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Stevedores, Marine Terminals, And Vessel Services
CASE LAW UPDATE
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Department of Labor

The Office of Workers Compensation, Division of Longshore and Harbor Workers' Compensation (DLHWC) has instituted a new and more efficient method for submitting case create forms by fax and has changed the mailing address for Central Case Create Site. Effective March 1, 2018, the DLHWC is decommissioning the New York District Office's fax number and replacing it with a program-wide system for submitting "case create" documents by fax at (202) 513-6814. The following forms result in DLHWC creating a new case and are referenced as "case create" forms:

LS-201 (Notice of Employee's Injury or Death)
LS-202 (Employer's First Report of Injury or Occupational Illness)
LS-203 (Employee's Claim for Compensation)
LS-262 (Claim for Death Benefits)

Alternatively, beginning March 1, 2018, "case create" forms may also be submitted by mail to the new mailing address: U.S. Department of Labor, Office of Workers' Compensation Programs, Division of Longshore and Harbor Workers' Compensation, 400 West Bay Street, Suite 63A, Box 28, Jacksonville, FL 32202, Fax (202) 513-6814. Industry Notice 166 is available on the Office of Workers' Compensation (OWCP), Division of Longshore and Harbor Workers' Compensation (DLHWC) website for the detailed guidelines of the submission of "case create" forms and change of mailing address.

On February 26, 2018, the Benefits Review Board, Department of Labor published a final technical rule amending one section of the Benefits Review Board's regulations in order to change the mailing address for notices of appeal and correspondence sent to the Board. The new address for notices of appeal and other Board correspondence is U.S. Department of Labor, Benefits Review Board, ATTN: Office of the Clerk of the Appellate Boards (OCAB), 200 Constitution Ave. NW, Washington, DC 20210–0001. The rule becomes effective March 28, 2018.

The Office of Workers Compensation, Division of Longshore and Harbor Workers' Compensation has revised the Form LS-208 (Notice of Payments) to incorporate sections of the now obsolete, LS-206 (Payment of Compensation Without Award).Noteworthy changes made to the Longshore mandatory form LS-208 include: Form LS-208 has been renamed from Notice of Final Payment or Suspension of Compensation Payments to "Notice of Payments". Incorporating relevant sections of the now obsolete Form LS-206. Reorganizing the report of payments made on account of permanent disability. Modifying the report of payments to allow up two (2) separate disability types. Modifying the new LS-208 to report initial, interim and final payments

of compensation. Industry Notice 165 is available with a complete explanation of the changes made.

On January 2, 2018, DOL promulgated a final rule adjusting penalties for 2018. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires the Department of Labor (DOL) to annually adjust its civil money penalty levels for inflation. The rule makes upward adjustments to the penalties assessed by the Office of Workers' Compensation Programs under the Longshore and Harbor Workers' Compensation Act. Industry Notice 160 outlines the adjustments in detail. The new amounts apply to penalties assessed after January 2, 2018.

IRS INCREASES MILEAGE REIMBURSEMENT RATE EFFECTIVE 1/1/18

On December 14, 2017, the Internal Revenue Service released the optional standard mileage rates to use for 2018 in computing the deductible costs of operating an automobile for business, charitable, medical or moving expense purposes. Beginning January 1, 2018, the standard mileage rates for the use of a car (including vans, pickups or panel trucks) will be:

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

The standard mileage rates for business, medical and moving purposes are based on an annual study of the fixed and variable costs of operating an automobile. The business mileage rate and the medical and moving expense rates each increased 1 cent per mile from the rates for 2017. The charitable rate is set by statute and remains unchanged.

Supreme Court of the United States

On March 5, 2018, the U.S. Supreme Court denied certiorari in the case of *ICTSI Oregon, Inc. v. International Longshore & Warehouse Union, et al.*, Docket No. 17-770. This case involved a Ninth Circuit ruling that an Oregon port terminal operator, ICTSI Oregon Inc., couldn't bring an antitrust counterclaim against the International Longshore and Warehouse Union and the Pacific Maritime Association in a long-running dispute over longshore work in Portland.

On April 23, 2018, the U.S. Supreme Court denied the petition for certiorari in the case of *Jordan v. Director, OWCP, et al.* [Dyncorp International, LLC], Docket No. 17-843. (Sup. Ct., April 23, 2018) 2018 U.S. LEXIS 2558. This was a Defense Base Act case involving claims of discrimination and for additional compensation.

On January 25, 2018, a petition for certiorari was filed with the U.S. Supreme Court in the case of *Kopras v. Marco Marine Construction, Inc.*, Docket No. 17-1066, 2018 U.S. S. Ct. Briefs LEXIS 377. The question presented for review was as follows: "In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 538 (1995), this Court fashioned a multifaceted test for deciding when federal maritime law displaces State tort law. One facet requires courts to describe the case's "general features" at an "intermediate level of possible generality" to discern

if the incident could "potentially" disrupt maritime commerce. Does damaging a recreational vessel while it rests securely in a boat lift both before and well after the damage have a realistic potential to disrupt maritime commerce?"

A petition for certiorari was filed with the U.S. Supreme Court on January 23, 2018 in the case of *Volk v. Franz, et al.*, Docket No. 17-1044, 2018 U.S. S. Ct. Briefs LEXIS 294. The questions presented are: "Whether a long-term employee engaged exclusively in maintenance and repair work on a fleet of 150-200 deck barges afloat in the Hudson River is a "seaman" under the Jones Act when the barges are under common ownership/operation of his employer, and he is injured while working on one of the vessels and whether the Second Circuit Court of Appeals misapplied the Chandris test and other authority from the Court by holding, as a matter of law, that Wayne Volk, was not a "seaman" under the Jones Act, 46 U.S.C. § 30104, thereby creating a conflict among the circuits.

On January 12, 2018, the U.S. Supreme Court granted certiorari in the case of Lucia, et al. v. Securities & Exchange Commission, Docket No. 17-170. The issue in this case is the same as the issue in the Bandimere case, as to whether the appointment of ALJs violates the Appointments Clause, and whether they are properly appointed.

Circuit Courts

2nd Circuit

COURT DISMISSES CLAIMS UNDER BOTH THE JONES ACT AND LHWCA
IN RE: BUCHANAN MARINE, LP

Franz, Jr., Trustee, as owner, and Buchanan Marine, L.P., as bareboat charterer, of the barge B-252 commenced this action pursuant to the Limitation of Liability Act, seeking exoneration from or limitation of liability. Franz and Buchanan moved for summary judgment, on the limitation action. Claimant, Tilcon New York, Inc., also moved for summary judgment and claimants Wayne and Karen Volk cross-moved for summary judgment, seeking dismissal of the limitation proceeding. Volk worked as a barge checker for Buchanan at a quarried rock processing facility operated by Tilcon At the facility, Tilcon processes quarried rock and loads the rock onto barges supplied by Buchanan. Using its tug boats, Buchanan then transports the barges down river to Tilcon's customers. Volk fell and injured his right arm and shoulder while inspecting a barge after it was loaded with wet stone. Volk has not worked since the accident and had been receiving workers' compensation under the LHWCA. Volk's injury occurred aboard the barge B-252, a "'dumb' barge" that required a tugboat to ferry it from place to place. Franz owned the B-252 as a trustee, and bareboat chartered that barge along with his fleet of other barges and tug boats to Buchanan. The Volks filed a complaint to recover for personal injury against Buchanan and Tilcon. In response, Franz and Buchanan commenced this limitation action in federal court, and offered a security bond of $47,420.77, representing the value of their interest in the B-252 (the court later directed Franz and Buchanan to increase their security by $10,000). The court thereafter granted Franz and Buchanan's motion to approve security, enjoin suits, and direct the issuance of notice. Both the Volks and Tilcon answered and asserted

counterclaims. The Volks contended that they were entitled to relief under the Jones Act because Volk was a seaman who suffered a personal injury. Franz and Buchanan oppose and assert that Volk did not meet the standard to be a Jones Act seaman. Tilcon argued that it was not liable under the Jones Act because it was not Volk's employer. Assuming without deciding that Volk met the first ***Chandris*** criteria, the court concluded that his connection to the B-252 was far from substantial in either duration or nature. On the contrary, Volk was square on all fours with the claimant in ***O'Hara*** and did not qualify as a Jones Act seaman. As a result, he did not qualify for seaman status, and Franz, Buchanan and were awarded summary judgment on the Volks' Jones Act claims. Alternatively, the Volks maintained that the parties were negligent under §905(b) of the LHWCA. Tilcon asserted that it had no LHWCA liability because it did not employ Volk nor did it own the B-252. Because LHWCA liability only attaches to employers or vessels, Tilcon's motion on this ground is granted. Franz maintained that it was not liable because it was not the owner of the B-252, as it bareboat chartered the B-252 to Buchanan as owner *pro hac vice*. Regarding LHWCA liability under a bareboat charter, the court noted that the original vessel owner is only responsible for its "turnover duty." The negligence that the Volks complained of did not relate to Franz's turnover duties to warn Buchanan of hidden dangers. Accordingly, the Volks did not have a LHWCA claim against Franz, and petitioners' motion on this ground was granted. Buchanan acknowledges it is liable under the LHWCA, however, asserted that Volk's remedy was limited to LHWCA workers' compensation payments under the statute's no-fault insurance scheme. The court agreed, applying the ***Gravatt*** rule. As Volk's injury was attributable to conduct related to Buchanan's capacity as his employer, LHWCA workers' compensation benefits were his exclusive remedy. The court concluded that the Volks had not established negligence or other actionable conduct against Franz and Buchanan under any alleged theory, and the complaint for exoneration from liability was granted. Consequently, Tilcon's claims for contribution or indemnification were dismissed. The Volks' cross-claims against Tilcon were also dismissed. The Volks appealed the district court's judgment, arguing that the district court erred in dismissing all of their claims against the three defendants. The appellate court concluded that the district court correctly held that Volk, who inspected and maintained moored barges used to transport rock from a quarried rock processing facility down the Hudson River, was not a "seaman" for purposes of the Jones Act. In weighing "the total circumstances" of Volk's employment, the appellate court concluded as a matter of law that Volk does not qualify as a seaman under the Jones Act, as a reasonable fact finder could only conclude, his work on the barges did not regularly expose him to the special hazards and disadvantages of the sea. In sum, none of Volk's work was of a seagoing nature. Volk did not go to sea and he was not exposed to the "perils of the sea" in the manner associated with seaman status. Volk also asserted claims under the LHWCA, general maritime law, and New York law against all three appellees: Buchanan, Franz, and Tilcon. The district court dismissed all these claims. The appellate court concluded that the district court should have permitted certain of these claims to proceed. The district court correctly dismissed all the remaining claims against Buchanan. Buchanan was Volk's employer and ordinarily would be immune from suit under 33 U.S.C. § 905(a). As bareboat charterer of the barge, however, Buchanan was a dual capacity employer-vessel owner. Therefore, if Buchanan were negligent in its vessel capacity in relation to Volk's injury, Buchanan would be liable under 33 U.S.C. § 905(b) in the same manner as a third party. The district court ruled that Buchanan was not acting in a capacity as vessel owner in relation to Volk's injury, and therefore is liable exclusively for Volk's workers' compensation payments under the LHWCA. Volk did not challenge that ruling on appeal. Because the statutory, no-fault

compensation payments under the LHWCA were Volk's exclusive remedy as to Buchanan, his general maritime law and state law claims against Buchanan were properly dismissed. As vessel owner, Franz was subject to suit for negligence under §905(b) of the LHWCA. Although the district court correctly noted that Franz was not an employer or bareboat charterer of the barge and therefore was only responsible for his "turnover duty," the district court did not properly analyze the LHWCA claims. While he could not be responsible for the presence of excess stone, Franz arguably had a duty, as owner, to address the condition of the barge before turning it over to Buchanan. On remand, the district court was ordered to consider whether there was a viable claim under §905(b) of the LHWCA against Franz as owner based on the condition of the vessel. The appellate court also observed that the district court correctly held that Tilcon, the operator of the rock processing facility, had no LHWCA liability because it did not employ Volk or own the barge. The district court also correctly held that the general maritime claims asserted against Tilcon fail because Tilcon was not an owner of the barge and because Volk was not a seaman. The district court erred, however, in dismissing Volk's New York state law claims against Tilcon for negligence, gross negligence, and violations of N.Y. Labor Law § 200. Accordingly, the case was affirmed in part, vacated in part, and remanded for such further proceedings as may be appropriate. (2nd Cir, October 27, 2017) 2017 U.S. App. LEXIS 21321

3rd Circuit

WAIVER OF THE CARMACK AMENDMENT SURVIVES APPEAL
SANOFI-AVENTIS U.S., LLC, ET AL. V. GREAT AMERICAN LINES, INC., ET AL.

