No. 2006-1808

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-05-87073

JOSEPH TALIK,
Plaintiff-Appellee,

v.

FEDERAL MARINE TERMINALS, INC.,
Defendant-Appellant.

MERIT BRIEF OF APPELLANT FEDERAL MARINE TERMINALS, INC.

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I. STATEMENT OF FACTS

This case arises out of a workplace injury to a longshore worker employed by Appellant Federal Marine Terminals, Inc. ("Federal Marine"), a company that conducts cargo handling operations along the Great Lakes and other shipping waterways on our nation's coasts. As it did when considering a railroad worker's claim in *Hess v. Norfolk S. Ry. Co.* (2003), 153 Ohio App.3d 565, *rev'd,* (2005), 106 Ohio St.3d 389, the Eighth Appellate District erroneously applied Ohio, instead of federal, law to the claim of a worker governed by a federal compensation act – here, the Longshore Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 903, et seq. The majority further declined to follow its own precedent[1] and held that an Ohio common law tort – here, Ohio's "substantial certainty" workplace intentional tort – is not preempted by the exclusive liability provisions of the LHWCA. The broad sweep of the LHWCA is necessary to maintain uniformity in the conduct of port operations throughout the United States, just as the broad sweep of federal statutes regulating railroad operations is necessary to maintain uniformity in interstate transportation. Federal Marine respectfully seeks a rule of law that acknowledges and effectuates the intent of Congress in enacting the LHWCA, a reversal of the majority decision below, and reinstatement of the summary judgment in favor of Federal Marine that was issued by the Trial Court.

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[1] *Daley v. Aetna Cas. & Sur. Co.* (1988), 61 Ohio App.3d 721 (state tort claim asserted by longshore worker was preempted by the LHWCA); *Darby v. A-Best Products Co.*, 8th Dist. No. 81270, 2002-Ohio-7070, *aff'd.* (2004), 102 Ohio St.3d 410 (state tort claim asserted by railroad workers was preempted by federal statute).

A. The Accident.

Federal Marine utilizes two-person teams – a "checker" and a forklift operator – to select and load cargo at the Port of Cleveland. (Supplement ("Supp.") 116, Talik Deposition ("Talik Dep.") 33.) Appellee Joseph Talik was a "checker," responsible for ensuring that the proper size and weight of cargo was loaded onto trucks for delivery to Federal Marine's customers. (Supp. 120, id. 37.) He and his partner, forklift operator Robert Holchin, worked as a cargo handling team for over 40 years. (Supp. 164, Holchin Aff., ¶ 4-5.)

On September 10, 2004, the first task on Talik's work list was to fill an order for 65,000 pounds of pipe from a pile of thin- and thick-walled pipe that had been unloaded and stacked in front of Dock 26 two to three weeks earlier. (Supp. 103-104, Talik Dep. 20-21.) According to Talik, the pile "was like no other pile I encountered because the amount of small pieces and the amount of large diameter pieces. It was stacked in such a way that it was just very, very risky." (Supp. 105, id. 22.) The pile was chocked in several places, including the large pipes at the bottom front of the pile. (Supp. 126-127, 134-135, id. 43-44, 51-52.)

To fill the order, Talik first located and picked out "a few big pieces in the front" that would fill out the first layer of the truck's trailer bed. (Supp. 124, id. 41.) Holchin then placed the forks of his forklift under the three pipes selected by Talik, lifted them off their chocks, and tilted the forks so that the pipes rolled backwards onto the "mast" of

the forklift. (Supp. 126-127, id. 43-44.) During this procedure, Talik was standing off to the side "[b]ecause that's the safest place to be." (Supp. 128, id. 45.)

Talik waited until Holchin had backed a safe distance from the pile before measuring and checking the weight markings of the pipes on the forklift, "[s]o in case the pile collapses I won't be in front of it." (Supp. 129-130, id. 46-47.) Holchin then drove the forklift over to the waiting truck to load the pipe onto the trailer. (Supp. 131, id. 48.)

Per their usual procedure, Talik was to wait until Holchin returned before measuring more pipe. That way, Holchin could stabilize the pile by placing his forks under the pipe exposed by removal of the first three. See Holchin Sworn Statement at 30 (Supp. 58) describing his previous warning to Talik: "Joe, don't do that. Don't go near that pile. Wait until I come back and get them on my forks. Then you can get [at] them."

