

THE LONGSHORE ACT: HISTORY, COVERAGES, RECENT CHANGES, CONTRACTOR/SUBCONTRACTOR AGREEMENTS*

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I. HISTORY OF THE LONGSHORE ACT

By the end of the 19th century, the Industrial Revolution coincided with an increasing number of industrial injuries. At the same time, the remedies available to workers were reduced by an increase in recognized defenses to common law claims by injured workers against their employers.

Germany was the first country to adopt a workers' compensation system in 1884. In 1910, a New York State Commission issued a report which became the basis for the New York Compensation Act, which would later become the basis for the Longshore Act. The New York Commission studied the German Act which was significantly different from the systems later developed under American law. The distinguishing feature of the German insurance was that workers made contributions to the system. Broadly speaking, the employers paid a portion of the disability compensation, and the workers collectively contributed the rest. The administration of the German plan was placed in the hands of representatives of employers and employees under government supervision. *Fundamental Law of 1884, Marine Law of 1887; Larson's Workers' Compensation Law*, Ch. 2, § 2.06 (2002). The current British compensation system is based upon the German "mutual" model.

The New York Commission rejected the German scheme for an adversarial scheme. This became the American pattern where the employer had sole liability for benefits, with no contribution by employees. *Larson, supra*, Ch. 2, § 2.06. The adversarial nature of American compensation systems is likely a continuation of the adversarial fault-based liability system which predated workers' compensation. *Id.*

By 1920, all but eight of the states then existing had enacted a workers' compensation scheme.

In 1908, Congress passed a workers' compensation act which covered certain federal employees. 35 Stat. 556 (1908). However, this act did not apply to maritime workers, who are subject to federal jurisdiction in many aspects of their employment. Some states attempted to apply their compensation acts to longshore and harbor workers, but in 1917, the Supreme Court ruled that such application was unconstitutional with respect to injuries occurring over the

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navigable waters of the United States. *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S. Ct. 524 (1917). The Court explained that Article III, Section 2 of the United States Constitution relegated jurisdiction over maritime matters to the federal government, and that the application of different state compensation laws to maritime matters would have the effect of defeating the uniformity necessary for the regulation of matters of maritime commerce. Thus, no state workers' compensation jurisdiction existed over maritime employees when their injuries occurred seaward of the boundary of navigable waters. This later became known as the "Jensen line."

In response, Congress twice attempted to amend the Judiciary Act to allow the application of state workers' compensation schemes to maritime injuries. The Supreme Court declared both enactments to be unconstitutional. *Knickerbocker Ice Company v. Stewart*, 453 U.S. 149, 40 S. Ct. 438 (1920); *State of Washington v. W.C. Dawson and Company*, 264 U.S. 219, 44 S. Ct. 302 (1924). In the second decision, the Court suggested that Congress could enact a federal compensation scheme to cover maritime workers.

The State of New York passed a workers' compensation law with compulsory coverage of certain "hazardous employments" in 1910. Following various challenges, the New York Act was found to be constitutional in 1917. *Hawkins v. Bleakley*, 243 U.S. 210, 27 S. Ct. 255 (1917).

The Longshore and Harbor Workers' Compensation Act was enacted in 1927. The Act was largely a rewriting of the earlier New York Act. If not for the enactment of the Longshore Act, the trend of the cases up until that time would have likely resulted in all harborworkers becoming "seamen" entitled to all the rights of seamen under maritime law and the Jones Act. Gilmore and Black, *THE LAW OF ADMIRALTY*, p. 438 (2nd ed. 1975).

The 1927 Longshore Act attempted to make a longshore employer's liability for compensation to be "exclusive and in place of all other liability." 33 U.S.C. § 933(a) (1927). By establishing a maritime workers' compensation system, Congress limited the liability of the employer and limited the recovery of the employee to that which could be obtained under the Longshore Act.

The employer and the employee are the first and second parties to a Longshore Act dispute with third-party liability referring to actions against other parties for damages not provided for by the Longshore Act. Generally speaking, third-party liability is greater than Longshore Act liability. A claimant limited to a longshore disability award usually receives less in terms of loss of earnings than they could have received in a "third-party" action for damages which would include past and future loss of earnings and pain and suffering. The pain and suffering component of damages available in third-party actions is altogether missing in a Longshore Act claim. The passage of the Longshore Act in 1927 held the potential of real savings for negligent employers of harborworkers if they could confine the claimant's recovery to the benefit scheme contained in the Longshore Act.

Unfortunately for the employers and their carriers, the 1927 Act came to be interpreted to allow a longshore worker to recover third-party damages from a ship owner, who was not his employer under the warranty of unseaworthiness. *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946), *reh'g denied*, 328 U.S. 878, 66 S. Ct. 1116 (1946). Later, the Supreme

Court held that a ship owner who was liable to a longshore worker for *Sieracki* unseaworthiness could recover against the worker's longshore employer in an indemnity action. *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124, 76 S. Ct. 232 (1956). As a result, a longshore worker, despite the exclusive remedy language of the 1927 Longshore Act, could ultimately recover full third-party type damages which would be paid by the longshore employer.

Congress amended the Longshore Act in 1972 and again in 1984 and inserted modified provisions to reinforce a longshore employer's immunity from liability outside of the Longshore Act compensation scheme, eliminate unseaworthiness actions against longshore employers, and limit negligence actions against longshore employers to specific situations.

The Longshore Act, like any workers' compensation act, represents a statutory compromise between an employer's potential exposure for tort claim damages and an employee's risk of not recovering damages because of a lack of negligence attributable to the employer. Section 904(b) of the Act makes clear that the compensation is to be paid to a claimant under the Act "irrespective of fault as a cause of injury." The only exception to this rule is injuries caused solely by intoxication of the injured employee or his or her willful intent to kill or injure themselves or another. 33 U.S.C. § 903(b).

Congress balanced these concessions to the injured worker by limiting the longshore employer's liability to the Act itself. Section 5(a) of the Act states that the liability of an employer "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." The 1972 amendments to the Act brought with it Section 905(b) which permitted an employee to bring an action against a vessel if their injury was caused by the negligence of the vessel. Section 905(b) negligence actions are discussed in detail below.

The Longshore Act gained extraordinarily wide coverage as a result of the 1972 amendments. Congress estimated that 800,000 employees were covered by the Act and its extensions in 1972. *Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, Committee Print, 92nd Cong., 2d Sess. (1972)*. During consideration of the 1984 amendments to the Longshore Act, the Senate noted that just five years following the passage of the 1972 amendments, the report of injuries had increased 185% and the number of claims had increased from 72,000 to 205,000. Similarly, the cost of benefits had increased 551% and covered employees had been forced to self-insure because coverage under the Longshore Act was "simply unaffordable". *Senate Report on Conference Report on S. 38 Longshoremen and Harbor Workers' Compensation Act Amendments of 1984* (September 20, 1984).

The 1984 amendments were, in part, an attempt on the part of Congress to limit the cost of longshore coverage by, for example, limiting (1) the number of covered occupations, (2) the circumstances upon which death benefits may be obtained, and (3) number of claims which are paid out of the Special Fund. The remainder of this discussion will apply to the amended 1984 version of the Longshore Act, unless otherwise noted.

