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LORMAN'S EDUCATIONAL SERVICES

PART I

COVERAGE AND JURISDICTION UNDER THE LONGSHORE AND HARBORWORKERS' COMPENSATION ACT

The Longshore & Harborworkers' Compensation Act, 33 U.S.C. §901 et seq. (the "LHWCA") is a Workers' Compensation Statute passed by Congress in 1927 for the purposes of providing compensation to injured longshoremen for injuries they suffer while in the course of their employment. This paper will provide an overview of coverage and jurisdictional issues under the Act. The Act was amended many times during its existence, but most significantly in 1972, when Congress expanded the scope of jurisdiction of the Act, and then again in 1984, when it limited the coverage of employees not engaged in "Maritime Employment."

A. **BACKGROUND**

The LHWCA provides disability dollar benefits for accidents arising out of the course of employment which result either in scheduled loss of use for certain body parts (enumerated in Section 908 of the Act), or for 2/3 of the worker's average weekly wage until he can earn wages. The concept of disability is contained in Section 908.

LHWCA cases are initially heard at an Office of Workers' Compensation Programs informal conference at the Dept. of Labor, before a Claims Examiner. A Claims Examiner will meet with the claimant and his attorney and an employer's attorney and make a determination as to preliminary matters; whether the injury comes

within the scope of the Act, whether there is an employer/employee relationship, whether it's a timely filed claim, etc. At that point the employer has 14 days, to either accept those findings or file a Form LS-207 to controvert those findings.

Once an LS-207 form is filed and the claim is controverted, the non-filing party has the opportunity to seek a formal hearing before an Administrative Law Judge, via the filing of an LS-18. An LS-18 Form is essentially a barebones form which indicates the names of the parties and issues to be tried, the injuries, witnesses etc.

ALJ trials, although somewhat relaxed in evidentiary standards, are governed by the rules of procedure found in the Administrative Procedure Act and Code of Federal Regulations.

Appeals of the ALJ's findings are initially taken to the Benefits Review Board. The Benefits Review Board is made up of a panel of Administrative Law Judges in Washington, D.C. and they review and hear appeals that raise substantive questions of law or fact taken by a party in interest from decisions with respect to the claims of the employees under the Act and its extensions. See, Section 921(b)(3) of the Act. The Board's review is limited by the substantial evidence standard, Presley v. Tinsley Maintenance Service, 529 F.2d 433 (5th Cir. 1976). The Board must affirm decisions of ALJ that are supported by that substantial evidence, i.e., if they are rational and the decision is in accordance with the law. Banks v. Chicago Grain Trimmers Assn., 390 U.S. 459 (1968). Generally, questions of credibility are unreviewable, as are most issues of fact so long as they are supported by the evidentiary record. In that regard, the Board generally does not re-weigh evidence. After the BRB appeal, a party then has the right to appeal to the Circuit Court of Appeals sitting in the jurisdiction where the

injury occurred. e.g., appeals involving injuries having arisen in the State of New York are heard by the Second Circuit.

B. INJURY

As a general proposition, the claimant **does not** have the initial burden of establishing a causal relationship between his injury and his employment. §920(a) Rather, a claimant must merely show that he suffered some physical harm, i.e., an injury, and that a work related accident occurred or working conditions existed which caused that harm. See, Mock v. Newport News Shipbuilding & Drydock, 14 BRBS 275 (1981).

It is then the employer's burden to rebut the presumption of causation. In order to rebut that presumption, employers have a burden of production to present substantial evidence disproving the work related injury under §920 of the Act, which presumes that in the absence of substantial evidence to the contrary, the claim comes within the provisions of the Act. That is, the claimant can establish a prima facie case of injury arising under the Act if he shows the physical harm and conditions which could have given rise to that harm.

C. SCOPE OF EMPLOYMENT

An injury occurs in the course of employment if it occurs within the time and space boundaries of that employment and within the course of an activity whose purpose is related to the employment. Generally speaking, employees who are doing something work related tend to be covered under the Act.