This case concerned a dispute over liability for the theft of a shipment of pharmaceuticals while it was in transit from the manufacturer, Sanofi-Aventis U.S., LLC, to the distributor, McKesson Corporation. McKesson's insurer, AXA Corporate Solutions Assurance, reimbursed McKesson for the loss and then filed a complaint, as McKesson's subrogee, against the trucking companies involved in the shipping, Great American Lines and M.V.P. Leasing, Inc., as well as the truck stop from which the Freight was stolen, Pilot Transportation Centers. AXA brought a claim for breach of contract and a claim under the Carmack Amendment, which imposes strict liability on motor carriers engaged in the interstate transportation of goods. The district court ultimately determined that the contract governing shipment of the pharmaceuticals waived liability under the Carmack Amendment. The court also determined that McKesson was not a party to the shipping contract, and AXA thus could not base its breach of contract claim on that agreement. Finally, the district court concluded that AXA had not provided sufficient evidence to warrant a jury trial on the question of whether allegedly lax security at the Pilot facility was a cause of the theft of the pharmaceuticals. AXA appealed, arguing that the district court erred in granting summary judgment to Great American and MVP on its Carmack Amendment and breach of contract claims. According to AXA, because McKesson was neither a party to, nor an intended beneficiary of, the Transportation Contract, the Carmack waiver should not apply. AXA also asserted for the first time on appeal, that it should be permitted to pursue its breach of contract claims under the Truck Manifest. With regard to its negligence claim against Pilot, AXA contended that the district court erred in granting summary judgment as genuine disputes of material facts remained. The appellate court found that the district court properly granted summary judgment to the trucking companies on the Carmack Amendment claim brought by the buyer's insurer where the transportation contract between the shipper and the shipper plainly

waived the Amendment, and 49 U.S.C. §14101(b)(1) did not require that the consignee, i.e., buyer, agree for in order for the waiver to be effective. The appellate court likewise found that summary judgment was properly granted to the trucking companies on the breach of contract claims where the insurer did not raise an argument concerning a truck manifest before the district court, and even if the argument had been preserved, it would have failed because the transportation contract clearly stated that it solely determined the liability for loss and damage. Finally, the appellate court held that the negligence claim failed for failure to sufficiently establish a causal link between the theft and a truck stop's alleged negligence. The judgment of the district court was affirmed. (3rd Cir, December 6, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 24643

4th Circuit

THOSE *PRO SE* LONGSHORE CLAIMANTS NEVER SEEM TO GO AWAY
TYLER V. MAIN INDUSTRIES, INCORPORATED, ET AL.

Myra Tyler initially filed a claim under the LHWCA in 2008 for injuries to her tailbone, back, neck, right ankle and carpal tunnel syndrome (CTS) which she allegedly sustained while working for her employer. Following a formal hearing and ALJ awarded Tyler temporary total disability benefits and medical benefits, for her work-related tailbone fracture and resulting back pain. The ALJ found, however, that employer had already paid claimant all of the compensation to which Tyler was entitled. The ALJ found that Tyler did not establish that her remaining alleged injuries were related to her employment accidents. Tyler appealed this decision. The Board vacated the finding that Tyler was not entitled to the §20(a) presumption with regard to her CTS and remanded the case for further consideration of that issue. In all other respects, the Board affirmed the ALJ's decision. On remand the ALJ awarded Tyler temporary total disability benefits and medical benefits, for her work-related CTS. That decision was not appealed. However, Tyler did subsequently file a motion for §22 modification, seeking additional compensation for her tailbone and back conditions. The ALJ issued an order to show cause why Tyler's claim should not be dismissed as untimely. Her employer urged that the case be dismissed. The ALJ addressed Tyler's submissions in support of her motion for modification, and concluded that Tyler's motion was untimely filed, and consequently dismissed Tyler's motion for modification. On appeal, Tyler challenged the ALJ's dismissal of her motion for modification. Employer responded, urging affirmance. The Board's review of the administrative file indicated that the ALJ's findings of fact and conclusions of law were rational, supported by substantial evidence, and in accordance with law. Therefore, the Board affirmed the dismissal of Tyler's Modification claim. Proceeding *pro se*, Tyler petitioned for review of the BRB's decision and order affirming the ALJ's dismissal of her request for a modification. The appellate court's review of the record disclosed that the Board's decision was based upon substantial evidence and was without reversible error. Accordingly, the appellate court denied Tyler leave to proceed in *forma pauperis* and denied the petition for review. (4th Cir, April 2, 2018) 2018 U.S. App. LEXIS 8275

LHWCA BENEFITS AND RETIREMENT
MOODY V. HUNTINGTON INGALLS INC., ET AL.

Russell L. Moody, a shipyard employee, suffered a workplace injury but did not undergo surgery until after he retired. He sought disability benefits for the two-month, post-surgery period during which he was not medically cleared for work. After Huntington Ingalls, Inc. assigned Moody to a new shift, Moody gave his requisite 90-day notice of retirement, unhappy with his new shift. During that 90 day-window Moody allegedly injured his right shoulder in the shipyard (how convenient). Even though the injury required surgery, Moody continued to work as a driver and received his normal wages. He eventually retired from the shipyard as planned. Two months later, Moody underwent shoulder surgery. According to his physician, Moody needed to remain out of work for two months to recover from surgery. Moody could then work with certain limitations for another month, with no restrictions thereafter. Since his retirement from the shipyard, Moody had not worked or pursued any job opportunities. Huntington paid for the costs of surgery but refused to pay Moody temporary total disability benefits for the post-operation recovery period. Huntington did not dispute that the injury was otherwise a compensable, workplace injury under the LHWCA that would have entitled Moody to disability benefits had he undergone surgery prior to retirement. Following a formal hearing on his claim, the ALJ ruled in Moody's favor and awarded temporary benefits. He concluded that Moody was totally incapacitated during the recovery period and that his workplace injury caused the incapacity. Although the ALJ found that Moody voluntarily retired for reasons unrelated to his injury, he ultimately concluded that retirement is irrelevant to the definition of "disability" under the LHWCA. However, the Benefits Review Board, on appeal, disagreed and concluded that Moody was not entitled to any disability benefits because he voluntarily retired before the onset of his workplace injury's debilitating effects. The Board reasoned that voluntary retirement results in a total loss of ability to earn wages, such that no injury could cause any further loss of economic capacity. Moody appealed the BRB's decision, arguing that voluntary retirement before the onset of a workplace injury's debilitating effects did not preclude the existence of a "disability." The appellate court began its analysis by pointing out that nothing in the statute expressly addresses retirement or its timing: the only reference to time requires the assessment of earning capacity at the time of injury, not the time of retirement. The appellate court found that the ordinary meaning of "incapacity" precluded the Board's and Huntington's interpretation that an employee's retirement necessarily makes him incapable of earning any wages. Retirement is not inherently debilitating. By focusing on the voluntary nature of Moody's retirement, the appellate court found both the Board and Huntington Ingalls confused being unwilling with being unable. Huntington and the Board also erroneously equated loss of earning capacity with loss of actual earnings. The fact that Moody did not actually work or seek job opportunities after retirement did not change the appellate court's analysis. That fact goes to actual economic loss but not incapacity. Because the LHWCA compensates workers for their inability to earn wages due to injury, workers are entitled to disability benefits when an injury is sufficient to preclude the possibility of working. In sum, the appellate court held that voluntary retirement is not a form of total incapacity. The appellate court held that the Benefits Review Board misinterpreted 33 U.S.C. §902(10), and reversed and remanded for further proceedings as may be appropriate. (4th Cir, January 3, 2018) 2018 U.S. App. LEXIS 102

I'M FINDING IT HARDER TO BREATH. IT MUST BE COMPENSABLE (CONT.)
METRO MACHINE CORPORATION V. DIRECTOR, OWCP, ET AL. [STEPHENSON]

John Stephenson worked for Metro Machine Corporation as a pipefitter, who had a long history

of breathing problems. He suffered from asthma until he was approximately eight years old, and he began smoking when he was 16. He received treatment for bronchitis caused by his smoking since the early 1980s. And he received treatment for a productive cough and wheezing in 1985 and 1986. Additionally, he regularly suffered from bronchitis during winters, and his bronchitis was treated with antibiotics. He has been taking steroids for his wheezing and coughing since 1986. He was diagnosed with chronic obstructive pulmonary in 1996 and emphysema in 2001. In 2008, while Stephenson was working in the superstructure of a vessel, he allegedly inhaled fumes from welding and burning and the application of epoxy paint, which allegedly caused him breathing problems and resulted his hospitalization and a diagnosis of exacerbation of chronic obstructive pulmonary disease. Stephenson voluntarily retired in 2011. Stephenson filed a formal claim for compensation under the LHWCA. Following a formal hearing, the ALJ found that Stephenson established a *prima facie* case by showing a harm — the worsening of his COPD — and a work incident that could have caused or aggravated that harm. Therefore, he found Stephenson entitled to the § 20(a) presumption that the worsening of his COPD was compensable. Metro appealed the decision to the Board, which affirmed. Metro petitioned for review of the Board's decision, contending that the ALJ erred in relying on Stephenson's medical experts opinions to find that Stephenson had established a *prima facie* case and that the Board erred in affirming the ALJ's decision. Finding no reversible error, the appellate court denied the petition. Following the favorable appellate ruling, Stephenson's attorney, Gregory Camden, petitioned the appellate court for fees at the rate of $600 per hour. In a very short decision, after reams of briefing, the clerk of the court granted Camden only $350 per hour, reducing his fee petition substantially. (4th Cir, September 25, 2017) 15-2525

Updater Note: Defense attorney for Metro, Nash Bilisoly, expects the district director, ALJ's & the Board in the 4th Circuit to follow this fee ruling for years to come.

5th Circuit

5th CIRCUIT ADDRESSES CHANGE OF PHYSICIAN UNDER THE LHWCA
PORTS AMERICA LOUISIANA, INC. V. DIRECTOR, OWCP [SCOTT]

Alexander Scott, a longshore foreman, allegedly injured his hip and lower back when he was struck from behind by a forklift at work. Scott consented to treatment from Ports America's physician, Dr. Steiner, and had been under his care for approximately five months, when Dr. Steiner told Scott he had reached maximum medical improvement, did not need additional treatment, and was capable of returning to his full duty activity without restriction. Scott insisted that he was still in pain and did not feel comfortable returning to work, but Dr. Steiner told him to try to work and to return the next month for a check-up. Scott did not go back to work. Instead, he sought the opinions of other physicians, who advised him not to recommence his employment duties. When Scott returned to Dr. Steiner in August for the follow-up visit, Dr. Steiner again told Scott that he should return to work and offered no additional treatment. Dr. Steiner recommended an MRI, but told Ports America that Scott's reports of continued back pain were subjective complaints. Five days later, Scott met with Dr. Bostick, who concluded that Scott had an altered gait and that he should undergo additional physical therapy, take medication for his pain, start using a crutch, and refrain from work. When Ports America refused to pay for the treatment by Dr. Bostick and ceased compensation payments, Scott requested an informal

conference with the district director. The district director found that Scott was entitled to choose another physician because Dr. Steiner had "effectively discharged" him by refusing further medical treatment. The district director also ordered that Scott undergo an independent medical examination in light of the clear disagreement between the two physicians. The district director's order required Ports America to pay for the treatment by Dr. Bostick and for the IME. Ports America appealed to the Board, which held that Ports America was only obligated to pay for the services Dr. Bostick provided Scott after the date of the district director's order, but otherwise affirmed the district director's decision. On further appeal, Ports America argued that the district director failed to apply the correct standard in determining whether Scott's change-of-physician request was permissible. It also argued that the IME was not justified by a medical question as required by statute. The appellate court initially observed that, under the LHWCA, an employee may not change physicians after his initial choice unless the employer or district director has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change. The parties disputed whether Scott's change-of-physician request should be evaluated under §907(b)'s "desirable or necessary in the interest of the employee" standard or the "good cause" standard in §907(c)(2). The district director approved Scott's change-of-physician request because the director concluded that the change was "desirable or necessary" to further Scott's medical interests. Ports America argued that §907(b) applied only when an employee does not request the change of physician. Requests initiated by the employee, it contended, are governed by the good cause standard in §907(c)(2). Although the district director's choice of legal standards for evaluating Scott's proposed change of physician is subject to de novo review, we review the district director's decision allowing Scott to change physicians for abuse of discretion. The appellate court noted that its precedent interpreting §907(d) established that when an employer's physician tells an employee he is recovered from his injury and requires no further treatment the employee has, in effect, been refused treatment by the employer. Ports America noted that Dr. Steiner did not refuse to treat Scott because he scheduled a follow-up visit in August 2015 and ordered an MRI. The appellate court rejected this argument, noting Dr. Steiner's repeated statements that Scott required no further treatment, had reached maximum medical improvement, and should return to work without any restrictions in spite of Scott's continued complaints of pain. The fact that Dr. Steiner scheduled a follow-up visit did not refute the evidence supporting Scott's request to obtain an assessment and opinion from Dr. Bostick, who found that Scott had an altered gait and concluded that Scott should not return to work. The district director's order allowing Scott to obtain a new physician and requiring Ports America to pay for Dr. Bostick's services was based on good cause and therefore was not an abuse of discretion. The appellate court also agreed with the Board's conclusion that the district director did not abuse his discretion in ordering an IME for Scott and requiring Ports America to pay for it, noting that the regulations implementing §907(e) clarify that medical questions about the appropriate diagnosis, extent, effect of, appropriate treatment, and the duration of any such care or treatment, may justify an IME. The district director properly concluded that the disagreement between the two physicians was a medical question. The director's decision to order an IME and impose the costs on Ports America was not an abuse of discretion. The appellate court affirmed the judgment of the Board. (5th Cir, January 23, 2018, UNPUBLISHED) 2018 U.S. App. LEXIS 1561

9th Circuit

LHWCA CLAIMANT APPEALS VOCATIONAL REHABILITATION EXAM ORDER
RUIZ V. NATIONAL STEEL & SHIPBUILDING COMPANY, ET AL.

