted that Fluor paid them an annual "salary" of $45,000, classified them as exempt from overtime wages, paid them at a straight time rate for overtime hours worked rather than at the premium overtime rates required by Afghanistan law, and required that they work twelve hours per day, seven days per week, without overtime premium pay. Plaintiffs argued that, despite their classification as "exempt," their weekly compensation was paid at an hourly rate and that they performed duties typically performed by hourly, non-exempt employees. They alleged that the exempt classification and resulting failure to pay them overtime pay for overtime hours worked was unlawful because they did not satisfy the requirements of any applicable exemption to overtime laws. Fluor moved to dismiss, arguing that under the Afghanistan Labor Code, Fluor cannot be held liable to the United States citizen plaintiffs for unpaid overtime pay. Fluor also contended that the use and cost of contractors in a theater of war is a sensitive military matter that should be insulated from judicial scrutiny as a political question, and U.S. courts are ill-suited to decide questions of Afghan law, which derives from a different legal culture and regulates a much different economy. Plaintiffs opposed Fluor’s motion, responding that their claim was suited to judicial resolution because it was an employment dispute between a private company and its employees, which does not significantly touch on U.S. military operations or foreign affairs. The court concluded that resolution of plaintiffs' cause of action did not require an impermissible judicial review of military or foreign affairs decisions and the case did not present a non-justiciable political question, and the court declined to dismiss plaintiffs' lawsuit for lack of jurisdiction. The court concluded that Fluor was not entitled to immunity from the application of foreign law based on its status as a private military contractor. Accordingly, the court concluded that it had subject matter jurisdiction to apply local civil law to a private military contractor that provides non-combat logistical support services. Finally, the court addressed Fluor’s contention that it was not liable under the Afghanistan Labor Code because, according to Article 6(1), the Code applied to foreign citizens only if they obtained a work permit. Fluor maintained that U.S. contractor employees were exempted from obtaining work permits by BSA Article 11(2). According to Fluor, this interpretation was consistent with guidance that the United States has given to its contractors exemption from the Afghanistan Labor Code. Based on the evidence of foreign law submitted by the parties, including expert declarations, the court concluded that the Afghanistan Labor Code did not apply to plaintiffs. The Code, by its terms, applies to foreign citizens who have obtained or will later obtain work permits, and not to other foreign citizens. Accordingly, the court concluded that plaintiffs' first amended complaint did not state a claim on which relief could be granted. Accordingly, the court granted Fluor's amended motion to dismiss and dismissed the action with prejudice. (USDC NDTX, June 15, 2017) 2017 U.S. Dist. LEXIS 92443

COURT REFUSES TO ALLOW EMPTY CHAIR AT TRIAL
ARMSTRONG V. NATIONAL SHIPPING COMPANY OF SAUDI ARABIA, ET AL.

Jordan Armstrong, a longshoreman, filed this lawsuit suing for damages stemming from an accident that occurred, in which he was injured by a forklift that rolled forward down a ramp on a ship where Armstrong was working, crushing him. He originally alleged three causes of action—negligence under the Longshore and Harbor Workers' Compensation Act, breach of implied warranty, and common law negligence—against various defendants. Discovery closed in the case and all dispositive motions have been filed and decided. The case is now set for jury trial. Defendants moved to designate responsible third parties pursuant to Texas Civil Practice and Remedies Code § 33.004. They move to designate REEM, the non-responsive defendant in the case, because it was the actual owner and shipper of the forklift at the time of the accident. As such, if there was a duty to warn, then the duty applied to REEM since it knew that the forklift would be shipped overseas. Defendants also moved to designate four of Armstrong's co-workers as responsible third parties, asserting that their negligent supervision and/or negligence in failing to wait for plaintiff to unlash the front of the forklift first and move out of the way directly caused plaintiff's alleged injuries and damages. The court found that if it were to allow the requested designations, Armstrong would have the burden of defending an "empty chair" at trial. This burden would be exacerbated by the fact that discovery had closed, dispositive motions have been ruled on, and trial is set to take place in less than a month. Under these circumstances, the court did not believe that justice required tolling the statute of limitations to allow defendants to designate responsible third parties this late in the case, and so soon before trial. Defendants' motions for leave to designate third parties was denied. (USDC SDTX, May 17, 2017) 2017 U.S. Dist. LEXIS 74921