In Wilson v. WMATA, 16 BRBS 73 (1984), a worker who was obtaining an authorization form to purchase a uniform who was injured on the premises, although not performing a specific job function within his normal working hours was held to be

performing work related activities at the time he was going to get the authorization form. Therefore, he was within the scope of his employment. Similarly, the worker who comes to work a little early to pick up his check and drink his cup of coffee is probably covered, because he is at work and on the work premises for a work-related reason, even though it is off-duty hours. Presky v. Cargill, Inc., 12 BRBS 916 (1980), affd., 14 BRBS 340 (9th Cir. 1981).

An exception to working within the scope of employment is the "frolic and detour" scenario. For instance, a security guard at a terminal who leaves his post, in violation of a rule, and without permission, to go get a soda, is likely not to be covered. The Courts have held that the employment nexus is severed in such a situation, since the employee violated an express prohibition and/or acted without authorization or for purely personal reasons. At that point, such conduct is deemed to be an "abandonment of employment related duties" or an "embarkation on a selfish personal mission." Durrah v. WMATA, 760 F.2nd 322 (D.C. Cir. 1995). Intentional torts and injuries occasioned solely by intoxication of the worker may not be considered within the scope of employment, Oliver v. Murry's Steaks, 17 BRBS 105 (1985); Green v. Atlantic Gulf Stevedores, Inc., 18 BRBS 116 (1986).

D. JURISDICTION

In order to qualify as a longshoreman under the LHWCA, one must satisfy two tests: the status test and the situs test. The status test refers to the nature of the work performed and situs refers to the place of that work's performance.

Section 902(3) provides the definition of status, but excludes certain types of employees from coverage. The most prominent of these would be individuals employed to perform office and clerical work or individuals employed by a club, camp, restaurant,

etc. With regard to situs, §903 provides the definition of those who are covered as any person engaged in maritime employment, including longshoremen or other persons engaged in longshoring operations, harborworkers, ship repairmen, ship builders, ship breakers and the like. Members of a ship's crew are excluded, as they are covered by the Jones Act.

1. STATUS

Certainly, individuals who work loading and off loading containers in a marine terminal are covered. Marine construction workers who are injured on structures adjoining navigable waters might be engaged in maritime employment under the LHWCA depending on the circumstances. A group of U.S. Supreme Court cases have addressed this issue. Director, OWCP v. Perini North River Associates, 459 US 297 (1983), held that regardless of status, if a claimant was covered under the LHWCA before the 1972 Amendments, for injuries which occurred on navigable waters, he is covered for injuries on navigable waters after the 1972 Amendments. That is, when a worker is injured on actual navigable waters, in the course of his employment on those waters, he likely satisfies the status requirement and is covered under the LHWCA.

Naturally, if the claimant's work, at the moment of the injury, is akin to maritime work, then he would be covered. However in Northeast Marine Terminal Co., Inc., v. Caputo, 432 U.S. 249 (1977), the Supreme Court stated that a claimant need not be engaged in maritime employment at the time of the injury to be covered by the Act. Moreover, if an employee regularly performs duties relating to maritime employment and he is injured while temporarily performing some non-maritime function, he will likely be covered.

Anyone who is involved in the traditional longshoring operations, loading, unloading, stuffing, stripping containers, and checking containers, will be covered. At what point in time do the traditional activities become too tangential and too far removed from longshoring operations to be covered? The answer is not so clear. In P.C. Pfeiffer v. Ford, 444 U.S. 69 (1979), Ford was injured on a dock while securing military vehicles. Another claimant was injured while unloading a bale of cotton, from a wagon into a pier warehouse, for subsequent loading. Because these two claimants were engaged in the immediate steps of moving cargo between ship and land and were not merely picking up the cargo for further land based trans-shipment, they were covered.

