

COMMENTS

ADMIRALTY: "UPON NAVIGABLE WATERS" REQUIREMENT FOR JURISDICTION UNDER THE LONGSHOREMEN'S AND HARBOR WORKER'S ACT OF 1927

Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968)

Four longshoremen, while working on land, were injured in three separate accidents.¹ Distinguishing the cases on the basis of the situs of the injuries, two District Courts affirmed the rulings of the deputy commissioner, allowing death benefits under the Longshoremen's and Harbor Worker's Act of 1927² to the longshoreman thrown into the water and drowned and denying benefits to the three remaining claimants who had sustained injury solely on land.³ The cases were consolidated on appeal to the Fourth Circuit, which reversed the District Court denials of recovery under the federal act.⁴ *Held*: the jurisdiction of the Longshoremen's Act is grounded on the *function or status* of the injured employee—not on the situs of the injury.

I. EARLY DEVELOPMENT AND BACKGROUND

The early 1900's marked the passage by several states of workmen's compensation laws. The intent was to provide speedy and adequate relief to the injured workman and, in the case of death, to the dependents. The ideal manner of accomplishing this goal was to remove the costly hazards of litigation and proof of negligence.⁵ Before 1917, both

1. *Avery v. Oosting*, 245 F. Supp. 51 (E.D. Va. 1965); *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965); *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78 (E.D. Va. 1965).

2. Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.
35 U.S.C. § 903(a) (1964).

3. One of the three plaintiff-appellants denied recovery under the federal act was a widow seeking death benefits. All of the employee-stevedores were injured by a free-swinging draft of a loading crane.

4. *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968).

5. See A. LARSON, WORKMEN'S COMPENSATION LAW §§ 89.10-60 (1952).

federal⁶ and state⁷ courts held that state compensation statutes provided coverage for all land-based workers (as contrasted with seamen) and that the locale of the injury was immaterial. Thus, longshoremen and other harbor workers were within the jurisdiction of state compensation acts.

In 1917 however, the Supreme Court, placing the Constitution and maritime uniformity above sympathy,⁸ ruled in *Southern Pacific Company v. Jensen* that longshoremen injured on vessels or on gangplanks between vessels and piers were exclusively within federal maritime jurisdiction and thus barred from any recovery under a state compensation act.⁹ The net result of this decision was to leave harbor workers injured upon navigable waters without workmen's compensation of any kind.¹⁰ Following that decision, Congress enacted two federal acts, ostensibly applying state compensation relief to workers injured on navigable waters. Both acts were struck down by the Court as unconstitutional delegations of authority to the states.¹¹ The Longshoremen's Act of 1927, enacted pursuant to the Supreme Court's suggestion in *State of Washington v. W. C. Dawson & Company*,¹² filled the shoreline vacuum in employment compensation coverage created by *Jensen*.¹³ The issue raised in *Marine Stevedoring Corporation v. Oosting*¹⁴ concerns the jurisdiction of that Act over injuries occurring on land sustained by workers while acting within the scope of their employment as maritime workers.

6. *Riegel v. Higgins*, 241 F. 718 (N.D. Cal. 1917); *Berton v. Tietjen & Lang Dry Dock Co.*, 219 F. 763 (D.N.J. 1915).

7. *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 A. 372 (1915); *Lindstrom v. Mutual S.S. Co.*, 132 Minn. 328, 156 N.W. 669 (1916). *But c.f.* *Schuede v. Zenith S.S. Co.*, 216 F. 566, 571 (N.D. Ohio 1914).

8. It was estimated that some 300,000 longshoremen and harbor workers, whose employment is by its inherent nature hazardous, were deprived of a compensation remedy. *See Comment, The Federal Longshoremen's and Harbor Workers' Act*, 43 *YALE L.J.* 640 (1934).

9. 244 U.S. 205 (1917).

10. *See Huttenbrauck, Maritime Personal Injury Cases—The Twilight Zone*, 1965 *INS. COUNSEL J.* 92, 93.

11. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

12. 264 U.S. 219 (1924).

13. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *see Michigan Mut. Liab. Co. v. Arrien*, 344 F.2d 640, 643-44 (2d Cir. 1965); *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965). *See generally*, G. GILMORE & C. BLACK, *ADMIRALTY* § 6-45 (1957).

14. 398 F.2d 900 (4th Cir. 1968).