II. COVERED INDIVIDUALS

A. Maritime Versus Non-Maritime Workers' Compensation.

In general, a state workers' compensation act will cover employees who suffer a landbased injury. The Longshore Act covers certain employees who are injured on or near the navigable waters of the United States. The shoreside area which will support Longshore Act jurisdiction should be devoted primarily to maritime commerce and should be as close as feasible to a waterway given all of the circumstances. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978). In some states, such as Alaska, the jurisdiction between the state and federal workers' compensation acts may overlap when an employee is injured on land which adjoins navigable water. The United States Supreme Court has approved this overlapping jurisdiction and found that a state may apply its workers' compensation scheme to landbased injuries which also fall within the Longshore Act. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S. Ct. 2432 (1980). The Alaska Workers' Compensation Board adheres to this distinction. It has ruled that it has no jurisdiction over injuries to longshore and harbor workers when those injuries occur over navigable waters of the United States. *Johnson v. Cook Inlet Processing*, AWCB No. 9206086 (9/14/94); *Schultz v. Sunmar Shipping, Inc.*, AWCB No. 9227232 (2/24/94); *Sharclane v. Southeast Stevedoring Corp. and City of Hoonah*, AWCB No. 726865 (2/24/89); *Kowalski v. Sea Star Stevedoring*, AWCB No. 723343 (4/29/88).

As a practical matter, many workers will choose the Longshore Act as a remedy, given the often greater benefits available under the Act in comparison to the state act. Washington State has dispelled any doubt concerning coverage between state and federal acts by specifically excluding coverage for workers for whom a "right or obligation exists under the maritime laws for personal injuries or death of such workers". RCW 51.12.100; *Lindquist v. Dep't of Labor & Industries*, 36 Wn. App. 646, 677 P.2d 1134, 1985 A.M.C. 1880 (Wn. App. Div. 1 1984), *review denied*, 102 Wn.2d 1001 (Wash. 1984).¹

B. Longshore Act Jurisdiction.

In order for jurisdiction to exist under the Longshore Act, an employee must be engaged in maritime employment (status) and must be injured at a maritime site (situs). *Northwest Marine Terminal Company v. Caputo*, 432 U.S. 249, 97 S. Ct. 2348 (1977).

The requirement of demonstrating that both maritime status and situs for longshore jurisdiction to attach applies to shoreside injuries. Individuals injured over navigable waters who were covered employees under the 1972 amendments to the Longshore Act continue to be covered employees. *Director, Office of Workers' Comp. Programs v. Perini North River Associates*, 459 U.S. 297, 103 S. Ct. 634, 646-647 (1983) (Stevens, J., dissenting). The Act does not extend to workers who are transiently or fortuitously over navigable water at the time of injury. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 908 (5th Cir. 1999) (worker spends substantial time over navigable water if 8.3% of work hours are over water).

¹ The states which do not allow concurrent jurisdiction between state workers' compensation acts and the Longshore Act are Florida, Hawaii, Louisiana, Maryland, Mississippi, New Jersey, Oklahoma, Oregon, Tennessee, Texas, and Washington.

1. Situs.

The Longshore Act defines a maritime situs as:

... the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

33 U.S.C. § 903(a). If the situs of an injury is not one of the areas specifically listed in the statute, then the claimant must show that the injury occurred on an “adjoining area”. Generally speaking, an adjoining area is a covered situs if it serves a maritime purpose. The criteria for determining whether a maritime purpose is served have been set forth by the 9th Circuit to be:

1. Suitability of the site for maritime uses listed in Section 3(a) (unloading or unloading a vessel; or building or repairing a vessel);
2. Whether the site is primarily devoted to uses in maritime commerce;
3. The proximity of the site to a waterway; and
4. Whether the site is as close as feasible to the waterway given all of the circumstances.

Brady-Hamilton Stevedoring Company v. Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). See also, *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1996 A.M.C. 995 (4th Cir. 1995), cert. denied, 518 U.S. 1028, 116 S. Ct. 2570, 135 L. Ed. 2d 1086 (1996); *Kinney v. Sause Bros., Inc.*, 1995 AMC 2213 (D. Hawaii 1995); *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 101, 1991 A.M.C. 2007 (2d Cir. (N.Y.) 1991).

The Benefits Review Board is the administrative appellate court which is the first level of appeal of an administrative law judge opinion. The Board was held that the situs requirement is fulfilled when the injury occurred in an area which is primarily used for maritime commerce. *Humphries v. Cargill, Inc.*, 19 BRBS 187, 191 (1986). In that case, the claimant was a foreman for a grain loading company when he left the job site and went to a restaurant to get a sandwich for a grain inspector. The restaurant was located within a mile of the waterfront on a public highway. The claimant was injured when getting back into his car. The Board held that when an injury occurs where the maritime industry co-exists with a non-maritime activity, the area is not primarily used for maritime commerce and is not “an adjoining area” under Section 3(a) of the Longshore Act.

In a similar case, the Benefits Review Board concluded that a claimant injured in an automobile accident while traveling from one employer’s facilities to another did not come within the coverage of the Longshore Act. *Cabaleiro v. Bay Refractory Company*, 27 BRBS 72(1993). The Court applied the criteria enunciated in *Brady Hamilton, supra*, to conclude that

an automobile accident at a location that neither adjoins navigable waters nor is customarily used by an employer in the building or repairing of a ship could not be a maritime situs. *See Alford v M.P. Industries of Florida*, 16 BRBS 261, 263 (1984). As these cases illustrate, a claimant can walk or drive out of coverage under the Longshore Act by leaving a maritime situs.

As noted above, a maritime situs includes a pier by definition. 33 U.S.C. § 903(a). The Ninth Circuit has concluded that a structure that looks like a pier but is not used as a pier is still a maritime situs. *Hurston v. Director, OWCP*, 989 F.2d 1547 (9th Cir. 1993). Although workers injured on such structures meet the requirements of maritime situs, they must also attain maritime status for the Longshore Act to apply. *McGray Construction Company v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999).

2. Status.

Covered “employees” under the Longshore Act must also have a maritime status, which is defined as:

... any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder, and ship breaker.

33 U.S.C. § 902(3). The 1984 Amendments to the Longshore Act specifically exclude certain individuals. These exclusions fall into two classes. The first applies the exclusion only when the listed categories of employees are covered under a state workers’ compensation law. This class includes individuals employed exclusively to perform office, clerical, secretarial, security, data processing work; individuals employed in a recreational operation, a restaurant, museum, a retail outlet, a club, or a marina; transporters, suppliers or vendors temporarily on the employer’s premises; aquaculture workers; and individuals who build or repair recreational vessels under 65 feet in length. 33 U.S.C. §§ 902(3)(A)-(F). The second class of exclusions is complete, irrespective of the existence of state workers compensation coverage. This exclusion applies to masters and members of the crew of a vessel and those individuals loading or repairing small vessels under 18 tons are not covered. 33 U.S.C. §§ 902(3)(G) and (H). Finally, an employer may obtain a limited exemption for coverage under the Act for the building and repair of small vessels as defined by the Act. 33 U.S.C. § 903(d).

In Section III, below, a new exclusion for coverage of certain individuals who repair recreation vessels is discussed in detail. 33 U.S.C. § 902(3)(F).

An employee whose job fits within the enumerated occupations defining the term “employee” under the Longshore Act is not precluded from bringing a Jones Act claim if a genuine issue of fact exists as to whether the employee was a seaman under the Jones Act. An employee who receives voluntary payments under the Longshore Act without a “formal award” may subsequently seek relief under the Jones Act. The amounts paid under the Jones Act shall be credited against any liability imposed by the Longshore Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486, 1992 AMC 305 (1992).