Harborworkers directly involved in the construction, repair, alteration, or maintenance of harbor facilities will be considered covered under the Act. While, that doesn't mean any construction project near water is covered, under Perini, if a worker is injured over water and could recover under the Act's pre-1972 amendments, he will likely be covered.

What of marine construction workers injured on land? See, Chesapeake & Ohio Railroad Co. v. Schwalb, 493 U.S. 40 (1989); Herbs Welding, Inc. v. Gray, 470 U.S. 414 (1985). In Perini, supra, Justice O'Connor, writing for the majority, stated that when a worker is injured on actual navigable waters in the course of his employment on those waters, he automatically satisfies the status requirement as a covered employee under the Act. Perini seems to leave open the question of whether an employee, building a pier or dock but **not** injured on navigable waters, is covered under the Act. In Herb's Welding, Justice White wrote that a welder injured while working on an oil platform offshore failed the status test. Although he was working on navigable waters, there was nothing inherently maritime about his tasks. In Schwalb, Justice White, writing for a unanimous Court, held that a railroad employee injured while maintaining or repairing

equipment essential to loading coal onto vessels was a covered employee because he was integral to the loading and unloading process. The status test seems to turn on whether the harborworker's functions have furthered maritime commerce in some manner.

Some examples may assist in explaining the standard. A claimant who was a laborer in a storage yard, where materials were used by the employer in a variety of marine and non-marine construction projects, was not a harborworker. Bazemore v. Hardaway Constructions, 20 BRBS 23 (1987). The reason that this worker failed the status test was because his job duties did not further maritime commerce in anyway.

A pile driver, repairing a breakwater located off shore from a nuclear facility was covered because he was building a structure extending into navigable water to protect or form a harbor, and therefore furthering maritime commerce. Olson v. Healy Tibbits Construction, 22 BRBS 221 (1989).

The Second Circuit's recent decision in this area is Fleischmann v. Director, OWCP, 137 F.3d 131, (2nd Cir.) cert. den. 525 US 981 (1998). Fleischmann suffered a right knee injury while in the scope of his employment with Sea Horse Coastal Assistance and Towing Co. Sea Horse paid him New York State Workers' Compensation Benefits, but Fleischmann filed a claim under the LHWCA. The only issue tried before the ALJ was the issue of whether claimant met the situs and status requirements of the LHWCA.

Seahorse was a contractor-employer hired to repair a retaining wall on private property. The retaining wall abutted a canal on Oyster Bay, Long Island, on Center Island, New York. The bulkhead acted as a retaining wall for the land. A portion of the

retaining wall had collapsed forward into the water; the purpose of the bulkhead was to prevent the erosion of the land into the water. Fleischmann worked primarily on a floating dock that tied to a barge, and he was injured when he fell from the retaining wall. He was standing on the retaining wall and fell into 12 to 15 feet of water, about 15 feet from the private property line.

The ALJ found no jurisdiction, but the Second Circuit remanded this decision. Fleischmann's general employment of building piers and docks sufficed to "establish the requisite connection to ships," to confer him with the status of a harborworker. A certiorari petition was filed but denied. The Second Circuit's decision does not answer whether Fleischmann was truly engaged in a maritime employment under the Perini decision for a post-1972 injury.

Fleischmann was arguably injured on land, although he spent most of his time on a barge. If the BRB applied the same rationale it used in Bazemore or Healy Tibbets to Fleischmann, the case may have been resolved differently. Was the pier in Fleischmann inherently maritime in nature? Did it keep the canal clear from maritime commerce? Arguably, the "pier" was merely a retaining wall used to keep the property from collapsing into the canal. It was there to help the property, not the maritime commerce of the canal. The Second Circuit seemed to pay no mind to the BRB decisions in this regard.

The Ninth Circuit, in an opinion which was eventually withdrawn, held that an oil discharge pier was not a maritime site. McGray Construction Co. v. Director, OWCP, 181 F.3d 1008 (9th Cir. 1999). In McGray, the 9th Circuit originally held that a pile driver, a construction worker much like Fleischmann, was not covered by the Act. McGray

involved a pier being built for the processing and transportation of oil. The 9th Circuit inexplicably said that that was a non-maritime activity.