II. "UPON NAVIGABLE WATERS"

Before the passage of the Admiralty Extension Act of 1948,¹⁵ there appears to be no support for the proposition that the Longshoremen's Act encompassed an injury incurred completely on land. While the exercise of Commerce Clause jurisdiction over all maritime workers was forcefully urged before Congress in 1927,¹⁶ the Congressional history clearly indicates that the intent of the legislation was to fill the void created by *Jensen* in workmen's compensation for harbor workers.¹⁷ The Act prescribes that its jurisdiction shall extend compensation to disability or death "only if the disability or death results from an injury occurring upon navigable waters of the United States (including any dry dock) . . ."¹⁸ The Supreme Court in *State Industrial Commission v. Nordenholt Corporation*¹⁹ made it clear that the federal compensation laws did not extend to injuries on land.²⁰ The occupation status of the longshoreman, therefore, had no bearing on his ability to make a federal claim.²¹ Obviously, the line between sea and land is a fine one. Protrusions from the land often stretch far out over the water. The courts have, therefore, been forced to characterize different structures as either land or "upon navigable water." Docks, wharves, piers (as in the instant case), and similar structures were considered,

15. Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C. § 740 (1964).

16. See *Johnson v. Traynor*, 243 F. Supp. 184, 189 (D. Md. 1965).

17. The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.

S. REP. NO. 973, 69th CONG., 1st Sess. 16 (1926); Clark, *The Longshoreman and Accident Compensation*, 22 MONTHLY LABOR REV. 753, 756 (1926).

18. Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C. § 903(a) (1964).

19. 259 U.S. 263 (1922).

20. See, e.g., *Swanson v. Marra Bros.*, 328 U.S. 1 (1946); *Travelers Ins. Co. v. Shea*, 382 F.2d 344 (5th Cir. 1967); *Nicholson v. Calbeck*, 385 F.2d 221 (5th Cir. 1967); *Houser v. O'Leary*, 383 F.2d 730 (9th Cir. 1967); *Michigan Mut. Liab. Co. v. Arrien*, 344 F.2d 640 (2d Cir. 1965); *Taylor v. Baltimore & O.R.R. Co.*, 344 F.2d 281 (2d Cir. 1965); *Hastings v. Mann*, 340 F.2d 910 (4th Cir. 1965); *American Export Lines, Inc. v. Revel*, 266 F.2d 82 (4th Cir. 1959); *Travelers Ins. Co. v. McManigal*, 139 F.2d 949 (4th Cir. 1944); *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965); cf. *Interlake Steamship Co. v. Nielsen*, 338 F.2d 879 (6th Cir. 1964).

21. "[T]he coverage of the Act is not keyed to function but has uniformly been situs-oriented." *Travelers Ins. Co. v. Shea*, 382 F.2d 344, 346 (5th Cir. 1967). But see *Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc.*, 306 F.2d 369, 372 (5th Cir. 1962).

consistent with the admiralty decisions prior to the passage of the Longshoremen's Act, as extensions of the land. Injuries occurring on a pier were, as a result, not "upon navigable waters" as required by the Act.²² A gangplank, traditionally a part of the equipment of the ship and not permanently attached to shore, was regarded as a part of the ship and fell within the jurisdiction of the Act.²³

Longshoremen are constantly moving from the ship to the land and back again and, consequently, move in and out of the legislation's coverage continually, notwithstanding the fact that they remain longshoremen throughout.²⁴ This does not mean that a longshoreman injured on a pier is without a remedy, as he may qualify under other federal and state acts.²⁵ However, because of the shortness of both the federal and state statutes of limitations,²⁶ a plaintiff mistakenly initiating his action in the wrong jurisdiction may be foreclosed from any compensation.²⁷ To avoid this and allow recovery, the courts have sometimes predicated jurisdiction on strange and even humorous distinctions between land and navigable water. For example, if the employee is struck by a boom while standing on the pier and is knocked into the water and drowns, the injury is considered to have occurred in navigable waters.²⁸ The same was held for death benefits for a fatal skull fracture received when an automobile was driven off the end of a pier onto solid ice.²⁹ "Upon navigable waters" has also been held to include injuries sustained while flying over the water,³⁰ and this sound result was dubiously extended to include a worker who was momentarily lifted

22. See, e.g., *Swanson v. Marra Bros.*, 328 U.S. 1 (1946); *Industrial Commission v. Nordenholt*, 259 U.S. 263 (1922); *Hastings v. Mann*, 340 F.2d 910, 911-12 (4th Cir. 1965); *American Export Lines, Inc. v. Revel*, 266 F.2d 82 (4th Cir. 1959); *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965).