An employee who spends some of his or her time in undisputable longshore operations is considered to be a covered employee. *Northeast Maritime Terminal v. Caputo*, 432 U.S. 249, 273, 97 S. Ct. 2348 (1977). In applying this standard, the Ninth Circuit has looked to an employee's job duties as a whole to determine whether or not he has regularly been assigned "some portion" of the time to maritime employment. *Schwabenland v. Sanger Boats*, 683 F.2d 309, 1983 A.M.C. 1503 (9th Cir. 1982), *cert. denied*, 459 U.S. 1170, 103 S. Ct. 814 (1983). In that case, a boat inspector spent 30 weekends per year driving recreational boats for promotional purposes. The Ninth Circuit concluded that a worker who works "less than a substantial" portion of his time in maritime employment may be considered to be covered under the Longshore Act. *Id.* at 312.

The Ninth Circuit has held that it does not matter what employment history a claimant has with employers other than the employer at the time of injury if he was not performing maritime work at the time of the industrial event. A lifelong maritime employee hired to do a nonmaritime job does not meet the status requirement if injured while doing the nonmaritime job. *McGray Construction Company v. Director, OWCP*, 181 F.3d 1008, 1015 (9th Cir. 1999).

In a more recent case, the Ninth Circuit found that an electrician (Mr. Maumau) working at Pearl Harbor, Hawaii, had maritime status. *Healy Tibbetts v. Director, OWCP*, 444 F.3d 1095 (9th Cir. 2006). At the time of his death, Mr. Maumau was digging a trench to supply electrical power to a submarine berth. The Ninth Circuit found Mr. Maumau to be a covered "harbor worker" even though his job duties did not involve loading a vessel or even ship repair. The Court found individuals engaged in construction of a maritime facility to have Longshore Act status.

The Third Circuit has concluded that a courtesy van driver at a marine terminal did not have Longshore status because the occupation was not an essential element of the loading and unloading process. *Sea-Land Services, Inc. v. Rock*, 25 BRBS 112 (CRT) (3rd Cir. 1992). *See Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 1995 AMC 94 (4th Cir. 1994) (pipe fitter employed in building power plant in shipyard met situs test, but did not meet status test, since his trade was not inherently maritime and activity was not an integral or essential part of loading, unloading, or repairing ships). *But see Marinelli v. American Stevedoring*, 34 BRBS 112 (2000)(Union Shop steward's job duties found integral to the loading process).

3. Navigable Waters.

The United States Constitution extends admiralty jurisdiction to civil cases arising on the "navigable waters of the United States." U.S. Const., ART. III § 2; 28 U.S.C. § 1833; 33 U.S.C. § 903(a). The U.S. Supreme Court has observed that the concept of navigability is a pragmatic one, having different meanings in different contexts. *Kaiser Aetna v. United States of America*, 444 U.S. 164, 100 S. Ct. 383 (1979). As a result, the Army Corp. of Engineers and the U.S. Coast Guard may determine a body of water to be navigable in a different context but this does not control whether the water is navigable for purpose of maritime personal injury claims.

The definition of "navigable waters" for maritime personal injury claims and claims coming under the Longshore Act is identical. This "navigability in fact" test was created by the Supreme Court in 1870. The Court held that waters are navigable in fact when they are used or

susceptible to being used in their ordinary condition as highways of commerce over which trade and travel may be conducted and they:

constitute navigable waters of the United States, in contra distinction from the navigable waters of the state, when they form in their ordinary condition by themselves, or by uniting other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries.

The Daniel Ball, 77 U.S. 567, 19 L. Ed. 999, 10 Wall. 557 (1870). Therefore, waters are considered to be navigable if they are used or capable of being used in their current configuration as a highway of commerce between states or other countries. The key to this concept is the use of the waters for trade and commerce. Navigable waters only include those bodies of water over which commerce can take place because the Constitution's grant of admiralty jurisdiction was designed to protect and promote the maritime shipping industry through the development and application of a uniform body of specialized federal law. *Adams v. Montana Power Company*, 528 F.2d 437, 439 (9th Cir. 1975).

This legal standard has been used by the courts to deny a number of Longshore Act claims including a claim where the injury took place on a river that had not been used as an artery of commerce since 1841 when a washout of a dam formed a permanent obstruction to the mouth of the river. *Elia v. Mergentime Corporation*, 28 BRBS 314 (1994). A land locked reservoir wholly within one state was found by the Benefits Review Board not to be navigable. *Williams v. Penn Marine Construction*, 18 BRBS 98 (1986), *affirmed Sub Nom Williams v. Director, OWCP*, 825 F.2d 246, 20 BRBS 25 (CRT) (9th Cir. 1987). Finally, the Board has found that a diver in an underground reservoir tank adjacent to the Great Miami River was not injured in navigable waters because the tank was not designed to support commerce by water and could not be navigated through by any craft on the river. *Rizzi v. Underwater Construction Corporation*, 28 BRBS 360 (1994).

While Jones Act cases will be described in greater detail below, the same analysis has been applied in such cases. The Seventh Circuit Court of Appeals has concluded that a slot machine attendant injured aboard a riverboat casino on the Illinois Fox River was potentially barred from bringing a general maritime and Jones Act action because of problems with the navigability of the river at the point of injury. In that case, the court found that the riverboat casino could only move about 300 yards because there was a dam on one side and a bridge on the other. *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 2001 A.M.C. 2563 (7th Cir. 2001). A different result was reached by the Fourth Circuit Court of Appeals in a case where a reservoir, which was used mainly for recreational purposes, laid between Virginia and North Carolina. The Fourth Circuit concluded that since the reservoir was capable of sustaining commercial traffic between states, it was navigable. *Price v. Price*, 929 F.2d 131 (4th Cir. 1991). The chief difference in this case was that the landlock reservoir sat astride two states so that maritime commerce could take place between the states.

The Longshore Act requires that an injury occur on or near navigable waters for maritime situs to exist as a qualifier to Longshore Act jurisdiction. In Jones Act cases, the location of the injury does not have to be on navigable waters so long as the Jones Act plaintiff has attained

Jones Act seaman status. *See Williams v. Western Pacific Dredging*, 441 F.2d 65 (9th Cir. 1971). The requirements for establishing a Jones Act seaman status are discussed in Section VIII of this paper.

4. Extraterritorial Coverage of the Longshore Act.

As pointed out above, the Longshore Act, by its own language, applies to injuries upon the “navigable waters of the United States”. 33 U.S.C. § 903(a). In this case, the plain words of the Act will mislead you. While there is a presumption applied by United States Courts against the extraterritorial extension of U.S. law, the Longshore Act appears to be on its way to being extended beyond the territorial waters (three mile limit) of the United States.

This trend began with a Second Circuit case which found that a claimant injured on the high seas in a voyage from Texas to California was covered under the Longshore Act despite being injured outside the territorial waters of the United States. The Second Circuit found the Act to apply because Section 39(b) directs compensation districts to be established to include the “high seas”. *Kolias v. D&G Marine Maintenance*, 29 F.3d 67 (2nd Cir. 1994). The Benefits Review Board has gone farther to conclude that a claimant who worked in the port of Kingston, Jamaica was a covered employee. The claimant in question was a U.S. employee of a U.S. employer. At the date of injury, he slipped on a catwalk of the employer’s barge. The Board has twice reconsidered this holding and stands by its belief that injuries of U.S. employees of U.S. employers within the territory of another country are covered under the Longshore Act. *Weber v. Loveland Company*, 28 BRBS 321 (1994); 35 BRBS 75 (2001); *affirm on reconsideration*, 35 BRBS 190 (2002). The Benefits Review Board emphasized that when all contacts of the injured claimant with the exception of the location of the injury are with the United States, then the Longshore Act applies.

