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ADMIRALTY - WORKMEN'S COMPENSATION - LONGSHOREMEN'S ACT STATUS OF WORKER ON VESSEL WITHDRAWN FROM NAVIGATION BUT MOVING ON NAVIGABLE WATERS

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RECENT DECISIONS

ADMIRALTY — WORKMEN'S COMPENSATION — LONGSHOREMEN'S ACT — STATUS OF WORKER ON VESSEL WITHDRAWN FROM NAVIGATION BUT MOVING ON NAVIGABLE WATERS — Plaintiff and five others were hired to load a lake freighter with cargo for winter storage. They were hired by the day and none lived aboard the vessel, which had been out of commission for a year. Plaintiff assisted in towing the vessel to the elevator dock and worked on deck while the cargo was being loaded. While shifting the vessel along the dock, plaintiff's hand was crushed in a winch. Plaintiff brought an action at law under the Jones Act.[1] *Held*, plaintiff is not a seaman within the terms of that act, nor "a member of a crew" so as to preclude recovery under the Longshoremen's Act. *Hawn v. American S. S. Co.*, (C. C. A. 2d, 1939) 107 F. (2d) 999.

The legal status of "amphibious" workers injured on navigable waters has been a troublesome question in maritime litigation.[2] Before the Jones Act in 1920 the longshoreman had his tort remedy in admiralty against the ship or its owner for an injury received on board a vessel in navigable waters and caused by negligence.[3] However, in 1926, by judicial interpretation of the Jones Act, longshoremen were held to be seamen [4] entitled to elect an action at law [5] or in admiralty [6] against the employer. Furthermore, these same longshoremen had been excluded from state compensation benefits by *Southern Pacific Co. v. Jensen.*[7] Then, in 1927, Congress gave longshoremen engaged in other than local activity a remedy under the Longshoremen's and Harbor Workers' Act.[8] The approach of the courts changed so as to accord with the Longshoremen's Act. Thus, where the longshoremen and stevedores had formerly been termed seamen to grant them the coverage of the Jones Act, the courts now held that these amphibious employees were excluded from that act and included in the Longshoremen's Act.[9] Following a group of decisions construing this part of the

[1] 41 Stat. L. 1007 (1920), 46 U. S. C. (1934), § 688.

[2] Athearn, "The Longshoremen's Act and the Courts," 23 CAL. L. REV. 129 at 138 (1935). "Amphibious workers" includes those longshoremen and harbor-workers who work partly on land and partly on vessels on navigable waters.

[3] Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524 (1917); Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438 (1920).

[4] International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19 (1926). Also, McCahan Sugar Refining & Molasses Co. v. Stoffel, (C. C. A. 3d, 1930) 41 F. (2d) 651.

[5] Panama R. R. v. Johnson, 264 U. S. 375, 44 S. Ct. 391 (1924).

[6] Plamals v. Pinar del Rio, 277 U. S. 151, 48 S. Ct. 457 (1928).

[7] 244 U. S. 205, 37 S. Ct. 524 (1917).

[8] 44 Stat. L. 1424 (1927), 33 U. S. C. (1934), § 903.

[9] Originally the Longshoremen's Act was intended to cover all maritime workers. After strong protests of the seamen's unions, the exception of crew and master was made to leave to them their maritime remedies of indemnity and maintenance, cure and wages. Therefore, the act should be construed as covering all maritime workers not in the meaning of the exception. See Athearn, "The Longshoremen's Act and the

act,[10] the court in the principal case had no trouble in holding that the plaintiff was not a "member of a crew." These decisions have established a general rule that where the worker's principal duties are of a non-seafaring nature, additional duties of a seamanlike nature [11] will be regarded as "incidental" and insufficient to place him in the class of "a member of a crew." [12] The plaintiff's relation to the vessel in the principal case was primarily that of a harborworker engaged in non-maritime employment on navigable waters, viz., loading a boat withdrawn from maritime service. The court's holding decided that plaintiff's status was (1) not that of "a member of a crew," since there was no crew, and (2) not that of a seaman since the decision denied him an action under the Jones

Courts," 23 CAL. L. REV. 129 at 137 (1935). Dewald v. Baltimore & O. R. R., (C. C. A. 4th, 1934) 71 F. (2d) 810, is an example of the courts' change in attitude. Decedent's duties as sole man on the barge were to supervise loading and unloading of the barge and to make trips on it around the harbor. His work in pumping the barge, handling lines, and tying up the barge alongside other boats was said to be incidental to his main employment. Under the Jones Act alone, the court would probably have taken a different approach so as to find him a seaman under that act. In The Herdis, (D. C. Md. 1927) 22 F. (2d) 304, the libelants were watchmen on vessels moored in the harbor and temporarily out of commission. They claimed wage liens under the Ship Mortgage Act, 41 Stat. L. 1004 (1920), 46 U. S. C. (1934), § 953. The court, in a well written opinion, held libelants to be members of a crew performing maritime duties on a vessel in navigation. This case is significant in contrast with cases under the Longshoremen's Act, as showing the liberal constructions of these remedial statutes. In the case of South Chicago Coal & Dock Co. v. Bassett, (C. C. A. 7th, 1939) 104 F. (2d) 522, deceased worked on a coal boat operating on the Calumet River, but lived ashore as the vessel had no sleeping or eating accommodations. His duties were general labor on board, painting, cleaning, and loading coal onto boats in the river. The court said, at p. 528: "It was an ordinary laborer's job and it was merely happenstance that the location of this position was on shipboard." This discussion of decedent's duties shows the inclination to exclude a deckhand or a part-time worker on these local vessels from the category of "a member of a crew."