Oscar Ruiz alleged injuries to both knees and filed two claims under the LHWCA, which were consolidated for hearing. As the close of discovery for that hearing approached, Ruiz's employer, National Steel & Shipbuilding Company (NSSC) moved for a protective order. It had noticed an evaluation that vocational rehabilitation counselor (VRS) was to conduct. The notice required Ruiz to appear at the VRS's office and cooperate with the evaluation. Alternatively, the VRS could perform the evaluation at Ruiz's counsel's office with counsel for both parties present. Ruiz objected. He asserted that he was entitled to have his counsel present for the evaluation while defense counsel was excluded. In the alternative, Ruiz offered that the VRS could question Ruiz at his deposition, or conduct the vocational interview without the presence of counsel, but a court reporter would transcribe the assessment. NSSC would not agree to this, cancelled the evaluation, and moved for a protective order to exclude Ruiz's counsel from the vocational evaluation. In the alternative, NSSC stated that, if Ruiz's counsel could be present, NSSC's counsel must be allowed to be present as well. The ALJ ordered Ruiz to attend the vocational evaluation with VRS and without counsel. Ruiz moved for reconsideration. The ALJ noted that NSSC had not moved to compel the evaluation but only for a protective order to exclude Ruiz's counsel. The ALJ therefore issued a substitute order that no longer compelled Ruiz to attend the evaluation. The order on reconsideration was limited to granting the protective order that excluded counsel from any vocational evaluation. Ruiz took an interlocutory appeal of the ALJ's order on reconsideration. The Benefits Review Board dismissed Ruiz's interlocutory appeal, and Ruiz appealed the dismissal to the Ninth Circuit and that the Benefits Review Board certified the record to the Ninth Circuit. The appellate court held that because the Benefits Review Board's order was not appealable as a final judgment or an order that came within the collateral order doctrine, Ruiz's appeal must be dismissed. (9th Cir, April 26, 2018) 2018 U.S. App. LEXIS 10874

APPELLATE COURT REVERSES ALJ AND BRB IN A DISHEARTENING OPINION
COLARUOTOLO, ET AL. V. SSA CONTAINERS, INC., ET AL.

Cosmo Colaruotolo worked for several decades as a longshoreman, performing various roles. He allegedly suffered several work related injuries throughout the years, consequently undergoing numerous back surgeries and spinal fusions. After his final injury in 2010, Colaruotolo sought permanent total-disability benefits under the LHWCA from SSA Containers, Inc. and its insurance carrier. Although an ALJ initially granted those benefits, he later granted SSA's motion for reconsideration, holding that Colaruotolo was able to work as a tower clerk and that this position was reasonably available. The Benefits Review Board affirmed in a divided decision. Colaruotolo then sought further review, contending that the findings of the ALJ and BRB were unsupported by substantial evidence. The appellate court initially noted that, in holding that the tower-clerk position would be available to Colaruotolo at least three days a week, the ALJ relied solely on the opinion of SSA's vocational expert. The ALJ originally concluded that the position's availability was "speculative." However, the ALJ later reversed course, finding that "a fairer reading" of the expert's deposition testimony was that the

tower-clerk position was available at least three days a week and that the speculation related to whether Colaruotolo could obtain the tower clerk position four or five days per week. The appellate court found that this conclusion was unsupported by substantial evidence for several reasons. The vocational expert's testimony revealed that he was unwilling to unequivocally state that the tower-clerk position would be available even three days a week. The appellate court found that a full reading of the testimony did not convey any sense of assurance that the tower-clerk position would be reasonably available to Colaruotolo. Second, the findings by SSA' vocational expert were premised on demonstrably incorrect information. The expert explicitly based his availability conclusion in part on Colaruotolo's purported statements, but Colaruotolo counsel asserted that Colaruotolo never made these statements. Contrary to the expert's recollection, his own notes reflect that Colaruotolo stated that the position is "rarely available" and that Colaruotolo previously worked the position only "occasionally." The Board, however, erroneously perceived this issue as a conflict in evidence rather than a defect in the expert's underlying information. Additionally, the vocational expert's analysis regarding the tower-clerk position's availability did not take into account the fact that Colaruotolo medically retired from his union. It was therefore unclear whether Colaruotolo's union seniority remained intact, which was a factor critical to the distribution of jobs, even absent disability accommodations. Finally, the ALJ and Board failed to consider the fact that Colaruotolo had ample incentives to return to work as a tower clerk if the position was readily available to him. The appellate court concluded that, when these issues were considered collectively, it was evident that the ALJ and the Board's findings regarding the availability of the tower-clerk position were unsupported by substantial evidence. Notwithstanding a vigorous dissent for Judge Rogers, a judge from the 6th Circuit sitting by designation, the appellate court granted the petition for review and remanded for an award of permanent total-disability benefits. (9th Cir, April 19, 2018, UNPUBLISHED) 2018 U.S. App. LEXIS 9878

Updater Note: The 9th Circus does it again, showing little respect for their colleague from the 6th Circuit, who could probably teach them a thing or two about fairness. The employer really got shafted here.

APPLICATION OF STATE EMPLOYMENT LAWS TO OCS FACILITIES
NEWTON V. PARKER DRILLING MANAGEMENT RGK AGR SERVICES, LTD.

Although not a maritime case, this case presented the novel question whether claims under state wage and hour laws may be brought by workers employed on drilling platforms fixed on the Outer Continental Shelf. Brian Newton worked on such a platform as a roustabout and painter for Parker Drilling. After Parker terminated him, Newton sued in state court for wage and hour violations under California law. Parker removed the case to federal district court and filed a motion for judgment on the pleadings. The district court granted the motion, concluding that the Fair Labor Standards Act is a comprehensive statutory scheme that is exclusive of California wage and hour laws. Newton appealed. The appellate court vacated the district court's dismissal on the pleadings, noting that the Outer Continental Shelf Lands Act provided that the laws of the adjacent state are to apply to drilling platforms fixed to the seabed of the Outer Continental Shelf as long as state law is "applicable" and "not inconsistent" with federal law. The panel held that California's minimum wage and overtime laws are not inconsistent with the Fair Labor Standards Act, which establishes a national floor under which wage protections cannot drop. The panel therefore vacated the dismissal of Newton's claims. In addition, the panel vacated the dismissal of claims brought pursuant to California's meal period, final pay, and pay stub laws, and instructed the district court to determine on remand whether these laws are "not inconsistent" with existing federal law. Finally, the panel also vacated claims under California's Private

Attorney General Act and Unfair Competition Law. The appellate court held that the absence of federal law is not, as the district court concluded, a prerequisite to adopting state law as surrogate federal law under the Outer Continental Shelf Lands Act and rejecting the proposition that "necessity to fill a significant void or gap," is required in order to assimilate "applicable and not inconsistent," state law into federal law governing drilling platforms affixed to the outer Continental Shelf. The appellate court vacated the district court's dismissal of Newton's claims and remanded for further proceedings consistent with its opinion. (9th Cir, February 5, 2018) 2018 U.S. App. LEXIS 2844

NO MONETARY BENEFITS EQUATES TO NO ATTORNEY FEE
CASTRO, ET AL. V. SSA TERMINALS, LLC; ET AL.

Bernard Castro allegedly sustained injuries while working for SSA Terminals, LLC. Castro filed claims under the LHWCA as well as a claim for California state workers' compensation. Castro retained Eric Dupree to handle his Longshore claim and Steven Birnbaum to represent him in his California workers' compensation claim. Dupree later informed Castro of his intent to withdraw as counsel. Castro, now representing himself, settled both the Longshore and state workers' compensation claims. Castro settled his state claim for $4,000. Meanwhile, with regard to his Longshore claim, Castro and SSA jointly requested the appointment of a settlement judge to mediate settlement negotiations. As a result of the negotiations, the parties submitted to the OALJ a joint 8(I) settlement agreement, which acknowledged Castro's settlement of his state workers' compensation claim for the net sum of $4,000, and agreed to receive a lump sum payment of $0.00 to settle all claims under the LHWCA. Dupree later filed an attorney's fee petition for work he performed before the OALJ, seeking a total fee of $33,518.04, representing 40.4 hours of attorney work at an hourly rate of $500, 33. SSA filed objections to the fee petition and counsel filed a reply. The ALJ denied Dupree's fee petition in its entirety, finding there was no successful prosecution of the claim resulting in an economic benefit to Castro under the Act. On appeal, Dupree challenged the ALJ's denial of an attorney's fee, contending the ALJ's conclusion that there was no successful prosecution of Castro's Longshore Act claim was erroneous and contrary to his finding, in approving the Section 8(i) settlement agreement, that the settlement was reasonable and adequate. The BRB pointed out that the plain language of the settlement agreement stated, as the ALJ found, that Castro would receive a lump sum payment of $0.00 under the Act. TheALJ's interpretation of this provision as evidence that SSA had no liability under the Act to Castro was held to be reasonable. Consequently, based on the ALJ's reasonable interpretation of the parties' settlement agreement, the Board affirmed the ALJ's rational conclusion that Dupree did not carry his burden to show that he was entitled to an attorney's fee pursuant to Section 28(a) because there was no successful prosecution of the claim under the Act. Dupree, appealed from the Benefits Review Board's denial of his petition for attorney's fees under the LHWCA. In a short, concise ruling, the appellate court found that the BRB's decision that Castro did not successfully prosecute his Longshore Act claim as required by 33 U.S.C. §928(a) was based on factual determinations that were supported by substantial evidence. First, substantial evidence supported the conclusion that the parties did not intend for a Section 3(e) credit to offset any liability imposed under the Longshore Act, because the settlement agreement stated that Castro was to receive a lump sum payment of $0.00 under the Longshore Act. Second, given that Castro received no payment under the Longshore Act, substantial evidence supported the conclusion that the parties did not intend for the $4,000 payment to serve as consideration for the release of Castro's Longshore Act claim. The petition for review was denied. (9th Cir, March 5, 2018, UNPUBLISHED) 2018 U.S. App. LEXIS 5584

APPELLATE COURT HOLDS BRB ERRED IN FINDING APPEAL UNTIMELY
SHAH V. WORLDWIDE LANGUAGE RESOURCES, INC., ET AL.

Shahwali Shah allegedly sustained injuries as a result of a helicopter crash which occurred while he was working for employer as an interpreter in Afghanistan. The parties stipulated to an award of benefits for those injuries. Shah returned to Afghanistan for a second tour of duty with employer. Shortly after the end of that tour of duty, Shah alleged he sustained cumulative traumatic injuries to his left ankle, left leg, right knee, back and neck, as well as post-traumatic stress disorder, due to his continued work in Afghanistan for employer. The administrative law judge awarded claimant benefits under the Defense Base Act Extension of the LHWCA. Shah's counsel sought, and was awarded, an attorney's fee for work performed before both the district director and the administrative law judge. Counsel, dissatisfied with the hourly rates awarded by the administrative law judge submitted a motion for reconsideration, which was summarily denied by the ALJ. Counsel appealed the ALJ's fee award and the fee award of the district director. The BRB affirmed both fee orders. The first attorney fee order, issued by the ALJ awarded $48,719.00 in attorney fees and $17,586.24 in costs. The second attorney fee order was issued by the District Director and awarded $8,480.50 in attorney fees. The Board's decision and order dismissed as untimely Shah's appeal from the underlying ALJ's attorney fee order and affirmed the District Director's attorney fee/compensation order. On further appeal, counsel argued that Board erred in dismissing the appeal from the underlying ALJ's attorney fee order as untimely. The appellate court agreed, finding the time for Shah to appeal was tolled until the date the ALJ entertained or considered and ultimately denied Shah's motion for reconsideration on its merits, rendering Shah's notice of appeal timely. Therefore, the appellate court granted Shah's petition and reversed and remanded the Board's dismissal of Shah's notice of appeal of the ALJ's attorney fee order for consideration on its merits. Additionally, because the Board erred in dismissing Shah's notice of appeal of the ALJ's attorney fee order, the appellate court remanded the Board's decision on the District Director's compensation order for findings that shall consider both the ALJ's findings and the District Director's findings, including the hourly rate determinations. (9th Cir, November 22, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 23719

APPELLATE COURT AFFIRMS RESPONSIBLE CARRIER AND INJURY DATE FINDING
HORNER V.. CASCADE GENERAL, ET AL.

Gary Horner sustained right knee injuries prior to beginning work for employer as a marine machinist in 1998. On September 18, 2007, Horner fractured his right femur in the hip area during the course of his employment. He underwent surgery for this injury, which entailed insertion of a metal rod to stabilize the bone. Horner returned to work on April 16, 2008, at which time Signal was providing employer's insurance coverage under the LHWCA. Horner retired from full-time work in August 2008, but he continued working part-time for employer from August 2008 to April 2011. In September 2010, claimant filed a claim under the Act against employer alleging that the residuals from the femur surgery caused increased pain in his right knee during work activities. Horner sought to hold employer liable for recommended knee replacement surgery and benefits for disability caused by the surgery. In response to the claim, employer's prior insurer moved to join Signal to the proceedings on the ground that Horner's continued work activities after April 2008 aggravated Horner's condition such that Signal was the responsible carrier. Following a formal hearing, the ALJ rejected Signal's contention that Horner's claim was untimely filed. The ALJ found that Horner established a *prima facie* case of a cumulative trauma knee injury, which the carriers did not rebut. The ALJ found that Signal was

the responsible carrier because Horner's work after he returned to work in April 2008 aggravated his pre-existing right knee condition. The ALJ found that the subsequent rod removal procedure in January 2012 was not an intervening cause of claimant's knee condition. The ALJ awarded Horner benefits for his right knee condition, including knee replacement surgery, payable by Signal. On appeal, Horner challenged the ALJ's finding that he sustained an ongoing cumulative trauma injury to his knee through his last day of work, alleging his ongoing knee injury is due to the 2007 accident in which he broke his femur. Horner contended that employer's prior insurer, and not Signal, was the responsible carrier and that his average weekly wage should be calculated as of the date of the 2007 injury. Signal cross-appealed, challenging the ALJ's findings that the September 2010 claim for a work-related knee injury was timely filed and that it was the responsible carrier. The BRB affirmed the ALJ's decision in all respects, finding that Signal did not produce substantial evidence that Horner was aware or should have been aware of the relationship between his femur injury and his increased knee pain more than one year before September 23, 2010, it did not rebut the Section 20(b) presumption. Thus, Horner's claim was timely filed. The ALJ did not err in finding that the rod removal procedure related to the knee injury for which Signal was the responsible carrier. Moreover, the rod removal surgery was not an intervening cause of any continued knee condition, as the surgery was undertaken solely as a predicate to total knee replacement surgery. Finally, the Board affirmed the ALJ's calculation of Horner's average weekly wage based the wages he earned during the year preceding his last day of work on March 4, 2011. Michelle Horner, as the personal representative of the estate of Gary Horner, petitioned for review of the opinion of the Board affirming the decision of the ALJ, arguing the ALJ failed to properly weigh medical evidence reflecting that Gary's knee condition was aggravated at an earlier date due to his femur fracture. The appellate court found that substantial evidence supported the injury onset date determination made by the ALJ and affirmed by the Board based on aggravation of Gary's knee condition when he returned to his work activities, holding that the ALJ sufficiently weighed the respective medical opinions in determining that the decedent's increase in knee pain was nine months after the femur fracture but only six weeks after resuming full duty at work and the change that coincided in time with the increased pain was the decedent's return to full-duty work, not the femur fracture and repair. The petition for review was denied. (9th Cir, December 4, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 24474

APPELLATE COURT AFFIRMS DENIAL OF SECTION 8(F) RELIEF
JONES STEVEDORING COMPANY, ET AL. V. POPOVICH, ET AL.