23. See, e.g., *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *Taylor v. Baltimore & O.R.R. Co.*, 344 F.2d 281 (2nd Cir. 1965).

24. "Any rule that we [adopt in applying 33 U.S.C. § 903(a) (1964)] . . . is necessarily arbitrary from the longshoremen's point of view because the boundary line between land and sea is crossed by a great deal of traffic and many injuries occur near the line." *Michigan Mut. Liab. Co. v. Arrien*, 344 F.2d 640, 647 (2d Cir. 1965) (Hays, J., dissenting).

25. See Comment, *The Longshoremen's and Harbor Workers' Compensation Act of 1927: Half-Way Protection for the Stevedore and the Longshoreman*, 64 MICH. L. REV. 1553, 1554 (1966).

26. See, e.g., *Ayers v. Parker*, 15 F. Supp. 447 (D. Md. 1936); 33 U.S.C. § 913 (1964); VA. CODE ANN. § 65.1-87 (1964).

27. See A. LARSON, WORKMEN'S COMPENSATION LAW (App. B) 524-28 (Supp. 1968).

28. See, e.g., *Noah v. Liberty Mut. Ins. Co.*, 267 F.2d 218 (5th Cir. 1959); *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78 (E.D. Va. 1965).

29. *Interlake S.S. Co. v. Nielsen*, 338 F.2d 829 (6th Cir. 1964).

30. *D'Aleman v. Pan American World Airways*, 259 F.2d 493 (2d Cir. 1958).

from the pier by a swinging boom and then dropped once again onto the pier.³¹ It has been argued several times that "upon navigable waters" includes any wharf or pier which has sufficient water flowing beneath it to facilitate the navigation of a small boat. Until *Marine Stevedoring*, the courts uniformly rejected this theory.³² When the situs of the injury is unknown, it would seem that the longshoreman may elect between state and federal recovery.³³ Beyond this, however, while the Act is to "be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results,"³⁴ it would appear that it is entirely possible that two harbor workers, standing on the same wharf, doing the same job, and hit by the same swinging draft, may fall within diverse compensation jurisdictions depending either on where the crane was located³⁵ or where they are thrown by the impact.³⁶

In recent years, a dispute largely based among the District Courts³⁷ and sometimes extending into the Circuit Courts³⁸ has developed concerning the effect of the Admiralty Extension Act of 1948³⁹ on the "navigable waters" requirement of the Longshoremen's Act. It has been contended, unsuccessfully, that the expanded admiralty tort jurisdiction under that Act similarly expanded the scope of the Longshoremen's Act to include injuries sustained completely on land.⁴⁰ The

31. *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968).

32. See, e.g., *Nicholson v. Calbeck*, 385 F.2d 221 (5th Cir. 1967), cert. denied, 389 U.S. 1051 (1968); *Travelers Ins. Co. v. Shea*, 382 F.2d 344 (5th Cir. 1967).

33. The Longshoremen's Act provides that jurisdiction is presumed unless there is substantial evidence presented to the contrary. 33 U.S.C. § 920(a) (1964). See *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78, (E.D. Va. 1965). *Contra Atlantic Stevedoring Co. v. O'Keeffe*, 220 F. Supp. 881, 885 (S.D. Ga. 1963).

34. *Voris v. Eikel*, 346 U.S. 328, 333 (1953), quoted in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963).

35. Compare *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935) with *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928).

36. See *Noah v. Liberty Mut. Ins. Co.*, 267 F.2d 218 (5th Cir. 1959).

37. See *Hendricks, Jurisdiction in Longshoremen's Injuries*, 16 CLEV. MAR. L. REV. 124, 127-29 (1967).

38. See, e.g., *Interlake S.S. Co. v. Nielsen*, 338 F.2d 879, 882-83 (6th Cir. 1964); *American Export Lines, Inc. v. Revel*, 266 F.2d 82, 84 (4th Cir. 1959).

39. 46 U.S.C. § 740 (1964).