Certain to cause more confusion in this area is the Second Circuit's most recent decision, Lockheed Martin Corp. v. Morganti, 415 F.3d 407 (2d Cir. 2005). Morganti was a test engineer who worked for Lockheed Martin in a lab in Syracuse. The division of Lockheed Martin in Syracuse for which Morganti worked did not engage in any longshore maritime business or activity. However, Morganti's duties included testing transducers on a work platform located in the middle of Cayuga Lake, at Portland Point, in Lancing, New York. Morganti spent 30% of his working hours on a floating platform which was permanently moored and had never been moved. The only navigation activity in which Morganti engaged in was in taking a five minute boat ride to and from the platform. Morganti drowned in an unfortunate accident, and Lockheed Martin began paying death benefits under the New York State Workers' Compensation Act. Morganti's estate then applied for LHWCA benefits, asserting that Morganti was a maritime worker.

Applying the language in Perini, which held that those individuals traditionally covered before the 1972 Amendments would continue to be covered in light of the 1972 Amendments, the Second Circuit found coverage. In this regard, any employee injured on navigable waters is a maritime employee for the purposes of the LHWCA if they were covered before the 1972 Amendments. The 1972 Amendments did not eliminate coverage for those who would have been covered previously.

Interestingly, the Morganti Court was careful to note in its holding that because the injured worker was not transiently and fortuitously on navigable waters, he did not fall into one of the exceptions of the LHWCA, and he therefore met the status

requirement. (See Perini, at footnote 34.) Similarly, in Bienvenue v. Texaco, 164 F.3d 901 (5th Cir. 1999), the Fifth Circuit held that a pump specialist who spent 75% of his time on a fixed platform did not even have to meet the status requirement of the LHWCA because he had been injured upon actual navigable waters and therefore automatically met the status requirement under Perini. The Fifth and Second Circuits seem to say that only if he could be found to be transiently or fortuitously on the water would workers be exempt from coverage of the LHWCA pursuant to Perini.

To further add to the confusion, the Eleventh Circuit has weighed in with Brockington v. Certified Electric Inc., 903 F.2d 1523 (11th Cir. 1990). Brockington was an electrician injured while traveling by boat with his tools to a worksite on an island and had only incidental connection to the water. Rather than follow Perini, the Brockington Court looked to traditional maritime law rather than the legislative history of the LHWCA and determined that Brockington was a “maritime worker.” The Eleventh Circuit held that he had at least a de minimus connection to maritime activities. In this regard, the Eleventh Circuit seems to apply a similar test to that of the Perini Court at footnote 34, that those transiently or fortuitously upon actual navigable water will probably be exempt from coverage. From the Second and Fifth Circuits’ perspectives, the Eleventh Circuit got to the right result, but used the wrong analysis.

2. SITUS

In order to qualify for longshore benefits, a worker **must meet both** the status and the situs test; he cannot have one without the other. Unlike the status inquiry, the situs inquiry looks to the nature of the place of work at the moment of the injury. Jacksonville Shipyards, Inc. v. Purdue, 539 F.2d 533 (subsequent history omitted). §903 of the Act enumerates the facilities which will give rise to situs coverage: adjoining piers, wharves, drydocks, terminals, building ways, railways, or other adjoining areas

customarily used by an employer in loading, unloading, repairing or building a vessel. The Second Circuit follows four main factors in determining whether a site is covered under the LHWCA:

1. Suitability of the site for maritime LHWCA maritime purposes;
2. Whether the adjoining properties are devoted primarily to uses in maritime commerce;
3. Proximity to the waterway, and;
4. Given all circumstances whether the adjoining site is as close to the waterway as feasible. Triguero v. Consolidated Rail Corp., 932 F. 2d 95 (2nd Cir. 1991).