Steen Popovich was working for Jones Stevedoring Company as a walking boss. As he boarded a ship via a gangway with rope rails, he slipped and, grabbing on to the stanchion to prevent himself from falling, wrenched his right elbow and shoulder. He reported the incident immediately, finished his shift, and went to the doctor the next day. He has not worked since this incident. Employer voluntarily paid Popovich temporary total disability benefits, and then permanent partial disability benefits, and ceasing benefits upon contending Popovich could return to work as of January 17, 2011. Popovich's elbow injury was diagnosed as a 90 percent rupture of the triceps tendon and his shoulder injury was diagnosed as a labral tear and a partial tear of rotator cuff, with significant degenerative changes noted. The elbow injury fully resolved. Popovich's treating physician determined that the shoulder injury reached maximum medical improvement on February 7, 2011, and he gave Popovich permanent work restrictions. Following a formal hearing, the ALJ found that Popovich was incapable of returning to his usual work. He gave greater weight to the treating physician's opinion than to that of employer's

expert, regarding the extent of Popovich's physical restrictions, which prevent claimant from working at his home port because all walking boss jobs require climbing gangways. Finally, the ALJ found that the evidence submitted by Jones Stevedoring did not establish the availability of suitable alternate employment, and he rejected employer's assertion that more of the identified jobs would be available to claimant if he obtained an Americans with Disabilities Act (ADA) accommodation. The administrative law judge concluded that, at ports in Oregon, such accommodations were granted infrequently, if at all, such that claimant's request for one would be futile. As employer did not identify suitable alternate work that was realistically and regularly available to Popovich, the ALJ found that he been permanently totally disabled since February 7, 2011. The ALJ denied Jones Stevedoring's request for §8(f) relief, holding that the evidence did not establish that preexisting medical conditions which were manifest to employer contributed to claimant's ultimate permanent total disability. Jones Stevedoring appealed the ALJ's award of permanent total disability benefits and his denial of §8(f) relief. The BRB affirmed the ALJ's award of benefits and denial of §8(f) relief in all respects. Jones Stevedoring on a further appeal, did not dispute the disability determination, but argued that the BRB erred when it determined that Jones Stevedoring was not entitled to §8(f) relief. The appellate court, in a brief and unpublished decision, disagreed with the employer and ruled that an employer is not entitled to partial relief from a ruling that it is financial responsible for the permanent total disability of an employee where the employer did not show that the employee's current disability is not due solely to his workplace injury. His other ailments just create a greater disability than would have the workplace injury alone. The appellate court reviewed the record and was satisfied that the decisions of the ALJ and the BRB were supported by substantial evidence, agreeing that Jones Stevedoring did not show that Popovich's current disability was not due solely to the most recent injury. The petition was denied. (9th Cir, December 4, 2017, UNPUBLISHED) 2017 U.S. App. LEXIS 24477

LHWCA FEE–APPLICATION AND FEE-LITIGATION WORK ARE TREATED THE SAME
VORTEX MARINE CONSTRUCTION, ET AL. V. GRIMM, ET AL.

After Vortex Marine Construction and Signal Mutual Indemnity Association dismissed a petition for review of a decision of the Benefits Review Board, the appellate court granted Terry Grimm's motion for an award of attorneys' fees on review and referred the determination of an appropriate amount of fees on review to the BRB, and also referred to the BRB for a report and recommendation on Grimm's supplemental attorneys' fees motion, including the issue of entitlement to fees for defending the fee application. In its order, the appellate court agreed with the BRB that *Baker Botts L.L.P. v. ASARCO LLC*, did not prevent an award of attorney's fees for the fee litigation under the §928(a) of the LHWCA. The panel noted that under fee-shifting statutes, like §928(a) of the Longshore Act, courts uniformly decline to treat fee–application and fee-litigation work differently. Accordingly, the appellate court upheld the BRB's order awarding attorneys' fees and costs for the petition for review in the amount of $32,280; and awarded attorneys' fees for the fee litigation in the amount of $20,060 in favor of Grimm and against Vortex Marine and Signal Mutual. (9th Cir, December 22, 2017) 2017 U.S. App. LEXIS 26596; 878 F.3d 709

State Appellate Courts

Louisiana

LHWCA INSURANCE ISSUE DOES NOT CREATE FEDERAL JURISDICTION (CONT.)
WALTON V. GUIDRY, ET AL.

Willie Walton was hired by Original USA General Labor, LLC to work as a rigger, and was assigned to provide labor services to businesses. Walton worked at an A-Port, LLC facility on the day he was injured, while assisting the crane operator in the loading of an industrial mud tank onto a flatbed trailer. Another employee was also assisting with loading the mud tank. During this process, Walton allegedly suffered injuries to his left foot and ankle. Walton filed a tort suit in state court against the crane operator, assisting employee, and A-Port, alleging that the accident and his injuries were caused by the negligence of A-Port and its employees. The case was removed to federal court by the Louisiana Workers' Compensation Commission, bur dismissed for lack of jurisdiction. Because LWCC failed to carry its burden of proving there was a federal issue because the LHWCA was involved, the court found it did not have subject matter jurisdiction and does not have authority to hear the case. Back in state court, the defendants filed a motion for summary judgment, contending that they were entitled to judgment as a matter of law on the basis that A-Port was a borrowing employer and, thus, immune from tort liability. The trial court granted their motion for summary judgment, finding there was no issue of material fact that Walton was the borrowed employee of A-Port and that Walton's right of recovery was therefore limited to workers' compensation. Upon appeal, the appellate court affirmed the trial court's findings and held that Walton was a borrowed employee of A-Port. Thereafter, Original USA and its insurer sought and obtained permission to file a petition as intervenors for a third-party demand against A-Port and A-Port's workers' compensation insurer, LWCC. In their third-party demand, Original USA and AIIC alleged that a contract existed between Original USA and A-Port that required A-Port (as a borrowing employer) and LWCC to reimburse Original USA and its insurer for the LHWCA benefits and to assume responsibility for the payment of future workers' compensation benefits to Walton. Upon being granted intervenor rights, Original USA and its insurer filed a motion for summary judgment. alleging that LWCC was the responsible carrier on Walton's workers' compensation claim. The trial court granted the motion for summary judgment filed by Original USA and its insurer, dismissing the claims asserted by LWCC. This appeal followed and LWCC argued the trial court erred in ruling that LWCC was the responsible carrier for Walton's LHWCA benefits when A-Port is an additional insured under Original USA's policy with its insurer. In the alternative, if he appellate court were to determine that there were factual issues that preclude rendering judgment in favor, then those factual issues preclude rendering judgment favor of Original USA's insurer. The appellate court found that the contract did not contain a valid and enforceable indemnification agreement that relieved LWCC of its obligation to reimburse Original USA's insurer for compensation benefits previously paid to Walton and its obligation to assume responsibility for payment of future workers' compensation benefits to Walton. The appellate court concluded that LWCC's assignments of error were without merit. The trial court's judgment granting the motion for summary judgment was affirmed. (La. 1st App., January 4, 2018) 2018 La. App. LEXIS 17

New York

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

Wayne Schnapp was allegedly injured while boarding a vessel owned and operated by Miller 's Launch, Inc., and chartered by Schnapp's employer, nonparty Weeks Marine, Inc., to transport workers and equipment to and from job sites. Schnapp claimed Miller's negligence, including its vessel's inadequate equipment and unsafe condition and inadequate warnings, caused his injury. Schnapp was employed by Weeks Marine as a surveyor working on a bridge rehabilitation project at the time of his alleged injury, and was transported to shore on board Miller's vessel. Schnapp, who was not involved in the unloading or loading of equipment, disembarked by climbing up to the pier. When re-boarding the vessel, he injured his leg by jumping down from the pier onto the deck while reaching forward in an attempt to grab the shoulder of another Weeks Marine employee as an anchor standing on the vessel a few feet in front of plaintiff. Schnapp did not notify the captain when re-boarding nor request assistance in re-boarding and admitted that he decided to jump down to the deck. Schnapp collected LHWCA benefits from his employer after the incident, but later filed a §905(b) action against Miller's, who moved for summary judgment dismissing Schnapp's complaint because the undisputed facts established that Miller's conduct did not amount to negligence under the LHWCA. Since Schnapp failed to identify any viable breach of Miller's *Scindia* duties, the court granted Miller's motion for summary judgment, dismissing Schnapp's claim of negligence under §905(b) Schnapp appealed, raising issues about the various duties that a vessel owner owes a harbor worker asserting a claim pursuant to the LHWCA under *Scindia*. The appellate court initially noted that Schnapp was not a mere passenger on the Miller's Launch vessel, but was working aboard the vessel at the time of the accident. Not withstanding a vigorous dissent from Judge Richard Andrias, the majority found that there were issues of fact as to whether Miller's Launch violated both the turnover duty and the duty to intervene. The appellate court held that Miller's was not entitled to summary judgment on Schnapp's personal injury claim under §905(b), because there were issues of fact as to whether the owner violated the turnover duty and the duty to intervene, including, whether Schnapp really had the option of obtaining a gangway or insisting that one be provided. The order on summary judgment was reversed and the case was remanded to the trial court. Miller's Launch time moved for reconsideration, pursuant to section 500.11 of the rules. On reconsideration, the appellate court affirmed the order, with costs, and certified question answered in the affirmative. Triable issues of fact existed as to whether Miller's Launch breached a duty of care it owed to Schnapp pursuant to the LHWCA. (1st App Div, Sup Ct. of NY, April 26, 2018) 2018 N.Y. LEXIS 811

District Courts

California

THIS JUDGE HAS OBVIOUSLY NOT DEALT WITH TOO MANY ALJ ORDERS
GRIMM V. VORTEX MARINE CONSTRUCTION, ET AL.

Terry Grimm was engaged in physically demanding pile driving work for various employers, including Vortex Marine Construction, for the last decade of his career. Grimm's alleged work-related hearing loss, and injuries to his neck, low back, bilateral shoulders, bilateral upper and lower extremities forced him to retire. Grimm filed a claim for benefits under the LHWCA against Vortex, its carrier, Signal Mutual Indemnity Association, and two other employers. Following a formal hearing, the ALJ issued a Decision and Order, finding that Grimm suffered

cumulative orthopedic trauma over a lifetime of heavy work that left him permanently totally disabled. The ALJ also found that Vortex was the "last responsible employer" and ordered Vortex to pay medical and compensation benefits under the Act. Vortex sought reconsideration of the order, which the ALJ denied. They then appealed the ALJ's order to the U.S. Department of Labor's Benefits Review Board, which affirmed. They then appealed to the Ninth Circuit, but voluntarily dismissed the appeal and, instead, petitioned for modification of the ALJ's orders. The ALJ denied the petition for modification. After the ALJ's order, Vortex continued to withhold authorization for medical care. Grimm demanded Vortex authorize specific arthroscopic shoulder surgery, but Vortex declined to authorize the surgery, forcing Grimm to rely on Medicare to pay for the surgery. Grimm asked Vortex to authorize reasonable medical care for his work injuries, to be completed by several providers in Pennsylvania. When Vortex failed to do so, Grimm again relied on Medicare to pay for the treatments. Grimm filed a complaint in federal district court, alleging that Vortex had failed to pay for his medical expenses, in violation of the ALJ's order, which resulted in Medicare paying those expenses instead. Grimm asked the court to enforce the ALJ's order and to award double damages for all the expenses Medicare covered for the treatment of Grimm's his work-related injuries. Vortex moved to dismiss Grimm's complaint, on the ground that the court lacked subject matter jurisdiction, which Grim opposed. The court found that the ALJ's order was not specific enough for the court to provide the relief that Grimm sought. The court was unable to determine whether Grimm was entitled to have Vortex pay for the specific medical expenses Grimm was seeking, without adjudicating whether the treatments were recognized as appropriate by the medical profession for the care and treatment of Grimm's work related injuries. The court would also have to determine if the fees charged by Grimm's medical providers were the same or similar to those that prevailed in the community in which the medical care provider is located and did not exceed the customary charges of the medical provider for the same or similar services. With respect to these issues, the court concluded that the ALJ's order was not final, and thus not enforceable by the court. Vortex disputed that Grimm had demonstrated a responsibility to pay for the specific medical expenses covered by Medicare and that Medicare paid for medical expenses that Defendants should have paid for. The court therefore concluded that it did not have subject matter jurisdiction to resolve those factual disputes unless and until the ALJ issued a more detailed order. Because the court lacked jurisdiction, and Grimm failed to state a legally cognizable claim, the court dismissed the claim with prejudice. (USDC NDCA, January 19, 2018) 3:17-CV-03103

SHIP REPAIRMAN FAILS TO PREVAIL ON HIS §905(B) CLAIM
MARABLE V. UNITED STATES OF AMERICA, ET AL.