The Ninth Circuit has acknowledged that the Longshore Act has extraterritorial effect to include the high seas. *Saipan Stevedore v. Director, OWCP*, 133 F.3d 717 (9th Cir. 1998).

III. RECENT CHANGES TO THE LONGSHORE ACT

The American Recovery and Reinvestment Act of 2009 was signed into law by the President on February 17, 2009, and includes a section amending the Longshore Act’s extension of jurisdiction over certain workers engaged in the repair of recreational vessels.

The purpose of the new law is to stimulate economic growth by attempting to reduce the insurance costs of recreational vessel repair companies.

Here is what the new language of 33 U.S.C. § 902(3)(F) of the Longshore Act provides:

(3) The term “employee” means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker, but such term does not include

* * * * *

(F) individuals employed to build any recreational vessel under 65 feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel;

* * * * *

If (such) individuals ... are subject to coverage under a State workers' compensation law.

With the new law, Congress has attempted to provide a narrow new exception to coverage. The practical effect of the amendment is that employees who repair (or dismantle in connection with repair) recreational vessels over 65 feet may no longer pursue a Longshore Act claim, so long as State Act insurance coverage is in place.

Employees injured while repairing recreational vessels over 65 feet in length will likely receive less in compensation because State Act benefits typically are less than Longshore Act benefits.

The new law does not change the fact that employees who build, rather than repair, recreational vessels over 65 feet are still covered under the Longshore Act. Further, Longshore Act jurisdiction for commercial vessel construction and repair is unaffected.

Boatyards which repair both commercial and recreational vessels will need to strictly segregate their payroll between commercial and recreational repair work to take advantage of the new law.

It can be anticipated that future disputes will be brought over the definition of "recreational vessel." For instance, a 70-foot yacht may be recreational in appearance but built to conduct some form of commerce.

There may be litigation over what it means to "repair" a recreational vessel, as opposed to "building" the same vessel.

Also, the fact that the new exclusion is in effect should not cause recreational ship repairers to instantly cancel their Longshore Act policy. The new law does not prevent an employee from alleging a Longshore Act claim, and without longshore insurance, the ship repairer will have to pay for its own legal defense.

Further, any work, however incidental, repairing or building a commercial vessel of any size is covered under the Longshore Act. Likewise, any work building a recreational vessel over 65 feet in length remains employment covered under the Longshore Act. This means, for example, that a recreational vessel repair yard, which undertakes to repair or build a commercial vessel, could be exposed to liability under the Longshore Act.

It will take some years for the legal issues raised by the recent amending of the Longshore Act to be sorted out by the courts.

IV. EMPLOYER IMMUNITY FROM THIRD-PARTY ACTIONS

As noted above, the Act, with some exceptions, immunizes an employer from third-party tort actions. 33 U.S.C. § 905(a). This immunity extends to even malicious or other misconduct by the employer short of an intentional act to injure the worker. 2A Larson, *Workmens' Compensation Law*, 68.13 at 13-9 (1986).

An employer loses its immunity and may be sued in negligence if it fails to “secure payment of compensation as required by this Act.” 33 U.S.C. § 905(a). In other words, if an employer fails to obtain longshore insurance or fails to attain status as an approved self-insured employer (or member of an approved self-insurer), it may be sued in the civil or admiralty courts. In such cases, the employer loses the ability to plead such defenses to the negligence claim as the injury being caused by the negligence of a fellow servant, that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. 33 U.S.C. § 905(a).

V. BORROWING EMPLOYERS

More than one employer may claim to be a claimant’s employer and avail themselves of the immunity afforded by Section 905(a). In such cases, a claimant may pursue a workers’ compensation claim against his employer and sue a negligent party as a third party. The potential third party defendant may claim that they were also the employer of the claimant in order to immunize themselves from this lawsuit. The courts have long recognized the borrowed servant doctrine. *McCollum v. Smith*, 339 F.2d 348 (9th Cir. 1965). In that case, the Ninth Circuit was faced with a question of whether a loaned employee could sue his regular employer as well as a borrowing employer after an injury occurred while working for the borrowing employer. In addressing the question, the Ninth Circuit established the following standard:

When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of the acts of that service, is dealt with as the servant of the latter and not the former.

McCollum, 339 F.2d at 350, citing, *Denton v. Yazoo & MVR Company*, 284 U.S. 305, 308, 52 S. Ct. 141, 142 (1942).

Further, the Ninth Circuit elaborated:

Again, the factual inquiry is based upon authority and control: in deciding this issue, a factor usually considered to be controlling is the location of the power to control the servant, for responsibility is regarded as a correlative of power.

McCollum, 339 F.2d at 350, *citing*, *Standard Oil Company v. Anderson*, 212 U.S. 215, 29 S. Ct. 252 (1909).

The Ninth Circuit has yet to directly apply its articulation of the borrowed servant doctrine to injuries covered under the Longshore Act. However, the Third, Fourth and Fifth Circuits have all found the borrowed employee doctrine of applicable in the context of Section 905(b) claims under the Longshore Act. *Peter v. Hess Oil Virgin Islands Corporation*, 903 F.2d 935 (3rd Cir. 1990); *Melancon v. Amoco Production Company*, 834 F.2d 1238 (5th Cir. 1988); *West v. Kerr-McGee Corporation*, 765 F.2d 526 (5th Cir. 1985); *Huff v. Marine Testing Corporation*, 631 F.2d 1140, 1143-44 (4th Cir. 1980); *Temporary Employment Services v. Trinity Marine*, 261 F.3d 456, 458 (5th Cir. 2001).

The factors for determining whether an employee is a borrowed employee for purposes of the Longshore Act have been enunciated by the Fifth Circuit in *Ruiz v. Shell Oil Company*, 413 F.2d 310, 311-14 (5th Cir. 1969). The nine elements identified by the Fifth Circuit emphasize that an employee becomes a borrowed employee when the borrowing employer exercises control over the employee and the employment circumstances. The factors include the borrowing employer furnishing the temporary employee with the necessary instruments for performance of the work in question, employment of the servant for a considerable length of time, the worker performed the work of the temporary employer, the temporary employer has the right to discharge the servant, and the temporary employer has the obligation for payment of wages. *See Brown v. Union Oil Company of California*, 984 F.2d 674 (5th Cir. 1993).

VI. NO EMPLOYER IMMUNITY FOR LONGSHORE LIABILITY FOR INJURIES TO EMPLOYEES OF UNINSURED CONTRACTORS

The 1984 amendments codified prior case law establishing that a contractor is liable for compensation payments to a subcontractor's employee if that subcontractor fails to obtain longshore insurance or self-insured status. 33 U.S.C. § 905(a).

A longshore general contractor becomes potentially liable for compensation when the injured employee was engaged in work that is either a subcontracted portion of a larger project or work that is normally conducted by the general employer's own employees rather than independent contractors. *Sketoe v. Dolphin Titan International*, 28 BRBS 212 (1994), *aff'd*, 188 F.3d 596 (5th Cir. 1999).