The Fleischmann case, supra, also involved situs issues. The Second Circuit stated that the bulkhead at issue was built on pilings that extended into navigable waters and, therefore, constituted a pier within the meaning of §903(a). That the bulkhead is not called a pier did not affect their determination.

Fleischmann exemplifies the concerns fueled by the 1972 Amendments; that is, if Fleischmann would have clearly been covered had he been injured while working on a work platform over navigable waters, several feet away, where he spent a substantial portion of the work hours, then why would he not be covered on the breakwater? Arguably, Congress made it clear that it considered the water's edge the jurisdictional line. Nevertheless, the bulkhead in Fleischmann prevented the erosion of the adjacent property into the water. The water contained a dock belonging to the property owner to which a boat was tied, as well as other docks. The fact that the area was residential did not affect the Second Circuit's analysis in finding situs.

The Second Circuit's decision raises several questions. It seems to adopt an "overall work duties" analysis rather than "a place of work at the moment of injury" type analysis. Courts sometimes look at the place of the work at the moment of injury when

determining situs. In Fleischmann, the Second Circuit overlooked the "moment of injury" requirement and focused instead on Fleischmann's usual presence on the float stage, not his "moment of injury" presence on the bulkhead.

A certiorari petition was filed in Fleischmann because of a direct conflict with a case in the Eleventh Circuit, Brooker v. Durocher Dock & Dredge, 133 F.3d 1390 (11th Cir. 1998). Brooker held that a construction worker who was injured on a retaining wall did not satisfy the LHWCA situs requirement, since the retaining wall was not a pier. The Second Circuit relied on the Ninth Circuit's opinion in Hurston v. Director, OWCP, 989 F.2nd 1547 (9th Cir. 1993).

Hurston interprets Congress' intent regarding adjoining piers and waterways as "unlimited", so long as they adjoin navigable waters of the United States. Hurston could be read to mean that anytime one is on a structure near navigable water, situs could exist, whether the site has something to do with maritime commerce or not, arguably ignoring one of the Second Circuit's Triguero factors.

Further complicating matters, in Brooker, the Eleventh Circuit held that whether a pier is a maritime site is a pure factual question, since the LHWCA does not provide a clear definition. The Court found that the factual evidence in the record rendered the seawall in Brooker a non maritime site.

3. BRIDGEWORKERS

Are bridge workers working over navigable waters covered under the LHWCA? The answer turns on whether the bridge aids highway or maritime navigation. Workers who work on a bridge used as an aid for navigation are covered. Workers on a bridge used primarily for vehicular traffic are not.

For example, a bridge worker who was injured while painting a bridge that was permanently affixed to land was not covered, because the base of the bridge was to land and did not touch any water. The BRB found that the work was land based and was not actually performed upon navigable waters even though the bridge spanned water. Johnsen v. Orfamos Contractors, Inc., 25 BRBS 329 (1992).

In a Fourth Circuit case, a concrete finisher, whose purpose was to assist in the demolition and replacement of an existing bridge, was covered under the Act. Both the existing bridge and the new bridge contained a stationary section and a draw section that could be raised to allow water traffic to pass through. Therefore, the proposed bridge was intended to provide additional horizontal clearance to allow more space for use by vessels passing each other beneath the bridge, and to reduce the chance of vessel collision with the bridge. The evidence established that the new lift span was designed to be an aid to marine navigation. Therefore, the worker was covered. Lemelle v. B.F. Diamond Construction Co., 674 F.2d 296 (4th Cir. 1982), cert. den. 459 US 1177 (1983).

4. JONES ACT versus LHWCA COVERAGE

Under the LHWCA, a master or a member of a crew of a vessel cannot be considered a covered employee for coverage purposes under the Act. What of workers who may qualify for both?