Phillip Marable, a ship repairman working on the USS Pinckney, a public vessel owned by the United States of America, allegedly sustained injuries after slipping on a ladder on the vessel. Marable was employed by Safway Services, LLC as a scaffolding superintendent on the date of the incident. Marable and his spouse initiated this action by filing a complaint against the United States and BAE Systems San Diego Ship Repair, asserting a negligence cause of action under general maritime law against BAE Systems and a negligence cause of action pursuant to §905(b) of the LHWCA, against the United States. Marable's spouse asserted a cause of action for loss of consortium against both defendants. The United States filed an answer and cross-claim against BAE Systems for contribution and indemnity, and BAE Systems filed an answer and cross-claim against the United States for contribution and indemnity. The Navy coordinated with BAE Systems to conduct repairs on the vessel who, in turn, subcontracted with scaffolding company

Safway. As part of the repairs and maintenance to be performed on the vessel, handrails on a number of ladders on the vessel were to be removed for powder-coating. BAE Systems was responsible for putting a temporary handrail in place or taping off the ladder. On the day of the incident, Marable used the incident ladder to access his work area. There were alternative routes by which Marable could access the work area, however, Marable testified that he observed that the ladder was missing a handrail but felt that he could safely climb the ladder. Marable testified that he did not recall exactly how he fell, but stated that his right foot slipped as he was walking down the stairs. Marable alleged that he injured his left knee in the fall. Marable testified that following his fall, he used the incident ladder again and still felt that the ladder was safe. Marable eventually underwent a total left knee replacement surgery and later underwent a revision surgery of his left knee replacement. Marable testified that during the time he was going through physical therapy after the second knee surgery, he began to suffer pain in his lower back and gait disturbance and underwent two spinal fusion procedures. Marable and his wife testified that although Marable's condition is improving, he remains in pain and the injuries have negatively impacted their previously active lifestyle and their relationship. Marable claimed that the active involvement duty is applicable and that the United States violated its duty of reasonable care under the circumstances by removing the incident ladder's inboard handrails. The United States contended that all aspects of the vessel owner's duty of reasonable care under the circumstances must be viewed in the context of an expert and experienced ship repair person. The United States further asserted that the missing handrail was not a breach of the active control duty regardless of whether the standard of care is viewed in light of a ship repair person or an expert and experienced ship repair person. The court found that the active involvement/control duty was applicable to the case because the United States was responsible for the removal of the inboard handrail on the incident ladder. However, the court also found that the incident ladder with the missing inboard handrail did not create an unreasonably hazardous condition for an expert and experienced ship repair person such as Marable, who had failed to demonstrate by a preponderance of the evidence that the United States breached its duty of reasonable care under the circumstances. Plaintiffs also contended that under general maritime law, BAE Systems owed to Marable a duty of reasonable care under the circumstances, and that BAE Systems breached its duty to put caution tape around the ladder to prevent expert and experienced workers from accessing the ladder. Plaintiffs also contended that BAE Systems failed to uphold its duty to correct the hazardous condition of the incident ladder after identifying that it was missing a handrail. The court found that BAE Systems did not owe Marable a contractual duty to identify and remedy the condition of the incident ladder with the missing inboard handrail under NAVSEA Standard 009-07. The court concluded that BAE Systems owed to Marable the ordinary negligence duty of reasonable care under the circumstances. On the day of the incident, the inboard handrail on the incident ladder had been removed. The outboard handrail on the incident ladder remained in place. Marable testified that he recognized that the incident ladder was missing one of its two handrails prior to using it and felt that it was safe. Therefore, the court concluded that the incident ladder with an outboard handrail in place did not constitute an unreasonably dangerous condition to an experienced ship repair person. In light of ***Peters*** and the section 905(b) cases limiting liability for open and obvious conditions, the court concluded that BAE did not have a duty to warn or remedy due to the open and obvious nature of the missing inboard handrail on the incident ladder. The court held that plaintiffs did not prove by a preponderance of the evidence that the missing inboard handrail on the incident ladder created an unreasonably dangerous condition to an experienced ship repair person and found that plaintiffs had not demonstrated by a preponderance of the evidence that BAE Systems breached its duty of reasonable care under the circumstances. Because the Court concluded that the United States and

BAE Systems were not liable to plaintiffs for any act of negligence in relation to injuries sustained by Marable, the spouse's cause of action for loss of consortium was dismissed. Judgment was entered in favor of the United States and BAE Systems. The court dismissed the defendants' cross-claims as moot. (USDC SDCA, December 21, 2017) 2017 U.S. Dist. LEXIS 210383

Florida

COURT DECLINES TO ACCEPT JURISDICTION OVER *PRO SE* LONGSHORE CASE
WOODS V. DIRECTOR, OWCP, ET AL.

John Woods, proceeding *pro se*, submitted a civil complaint in federal district court pursuant to the LHWCA. Woods did not initially pay the filing fee for this case nor submit an *in forma pauperis* motion; however, he later did so. Because Woods' amended *in forma pauperis* motion demonstrated his inability to pay the court's $400.00 filing fee, the motion was granted and Woods was permitted to proceed without payment of the filing fee. In his complaint, Woods named the Director of the Office of Workers Compensation Programs in Washington, D.C., and the Sixth Compensation District Director, OWCP Division of Longshore and Harbor Workers Compensation as defendants, arguing that defendants violated 33 U.S.C. §919(c) and §919(d) of the Act. Woods was allegedly injured, while employed by Harry Pepper and Associates, Inc., and ultimately had back surgery. A workers compensation claim was allegedly filed by the employer and an order was entered by an ALJ concerning weekly benefits and Woods repayment of $7,500 to the employer. At some point thereafter, Woods' attorney advised him to settle his case for approximately $75,000. Woods did so, although he contended that when his attorney sent him a signed copy of the settlement agreement, it was not as agreed upon. Woods initiated a case seeking review by the Benefits Review Board at some point thereafter, and his administrative case is still currently pending. The court noted that Woods had not demonstrated that a final order had been issued in that proceeding. The court noted that it would not have jurisdiction to review such an order, even if one had been issued. Therefore, the court determined that Woods' case should be dismissed, and the magistrate judge so recommended for lack of jurisdiction and because the case was not ripe for judicial review. (USDC NDFL, January 8, 2018) 2018 U.S. Dist. LEXIS 12247

In a subsequent ruling, after having considered, without hearing, the magistrate judge's report and recommendation, the district court ordered he report and recommendation be accepted and adopted the magistrate's opinion as its own, ordering the clerk to enter judgment dismissing the case for lack of jurisdiction and because the case was not ripe for judicial review. (USDC NDFL, January 25, 2018) 2018 U.S. Dist. LEXIS 11919

LONGSHOREMAN TRIES TO DO AN END RUN AROUND THE LHWCA
SMITH V. PATE STEVEDORE COMPANY, INC., ET AL.

Theodore Smith initiated an action in federal district court, seeking damages under the LHWCA, alleging the defendants' negligence led to a work-related injury. He attempted to avoid the Longshore Act's grant of tort immunity to employers by claiming that his employer, Pate Stevedore Company, Inc., was a vessel owner and his action was a section 905(b) third-party lawsuit. The court advised Smith that he could not state a claim for relief because he had not

alleged facts suggesting Pate violated any duty in its capacity as a vessel owner and section 905(b) expressly provides that no cause of action "shall be permitted" when the injury is caused "by the negligence of persons engaged in providing stevedoring. Smith then filed an amended complaint, named the same four defendants, Pate, American Interstate Insurance Company, Dr. Stephen Slobodian; and West Florida Hospital. The amended complaint alleged that smith was involved in an accident while unloading a vessel. When Pate's crane operator raised the crane, it lifted Smith's right leg off the ground and pinned the leg between 4 to 5 tons of lumber for 4 minutes. Smith alleged the accident permanently injured his back. Smith also criticized the medical attention he received after the accident. As relief, Smith sought punitive damages from each defendant. After reviewing the amended complaint, the court advised Smith that the court appeared to lack subject-matter jurisdiction over the action because the complaint did not allege diversity jurisdiction and the allegations did not implicate a substantial federal question. The court, therefore, ordered Smith to show cause why this case should not be dismissed for lack of subject-matter jurisdiction. Rather than respond to the court's show cause order, Smith submitted what appears to be a second amended complaint, which did not address the court's concerns about its subject-matter jurisdiction, but indicated Smith was suing each defendant for $7,000,000 for fraud. After reviewing the second amended complaint, the court concluded the case should be dismissed, as Smith's entitlement to workers' compensation benefits must be resolved through the Department of Labor's administrative process. Likewise, Smith could not raise state-law claims based on the defendants' handling of his workers' compensation claim, as they would be preempted by the Longshore Act. Smith's complaint was dismissed. (USDC NDFL, October 27, 2017) 2017 U.S. Dist. LEXIS 195130

Hawaii

COURT DENYS CLAIMANTS' MOTION TO COMPEL PAYMENT OF CURE
IN RE: HEALY TIBBITTS BUILDERS, INC.

David B. Makua, III, and Cesario T. Gaspar (collectively, "claimants") sought an order compelling their employer, Healy Tibbitts Builders, Inc. (HTBI), to pay for magnetic resonance imaging scans (MRIs) that claimants' treating physicians had recommended. Claimants are HTBI employees who were injured in an accident while working on a project to upgrade moorings in Pearl Harbor. Claimants contended that they were entitled to this treatment, as well as attorney fees for work done to obtain the care, under the Jones Act or under the LHWCA. Either way, claimants contended HTBI was responsible to pay for this treatment as HTBI is both the Longshore insurance carrier and the putative Jones Act Seaman insurance carrier. HTBI contended that an order compelling "cure" was premature because claimants' status as seamen was, as yet, unsettled. The court had already determined that there were questions of fact as to whether, at the time of their injuries, claimants' job duties were primarily land-based, making them eligible for medical care under the LHWCA, or primarily sea-based, making them seamen entitled to cure under the Jones Act. Under either system, HTBI is responsible for providing reasonable and necessary medical treatment for claimants' injuries; HTBI denied the MRIs under the LHWCA and controverted an OWCP recommendation regarding Makua's MRI, because he had an MRI seven months post-accident and there had been no interim injury nor a documented change in Makua's condition. To the extent claimants were asking the court to order payment for the MRIs under the LHWCA, the court agreed that it had no jurisdiction to do so. As HTBI has argued, and claimants' do not deny, a worker seeking compensation under the LHWCA must

proceed through the administrative procedure outlined in 33 U.S.C. § 919. Because the court had previously determined that a question of fact exists as to claimants' status as seaman (and no new evidence has been presented on that question), claimants' motion to compel payment of cure was denied. (USDC DHI, February 20, 2018) 2018 U.S. Dist. LEXIS 26995

Louisiana

COURT FINDS QUESTION OF FACT PRECLUDES 905(B) SUMMARY JUDGMENT
GUIDRY V. NOBLE DRILLING SERVICES INC, ET AL.

Glen Guidry was employed as a field service representative by VAM USA, LLC, a subcontractor of Shell. VAM performed casing operations aboard a drill ship, which was owned by Noble Drilling Services. Guidry was inspecting a joint casing while standing upon the drilling floor, which was covered in mud. Guidry slipped and allegedly sustained injuries to his back, ligaments, muscles, and nervous system. He sued Noble, claiming that he was injured as a result of the their negligence and seeking relief under general maritime law and the LHWCA. Nobel moved for summary judgment, contending that nothing in the record created a material fact issue and that Guidry had not submitted evidence that supports his claim that Nobel breached the duty owed to him. But the court found that Guidry had submitted testimony that undermined Nobel's arguments. Nobel pointed to Guidry's testimony that he was aware that mud and water were a frequent occurrence in such operations and that the mud was a hazard present in this operation. Moreover, they pointed to testimony that the area was diligently cleaned during this project between every joint casing, arguing that Nobel cannot be held liable for Guidry's fall when Guidry was aware of the conditions and did not take steps to clean the mess. Guidry countered that, while there was always slippery mud during these operations, the amount was excessive here. He testified that other operations cleaned the mud between every joint, where on the Noble drill ship, the Noble employees would clean between every two or three joints, allowing the mud to accumulate. Strong or weak, the court found that this argument was obviously a fact issue for trial. Guidry also testified that Noble was in charge, or at least shared responsibility, for the casing operation. Further, Guidry pointed to his own testimony that the driller's speed determines the amount of mud that would accumulate on the rig floor; the faster he drilled, the more mud would build up. Because Guidry wasn't in control of the amount of mud or the cleaning of it, he argued, Noble was not immunized from liability. The court concluded that these issues demonstrated that a genuine dispute of fact existed regarding whether Nobel breached their duty of reasonable care. The conflicting record testimony went directly to the issue of whether Noble had active control of the area and operation where Guidry was injured. Because there was a genuine dispute as to material facts underlying a determination of whether Noble breached its duty and was in control of the area, summary judgment as to Guidry's claim under §905(b) was highly inappropriate. Nobel's motion for summary judgement was denied. (USDC EDLA, April 4, 2018) 2018 U.S. Dist. LEXIS 57382

INSUFFICIENT POTENTIAL FOR DISRUPTING MARITIME COMMERCE
HICKS ET AL. V. BP EXPLORATION & PRODUCTION, INC. ET AL.