Washington

COURT ENFORCES PMA SETTLEMENT AGREEMENT WITH LONGSHOREMAN
OBERTI V. PACIFIC MARITIME ASSOCIATION

Edmund Oberti sued Pacific Maritime Association (PMA) and the International Longshore and Warehouse Union (ILWU), Local 19, for disability discrimination. Oberti was a member of the ILWU and worked as a longshoreman. The parties dismissed the action after coming to a mutually agreed upon settlement with benefits to both sides. That Settlement Agreement provided Oberti with three options: A) PMA would advise the ILWU that PMA supported Oberti's reinstatement as a Seattle Class B registered longshore worker and pay him a base settlement sum; B) if the ILWU does not agree to this classification, PMA would advise ILWU that PMA supported Oberti's reinstatement as a Seattle ID Casual and pay him a larger base settlement sum; and C) if the ILWU refused to reinstate Oberti or agreed to reinstate him with terms unacceptable to either PMA or Oberti, or if the ILWU simply did not respond by the deadline, then PMA would pay Oberti the largest settlement sum in lieu of reinstatement. The settlement amount was greatest under Option C because this option would not only settle the matter but would also terminate PMA's duty to support Mr. Oberti's reinstatement. PMA fulfilled its duties under Options A and B by advising the ILWU that PMA supported Oberti's reinstatement. This triggered Option C of the Settlement Agreement, and PMA sent Oberti checks for the agreed upon amounts, which Mr. Oberti accepted and cashed. Oberti claimed to have been devastated by the ILWU's decision against his reinstatement. He appealed to the ILWU to reconsider its decision or at the very least offer an explanation for the denial. ILWU

did neither, and in response Oberti filed a charge against the ILWU with the National Labor Relations Board (NLRB), accusing the ILWU of "denying him a work opportunity that had been agreed upon by PMA. The NLRB then filed a complaint against the ILWU on behalf of Oberti seeking, in part, to require the ILWU to reinstate Oberti per the Settlement Agreement. PMA successfully intervened in the NLRB action because it claimed that this requested reinstatement remedy violated the Settlement Agreement between Oberti and PMA. In his complaint, Oberti failed to claim that any term or terms in the Settlement Agreement were susceptible to an interpretation requiring PMA to support reinstatement beyond the agreement deadline. The court declined to renegotiate or rewrite the parties' agreement to erase this provision. The court further agreed with PMA that the Settlement Agreement had been satisfied and PMA had fulfilled its duty to support Oberti's reinstatement and upon the ILWU's negative response, PMA paid Oberti the largest sum under Option C. The court noted, however, that the Settlement Agreement was only between Oberti and PMA. It did not prohibit Oberti from pursuing legal action against the ILWU or its affiliate Local 19 for alleged violations of the law. Still, allowing Oberti to pursue remedies against the ILWU or Local 19 did not enable him to circumvent the Settlement Agreement with PMA. The court granted PMA's motion to enforce the settlement agreement. (USDC WDWA, January 27, 2017) 2017 U.S. Dist. LEXIS 11791

BRB Decisions

BRB CONTINUES TO MAKE A FRIVOLOUS RULINGS IN HEARING LOSS CASES
ROY V. COOPER/T. SMITH, INCORPORATED, ET AL.