If we assume that the subcontractor obtains insurance for longshore claims, the general contractor is potentially liable for a third-party action. 33 U.S.C. § 905(a) and § 933. In this way, a contractor's potential liability depends upon whether or not the subcontractor has longshore insurance or is an approved self-insurer under the Act. However, the general contractor may establish immunity to a negligent action by the employee of an insured contractor if it is "borrowing employer" as discussed above. *See West v. Kerr-McGee Corporation*, 765 F.2d 526, 530 (1985).

A case in the Washington State Court of Appeals illustrates the type of immunity issues that are raised in a third-party action. *Campbell v. Lockheed Shipbuilding Corporation*, 115 Wn. App. 1047, 61 P.3d 1160 (Wn. App. 2002).

In that case, the claimant was exposed to asbestos at a variety of shipyards in the Puget Sound area. He had worked for a time at Lockheed Shipbuilding as Lockheed's employee. He also worked for Frigitemp Marine as one of Lockheed's subcontractors. Later, he worked for Todd Shipyards. Claimant filed a claim against Todd Shipyards for longshore benefits when he was diagnosed with lung cancer in 2001. He later filed a third-party tort action against a variety of defendants including Lockheed. Claimant argued that he was suing on account of an exposure he received to asbestos while working for Frigitemp as a subcontractor to Lockheed. Claimant argued that since Lockheed was not his employer at that time, he was entitled to assert a third-party action and Lockheed was not entitled to assert the exclusivity provision of a Longshore Act as a defense.

The Washington Court of Appeals concluded that Lockheed Shipbuilding was immune from a third-party action as an employer under the Act. 33 U.S.C. § 905(a). The Court reasoned that Lockheed had a potential for full liability under the Longshore Act because it was one of claimant's employers who exposed him to asbestos. The fact that claimant was last employed by Todd Shipyards and last exposed by asbestos during that employment, placed liability on Todd Shipyards but did not remove immunity from a third-party action against Lockheed. The Court found it to be significant that the asbestos exposure claim was an "indivisible injury" and implied that the result may have been different if the claimant's injury while working for Frigitemp was a distinct, nonoccupational disease such as a back injury from falling from a ladder.

VII. CARRIER IMMUNITY

Courts have interpreted the Longshore Act as implicitly granting an employer's insurance carrier and its employees the same immunity that it grants the employer and its employees. *Nations v. Morris*, 331 F. Supp. 771 (E.D. La. 1971), *aff'd*, 483 F.2d 577 (5th Cir. 1973); *Atkinson v. Gates, McDonald & Company*, 838 F.2d 808, 812 (5th Cir. 1988); *Barnard v. Zapata Haynie Corporation*, 975 F.2d 919, 921 (1st Cir. 1992).

The case law is consistent in holding that the penalty provisions of the Longshore Act preempt any action against an employer and the carrier outside of the Act.

VIII. JONES ACT CASES

The Longshore Act is focused on remedies available to mainly land-based maritime workers. The Longshore Act excludes injuries to the "master or member of a crew" of a vessel. 33 U.S.C. § 902(3)(G). The courts have held that the "master or member of the crew" and a "seaman" are synonymous terms. *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S. Ct. 807 (1991).

The Jones Act seaman may sue his employer for tort liability in a negligence action. For this reason, Jones Act cases are often confused to be "third-party" cases. In fact, the parties to a Jones Act case and a longshore case are the employer and the employee and are therefore the same parties. No third party is involved. However, an employer sued under the Jones Act may establish immunity from the negligence action by establishing that it is a longshore employer rather than a Jones Act employer. *Heise v. Fishing Company of Alaska*, 79 F.3d 903 (9th Cir. 1996).

In *Heise*, the plaintiff was hired as a temporary laborer in the category of a “assistant engineer” by the defendant employer. The plaintiff performed repair and maintenance on the employer’s vessel while in port during the time leading up to the industrial injury.

The Ninth Circuit applied an analysis of whether the plaintiff was a Jones Act seaman to determine whether the employer was a longshore employer and thereby immune from an action for damages under the Jones Act. The Ninth Circuit noted that requirements for seaman status included (1) the employee’s duties must contribute to the function of the vessel or to the accomplishment of its mission, and (2) the seaman must have a connection to the vessel in navigation that is substantial in terms of both its duration and nature. *Heise, supra*, 79 F.3d at 906, citing, *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S. Ct. 807, 817-818 (1991). The Ninth Circuit looked to a later Supreme Court opinion for the proposition that a seaman must work at sea in the service of a vessel and concluded that this embodies the first basic principle of the definition of a seaman. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S. Ct. 2172, 2190 (1995). The Ninth Circuit found that Mr. Heise was a temporary laborer for the duration of the repairs and maintenance on the vessel and was therefore a landbased ship repairer covered by the Longshore Act rather than the Jones Act. *Heise, supra*, 79 F.3d 906. The Ninth Circuit also dismissed Mr. Heise’s claim for Section 905(b) negligence noting that the Act bars such cases against an employer when the employee is hired to provide shipbuilding, repairing or breaking services. *Id.* at 907, 33 U.S.C. § 905(b).

It would be beyond the scope of this paper to discuss all the factors which distinguish land-based workers from Jones Act seaman. There are many cases which discuss these distinctions. *See Delange v. Dutra Construction Company, Inc.*, 183 F.3d 916 (9th Cir. 1999); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997); *Gault v. Modern Continental/Roadway Construction Company*, 123 Cal. Rptr. 2d 85 (Cal. App. 2002); *Schearing v. Traylor Bros.*, 476 F.3d 781 (9th Cir. 2007).

IX. DUAL CAPACITY LIABILITY OF A LONGSHORE EMPLOYER FOR A THIRD-PARTY CLAIM – SECTION 905(B)

A. The Section 905(b) Basics.

As it stands today, the Longshore Act establishes a comprehensive workers’ compensation scheme which holds employers liable, irrespective of fault, for securing the payment of the prescribed compensation to qualified maritime employees injured in the course of their employment. 33 U.S.C. § 904. The Act expressly states that the liability of an employer is “exclusive and in place of all other liability of such employer to the employee.” 33 U.S.C. § 905(a).

As noted above, prior to the enactment of § 905(b), the statutory framework that was supposed to protect employer immunity had been eroded by several United States Supreme Court decisions. For instance, a covered employee could bring a personal injury action against a vessel under the doctrine of unseaworthiness. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872 (1946). The vessel could then seek indemnification from the employer based on an express contract of indemnification or on an implied warranty of workmanlike performance to the vessel. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). The

result being that in many situations the stevedore employer would be held liable both for compensation benefits and for third party damages to the shipowner. In effect, an end run was accomplished, bypassing the supposed exclusive liability of the Act – an employer could now be indirectly liable to its employee in tort, despite Congress’ clear mandate that employers be immune from direct suits by their injured employees. *See In Re: ADM/Growmark River System Inc. v. Lowry*, 234 F.3d 881, 887 (5th Cir. 2000).

To stem this tide of tripartite litigation (employee-shipowner-employer), Congress added Section 905(b) to the Act in 1972. *See Davis v. Partenreederei M.S. Normannia*, 657 F.2d 1048 (9th Cir. 1981) (recognizing that the intent of the 1972 amendments was to eliminate the stevedore from indemnity actions against shipowners). As a result, Section 905(b)’s enactment precluded the shipowner from seeking indemnification from the employer under any theory of liability, abolished unseaworthiness as a remedy for longshoremen, and recognized a third-party action against the shipowner for negligence.