40. See, e.g., *American Export Lines, Inc. v. Revel*, 266 F.2d 82 (4th Cir. 1959); *Gladden v. Stockard S.S. Co.*, 184 F.2d 510 (3d Cir. 1950); *East v. Oosting*, 245 F. Supp. 51 (E.D. Va. 1965); *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965); *Michigan Mut. Liab. Co. v. Arrien*, 233 F. Supp. 496 (S.D.N.Y. 1964), *aff'd*, 344 F.2d 640 (2d Cir. 1965); *Atlantic Stevedoring Co. v. O'Keeffe*, 220 F. Supp. 881 (S.D. Ga. 1963). *But see Interlake S.S. Co. v. Nielsen*, 338 F.2d 879 (6th Cir. 1964).

express language of the statute refutes the argument,⁴¹ and indeed, the Fourth Circuit until *Marine Stevedoring* had consistently held that the Extension Act did not and was not intended to have any effect on the jurisdictional requirements of the Longshoremen's Act.⁴² While the Supreme Court has yet to consider the question, detailed analysis of the argument by several District Courts indicates that, in light of the more recent Supreme Court decisions, the argument is not a strong one.⁴³

III. THE CALBECK ARGUMENT

A survey of the massive digest of Longshoremen's Act litigation since 1927 indicates that the courts have been primarily concerned, not with the jurisdiction of the act to land-based injuries, but rather, with the jurisdictional scope of state workmen's compensation acts to injuries sustained on the water.⁴⁴ Two judicial nightmares under the Act have been the "maritime but local" doctrine⁴⁵ and the subsequently developed "twilight zone."⁴⁶ The Supreme Court in *Calbeck v. Travelers Insurance Company*⁴⁷ attempted to cure many of the anomalies present under the "maritime but local" doctrine.⁴⁸ The decision was concerned directly with the interpretation of the phrase ". . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law . . ." ⁴⁹ as a condition precedent to federal jurisdiction. The Fourth Circuit in *Marine Stevedoring*, while recognizing that the decision was not concerned with an

41. ". . . [A]ll cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740 (1964) (emphasis added). This argument is fully developed in *Michigan Mut. Liab. Co. v. Arrien*, 233 F. Supp. 496, 501-02 (S.D.N.Y. 1964), *aff'd*, 344 F.2d 640 (2d Cir. 1965).

42. *See* *American Export Lines, Inc. v. Revel*, 266 F.2d 82 (4th Cir. 1959); *cf.* *Boston Metals Co. v. O'Hearne*, 329 F.2d 504 (4th Cir.), *cert. denied*, 379 U.S. 824 (1964).

43. *Cf.* *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).

44. *See, e.g.,* Note, *The Longshoremen's and Harbor Workers' Act of 1927: Half-Way Protection for the Stevedore and the Longshoreman*, 64 MICH. L. REV. 1553 (1966).

45. *See generally* G. GILMORE & C. BLACK, ADMIRALTY §§ 6-48 to -52 (1957).

46. *See generally* Gainsburgh & Fallon, *Calbeck v. Travelers Insurance Co.: The Twilight's Last Gleaming?*, 37 TUL. L. REV. 79 (1962).

47. 370 U.S. 114 (1962).

48. Many commentators indicate that the "maritime but local" doctrine was abolished. *See* Note, *Admiralty and Workmen's Compensation: "Maritime but Local" Doctrine Rejected as Limitation on Federal Jurisdiction under the Longshoremen's Act*, 1963 DUKE L.J. 327.

49. 33 U.S.C. § 903(a) (1964).

interpretation of "upon navigable waters," concluded that dictum in the Supreme Court opinion "authoritatively resolved"⁵⁰ the issue of status versus situs before them in favor of a contractual, occupational-status approach. Such an interpretation of *Calbeck* at the very least seems highly strained and is easily questioned in view of the express holding of the case, which distinguished the land and water injuries.⁵¹ Nor does such an interpretation square with the intent the Supreme Court has evinced in *Calbeck* and earlier decisions.⁵² Indeed, subsequent litigation under *Calbeck* has indicated that the decision stands authoritatively for only one proposition: "All injuries occurring on navigable waters are in the purview of the [Longshoremen's Act]."⁵³

CONCLUSION

The legislative history of the Longshoremen's Act, the Admiralty Extension Act of 1948, the forty-one years of case law, and the recent decision of *Calbeck* do not lend ready support to the Fourth Circuit's conclusion in *Marine Stevedoring*. There is a seemingly harsh and incongruous result in the case of two companion longshoremen who are hit by a flying boom, one ultimately recovering greater benefits under the federal act because he was catapulted into the water by the impact. The apparent incongruity, however, is clearly consistent with the Su-

50. 398 F.2d 900, 905 (4th Cir. 1968).