[10] "No compensation shall be payable in respect of the disability or death of (1) a master or member of a crew of any vessel. . . ." Longshoremen's Act, 44 Stat. L. 1426 (1927), 33 U. S. C. (1934), § 903. See South Chicago Coal & Dock Co. v. Bassett, (C. C. A. 7th, 1939) 104 F. (2d) 522 at 526-528, notes 5 and 6, for an exhaustive list of cases on this and other clauses of the Longshoremen's Act.

[11] Tending lines, pumping boat, moving ship around harbor, or riding on a tow are considered seamanlike duties.

[12] When the "incidental" duties are sufficient to become dominant is not clear. The courts do not regard as conclusive the fact that the plaintiff (1) spends all or most of his time on board ship—Moore Dry Dock v. Pillsbury, (C. C. A. 9th, 1938) 100 F. (2d) 245; Kraft v. Bull S. S. Co., (D. C. N. Y. 1939) 28 F. Supp. 437; (2) eats and sleeps on board—Antus v. Interocean S. S. Co., (D. C. Ohio, 1938) 1939 Am. Mar. Cas. 617; Diomede v. Lowe, (C. C. A. 2d, 1937) 87 F. (2d) 296; (3) is doing work necessary for and in anticipation of becoming a member of the crew on the next voyage—Antus v. Interocean S. S. Co., supra; Pryce v. U. S. Steel Products Co., (Fed. Comp. Comm.) 1939 Am. Mar. Cas. 1180; Taylor v. McManigal, (C. C. A. 6th, 1937) 89 F. (2d) 583, 1937 Am. Mar. Cas. 722; *contra*: Jones v. Shepherd, (D. C. Miss. 1937) 20 F. Supp. 345; or (4) makes trips outside the harbor —Diomede v. Lowe, supra.

Act. The court had strong authority for holding the ship was without a crew [13] and all that remained was to call the plaintiff a harborworker. The court expressed a dictum that plaintiff's exclusive remedy was under the Longshoremen's Act.[14] But the possibility of plaintiff being excluded from recovery under that act because of an applicable state compensation law [15] was not discussed. Under the doctrine of *Grant Smith-Porter Ship Co. v. Rohde*,[16] the state compensation law could well apply in the principal case even though the vessel was on navigable waters, because the plaintiff was engaged in a non-maritime employment, the ship was withdrawn from navigation, and his employment was of "local concern" with no direct relation to navigation and commerce. However, it has been suggested that only one test is needed to determine the existence of federal jurisdiction to the exclusion of state compensation laws, i.e., whether there is a close relationship between the employment and navigation and commerce in general upon navigable waters.[17] The freighter in the principal case had been withdrawn from navigation [18] for over a year and the work being done was not in anticipation of, nor necessary for, any voyage. Therefore, any close relation between the work and navigation in general is missing and the state compensation law could have been applied.

[13] An analogous and stronger case is Antus v. Interocean S. S. Co., (D. C. Ohio, 1938) 1939 Am. Mar. Cas. 617, where a seaman from the previous voyage had been hired to remain on the vessel while it was laid up for winter to assist in loading grain for winter storage. Held, not a member of the crew. In Moore Dry Dock Co. v. Pillsbury, (C. C. A. 9th, 1938) 100 F. (2d) 245, a rigger at a shipyard who spent most of his time on a small tug was held not to be a member of a crew. The court said the act meant to except "only those . . . ordinarily and generally considered as seafaring men."

[14] 107 F. (2d) 999 at 1000: "If not [a member of the crew], he was limited to compensation under the Longshoremen's and Harbor Workers' Compensation Act."

[15] "(a) Compensation shall be payable . . . only . . . if recovery . . . through workmen's compensation proceedings may not validly be provided by state law." 44 Stat. L. 1426 (1927), 33 U. S. C. (1934), § 903.

[16] 257 U. S. 469, 42 S. Ct. 157 (1923). The courts held a non-maritime employee injured on navigable waters to be compensable under a state compensation law. See Longshoremen's Act, Opinion No. 30, (Fed. Comp. Comm.) 1928 Am. Mar. Cas. 417; United States Casualty Co. v. Taylor, (C. C. A. 4th, 1933) 64 F. (2d) 521 (Oregon compensation law held applicable to an injury received on a launched but uncompleted ship). See Athearn, "The Longshoremen's Act and the Courts," 23 CAL. L. REV. 129 at 134 (1935), for a discussion of the problem and collected cases where state acts have been held applicable or inapplicable. See also Stumberg, "Harbor Workers and Workmen's Compensation," 7 TEX. L. REV. 197 at 210 (1929).

[17] Morrison, "Workmen's Compensation and Maritime Law," 38 YALE L. J. 472 at 498 (1929).

[18] There is a question whether the towing of the vessel to the dock and warping it back and forth will justify a holding that the ship was in navigation and that ergo a relationship between navigation and the plaintiff's employment existed. The case of The Herdis, (D. C. Md. 1927) 22 F. (2d) 304, cited three situations in which a boat had been held to be in navigation: (1) boat temporarily at anchor; (2) boat in repair; (3) boat being moved for purposes of profit. However, the court held that a vessel cannot be regarded as being in navigation where it is laid up for any considerable length of time and cannot reasonably be said to be employed in navigation.