In 1984, Congress further tinkered with the provisions of § 905(b). The 1984 Amendments narrowed the availability of negligence actions to certain categories of harbor workers against a vessel in circumstances where the employer was also the owner of the offending vessel. In these so-called “dual capacity” cases, employees providing “shipbuilding, repairing, or breaking services” were barred from suing the employer-vessel owner for negligence in any capacity. 33 U.S.C. § 905(b). However, the 1984 Amendments did not purport to prohibit employees other than in the described categories from suing for negligence in dual capacity cases. *See Morehead v. Atkinson-Kiewit*, 97 F.3d 603, 608 (1st Cir. 1996) (citing to congressional history of the 1984 Amendments); *but see Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903, 907 n.2 (9th Cir. 1996) (commenting that *Morehead* holding is in conflict with Ninth Circuit opinion).

Section 905(b) in its present form reads as follows:

In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person’s employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person’s employer (in any capacity, including as the vessel’s owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection

shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Essentially, as far as a cause of action against a vessel is concerned, the statute breaks down into three parts, consisting of a general rule and two exceptions. First, the statute states that an “injury to a person covered under this chapter caused by the negligence of a vessel” gives rise to “an action against such vessel as a third party.” This is the general rule. The second sentence of § 905(b) essentially prevents an action by a stevedore employed by a vessel against the employer-vessel if the injury causing event was itself caused by the act of another stevedore. Finally, as described above, § 905(b) also prevents an action by an employee against the vessel if the person was employed to provide “shipbuilding, repairing, or breaking services” and if the employer of the injured person was also owner of the vessel. *Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381, 385 (2d Cir. 1993).

In addition, § 905(b) also speaks towards the issue of whether such a vessel sued in negligence by a longshoreman can seek indemnification or contribution from that longshoreman’s employer.

B. Indemnity Clauses and Employer Liability.

Section 905(b) provides that “the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.” Put another way, a vessel sued for negligence may not seek indemnity from an employer. *E.g.*, *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 99 n.2 (2d Cir. 1991).

Courts uniformly recognize that once an employee’s status in maritime employment within the meaning of the Act is established, the employer is immune from a vessel owner’s indemnification demands. *See Sumrall v. Ensco Offshore Co.*, 291 F.3d 316, 322 (5th Cir. 2002) (“Subsection 905(b) of the LHWCA prohibits indemnification by the employer of a longshoreman for a claim due to bodily injury brought against a vessel owner”); *In re: ADM Growmark River System, Inc. v. Lowry*, 234 F.3d 881, 889 (5th Cir. 2000) (“A provision offends section 905(b)’s prohibition if it imposes any liability on an employer that is otherwise immune from suit under section 905(a)”); *Smith v. U.S.*, 980 F.2d 1379, 1381 (11th Cir. 1993) (recognizing that § 905(b) prohibits indemnity actions by vessel but does not extend to nonvessels); *Voisin v. O.D.E.C.O. Drilling Co.*, 744 F.2d 1174, 1177 (5th Cir. 1984) (holding, in part, that indemnity clause directly contravenes § 905(b)); *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Rawlins v. United States*, 56 F. Supp. 2d 741, 750 (E.D. Tex. 1999) (“[T]he vessel owner . . . may not obtain indemnity even by contract from a stevedoring employer”); *Kramer v. Bouchard Transp. Co. Inc.*, 741 F. Supp. 1023, 1026 (E.D.N.Y. 1990) (holding that Act explicitly forbids third party complaint trying to “thrust barge-related liability on the employer”); *Furuc v. Ansul Corp.*, 1985 A.M.C. 2009 (W.D. Wash. 1983) (finding that vessel owner was barred from pursuing indemnification claim).

C. Charterers Also Liable Under Section 905(b).

A party can be considered both employer and vessel owner is by virtue of its status as bareboat charterer. Under the Act, a “vessel” is defined as:

[A]ny vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel’s owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. § 902(21).

The Ninth Circuit found: “Our cases make no distinction between charterers and shipowners as far as who is a ‘vessel’ under the LHWCA.” *Rodriquez v. Bowhead Transportation Co.*, 270 F.3d 1283, 1286 (9th Cir. 2001) (citing to *Carpenter v. Universal Star Shipping*, 924 F.2d 1539, 1541 (9th Cir. 1991)).

D. Vessel Owner Negligence.

Courts consistently look to the United States Supreme Court decision *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981) for guidance on what duties a vessel owner owes a longshoreman under §905(b). See *Christensen v. Georgia-Pacific Corp.*, 279 F.3d 807, 812 (9th Cir. 2002) (“While [plaintiff] can sue a vessel for negligence under the LHWCA, [*Scindia*] has limited the duties that a vessel owner owes to the stevedores working for him or her.”) Though the Court was dealing with the issue of what duties a vessel owner owes to a longshoreman engaged in stevedoring operations, subsequent case law shows that these *Scindia* duties are not limited to just stevedores. For instance, in *Teply v. Mobile Oil Corp.*, 859 F.2d 375, 377 (5th Cir. 1988), the court recognized that in *Scindia*, “the Supreme Court interpreted § 905(b) as it applies to stevedores, but in principle as it applies to other harborworkers who work on board vessels as well.” See also *Lormand v. Superior Oil Co.*, 845 F.2d 536, 540 - 542 (5th Cir. 1987) (court found that *Scindia* defined the duties owed to a longshoreman employed by an independent contractor working aboard a jack-up vessel); *Casaceli v. Martech International, Inc.*, 774 F.2d 1322 (5th Cir. 1985) (holding that the principles set forth in *Scindia* apply to other maritime workers and are not limited to longshoremen employees of stevedores).

Generally, there are three distinct duties: the turnover duty; the active control duty; and the duty to intervene. The turnover duty requires a vessel owner to exercise ordinary care to assure that the vessel and its equipment are turned over to a stevedore, or other contractor employing nonlongshoring harbor workers, in such condition that an expert and experienced stevedore or contractor will be able by the exercise of ordinary care to carry on its operations with reasonable safety. *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 98 (1994); *O’Hara v. Weeks Marine*, 294 F.3d 55, 65 (2d Cir. 2002).

The active control duty provides that a vessel owner must exercise reasonable care to prevent injuries to employees in areas that remain under the “active control of the vessel.” *Gravatt v. City of New York*, 226 F.3d 108, 121 (2d Cir. 2000).

As to the last duty, “[w]ith respect to obvious dangers in areas under the principal control of the stevedore, the vessel owner [and others falling within the statutory definition of ‘vessel’] must intervene if it acquires actual knowledge that (1) a condition of the vessel or its equipment poses an unreasonable risk of harm and (2) the stevedore [or other contractor] is not exercising reasonable care to protect its employees from that risk.” *O’Hara v. Weeks Marine*, 294 F.3d 55, 65 (2d Cir. 2002) (citing *Gravatt*, 226 F.3d at 121).

E. Dual Capacity Employers, Indemnity Clauses, and Vessel Negligence.

If the defendant party is both employer and vessel owner, courts have had a difficult time with the legal gymnastics involved in separating out the respective duties of a vessel owner and an employer where an entity wears both hats. Irrespective of this difficulty, however, the general framework supplied by *Scindia* still applies. See *Levene v. Pintail Enterprises*, 943 F.2d 528, 534 (5th Cir. 1991) (“*Scindia* alone supplies the substantive negligence standards in an action under §905(b)”).