Robert Hicks was working as a rig electrician on an oil and gas spar platform on the Outer Continental Shelf, pursuant to a contract between Ensco and BP Exploration. Hicks alleged that he was injured during a basket transfers between a vessel and the platform. According to Hicks,

the personnel basket in which he was being transferred hit the deck of the vessel, then jerked up before it hit the vessel again. Hicks contended that he fell down in the basket the second time that it made contact with the vessel, with one leg in the basket and one leg out of it. Hicks and his wife eventually initiated this tort action, alleging that negligence attributable to BP Exploration, BP America, and Bishop-as well as other defendants-during the personnel basket transfer caused the injuries to Hicks. The question is, what substantive law governs plaintiffs' case? BP Exploration and Production Inc., BP America Production Company, and Bishop Lifting Products, Inc. Filed motions for summary judgment, argue that Louisiana law applied to the negligence action, at least as to plaintiffs' tort claims against them. Plaintiffs countered that general maritime law, not Louisiana law, applied. The court first considered whether the tort action arose under the Outer Continental Shelf Lands Act (OCSLA). Applying the "but-for" test to the undisputed facts, the court concluded that OCSLA jurisdiction extends to plaintiffs' tort action. As a contract rig electrician on the oil and gas spar platform Hicks' employment undoubtedly furthered mineral development on the OCS. In addition, Hicks would not have suffered his alleged injury but for his employment on the offshore platform. However, the fact that a case arises under OCSLA does not mean that it is governed by OCSLA. In order for adjacent state law to apply as surrogate federal law in a case arising under OCSLA, then, general maritime law must not apply of its own force. The court then proceeded to consider whether plaintiffs' tort claims sounded in admiralty. The court assumed, *arguendo*, that the maritime situs requirement was met. The Court also assumed, *arguendo*, that at least one of the putative tortfeasors was engaged in a traditional maritime activity at the time of the incident and that the second prong of the maritime connection requirement was thus met. Therefore, the court was left only with the first prong of the maritime connection requirement. Because the activities performed on offshore platforms by platform workers fall outside the purview of maritime navigational or commercial activities, injuries to platform workers during personnel basket transfers on offshore platforms will not have a potentially disruptive impact on maritime commerce. The motions filed by the BP defendants and Bishop were granted, and the court held that Louisiana law governed plaintiffs' tort claims against them. (USDC EDLA, April 5, 2018) 2018 U.S. Dist. LEXIS 57895

COURT ADDRESSES OCSLA BORROWED SERVANT CLAIMS (CONT.)
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. 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 immediately file a second motion for summary judgment or, alternatively, for reconsideration. The court initially noted that, despite what Fieldwood titled the motions, each motion asked for reconsideration of this court's prior ruling. Specifically, Fieldwood's motion contested the court's findings on three of the ***Ruiz*** factors regarding borrowed employee status. The court held that, in light of the material issues of fact present in the third factor and the second factor's clear counsel against a borrowed employee finding, the court need not consider Fieldwood's arguments regarding the first factor of control. The court declined to reverse its prior holding and maintains that a material issue of fact existed as to Washington's borrowed employee status. Next, Fieldwood argued that the court erred in dismissing Washington's claims against Wood Group after holding that its employee was the borrowed employee of Fieldwood, arguing that Louisiana tort law applied to this issue through OCSLA and the lending employer is solidarily liable with the borrowing employer for the torts of the borrowed employee. The court noted that it had not held that Washington and Wood Group's employee were co-employees. Accordingly, the LHWCA's prohibition against suits between co-employees and their solidary obligors was inapplicable to the case. Wood Group argued that the reasoning of ***Morgan*** was no longer sound in light of the Louisiana legislature's amendment abolishing solidary liability between joint tortfeasors. However, court found that the 1996 amendments had no effect on the relationship between employees and employers, and there was therefore no reason why such would invalidate the holding in ***Morgan***. Accordingly, Wood Group failed to convince the Court that the rule of ***Morgan*** should not apply to this case through OCSLA. ***Morgan*** held that a lending employer is still liable to an injured third party for the torts of the borrowed employee. Accordingly, Wood Group could still be vicariously liable for the negligence of it nominal employee. Therefore the court reversed its dismissal of Wood Group and reinstated Washington's claims against it. Fieldwood's motion for summary judgment was denied, and motion for reconsideration was granted. The court reversed its ruling dismissing Wood Group and reinstated Washington's claims against Wood Group for vicarious liability of its employee. (USDC EDLA, January 2, 2018) 2018 U.S. Dist. LEXIS 63

COURT FINDS PLAINTIFF TO BE A LONGSHOREMAN, NOT A SEAMAN
COSTANZA, ET AL. V. ACCUTRANS, INC.

Calvin Costanza worked as a tankerman for Accutrans, Inc. from April 2012 until January 2016. His duties included loading and/or unloading cargo from barges, mooring the barges to the dock, monitoring the drafts of the barges to make sure they stayed afloat, and pumping out the ballast tanks if the barges took on water during the loading and/or unloading process. Accutrans provided stevedoring services to various companies. When Accutrans assigned Costanza to a particular barge, he was in charge and given total control over it. For the most part, these barges were special purpose vessels designed to transport hazardous cargo, and Costanza alleged that he was regularly being exposed to toxic substances. In January 2015, Costanza was diagnosed with cancer, which he alleged was a direct result of his exposure to toxic and carcinogenic substances while in the course and scope of his employment. Costanza filed suit in state court, pursuant to the Jones Act, alleging Costanza was employed as a seaman within the meaning of the Jones Act and the general maritime law. Accutrans removed the action to this federal court, contending Costanza may not seek relief under the Jones Act, as Costanza's seaman status was fraudulently pleaded. Costanza moved to remand the case to state court, which the court denied, finding that there was no possibility that Costanza would be able to establish a cause of action' under the Jones Act. Accutrans then moved for summary judgment, contending the LHWCA, the exclusive remedy in the case, barred Costanza's Jones Act claims. Having previously determined Costanza

was not a Jones Act seaman when he incurred his injuries, the court found that his claims were exclusively governed by the LHWCA. Thus, because Costanza is a longshoreman, not a Jones Act seaman, and because he filed his claims against Accutrans pursuant only to the Jones Act, Accutrans was entitled to summary judgment on these claims. Accutrans' motion for summary judgment was granted. (USDC EDLA, December 5, 2017) 2017 U.S. Dist. LEXIS 199716

DELETING FEDERAL CLAIMS MAY NOT DESTROY FEDERAL JURISDICTION
PITRE, ET AL. V. HUNTINGTON INGALLS, INC., ET AL.

This is a case involving alleged asbestos exposure at Avondale Shipyard. Stewart Pitre worked as a pipefitter for Avondale Shipyard from 1963 to 1972 and later developed lung cancer, allegedly as a result of his exposure to asbestos at Avondale Shipyard, eventually resulting in his death. Pitre's wife and children filed an action in state court for wrongful death and survival, naming numerous defendants, including Huntington Ingalls, Inc. and Foster Wheeler, LLC. The original petition included, among other causes of action, failure to warn and other negligence claims against Avondale, and strict products liability and failure to warn claims against Foster Wheeler. Foster Wheeler allegedly produced boilers with asbestos-containing insulation that Pitre came into contact with aboard vessels at Avondale. Plaintiffs filed a first amended petition added Occidental Chemical Corporation as a defendant, and asserted strict liability claims against both Avondale and Occidental Chemical. Avondale and its insurer removed the case to federal court, arguing that they were entitled to remove this matter under 28 U.S.C. §1442(a)(1) because plaintiffs' claims are for or related to acts performed under color of federal office while Avondale was acting under the authority of an officer of the United States. Plaintiffs requested leave to file an amended complaint to delete their strict liability claims against Avondale, which the magistrate judge granted. Avondale appealed and plaintiffs opposed the appeal, and moved to remand the case to state court. After reviewing the magistrate's recommendation, the court observed that the magistrate judge could reasonably have concluded that plaintiffs' amendment sought to correct a good faith error, and was not made in bad faith. Plaintiffs were dropping substantive claims against Avondale that they might otherwise have pursued, and were not engaging in merely superficial manipulation of the pleadings to defeat federal jurisdiction. Avondale argued that plaintiffs' amendment was futile because it could not destroy federal jurisdiction. The court noted that the fact that the amended complaint did not automatically Accordingly, the court found no error in the order granting plaintiffs leave to amend their complaint, denying Avondale's appeal. Plaintiffs argued that, in light of the amended complaint, the court lacked subject matter jurisdiction and this case must be remanded to state court. The court noted that, while an amended complaint deleting federal claims may permit a discretionary remand, it did not destroy federal jurisdiction over a validly removed case. Instead, the court found that remand was not justified. Avondale's notice of removal was valid, and the court properly acquired jurisdiction over the matter. Further, Foster Wheeler was not affected by plaintiffs' amended complaint, and remained entitled to a federal forum under the federal officer removal statute. Therefore, the court denied the motion to review the magistrate judge's order granting plaintiffs leave to amend. Further, the court denied plaintiffs' motion to remand. (USDC EDLA, December 6, 2017) 2017 U.S. Dist. LEXIS 200355

DISPUTED ISSUES OF MATERIAL FACT ON §905(B) CLAIM
VELASQUEZ V. CRESCENT TOWING & SALVAGE CO., INC.

Michael Velasquez, an employee of Jonny White's C&W Air Repair, Inc., was performing

maintenance work on a towing vessel owned by Crescent Towing & Salvage Co., Inc., rebuilding the compressors in the lower engine room. Velasquez alleged that he sustained serious and disabling injuries when he slipped and fell while he was traversing the stairs leading from the upper engine room to the lower engine room. Velasquez further alleged that the fall was caused by a slippery substance, likely oil, left on the stairs by Crescent Towing's employees, and an inadequate non-skid surface. Velasquez filed this suit against Crescent Towing alleging that its negligence and the unseaworthiness of the caused the accident. Crescent Towing moved for summary judgment arguing that Velasquez could not prevail on his negligence claim under §905(b) of the LHWCA because he could not prove that Crescent Towing breached one of the duties enumerated in *Scindia*. Crescent Towing also argued that a person covered by the LHWCA is precluded from making an unseaworthiness claim against the vessel. Velasquez argued that Crescent Towing breached the active control duty outlined in *Scindia*. Velasquez contended that there were genuine issues of material fact regarding whether Crescent Towing maintained active control of the area in which C&W's employees were working and that it failed to act reasonably in either cleaning up the spilled slippery substance or warning C&W's employees about it. Crescent Towing argued that deposition testimony demonstrated that it did not breach the active control duty. Velasquez testified that he worked for at least two hours and went up and down the engine room stairs at least ten times before his accident. Velasquez did not see any oil on the stairs and he did not report any oil on the stairs to the vessels' crew or his boss before his fall. At the time of the fall, Velasquez was traversing the stairs facing forward, carrying six steel plates in one hand and using the other hand to hold the handrail. Velasquez testified that he saw oil on the stairs after his fall, but he did not know where it came from. Velasquez argues that there are disputed issues of material fact that preclude summary judgment as to the active control duty, citing other deposition testimony from crew members. The court concluded that the testimony cited by Velasquez demonstrated that there were disputed issues of material fact regarding whether the vessel's crew remained in active control of C&W's worksite. Although nobody else testified that they saw oil on the stairs before the accident, Velasquez testified that he observed the oil on the stairs after his fall and it looked as if someone had stepped in it. Crescent Towing also moved for summary judgment on Velasquez's unseaworthiness claim. Velasquez did not oppose this part of Crescent Towing's motion for summary judgment. Therefore, Crescent Towing's motion for summary judgment is GRANTED as to Velasquez's unseaworthiness claim, and that claim was dismissed. Crescent Towing's motion for summary judgment was denied as to Velasquez's claim brought under §905(b). (USDC EDLA November, 3, 2017) 2017 U.S. Dist. LEXIS 182579

OCSLA §905(B) CLAIM FAILS
CALLAHAN V. GULF LOGISTICS LLC ET AL.

Christopher Callahan was employed as a field service technician by Cameron International Corporation, and was performing duties within the course and scope of his employment. Callahan was aboard a crew boat, owned by Gulf Logistics LLC and crewed by employees of Gulf Logistics Operating, Inc., at the time of his alleged injury. While awaiting a personnel basket transfer from the crew boat, Callahan, without being instructed to do so and before the personnel basket was even secured on the crew boat in preparation for his transfer, decided to lift his 35-pound bag in an effort to put it on his shoulder. This movement coincided with a sharp roll from the crew boat, caused Callahan to be thrust forward and to sustain an alleged back injury. Callahan brought a lawsuit, pursuant to §905(b) of the LHWCA, made applicable to Callahan by the Outer Continental Shelf Lands Act (OCSLA). To prevail on his maritime tort

claim, Callahan was required to prove duty, breach, causation, and damages. All parties agreed that Gulf Logistics owed Callahan a duty of reasonable care under the circumstances. This included a "duty to warn passengers of reasonably anticipated dangers, though not openly obvious ones. Following a bench trial on the liability issue, Gulf Logistics LLC, Gulf Logistics Operating, Inc., C & G Boats, Inc., and Houston Casualty Company argued in favor of a judgment on partial findings. The court pointed out that Callahan was also required to exercise reasonable care and prudence, and since the vessel owner is not an absolute insurer of the passenger's safety, if the passenger is injured absent vessel owner negligence, no recovery is mandated. The court pointed out that Callahan was an experienced service technician who had completed hundreds of transfers from crew boats to other structures via personnel baskets. At trial, Callahan confirmed that he was aware of the risks involved in making the personnel basket transfer and decided to accept same, without having any discussions with anyone on board regarding the safety of making the transfer. At all times relevant, Callahan knew that he had "stop work" authority, which he had exercised in the past without adverse consequences, but declined to exercise that authority on the date of his alleged injury. The court found that the conditions that existed on the night of Callahan's injury, were neither unusually unsafe nor particularly hazardous. The court found no fault on anyone's part and therefore no liability on behalf of any defendant. Upon due consideration of the facts and evidence presented at trial, and the arguments of the parties, the court found that Callahan had failed to establish liability by a preponderance of the evidence and granted judgment in favor of all defendants. (USDC WDLA, November 15, 2017) 2017 U.S. Dist. LEXIS 189329

COURT DECLINES TO EXERCISE JURISDICTION OVER LHWCA CLAIM
WARNER V. CONTRACT CLAIMS SERVICES, INC., ET AL.

