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WINTER 2014

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Recent Decisions Affecting Maritime Jurisdiction In Employer Liability Claims

Employers with operations on or near waterways often face exposures under the Longshore and Harbor Workers' Compensation Act (LHWCA) and the Jones Act. This article provides a brief review of recent federal cases affecting jurisdiction under these laws.

Jones Act – What is a Vessel?

In 2005, practitioners thought the U.S. Supreme Court had finally answered this question in *Stewart v. Dutra Construction Company*, 543 U.S. 481. Dutra's dredge SUPER SCOOP is a floating platform. It removes silt from the ocean floor and dumps it into adjacent scows (small barges). Stewart was injured and sued Dutra claiming he was a seaman. The dispositive issue was whether the dredge was a vessel. The court defined a "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Although the dredge's primary purpose was not navigation or maritime commerce, the court concluded the dredge was a vessel because it was "capable of being used as means of transportation on water."

This year, the Court decided *Lozman v. City of Riviera Beach, Florida*, 133 S.Ct. 735 (2013). Lozman's floating home was a plywood house-shaped structure, stored at a marina owned by the City of Riviera Beach. The City filed suit seeking dockage fees. Lozman moved to dismiss for lack of admiralty jurisdiction. The district court found the structure to be a vessel. The 11th Circuit affirmed, deciding the home was a vessel because it was "capable of moving over the water" despite Lozman's subjective intent to have the structure remain moored indefinitely. *Lozman* appeared to move away from the *Stewart* test, reasoning that a contrivance or watercraft may be a vessel when a "reasonable observer looking at its physical characteristics and activities could conclude that it was designed to any practical degree for carrying people or things on water."

In most maritime cases, "vessel" status is obvious. Outlier cases, including structures used in the offshore energy industry, will create challenges under the *Dutra* and *Lozman* tests for vessel status. In *Mendez v. Anadarko Petroleum Corporation*, 2012 U.S. App. LEXIS 6405 (5th Cir. 2012) Anadarko won dismissal of Mendez's Jones Act claims, ruling the spar structure Mendez was working on was not a "vessel."

The spar, RED HAWK, was a floating gas production platform moored 5,000 feet in ocean water, 210 miles from Sabine Pass, Texas. Since 2004, it was secured to the ocean floor by six anchor moorings.

Under the Jones Act, a plaintiff must first establish that he has a "connection to a vessel in navigation (or an identifiable group of such vessels) …" The court noted from Stewart that "a watercraft is not capable of being used for maritime transport in any meaningful sense if it had been permanently moored or otherwise rendered practically incapable of transportation or movement," and held the RED HAWK was not a vessel because it was permanently moored. Moving the spar would take two months, involve detaching all moorings, severing

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pipelines, and would cost $42 million. The *Mendez* court noted that "at most that the RED HAWK is theoretically capable of maritime transport, but not practically capable."

Mendez is a recent example of the critical nature of the vessel question – if the structure is not a vessel, the plaintiff cannot sue under the Jones Act.

Lozman was recently followed in *Mooney v. W&T Offshore Inc*., 2013 U.S. Dist. LEXIS 30091 (E.D. La. 2013). Mooney alleged he was a Jones Act seaman because the tension-leg platform (TLP) operated by his employer was a "vessel." The court disagreed and dismissed the suit, relying on *Lozman*: "a reasonable observer looking at the structure's physical characteristics and activities, would not consider the vessel as being designed for carrying people or things over water." The court compared the TLP to floating gas production platforms and floating casinos, which do not qualify as vessels under current law; it was permanently moored to the seafloor. Under *Lozman's* "reasonable observer" test, vessel status was denied.