The Supreme Court has held that when a longshore employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued ‘qua vessel’ for acts of vessel negligence. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 532 (1983). Unfortunately, in *Jones*, the Court did not analyze what a vessel’s duties are in a dual capacity case because the negligence of the dual capacity defendant qua vessel had been conceded.

Early case law from circuit courts resulted in a fractured analysis. In *Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424 (2d Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983), the Second Circuit decided that a vessel assumes a greater duty of care when there is not an independent employer responsible for workplace conditions, upon whom the vessel owner may rely to oversee the safety of the workplace on board. However, the Fifth Circuit saw no reason for this greater duty of care, and found that creating such a duty contravened Congress’ intent to provide injured workers the same remedies regardless of whether their employer or another happens to be the legal owner of the vessel. *E.g., Castorina v. Lykes Bros. S.S.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985).

Over the past fifteen years, courts are more in line with the Fifth Circuit. Now, the trend seems to be to allocate the same vessel duties of care to dual and single capacity defendants. See *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 612 (1st Cir. 1996) (see cases cited therein).

In agreeing with this approach, the First Circuit wrote:

[T]he duties of care described in *Scindia* should be applied in dual capacity cases insofar as the facts allow. To do so, a court may have to divide the employer-shipowner into a hypothetical independent employer and independent vessel owner, each separately holding the duties allocated under principles suggested in *Scindia*. A court may sometimes be assisted in this process by the defendant’s internal employment arrangements assigning certain personnel to the ‘vessel’ side of its operation. On occasion,

however, the duties and work arrangements pertaining to a suing harbor worker may be so foreign to those in *Scindia's* stevedoring context that *Scindia's* analysis will become no more than a point of departure. Nonetheless, *Scindia's* general approach, at least, can be followed and, in many cases, some or all of its express analysis may be useable.

Id. at 612.

The progression of dual capacity case law makes quite clear that an employee can sue his dual capacity employer in tort and overcome the exclusive liability provisions of the Act if there is some modicum of vessel-owner negligence. There is no reason to think that a vessel owner sued by an employee could not seek indemnification from such a dual capacity employer.

An illustrative case comes from the Fifth Circuit. In *In Re: ADM/Growmark River System Inc. v. Lowry*, 234 F.3d 881, 884 (5th Cir. 2000), Kostmayer Construction, Inc., which was found to be both a vessel owner and an employer, promised ADM (which was also considered a vessel owner) that it would indemnify ADM against any liabilities ADM might incur for injuries to Kostmayer employees during a marine construction job.

Kostmayer was sued in its capacity as a Section 905(b) vessel. *Id.* ADM subsequently filed a Complaint for Exoneration From Or Limitation of Liability under the Limitation Act. *Id.* at 885. Kostmayer filed a claim preserving its right to indemnity or contribution from ADM in case the plaintiff ever succeeded in obtaining judgment against Kostmayer. *Id.* Kostmayer's claim was limited to contribution for any liability it might have incurred to plaintiff in its capacity as vessel owner. *Id.*

The Fifth Circuit held that the indemnity contract entailed a waiver by Kostmayer of any claim for contribution against ADM. Predictably, Kostmayer tried to argue that the indemnity contract was void under Section 905(b). However, the court held otherwise, stating, "This Court has previously interpreted the [§905(b)] prohibition narrowly as it applies to dual capacity employer/vessel owners . . . liability allocation agreements between two vessels, one of which also employs longshoreman [sic], are invalid only when they infringe on the statutory immunity of the dual capacity vessel-employer." *Id.* at 887. The court also added, "Nothing in the legislative history of Section 905(b) suggests that the prohibition on contractual indemnity between employers and vessels should be extended to protect dual capacity employers facing direct liability in their vessel capacity." *Id.* at 889.

Important to the court's decision was its analysis of the liability allocation provisions between Kostmayer and ADM. The lower court had originally granted summary judgment in favor of ADM because of the presence of a covenant not to sue in the agreement between Kostmayer and ADM. *Id.* at 885. Kostmayer had argued that covenant was invalid because, as an employer under the Act, it was immune from such agreements. *Id.* However, the district court held that agreements containing a covenant not to sue were outside the scope of Section 905(b)'s prohibition. The Fifth Circuit, though affirming the district court's ultimate decision, disagreed with its reasoning:

To the extent that the district court reasoned that a ‘covenant not to sue’ is not subject to Section 905(b) simply because it is a ‘covenant not to sue,’ we agree with Kostmayer that the district court is incorrect. Congress did not limit its prohibition of liability allocation agreements to provisions of any particular nomenclature, the prohibition applies to ‘any agreement or warranty’ that disrupts the statutory allocation of liability among employers, vessels and vessel owners. Prohibited agreements may be drafted as covenants not to sue or as indemnity agreements. The crucial inquiry is not the classification of the contract provision at issue but the effect of that provision on an *employer’s* liability for the personal injuries of its employees.

Id. at 889.

X. EMPLOYER’S LIEN AND CREDIT AGAINST THIRD-PARTY RECOVERY

An employer/carrier who has paid longshore benefits has a lien for what it has paid against the net amount of the third-party recovery. The courts have implied this lien right from Section 33(f) of the Act. *Allen v. Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975). Further, an employer/carrier has a credit against the future medical and disability benefits for any remaining recovery after it has collected its lien. *Castorina v. Lykes Brothers Steamship Company*, 21 BRBS 136 (1988).

The Ninth Circuit has ruled that the credit doctrine implied in Section 33(f) does not extend to give an employer a credit for compensation paid by other longshore employers under the Longshore Act for the same disability. *Alexander v. Director, OWCP*, 273 F.3d 1267 (9th Cir. 2001). In that case, the Ninth Circuit noted that the plain language of Section 903(e) governs to allow a credit to an employer/carrier only for that compensation paid under other workers’ compensation law or under the Jones Act.

The employer/carrier’s lien against a third-party recovery is against the net recovery after payment of attorneys’ fees and costs. It is not reduced by the amount that claimant receives for pain and suffering. *Brandt v. Stidham Tire Company*, 785 F.2d 329 (D.C. Cir. 1986).

A carrier may waive its lien against a third-party recovery if it waived its subrogation rights against an entity. *Allen v. Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975). In that case, the claimant was employed by American Casing Crews aboard an oil drilling barge while performing work for the barge’s owner, Texaco. The contract between American and Texaco required that American obtain from its insurance carrier a waiver of subrogation rights against Texaco in case of an injury to employees of American. American complied with this provision. The employee sued Texaco and American’s compensation carrier asserted a lien for the amount of compensation already paid. The Fifth Circuit affirmed the District Court’s holding that the insurer had waived its right to recoup compensation from the employee’s recovery against Texaco when it waived its subrogation rights.

There are instances where a claimant must obtain an employer's approval of the third-party settlement. If the claimant enters into a settlement with a third party for an amount less than the compensation to which the claimant would be entitled under the Act, the employer is liable for future compensation only if the written approval of the settlement is obtained from the employer and the employer's carrier before the settlement is executed by the person entitled to compensation. 33 U.S.C. § 933(g)(1).