Melvin Roy worked as a longshoreman for at least 20 years until 1991, when he retired. During his career, he worked for Cooper/T. Smith, Inc., Ryan Walsh, and Ports of America. Roy's last day of work was for Cooper on September 11, 1991. Roy's second to last day of work was for Ryan Walsh and Roy testified that he was exposed to noise while working for both employers. On April 5, 2012, Roy underwent an audiogram which showed a 31.9% in the left ear and 28.1% in the right ear with a 33.8% binaural impairment, which included 5% for tinnitus. Following a formal hearing on the LHWCA claim that Roy subsequently filed, the ALJ found Roy's testimony to be credible, in particular his testimony that his last day of work occurred on September 11, 1991. However, the ALJ also stated that he could not accord significant probative value to Roy's testimony regarding his overall working conditions on his last day of employment with Cooper on September 11, 1991 "because his testimony was vague and, at times, he could not recall any factual details about his working conditions." The ALJ specifically noted that claimant's testimony on direct examination differed somewhat from his responses on cross-examination because on cross, he could not remember what he was doing on the ship on his last day, whereas, on direct, when asked if he worked in the hold with pipes, steel, and coil and if it was "noisy," claimant answered simply, "yes." The ALJ found that Roy's 2012 audiogram was not presumptive evidence of a hearing loss under 20 C.F.R. §702.441 because the ALJ was unable to determine who actually administered the audiogram and the record was devoid professional credentials. Nonetheless, the ALJ went on to state that Roy "arguably" established that he suffered a hearing impairment because of his own credible, subjective complaints of symptoms. The ALJ concluded, however, that Roy did not establish the second element of a *prima facie* case, i.e., that conditions existed at work which could have caused the harm. Thus, the ALJ denied the claim for benefits because he found that Roy did not establish that he suffered a work-related injury. Roy appealed the ALJ's denial of benefits, contending that the ALJ judge erred in not according the audiological report any probative weight. Roy also

assigns error to the ALJ's conclusion that he failed to establish the second element of his *prima facie* case. Cooper and Ryan Walsh each filed a response brief, urging affirmance. The BRB, in its infinite wisdom, agreed with Roy's contention that the ALJ's conclusion that the audiogram was not entitled to any probative weight was not supported by the evidence in the record. The reord clearly disclosed adequate credentials on both the audiogram and the report. In addition, there were no other audiograms of record, and thus the 2012 audiogram was uncontradicted. From this evidence, the ALJ could conclude that the audiogram was presumptive of the degree of Roy's hearing loss. The BRB, in its unquestionable understanding of the law, agreed with Roy that the ALJ did not address all the relevant evidence in the record to determine whether the evidence was sufficient to establish a *prima facie* case. Finally, the Board addressed Roy's ascription of error to the ALJ'sconclusion that, although Roy had a hearing impairment as of 2012, he failed to establish that he had a measurable hearing impairment at the time he left covered employment with either Cooper or Ryan Walsh. The BRB agreed that the ALJ must reconsider this finding as well, noting that the Board had previously held that in cases of retirees alleging occupational hearing loss, it is not required that claimants recreate the precise extent of their hearing loss at the date their covered longshore employment terminated. Rather, in the absence of credible evidence regarding the extent of claimant's hearing loss at the time he leaves covered employment, the ALJ may evaluate all the relevant evidence of record to determine the extent of the claimant's work-related hearing loss. The administrative law judge's decision and order denying benefits was vacated and the case was remanded for further proceedings. (USDOL BRB, May 18, 2017) BRB No. 16-0603

Updater Note: As my long-suffering readers know, I rarely review BRB cases. But this case deserves attention as a perfect illustration of what is wrong with the adjudication of hearing loss claims under the LHWCA. Here, the claimant filed a hearing loss claim 21 years after his last day of work on the waterfront, against the employer for whom he worked for that one last day, asking that his hearing loss be associated with his employment. The ALJ made a credibility determination on the basis of which he found that the claimant did not establish his prima facie case. The standard of review is very clear. The BRB must affirm the ALJ's finding that a claimant is not a credible witness unless the credibility determination is itself inherently incredible or patently unreasonable. Not this time. The Board grasped at straws, finding a second hand report of a statement made by a claimant that the ALJ found to be non-credible, to hold that the second prong of the prima facie case could have been established. This was an absolutely horrible and overreaching decision. I hope the ALJ stick to his guns on remand.

ALJ Decisions

SINGLETON V. PORTS AMERICA LOUISIANA, INC. (TTO), ET AL.