Recent Cases Involving Jurisdiction under the LHWCA

The Fifth Circuit recently adopted a strict interpretation of "adjoining area" for jurisdiction under the LHWCA (the LHWCA applies to "adjoining areas" used for maritime activity); *New Orleans Depot Services, Inc. v. Director OWCP*, 718 F.3d 384 (5th Cir. 2013)(en banc) (NODSI). NODSI overruled the 1980 Fifth Circuit *Winchester* case which held that an adjoining area (a stevedore's gear room about ½ mile outside the fence boundary of the Port of Houston) need not be directly contiguous to navigable waters.

NODSI employee Juan Zepeda was injured in the "Chef Yard" facility in New Orleans. NODSI repaired shipping containers and chassis. Chef Yard, with access to the Chef Menteur Highway and rail transportation, is a small industrial park located about 300 yards from the Intracoastal Canal.

All equipment NODSI serviced was delivered to and taken from the Yard by truck with no access to the canal. An administrative law judge held the Yard was close enough to navigable waters for jurisdictional purposes. The Benefits Review Board affirmed.

The Fifth Circuit overruled *Winchester* with a plain language approach to interpreting the Act: "The plain language of the LHWCA requires that coverage situs actually adjoin navigable waters" and not be "in the general geographic proximity of the waterfront."

What are the Outer Limits of the LHWCA?

NODSI dealt with the Act's landward limits but how far does the LHWCA go seaward? The question was recently addressed in *Keller Foundation v. Tracy*, 696 F.3d 835 (9th Cir. 2012), cert. denied 569 U.S. (2013). In Keller, a worker was injured while employed in the ports of Singapore and an Indonesian ship yard. Previous lower court decisions had determined that the LHWCA did not apply to workers injured on foreign territorial waters.

But more recently, in *Weber v. S.C. Loveland Company*, 28 BRBS 321 (1994), a longshoreman injured on a barge in Kingston, Jamaica, was held to be covered under the LHWCA because the worker was a U.S. citizen, employer was U.S. based, and the vessel was under the American flag.

In *Keller*, the court agreed with the Plaintiff that the navigable waters of the U.S. includes the high seas, but drew the line where those high seas intersect with foreign territorial waters, and held that in the absence of clear congressional intent to include injuries in foreign territorial waters in Section 903(a), there is a presumption that the LHWCA *does not apply* extraterritorially.

In another 2012 landmark decision, the Court extended the Outer Continental Shelf Lands Act (OCSLA), to land injuries. (Congress enacted OCSLA in the 1950s and extended the LHWCA to claims that fall under the OCSLA.) *Pacific Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680 (2012) ("Valladolid"). The outer continental shelf (OCS) is a subsea area that begins offshore from the coastal states where their territorial waters end. Juan Valladolid was killed while performing maintenance work at the employer's onshore oil and gas processing facility in Ventura County, California. Ninety-eight percent of his other duties were on OCS platforms. His widow filed for benefits under OCSLA, which provides benefits for injury or death to an employee occurring "as a result of operations connected with the exploration, development, removal and transportation of natural resources from the seabed and subsoil of the outer continental shelf." For many years, courts had held OCSLA had a situs requirement limiting jurisdiction to injuries occurring on the OCS. In *Valladolid*, the Court extended OCSLA coverage to work-related injuries occurring away from the OCS, provided the work has a "substantial nexus" to the employer's operations on the OCS.

Before January 2012, Federal Courts disagreed about OCSLA jurisdiction. The Fifth Circuit refused to extend OCSLA to injuries outside the OCS. The Third Circuit took a broader view, applying OCSLA even to land injuries, if the injury would not have occurred "but for operations" on the OCS.

Valladolid rejected these views and adopted the Ninth Circuit's "substantial nexus" test. Practitioners need to follow subsequent cases to probe the landward limits of OCSLA jurisdiction. *Valladolid* will likely result in more claims for land/near-land injuries under OCSLA that were formerly covered under state law.

Conclusion

The courts have recently been active defining the parameters of jurisdiction under the Jones Act, the LHWCA and the OCSLA. Employers and their counsel must remain current on these and subsequent decisions given the risks and substantial dollars at stake. P