Section 33(g)(1) has been interpreted to mean that a third-party settlement does not bar the longshore claim if the settlement exceeds a future compensation entitlement. *Paris v. Todd Pacific Shipyards*, 30 BRBS 5 (1996); *Bethlehem Steel v. Mobeley*, 920 F.2d 558, 24 BRBS 49 (CRT) (9th Cir. 1990). When determining whether the settlement exceeds the future compensation entitlement, the comparison is made between the gross settlement amount and the future compensation entitlement exclusive of medical care and treatment. *Bundens v. J.E. Brenneeman Company*, 46 F.3d 292 (3rd Cir. 1995); *Brown and Root, Inc. v. Sain*, 162 F.3d 813 (4th Cir. 1998); *Linton v. Container Stevedoring*, 20 BRBS 282, 287 (1994).

When calculating the future compensation entitlement, the Administrative Law Judge looks to any reasonable factors for determining the extent of the impairment, the compensation rate and the life expectancy of the claimant. *Linton, supra*, at 288.

Section 33(g)(1) applies if a claimant is a "person entitled to compensation" at the time that the third-party settlements were entered into. In a death benefits case, the Supreme Court has held that a surviving spouse does not qualify as a "person entitled to compensation" until the date of the workers' death. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 31 BRBS 5 (CRT) (1997).

A typical case involving the application of Section 33(g)(1) is where a widow enters into third-party settlement with asbestos defendants without obtaining the employer's prior approval. *Barnes v. General Ship Service*, 30 BRBS 193 (1996). In that case, the claimant personally signed settlement releases, money was sent to her attorney, and dismissed with prejudice were entered into with respect to the settling third-party defendants. After signing the settlement releases, the claimant sent the releases to the third-party defendants with a cover letter setting forth an "employer consent contingency." The cover letter stated:

- (1) That the agreement are contingent upon the required consent under the Longshore Act;
- (2) that if at any time plaintiff is required to rescind the agreement because of a longshore claim, plaintiff will return the settlement monies to the defendant; and
- (3) that the defendant has no right to rescind the agreement which is final and binding as to the defendant as of the date initially entered into.

Barnes, 30 BRBS at 195.

The claimant contended that these cover letters created a condition precedent. She argued that the contingency contained in the cover letter allowed her to return the settlement proceeds to the defendants and rescind the settlements should she be unable to obtain the employer's approval of the settlements. *Id.* at 198. The BRB rejected the claimant's arguments

and found her claim barred under Section 33(g). Important to the board's decision was the fact that none of the settlement releases contained provisions requiring the employer's approval be obtained. The Board concluded: "As there is no condition on the faces of the releases which has not been satisfied, the agreements signed by the claimant have been fully executed." The Board also found it to be important that the third-party defendants have been dismissed with prejudice. The Board affirmed the denial of the widow's longshore claim.

A claimant has argued that an employer's waiver of a threat of subrogation against an oil platform and its agreement to indemnify the platform owner negated the employee's obligation to notify the longshore employer and carrier and receive consent of the longshore/carrier prior to settlement of the claim with the platform owner for injuries sustained on the platform. *Jackson v. Land and Offshore Services, Inc.*, 855 F.2d 244 (5th Cir. 1988). In that case, Union Oil owned an offshore platform and contracted with Land and Offshore Services to perform maintenance service on the platform. Land and Offshore Services agreed to indemnify Union for claims brought against Union by Land and Offshore Services employees.

Mr. Jackson was employed by Land and Offshore Services. He brought an action against Union and ultimately settled the action without the consent and approval of Land and Offshore Services. It appears that the settlement was paid by Land and Offshore Services' insurance company under the indemnity agreement. In any event, Land and Offshore Services learned of the settlement over a year later and discontinued making voluntary longshore payments. The claimant then asked for a longshore hearing and the judge denied the claimant's request for benefits because he had settled his third-party claim against Union without the employer's consent under Section 33(g). The Benefits Review Board affirmed and the case went to the Fifth Circuit. The Fifth Circuit concluded: "The fact that Land and Offshore Services indemnify Union in addition to waiving its subrogation rights strengthens rather than distinguishes the holding in *Collier*." In *Collier*, the employer had been allowed a setoff of the amount of settlement against future payments even though it had waived subrogation rights. *Trillion Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986). The Fifth Circuit, in *Jackson*, emphasized that the purpose of their holding was to prevent claimant from recovering twice and to prevent Land and Offshore Services from paying both Jackson's settlement with Union and continuing paying workers' compensation benefits.

XI. MINIMIZING AND TRANSFERRING RISK FOR LIABILITY

A. Subrogation.

Subrogation is a party's right of recovery of the cost of a claim from a third party. The Longshore Act does not use the term subrogation. However, the concept is within the Act. For instance, an employer has a lien and credit against a third-party recovery under Section 33(g) of the Longshore Act. A carrier may waive its lien against a third-party recovery if it waived its subrogation rights against the entity. *Allen v. Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975). Waivers of subrogation are discussed below.

B. Contractual Risk Allocation.

A typical situation is when a shipyard retains a subcontractor to perform services during vessel construction or repair. The Longshore Act contains provisions, discussed above, defining instances where the shipyard and/or the subcontractor is liable for disability compensation under the Act and potential third-party recoveries.

The shipyard and the subcontractor often enter into a contract to further define the relationship and allocate risks. The object of the transferring of risks is to shift potential risks to another party in the context of a work contract.

Common excuses for starting work without a signed contract include: it is only a small job, we have always worked on a handshake agreement, we needed someone quickly, and we did not want to offend the other party by requiring a contract. It is in the best interest of both parties to put aside these excuses and enter into a contract.

There are different types of service contracts. It is important to determine whether the contract is enforceable in the state in question. For instance, there are mutual indemnity or “Knock-For-Knock” contracts which make each employer liable for injury to its employee, regardless of fault. Such contracts may be unenforceable under the Anti-Indemnity Acts of Texas, Louisiana, New Mexico, and Wyoming. It is important to understand the law of the state to make sure that the work contract is enforceable.

The party with the most bargaining power in a contractual negotiation will attempt to get the most beneficial terms. As a practical matter, the shipyard will often protect its interests by requiring the subcontractor to prove that it has Longshore Act insurance to cover the injuries to the subcontractor’s own employees. Please note from the discussion above that co-employer status can be fairly easily established. It is potentially possible for the employee of the subcontractor to bring an action against the subcontractor under the Longshore Act, settle that action, and then bring another action for the same injury against the shipyard as co-employer. At least one Administrative Law Judge has allowed such a tactic. Therefore, the subcontractor’s Longshore Act coverage should contain a provision whereby the shipyard is one of the released parties at the time of a longshore Section 8(i) settlement.

The shipyard also will often require that the subcontractor prove that it has comprehensive general liability insurance (CGL) that covers liability for bodily injury and property damage to third parties at the shipyard. Likewise, the shipyard should consider requiring the subcontractor to obtain pollution insurance coverage.

Certificates of insurance should be required of the subcontractor to prove all of these coverages.

It is important for a party to a work contract to work closely with their broker to ensure that all predictable risks are covered. The broker should be consulted with to identify any gaps which might occur between contractually assume indemnity obligations and general liability coverage.

A technique for allocating risk is a waiver of subrogation whereby the subcontractor, for instance, waives its right (and that of its carrier) to recover payments made, for example, to the subcontractor's workers injured as a result of the negligence of the shipyard.

An exception exists for a vessel owner. As noted above, a vessel owner sued for negligence may not seek indemnity from the employer under Section 905(b).

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