Ronald Singleton sought disability compensation and medical benefits as a result of an alleged work-related top loader accident, that allegedly caused injuries to his knees, right elbow, and lower back. Employer, Ports America Louisiana, Inc., argued that Singleton did not suffer any compensable, work-related injuries and did not seek prior authorization for treatment with several medical providers. Singleton reported he was driving a large forklift when it fell forward and crashed. Singleton explained he was wearing a seatbelt, but his knees and elbows hit the dash board. Findings on Singleton's initial examination were minimal, with complaints of tenderness, but neither knee had swelling, erythema, limited range of motion, or ligamentous laxity. X-rays were negative. The examiner documented a very mild abrasion of the left knee. The external appearance of Singleton's elbow was normal and the entire musculoskeletal exam

was normal and Singleton demonstrated a full range of motion in all four extremities without restriction. Ports America also retained, Dr. Torrence D. J. Welch, Ph.D., a biomechanical engineer, who submitted a biomechanical evaluation of the alleged incident. Based on his findings, Dr. Welch opined: 1) when Singleton braked the top loader, it tipped forward approximately 70 to 75 degrees due to inertial forces, landing at a pitch angle of approximately 15 to 20 degrees with respect to the ground; 2) during the incident, the top loader would have pitched forward at a maximum speed of approximately seven feet per second over a distance of approximately nine to ten feet; 3) the mechanism for the traumatic herniation of a lumbar intervertebral disc was not present for Singleton during the subject incident; 4) the comprehensive loads experienced by Singleton lumbar spine during the subject incident were less than 1g force, and less than those expected during typical activities of daily living; and 5) the subject incident provided no impetus for the structural exacerbation, aggravation, or progression of the pre-existing degenerative condition present within Singleton's spine from a prior auto accident. Additionally, an IME examiner concluded that Singleton sustained contusions to both knees, but there were not objective physical findings of an injury present during his examination. Singleton demonstrated tight hamstring muscles, unrelated to the incident, which could cause anterior knee pain. The examiner found that although Singleton had complaints of back pain, his multilevel degenerative changes are consistent with his age group, and this was a pre-existing condition. Testimony from Ports America's Break Bulk Operations Manager, who was an eyewitness to the incident, demonstrated that when the top loader fell, it basically just rolled over and folded right into the container that he was carrying. There did not appear to be any jerking or violent movements. Rather, the fall as a "slow motion" fall. At a formal hearing on the claim, Ports America conceded Singleton was involved in a work-related incident, but argues Singleton could not invoke the Section 20(a) presumption because he lacked credibility and the evidence did not establish that his alleged injuries could have physically resulted from top loader incident. Following a thorough review of all the testimony and evidence introduced at the hearing, the ALJ concluded Ports America had met its burden of production and produced substantial evidence of the absence of a causal relationship between the accident and Singleton's alleged injuries. Having concluded that employer successfully rebutted the Section 20(a) presumption with the production of substantial evidence, Singleton bore the burden of persuasion and had to establish that his back condition was work-related by a preponderance of the evidence. The ALJ found that Singleton had presented minimal and unpersuasive evidence to suggest his back pain was related to the accident. Therefore, the ALJ concluded Singleton failed to meet his burden to establish his reported back pain is the result or an aggravation of a pre-existing condition, of his work-related accident. Therefore, Singleton's lower back pain was not compensable under the Act. Based upon the totality of the evidence in this case and the analysis of applicable law regarding the contested facts and issues, the ALJ concluded Singleton had failed to establish a compensable injury under the Act. Additionally, Singleton was not entitled to reimbursement of any medical expenses. The claim was denied and this case was dismissed. (USDOL OALJ, July 20, 2017) 2016-LHC-00007

<u>Updater Note</u> - As my long-suffering readers know, I rarely review ALJ or BRB opinions. However, once in awhile, one of those refreshing decisions comes along that makes my day and warrants sharing with my readership. This is one of those. One rarely sees a win like this one in the Longshore practice area. Congratulations to Steve Arceneaux, of Ports America, and Scott Soule, of Blue Williams, New Orleans, on a great win.