Biljana Warner, employee of the Marine Corps Community Service, an entity of the United States Department of Defense, filed this action pursuant to the LHWCA, as extended by the Non-appropriated Fund Instrumentalities Act, seeking enforcement of an order by an administrative law judge granting her compensation for an injury sustained at her workplace. Warner also sought compensation for pain management, attorney's fees, and late payment penalties. Contract Claim Services, Inc. (CCSI) moved to dismiss for failure to state a claim or, in the alternative, motion for summary judgment arguing in part that the court did not have jurisdiction over Warner's claims. The United States also filed a motion to dismiss for failure to state a claim and for lack of jurisdiction, also arguing in part that the court lacked jurisdiction over Warner's claims. In support of the motion, United States filed CCSI's appeal to the BRB, and Warner's appeal to the BRB, along with the BRB's letters of acknowledgment of both appeals. The court observed that the thrust of defendants' motions was that the court did not have subject matter jurisdiction and on this basis the complaint must be dismissed. Under Rule 12(b)(1), the plaintiff bears the burden of showing that subject matter jurisdiction is appropriate. Warner's primary claim against defendants was brought pursuant to §921(d) under the LHWCA, requesting enforcement of the ALJ's order granting Warner compensation related to work injuries sustained at plaintiff's place of employment. Defendants argued that the ALJ order at issue was not final and therefore the court lacked subject matter jurisdiction to grant the relief sought. The statutory scheme provides for limited jurisdiction to federal district courts. After an order "has become final," the LHWCA allows for judicial enforcement, not review, of the order in "the Federal district court for the judicial district in which the injury occurred." The record before the court reflected that there were multiple appeals pending before the BRB regarding the ALJ's orders. Pursuant to 33 U.S.C. § 921(d), the court has limited jurisdiction only over an

order that "has become final" and only to the extent of enforcing that order. Pursuant to the terms of the LHWCA, the court agreed that it lacked jurisdiction over Warner's request for enforcement of an order that is not yet final. Similarly, the court did not have jurisdiction to consider Warner's additional claims seeking enforcement of attorney's fees and late payment penalties as provided under the LHWCA pursuant to 33 U.S.C. §928(a) and §914(f). Even if the court did have jurisdiction, by its explicit terms, §921(d) only applies to the enforcement of final compensation orders, not the modification of such orders to provide for additional relief such as for pain management. Because the court concluded it lacked subject matter jurisdiction over Warner's claims, Warner's complaint was dismissed without prejudice. (USDC EDNC, November 3, 2017) 2017 U.S. Dist. LEXIS 182567

ISSUES OF FACT AND CREDIBILITY PRECLUDE SUMMARY JUDGMENT
LEBRUN V. BAKER HUGHES INC ET AL.

Jonathan Lebrun, worked for Baker Hughes Oilfield Operations, Inc. and was assigned to work as a sample catcher or "mudlogger" aboard Transocean's drillship. Lebrun alleged he injured his lower back by having to repeatedly pry open a vacuum sealed, 1/4 inch steel blast-proof shaker house door during his 12-hour shifts. Lebrun was terminated by Baker Hughes due to a company-wide reduction in force. Lebrun filed his seaman's suit alleging JonesAct negligence. The court found Lebrun was not a Jones Act seaman. 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 a cause of action under the LHWCA and the general maritime law. The court denied Lebrun's motion for summary judgment for *Sieracki* seaman status. Thus, Lebrun only retained a negligence claim against Transocean, the owner of the drillship, and moved for summary judgment on this remaining claim asking the court to find that there was no genuine dispute as to any material fact that Transocean's negligence substantially caused or contributed to his lumbar injuries and resulting surgery. The court agreed that because issues of fact and credibility remain, the issue of medical causation before the court was not ripe for summary judgment and must be resolved by a trier of fact. Lebrun's motion for summary judgment was denied. (USDC WDLA, November 1, 2017) 2017 U.S. Dist. LEXIS 181181

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 denied Lebrun's motion for summary judgment. Thus, as a covered LHWCA employee, Lebrun retained a negligence claim against Transocean, the operator of the drillship. Transocean moved for dismissal of Lebrun's negligence action with prejudice, at Lebrun's cost, contending that it had no "turnover duty" to Lebrun related to the condition of the shaker shack door that Lebrun alleged caused his back injury because the door was an "open and obvious" condition which is not encompassed in the "turnover duty." During the hearing, for the first time, counsel for Lebrun argued there was no issue of "turnover duty' because Lebrun had no control over any aspect of the drillship. Rather, Lebrun argued that the real issue in this case is whether or not Transocean breached the "active control" duty by maintaining control over the venting system and thereby control of the vacuum door through which Lebrun had to enter and exit the shaker shack. The court considered all of the evidence and the parties' memoranda and applicable jurisprudence, in particular Lebrun's concession that the "turnover duty" did not apply in this case, and found there were no genuine issues in dispute that Transocean did not breach its turnover duty. But even assuming arguendo that the duty did apply, the court found it was undisputed that the condition of the shaker shack door was open and obvious and the "no alternative" exception does not apply. The court granted Transocean's motion as to the "turnover duty" but refused to dismiss the case in light of Lebrun's new assertion that Transocean breached the "active control" duty. (USDC WDLA, November 14, 2017) 2017 U.S. Dist. LEXIS 187821

NO RIGHT TO JURY IN FRCP 9(H) ACTION BUT LHWCA ISSUE IS PREMATURE
ABADIE V. MADERE AND SONS MARINE SERVICES, LLC, ET AL.

Joseph and Amy Abadie (Abadie) moved for a judgment on the pleadings, seeking an order striking the jury demand made by defendants, Brammer Engineering, Inc. and Zurich American Insurance Company. Abadie also sought an order striking Brammer and Zurich's affirmative defense of workers' compensation tort immunity. Abadie was employed by Madere and Sons Marine Services, LLC and/or Deep South Oilfield Construction, LLC, assigned to work as the captain of a crew boat in navigation owned and operated by Madere and Deep South. He was allegedly instructed to sail to a production platform owned and operated by Brammer. When the vessel arrived at the production platform, Abadie was informed by the platform well site supervisor that the vessel had to take a tote tank containing liquid oilfield waste and weighting approximately 4,600 pounds from the platform to shore. Joseph advised the supervisor that the tote take was too big and heavy to be safely offloaded from the production platform onto the

crew boat, but the supervisor insisted on using the crew boat to do the job. During the loading process, the tote tank swung toward the vessel's bow, striking Abadie and pinning him against the bulkhead between the stern deck and the wheelhouse. Abadie alleged that he sustained multiple injuries as a result of the accident, including bruises and abrasions and injuries to his spine, shoulder and connective joints, tissues and nerves. Abadie filed suit against Madere, Deep South, Brammer, the supervisor and Zurich seeking damages for the injuries he allegedly sustained as a result of the accident, alleging that Madere and Deep South were liable for negligence under the Jones Act and damages under the general maritime law. Abadie also alleged that Brammer and the supervisor were liable for negligence under the general maritime law. In the alternative, Abadie alleged that he was a maritime employee covered by the LHWCA. Further, Abadie alleged that Brammer and Gautreaux were liable for his wife's loss of consortium and society. Abadie filed an amended complaint alleging that his claims were maritime claims that arose under FRCP 9(h). Brammer and Zurich filed an answer demanding a jury trial. Brammer and Zurich also raise an affirmative defense that Abadie's exclusive remedy against them was in workers' compensation. Abadie argued that he was entitled to a bench trial because they pleaded that their claims arise under this court's admiralty jurisdiction pursuant to Rule 9(h). He also argued that he was not employed by Brammer, thus his remedies against Brammer and its insurer, Zurich, were not limited to workers' compensation. The court pointed out that if a claim is pleaded under diversity jurisdiction, the rules of civil procedure would apply, and the parties will be guaranteed, under the Seventh Amendment, a right to have the claim tried by a jury. However, if the claim is pleaded under admiralty jurisdiction, the plaintiff will invoke those historical procedures traditionally attached to actions in admiralty. One of the historical procedures unique to admiralty is that a suit in admiralty does not carry with it the right to a jury trial. Therefore, the court concluded that Brammer and Zurich did not have a constitutionally or statutorily based right to a jury trial. Brammer and Zurich argued that it was premature to strike their workers' compensation defense. contending that Abadie was a borrowed employee of Brammer. The court agreed, noting that discovery in this case was ongoing and there were no facts before the court that would allow it to weigh the factors relevant to the borrowed servant test. Abdie's motion for judgment on the pleadings was granted as to striking the jury demand made by Brammer and Zurich. But the motion was denied as to striking the workers' compensation affirmative defense raised by Brammer and Zurich. (USDC EDLA, November 13, 2017) 2017 U.S. Dist. LEXIS 187075

COURT DECLINES TO REMAND FRAUDULENTLY PLED JONES ACT CLAIM
COSTANZA, ET AL, V. ACCUTRANS, INC.

Calvin Costanza worked as a tankerman for Accutrans from April 2012 until January , loading and/or unloading cargo from barges, mooring the barges to the dock, monitoring the drafts of the barges to make sure they stayed afloat, and pumping out the ballast tanks if the barges took on water during the loading and/or unloading process. Accutrans provides stevedoring services to various companies operating in the Gulf of Mexico. Costanza was diagnosed with cancer and filed suit in state court against Accutrans, alleging that he was regularly being exposed to toxic substances in the course and scope of his work and that his cancer was a direct result of his exposure to toxic and carcinogenic substances. Costanza filed suit pursuant to the Jones Act, alleging he was employed as a seaman. Accutrans removed the action to federal court, contending Costanza could not seek relief under the Jones Act, as Costanza's seaman status was fraudulently pled. Accutrans invoked the jurisdiction of the court under 28 U.S.C. §§1333, 1441, and 1446. Costanza moved to remand his case to state court and Accutrans opposed the motion.

Accutrans argued that Costanza's Jones Act claim was fraudulently pled, because Costanza lacked a substantial connection to the vessels on which he worked, and never sailed with the barges, or went to sea. When Costanza was working, the tank barges were always moored, unmanned, and had no crew. For those reasons, Costanza was a longshoreman covered by the LHWCA, and was therefore ineligible for relief under the Jones Act. Costanza disputed all of the arguments made by Accutrans. The court found that it was undisputed that the vessels upon which Constanza worked did not fall under common ownership. In his time with Accutrans, Mr. Costanza worked a total of 766 jobs, performing 8223.5 hours of work. These hours were spent working on barges owned by 30 different companies; Costanza spent no more than 11.58% of his time working for any one company. Mr. Costanza did not sail with the vessels, was not a member of a vessel's crew, and did not work aboard the vessels for the duration of their missions. Rather, Mr. Costanza interacted with the vessels to perform a particular service. Because Costanza failed to show that at least 30 percent of his time was spent on vessels, every one of which was under his defendant-employer's common ownership or control, the court Found there was no possibility that Costanza would be able to establish a cause of action under the Jones Act. Costanza's motion to remand was denied. (USDC EDLA, October 24, 2017) 2017 U.S. Dist. LEXIS 175517

ANOTHER REMOVAL ACTION BITES THE DUST
ARRINGTON V. SEAONUS STEVEDORING NEW ORLEANS, LLC

Eric Arrington alleged an incident, while he was employed as a maritime worker aboard a vessel owned and/or operated by Seaonus Stevedoring New Orleans, LLC. Specifically, Arrington alleged that while he was assisting in moving stacks of plywood aboard the vessel, one of Seaonus's crane operators dropped a load of materials directly on top of him, resulting in his alleged injuries. Arrington originally filed suit in state court. Shortly thereafter, Seaonus removed the case citing the court's original jurisdiction under 28 U.S.C. §1333 and removal pursuant to 28 U.S.C. §1446(a). Arrington moved to remand the case and Seaonus opposed the motion. Seaonus averred that the case was properly removed as a result of the 2011 amendment to §1441(b). Alternatively, Seaonus requested the court deny Arrington's request for an award of attorney's fees in light of this issue being a contested issue of law. The court observed that it had previously concluded that claims originally filed in state court are not, and were not made, removable by the recent amendments to the removal statute because there was no independent basis for removal. The court found that fees should be denied because Seaonus had an objectively reasonable basis for seeking removal. Arrington's motion was denied in part, to the extent that it sought the assessment of attorney fees, expenses, and costs against Seaonus, but the motion to remand was granted. (USDC EDLA, October 23, 2017) 2017 U.S. Dist. LEXIS 176637

COURT FINDS INDEPENDENT CONTRACTOR DID NOT OWE WORKER A DUTY
FORNAH V. TETRA APPLIED TECHNOLOGIES, LLC, ET AL.