51. The Court in *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968), does not set out the express holding of *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), as they did in *Boston Metals Co. v. O'Hearne*, 329 F.2d 504 (4th Cir.), *cert. denied*, 379 U.S. 824 (1964), where they ruled that under *Calbeck, supra*, the locale of the injury brought the workman within the Longshoremen's Act. The Supreme Court expressly held in *Calbeck, supra*: "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." 370 U.S. 114, 117 (1962). In *Boston Metals, supra*, the workman was not a longshoreman, yet the Fourth Circuit did not consider the occupational status as significant. *Cf. Sanderlin v. Old Dominion Stevedoring Corp.*, 385 F.2d 79, 81 (4th Cir. 1967).

52. See Note, *Admiralty and Workmen's Compensation: "Maritime but Local" Doctrine Rejected as Limitation on Federal Jurisdiction under the Longshoremen's Act*, 1963 DUKE L.J. 326, 333; *cf. Davis v. Department of Labor*, 317 U.S. 249 (1942). *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), indicates the Supreme Court's desire to (1) assure that all employees injured in or around navigable waters are covered by at least one compensation law, and (2) that the claimant might readily and without expense or litigation determine the proper forum. *Calbeck, supra*, accomplished this result by drawing a strict line for the federal jurisdiction at the shoreline.

53. Comment, *Conflict Between State and Federal Compensation Law in Admiralty: From Jensen to Calbeck and Beyond*, 35 MISS. L.J. 84, 102 (1963).

preme Court's view that a position should be taken that will place each worker under the constant protection of *some* compensation law, with a clear guideline as to which jurisdiction either must or may be elected by the plaintiff for recovery.⁵⁴ This position has been resolved to be a firm line at the shore, at least as far as the jurisdiction of the federal act is concerned.⁵⁵

The Fourth Circuit prior to *Marine Stevedoring* had indicated in several decisions that the locale or situs of the injury was the proper characterization of the jurisdictional requirement under the Longshoremen's Act.⁵⁶ A reversal of this position to one based on the nature and subject matter of the employee's contract would clearly expand the jurisdiction of the federal coverage to all stevedores, including those validly covered presently by state workmen's compensation.⁵⁷ At the same time, such a characterization would exclude from coverage workmen whose employment was not maritime in nature, even though they were injured on navigable waters. And if *Jensen*⁵⁸ were followed, such workmen would be equally remediless in a state proceeding (unless the "maritime but local" doctrine were revived).

There seems to be no logical reason to invite another round of confusion in the courts over the jurisdiction of the Longshoremen's Act. It is precisely such confusion that the Supreme Court sought to eliminate in *Calbeck* with its positive holding that all injuries upon navigable waters are encompassed under the federal act. No doubt some unfair differentiations still exist which will occur under a strict land-water dividing line, but this danger is clearly outweighed by the establishment of understandable and predictable jurisdictional boundaries which will afford all workers a remedy of some kind. The intent of Congress to provide some form of compensation for the longshoremen and harbor workers, wherever the injury is sustained, has been accom-

54. See *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 124 (1962).

55. It may be that under *Calbeck v. Travelers Ins. Co.*, a workman injured upon navigable waters, but otherwise falling within the "maritime but local" exception, may elect either federal or state compensation. See Note, *Admiralty and Workmen's Compensation: "Maritime but Local" Doctrine Rejected as Limitation on Federal Jurisdiction under the Longshoremen's Act*, 1963 DUKE L.J. 326, 333.

56. See *Hastings v. Mann*, 340 F.2d 910 (4th Cir. 1965); *Boston Metals Co. v. O'Hearne*, 329 F.2d 504 (4th Cir. 1964); *American Export Lines, Inc. v. Revel*, 266 F.2d 82 (4th Cir. 1959).

57. See *American Stevedores v. Porello*, 330 U.S. 446 (1947).

58. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

plished.⁵⁹ To follow the tack advocated in *Marine Stevedoring* is to attempt judicially to legislate a *higher* recovery for the land-injured longshoreman, when the intent of the 1927 Act was to provide some recovery to water-injured harbor workers who were otherwise without protection.

59. See Clark, *The Longshoreman and Accident Compensation*, 22 MONTHLY LAB. REV. 753 (1926).