In Phelps v. St. James, 2007 U.S. Dist. LEXIS 81000 (USDC EDLA, November 1, 2007), Marcus Phelps allegedly injured his spine when a spreader bar struck him in the back. At the time, Phelps was working for St. James Stevedoring Company as a flagman and lead man in the hold of a vessel. Phelps had only worked with St. James for five days, either in the hold of the vessel being unloaded, on the deck of the crane

barge, or in the hold of the river barge. His duties involved pulling bags out of the vessel, loading bags into the river barge, and removing and replacing covers on the river barge. Phelps went home each night, but ate his meals and used the restrooms on the vessels. Phelps sued St. James for personal injury, and later filed a separate Jones Act suit, alleging that he was a Jones' Act seaman. The two cases were consolidated and St. James moved for summary judgment, contending that Phelps was not a Jones Act seaman.

The court noted there was no dispute that Phelps spent no less than 90% of his job time on vessels. Rather, St. James argued that the evidence demonstrated that Phelps worked primarily loading and unloading cargo and was engaged in traditional land based longshore work. However, the court held that this was not dispositive of seaman status. The court pointed to a record from OSHA proceedings against St. James, that Phelps offered into evidence, where St. James alleged that "employees aboard the crane barges are seamen. They are employed in a more or less permanent status and contribute to the function of the barges, notwithstanding that some jobs are not traditionally considered classic sailor jobs." The court also rejected St. James' argument that Phelps' five-day tenure with St. James should preclude a finding of seaman status, under the "no snapshot" doctrine articulated in Chandris. St. James' also failed to rule out a conclusion that Phelps was exposed to the perils of the sea or that he substantially contributed to the function any of St. James vessels. The court held that material issues of fact remained making summary judgment inappropriate and St. James' motion for summary judgment was denied.

Similarly in Calcaterra V. City Of New York, 2007 NY Slip Op 8285; 2007 N.Y. App. Div. LEXIS 11003 (NY Sup Ct., 1st Dept., November 1, 2007), Joseph Calcaterra was employed by Spearin, Preston & Burrows (SPB), a marine construction company, in connection with the installation of a sewer main. Calcaterra worked on board a crane barge which drove vertical interlocking steel sheets into the seabed to define a trench

area. Calcaterra was allegedly injured while he was retrieving a scow filled with material from the mooring, to which he had been towed by tugboat on an empty scow. After settling his LHWCA claim against SPB, Calcaterra commenced a Jones Act and general maritime action against them.

After a trial court granted Calcaterra's motion for summary judgment as to his status as a seaman under the Jones Act and denied the cross motion of SPB for summary judgment dismissing the Jones Act count, SPB appealed contending, in part, that Calcaterra did not have the necessary connection to a vessel in navigation and that Calcaterra was precluded from bringing a Jones Act claim by reason of the fact that he had commenced this action after resolution of his LHWCA claim against SPB. Contrary to SPB's contentions, the appellate court found that the evidence established conclusively that the barge to which Calcaterra was assigned was a vessel in navigation, that his duties contributed to the accomplishment of its mission, and that his connection to the barge was substantial in terms of both its duration and its nature. Hence, he was a Jones Act seaman. Additionally, Calcaterra was not precluded from bringing a Jones Act claim after resolution of his LHWCA claim. See also Reyes v. Delta Dallas, 199 F. 3d 626 (2nd Cir 1990) (acceptance of benefits under workers compensation does not operate to waive a Jones Act claim). But see Mooney v. City of New York, 219 F. 3d 123 (2nd Cir. 2000) (if formal compensation award and/or settlement is made, waiver may occur, especially if settlement agreement settles the worker's claims in their entirety) and Pedersen v. Manitowoc, 25 NY 2d 412 (1968) (express waiver under state law may serve to waive Jones Act rights).

E. EMPLOYER-EMPLOYEE RELATIONSHIP

Recently there have been several trends in the industry to attempt to insulate a company from liability for workers' compensation by hiring independent contractors to

perform the work. Oftentimes, workers collect workers compensation benefits from one company and then seek to sue the employer's corporate affiliate, alleging that it controlled the work, was negligent, and caused the plaintiff's injuries. Is the injured worker able to collect worker's compensation benefits from the employer and then turn around and sue the employer's corporate affiliate?