This personal injury case arose from an offshore accident during a coiled tubing operation decommissioning a well on a plug and abandon project in which John Fornah alleged he was injured as a result of being the only rigger assigned to guide various hydraulic hoses, which were metal reinforced, filled with heavy viscous fluids, and suspended overhead by crane. As part of plugging and abandonment efforts, Chevron Corporation hired Schlumberger Technology Corporation, as an independent contractor, to perform coiled tubing wellbore cleanout. Tetra

Applied Technologies, LLC provided a crew for plugging and abandoning services. Pursuant to Tetra's Master Services Contract with Chevron, Tetra was also an independent contractor of Chevron. Fornah worked for Tetra as a rigger. Fornah claimed that he injured his neck, back, and shoulder after being instructed by his Tetra supervisor to guide a tubing hose during a crane lift. He attempted to perform this task by himself because other Tetra co-workers were busy and he did not see anyone available to help him. Another Chevron independent contractor, Alliance Offshore, LLC, owned and operated a liftboat adjacent to the platform and operated the crane being used to lift and move the hoses in Schlumberger's coiled-tubing job as part of Chevron's plug and abandonment effort. The Alliance-operated crane, located on an adjacent liftboat, lifted Schlumberger's coiled tubing injector head into position. Fornah said that, acting alone, he jerked an attached hose to get it untangled from scaffolding and felt a pain in his back and shoulder. Fornah continued to work, and worked two additional hitches. During the Chevron work, no one reported to Schlumberger any incident or injury to a Tetra employee. Fornah sued to recover maintenance and cure under general maritime law and also alleged Jones Act negligence on the part of his employer, Tetra; he also alleged unseaworthiness of the vessel, as well as negligence claims under general maritime law against Alliance (for failing to stop an unsafe lift operation), Schlumberger (for failing to provide a full coiled tubing crew and for negligent supervision), and Chevron. Schlumberger moved for summary judgment dismissing Fornah's claims. Fornah's alleged injuries occurred on a fixed platform in federal waters on the Outer Continental Shelf. It was undisputed that federal jurisdiction is predicated on the OSCLA, as extended by the LHWCA. In order for state law to apply as a surrogate to federal law under OCSLA, three requirements must be met. The parties disputed whether the second requirement, that federal maritime law must not apply of its own force, was met. In support of his argument that maritime law applies of its own force, Fornah merely suggests that the negligence of the Alliance crane operator, while operating the vessel crane, constituted vessel negligence, giving rise to federal admiralty jurisdiction, and with it, the general maritime law. The court was not persuaded that his arguments regarding Alliance's alleged negligence had any bearing on Fornah's claims against Schlumberger in which Fornah alleged that he was injured moving hoses on a fixed platform. Thus, pursuant to OCSLA, Fornah's negligence claim was governed by the law of Louisiana, the state adjacent to that portion of the seabed where he was injured. The court was compelled adjacent state would be applied to the extent not inconsistent with other federal laws and regulations. Schlumberger submitted that it was entitled to judgment as a matter of law dismissing Fornah's negligence claim against it due to the absence of the threshold duty element and the absence of any evidence of breach of any duty. The court agreed. Independent contractors do not generally owe a duty to protect the employee of another independent contractor beyond the exercise of ordinary care that is owed to the public generally. Absent from the record was any evidence indicating that, on the date of Fornah's alleged injuries, Schlumberger exercised supervisory control over Fornah or tasked him to handle the hoses. Fornah himself unequivocally admitted that Schlumberger did not directly supervise him. The court concluded that summary judgment in Schlumberger's favor was patently appropriate. Fornah failed to persuade the court that Schlumberger owed Fornah a duty. The record demonstrated that Tetra, not Schlumberger, directed and exercised supervisory control over Fornah at the relevant time. Because there is no genuine controversy to be resolved at trial, Schlumberger was entitled to judgment as a matter of law. Schlumberger's motion for summary judgment was granted. (USDC EDLA, October 23, 2017) 2017 U.S. Dist. LEXIS 174944

COURT GRANTS MOTION TO INTERVENE DUE TO OCSLA LIEN
DOUCET V. R & R BOATS, INC.

Elroy Doucet, an employee of W&T Offshore, sued R & R Boats, Inc. in admiralty, alleging that he was injured while traveling as a passenger on board a vessel in navigation owned, being operated by and under the sole custody and control of R&R. Doucet claimed, while transporting him and other workers to various platforms located in the Gulf of Mexico the crew boat encountered progressively worsening seas to the point where they were unreasonably dangerous for the R&R vessel to continue traversing. Doucet alleged that, due to the extremely rough sea conditions, he lost his balance and fell onto and against the edge of a table, striking and injuring his back, left shoulder, and neck. Doucet contended that he had been rendered totally disabled from working, and asserted that his injuries occurred solely through the negligence and/or fault on the part of R&R. Following his alleged injuries, W&T Offshore paid Doucet compensation and medical benefits under the OCSLA, as extended by the LHWCA. After Doucet filed suit, W&T Offshore's insurer, ALMA, moved to intervene in the case alleging that it issued a Member's Coverage Agreement to W&T Offshore, covering its liabilities for injuries to its employees pursuant to the 'OCSLA, extending the benefits of the LHWCA and that it had incurred liability for the payment of indemnity and medical benefits under the OCSLA and LHWCA to Doucet. The court found ALMA's Motion to Intervene to be timely and ALMA to be an intervenor of right under FRCP 24(a)(2). Therefore, the consent motion of intervention was granted. (USDC MDLA, October 10, 2017) 2017 U.S. Dist. LEXIS 167142

Wisconsin

LONG & COMPLICATED RULING IN §905(B) CASE IN WISCONSIN COURT (CONT.)
HOLDER V. THE INTERLAKE STEAMSHIP CO., ET AL.

James Holder alleged that he suffered from lead poisoning while working on a project to convert a ship's propulsion system from steam to diesel-powered. Holder applied for a job as a "ship fitter" with Tradesmen, who assigned workers to Fraser Shipyards for the vessel upgrade, including Holder. As a result, the vessel was in dry dock for six months, and could not have been used for transport during this time. The parties disputed who controlled the vessel during this upgrade. Holder argued that the ship remained in the active control of the Interlake Steamship Company, while Interlake pointed to Fraser. They likewise disputed whether Interlake controlled the details of the work performed by Fraser. Holder worked aboard the ship at Fraser's dry dock for 37 days. After Holder stopped working on the vessel, a former colleague advised him to have his blood tested because others had been exposed to lead. When Holder did so, his blood test revealed a blood-level of 36.5 µg/dL. In contrast, a normal blood lead level for adults at that time was considered to be less than 5 µg/dL, with an average of 1.2 µg/dL. Interlake, the owner of the vessel involved, started a ten-year project to upgrade five ships in its fleet, including converting four to diesel-powered. To facilitate this, Interlake entered into a contract with Fraser. Capstan is Fraser's sole shareholder and parent corporation. Holder sued the ship's owner, Interlake, alleging negligence under the LHWCA, as well as Fraser Shipyards, Inc., where the vessel was dry-docked for the upgrade, and Capstan Corporation, Fraser's parent corporation, for negligence under §933 of the LHWCA. The principal issue on summary judgment as to Interlake, the vessel's owner, was whether it was subject to liability under the Act as a "vessel," or under the general umbrella of a suable third party. Turning first to Interlake's assertion that the situs of injury was on land because the vessel was in "dry dock," Holder pointed out, that term is included within the definition of "navigable waters" in §903(a) itself. Indeed, a vessel in dry dock has still been considered within navigable waters for purposes of admiralty jurisdiction. As

to the argument that vessel status did not exist, however, Interlake had a better argument, albeit one that did not warrant summary judgment. The relevant question was whether the work on the vessel became significant enough that it was no longer capable of being used for maritime transportation. Thus it will be for the jury to determine whether the Jackson was a "vessel" at the time of Holder's lead exposure, which will determine the applicability of §905(b). Holder also brought a negligence claim against Fraser under §933 of the Act. Fraser argued that Holder was its "borrowed employee" when he was injured, and as such, §933 is unavailable because the LHWCA limits employer liability to compensation under §904. Holder and Interlake argued that a contractor (such as Fraser) is not the LHWCA employer of a subcontractor's (i.e., Tradesmen) employees unless the subcontractor failed to secure payment of LHWCA benefits and the contractor stepped in to fill the gap. As pointed out by Fraser, however, this argument has been addressed and rejected by other courts on the ground that the 1984 amendment to §905(a) did not eliminate the borrowed employee doctrine. After weighing the ***Ruiz*** factors, the court found that any reasonable jury would find Holder was the borrowed employee of Fraser and therefore his only recourse was a workers' compensation claim. Fraser's motion for summary judgment was granted. Interlake's motion for summary judgment was denied. The court ordered that trial would proceed on a trifurcated basis: first, the jury would determine whether vessel status existed at the time of Holder's injuries; then it would determine liability; finally, if the jury found liability, it would calculate damages. The case was set for a jury trial to resolve Holder's negligence claims stemming from lead exposure. Following summary judgment, his claims Interlake and Capstan remained; also remaining was a cross claim by Interlake against Fraser. The court then addressed the parties' voluminous briefing on various motions *in limine*, many of which the court found to be frivolous. Holder's Capstan's and Interlake's motions *in limine* were granted in part and denied in part. Capstan's supplemental motion *in limine* was reserved. Fraser's motions *in limine* were denied, while its supplemental request was reserved. Fraser's request to file a reply brief was granted. Fraser's initial motion to sever was denied. One of Interlake's motions *in limine* was reserved in part and denied in part. Interlake's motions to join were granted. Readers are referred to the extremely lengthy opinion itself for details on the various motions. (USDC WDWI, April 10, 2018) 2018 U.S. Dist. LEXIS 60496

Benefits Review Board

BRB HOLDS AUDIOLOGIST IS NOT A "PHYSICIAN"
JONES V. HUNTINGTON INGALLS, INCORPORATED

Clarence Jones, Jr. worked as a sheet metal mechanic for Huntington Ingalls, and allegedly worked in a noisy environment. During his employment, he underwent audiometric testing which revealed zero percent hearing loss. Jones sustained a work-related knee injury in 2009, and he has not worked since In 2014, Jones underwent an audiological evaluation that demonstrated a 17.2 percent noise-induced binaural sensorineural hearing loss and was told he needed hearing aids. Huntington Ingalls sent Jones for a second opinion evaluation, which revealed a binaural impairment of zero percent. Although the audiologist agreed Jones was a candidate for amplification, he stated that any change in Jones' hearing since he left the shipyard was probably not noise-related. The parties agreed to a number of stipulations, which the ALJ summarized, accepted, and incorporated into his decision. On the issue of causation, the ALJ found that the parties did not dispute that Jones suffers from a sensorineural hearing loss and that he was exposed to work place noise. Nevertheless, he stated, the burden was on Jones to prove

on the basis of the record as a whole that his hearing loss was caused or aggravated by his work for employer, and to what extent he has suffered a hearing loss. Weighing the evidence of record as a whole, the ALJ found that Jones' hearing loss was not noise-induced and that he did not have a ratable hearing impairment. Therefore, he concluded that Jones was not entitled to disability or medical benefits for his hearing loss. The ALJ denied Jones' motion for reconsideration. Jones appealed the decisions, contending the ALJ erred in denying disability and medical benefits. With regard to disability benefits, claimant asserts his hearing loss is work-related because employer did not rebut the §20(a) presumption that his hearing loss was related to the medication (aspirin) he took for his work-related knee injury, and he submitted credible evidence of a 17.2 percent hearing loss. With regard to medical benefits, claimant asserted his entitlement to hearing aids is established by the parties' stipulations. Jones also contended the ALJ should have made a finding as to which audiologist is to dispense the hearing aids. The BRB agreed with Jones that the ALJ erred in denying medical benefits. The administrative law judge accepted the parties' stipulations which established that employer accepted liability for medical benefits and authorized claimant to get hearing aids. In denying medical benefits, the administrative law judge gave no notice or explanation as to why he later "rejected" the stipulations. As to whether Jones was permitted his choice of audiologist, Huntington Ingalls asserted that audiologists, like pharmacists, are not "physicians" within the meaning of the Act and claimant is not entitled to his choice thereof as a matter of law. The Board rejected Jones' contentions, as he had not raised an issue to be addressed by the ALJ, and he had not shown that he was entitled, by statute or regulation, to choose an audiologist. As with pharmacists, claimants do not have a statutory or regulatory right to choose their own audiologists. Jones contended the ALJ erred in denying disability benefits for his hearing loss. The administrative law judge noted that both audiologists stated that the audiogram most reflective of any permanent impairment is the one that demonstrates the lowest loss. The administrative law judge also found the two 2014 audiograms wholly credible and equally probative of the degree of Jones' hearing loss. The ALJ found, under these circumstances, that Jones did not meet his burden of establishing that he has a hearing impairment and he denied benefits. The BRB affirmed this finding, noting it is well established that an ALJ is entitled to determine the weight to be accorded to the evidence of record. Thus, substantial evidence supported finding the two 2014 audiograms both credible and equally probative, and the ALJ did not err in so finding. Accordingly, the ALJ's denial of medical benefits was reversed. The case is remanded to the district director for supervision of claimant's medical care. In all other respects, the Decision and Order and the Order Denying Motion for Reconsideration were affirmed. (USDOL BRB, October 10, 2017) 51 BRBS 29

<u>Updater Note</u>: As many of my long-suffering readers know, I rarely review BRB decisions. However, I found this one interesting in that the Board held that an audiologist is not a physician; but more so because the Board accepted the opinion of the two audiologists that the audiogram most reflective of any permanent impairment is the one that demonstrates the lowest loss. Thanks to Doug Matthews and Nash Bilisoly for sharing this interesting case with me.