Factors to be considered are whether the corporations share the same phone, fax, offices, financial statements, workers' compensation policies and whether the facts showed that the two companies "merged to form a single integrated enterprise." Federal courts have held that members in a joint venture are employers of any employee working for that joint venture. Heavin v. Mobil Oil Exploration & Producing South East, Inc., 913 F.2d 178 (5th Cir. 1990); Claudio v. U.S., 907 F.Supp. 581 (E. D. N.Y. 1995). There are several New York State Workers' Compensation decisions which are instructive on this point as well. Fallone v. Misericordia Hospital, 23 A.D.2d 222, 259 N.Y.S.2d 947 (1965); Levine v. Lee's Pontiac, 203 A.D.2d 259, 609 N.Y.S. 2d 918 (2nd Dept. 1994). Some of the factors looked at are the sharing of office space and telephone numbers, the general interrelation of operations, the sharing of costs and profits, the sharing of a common workers' compensation policy and common management and ownership.

Another defense is that of the borrowed servant. The "borrowed servant" doctrine arises when the employee is employed by one company, but is injured while working in the scope of employment of another company (the "borrowing company"). An excellent discussion of the borrowed servant test is located in Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969).

The nine Ruiz factors for determining the "borrowed servant" test is:

- (1) who controls the employee and his work;
- (2) whose work is being done;
- (3) is there any agreement between the employers;
- (4) did the employee acquiesce in his employment; did he agree to come aboard and work for a second employer;
- (5) did the employer end his relationship with the original employer;
- (6) who provided the place and the tools for the work?
- (7) was the employment/borrowing over a long period of time;
- (8) who had the power to fire the employee; and
- (9) who paid the employee?

The borrowed servant defense is used sparingly. However, the borrowed servant doctrine can be invoked to shield companies from tort action. In Guillory v. Christian Construction, Inc., 534 F. Supp. 2d 267, (USDC RI, February 15, 2008, Christian Construction, Inc. (CCI) moved for summary judgment on all claims brought against them by Patrick Guillory's estate. Guillory was killed while working at Senesco's shipyard, when the man-lift that CCI's employee had been operating pinned Guillory between the man-lift basket and the controls. CCI had sent its employee to work for the shipbuilding company and he was working with Guillory, a Senesco employee, in the construction of a barge at the Senesco facility when Guillory was fatally injured. After the fatal accident, Senesco filed notice under both the Rhode Island Workers' Compensation Act, and the LHWCA. The estate was awarded workers' compensation benefits pursuant to Rhode Island's statutory scheme. The estate then filed the instant action asserting claims of negligence and wrongful death against both CCI and its employee, and negligent hiring and training against CCI.

In its motion for summary judgment, CCI invoked the "borrowed servant" doctrine, asserting that its employee was a borrowed servant of Senesco, and thus entitled to the protection from tort liability afforded to co-workers under the LHWCA. CCI

further asserted that it is entitled to share the immunity of its nominal employee on the counts against it sounding in negligence via *respondeat superior* and as to any negligent hiring and training claims. Therefore, the primary issue before the court was whether the employee was a borrowed servant of Senesco at the time of the accident, because if he was, both he and CCI were cloaked from liability by the immunity enjoyed by Senesco. The court found the Fifth Circuit's nine-part test a useful rubric by which to assess the question of control in the context of borrowed servant status. The court noted that, although CCI may have had continued contact with the employee, the actual work performed at Senesco was directed, controlled, and overseen by Senesco alone.

Applying the nine factors as a part of a "control" inquiry, the court concluded that the employee was Senesco's borrowed servant. Because the employee and Guillory were persons in the same employ, compensation benefits were the estate's sole available remedy against the employee. The court also held that the estate had failed to set forth any evidence to establish that the CCI employee was "unfit and incompetent for the work assigned to him at Senesco and, therefore, the negligent hiring claim must fail". The court granted summary judgment on all counts.

Another interesting case is Dinh V. Louisiana Commerce & Trade Association-Self Insurers Fund 2008 U.S. Dist. LEXIS 42080 (USDC EDLA, May 27, 2008). This case involved a dispute over whether a certificate of self insurance issued by Louisiana Commerce and Trade Association-Self Insurers' Fund (LCTA) to Structure Services, Inc. provided coverage for the compensation benefits, due under the LHWCA, to Sau Dinh for injuries he allegedly sustained while working for KYE, Inc. as a borrowed employee. Structure had entered into a contract with KYE to provide a labor pool of employees for KYE's shipyard and had agreed to indemnify and hold KYE harmless of any claim due to negligence or injuries to their employees, or any governmental claims

for withholding taxes, FICA taxes, and unemployment taxes attributable to the covered workers. Dinh, a payroll employee of Structure, worked as part of a labor pool sent to KYE's shipyard. While performing repair work aboard a barge Dinh allegedly sustained injuries entitling him to benefits under the LHWCA. LCTA, Structure's compensation carrier, began paying Mr. Dinh benefits. Thereafter, Dinh filed suit against a number of defendants, including KYE, for tort damages resulting from his injuries.

LCTA intervened in that suit seeking reimbursement of the benefits it had paid to Dinh. In response to a motion for summary judgment filed by KYE, the court concluded that Dinh was a borrowed employee of KYE, and that as such he was precluded from pursuing a tort claim against KYE. Thereafter, KYE moved to dismiss the intervention filed on behalf of LCTA contending that because the contract between KYE and Structure provided that Structure would indemnify KYE for compensation payments, there was no basis for the intervention. The court concluded that the contractual language between the two parties constituted a valid and enforceable indemnification agreement and dismissed LCTA's intervention.

After the dismissal of its intervention, LCTA ceased paying Dinh voluntary compensation benefits. Following a hearing, an ALJ found KYE, which was no longer in business, to be the "responsible employer" under the LHWCA and therefore liable for Dinh's LHWCA benefits. Dinh contends that the indemnity provision of the contract obligated LCTA to pay him compensation benefits, while LCTA asserted that it was not liable for the benefits because it was not the "responsible carrier" under LHWCA as it did not insure the compensation obligations of KYE, the "responsible employer." The ALJ did not resolve that dispute, concluding that he lacked subject matter jurisdiction.

Dinh then filed suit against LCTA, among others, seeking compensation benefits. LCTA filed a motion for summary judgment seeking to dismiss Dinh's claim against it contending that it is not the "responsible carrier" under the LHWCA. Dinh opposed that

motion and filed a cross motion for summary judgment. The court found that the clear language of the insurance contract restricts the payment of compensation benefits required of Structure, it was unnecessary to include language in excluding contractual liability. Therefore, the failure to include an exclusion for contractually assumed liability was not inconsistent with presence of such an exclusion in Part Two, and did not render the policy ambiguous. The court concluded that the compensation coverage in Part One does not automatically extend to liability assumed by contract. The court rejected Dinh's argument that the "reasonable expectations doctrine" authorizes the court to extend LCTA's compensation coverage to the compensation liability of KYE, holding that the "reasonable expectations doctrine" applies only when there are ambiguities in the policy. As the LCTA policy was not ambiguous, the reasonable expectations doctrine is inapplicable. The court granted LCTA's motion for summary judgment and dismissed Dinh's counter claim.

CONCLUSION

The issue of "coverage" under the Act is indeed a complex one and one which is ever changing. The terms "coverage", "status", "situs", and "employment" seem deceptively simple. The case law interpreting the Act has done nothing to simplify the confusing application of these terms to LHWCA litigation and claims handling. The results are sometimes not logical and require close attention to recent developments in the case law.