This time, however, Talik approached the pile from the side to measure another pipe before Holchin returned. (Supp. 131, Talik Dep. 48.) Talik testified that although he knew the chocked pipes had been removed, other pipes were chocked, including the newly exposed front bottom pipe of the pile. (Supp. 135-136, id. 51-52.) Talik agreed that "you should never climb on to a cargo stack for any reason." (Supp. 137, id. at 54.) But he stepped between a long and short pipe because "the piece I needed was buried inside more towards the middle of the pile. So that's the one I went to measure and that is when it let go." (Id.) When the pile collapsed, a pipe rolled onto and injured Talik's right leg. (Supp. 19, Compl., ¶ 12.)

Talik later testified that he and his partner "used to break the pile down" before loading and that this was the "first pile" that wasn't broken down. (Supp. 149, Talik Dep. 66.) He complained that he wasn't given the time needed for that task, but admitted that he did not ask his manager for additional time. (Supp. 150, id. 67.) Talik's attorneys obtained sworn statements, later converted into affidavits, from Holchin and other co-employees, averring that they had had complained "'that they needed time to properly break down and sort that pile.'" (See Appendix ("Appx.") 16-18, Appellate Opinion ("App. Op.") 13-15.)

B. Talik Receives Worker Compensation Benefits and Files Suit Alleging an Ohio "Substantial Certainty" Workplace Tort.

As a longshoreman injured within the scope and course of his employment, Talik was entitled to "no-fault" benefits under the LHWCA. See § 904 (Appx. 38), requiring employers to secure "no-fault" compensation for employees, and § 906, 907 (Appx. 43, 46), setting forth maritime employers' responsibility to provide medical services and supplies and compensation for disability.

Because he was a "twilight zone" worker – that is, he worked on land appurtenant to navigable waters – Talik had the option of seeking Ohio or federal (LHWCA) worker compensation benefits, or both. See 33 U.S.C. § 903(a), extending coverages to include not only injuries that occur "upon the navigable waters of the United States" but also injures that occur upon:

> *** any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.

(Appx. 35.) If a longshore worker applies for both federal and state benefits, the LHWCA effectively allows him to keep the higher paying of the two:

> *** any amounts paid to an employee for the same injury *** for which benefits are claimed under this chapter pursuant to any other workers' compensation law *** shall be credited against any liability imposed by this chapter.

33 U.S.C. § 903(e) (Appx. 36). Following his injury, Talik elected to receive Ohio workers' compensation benefits, which he understood to be benefits "through" the LHWCA. (Supp. 156-157, 159, Talik Dep. 73-74, 76.)[2]

In November 2004 – less than two months after his accident – Talik filed a lawsuit in Cuyahoga County Common Pleas Court, alleging that Federal Marine should be held liable for his injuries under Ohio's common law, "substantial certainty" tort (*Fyffe* v. *Geno's, Inc.* (1991), 59 Ohio St.3d 115). (Supp. 18, 19, Compl., ¶ 7, 8, 11.) Federal Marine filed a motion for summary judgment, on the grounds that Talik's Complaint was barred and preempted by the exclusivity provisions of the LHWCA. (Supp. 175, Def. MSJ). The Trial Court granted the motion (Appx. 26) and Talik appealed.

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[2] Talik testified that in addition to medical care, the Ohio Bureau of Workers' Compensation was paying him $2,000 a month "and change." He was also receiving $814 a month in Social Security benefits, and was anticipating "roughly $2,000 a month" in additional pension benefits from Federal Marine. (Supp. 157, Talik Dep. 74).

C. Two Appellate Judges Reject the Uniform Rule of Law Established by State and Federal Courts Construing the LHWCA, and Misconstrue a Louisiana State Court Appellate Decision.

The majority of the panel hearing Talik's appeal reversed. The Court cited a Louisiana appellate decision – *Taylor v. Transocean Terminal Operators, Inc.* (La. App. 2001), 785 So.2d 860 – to conclude (emphasis added):

> [B]ecause the LHWCA is a workers' compensation program, and because *in Ohio* an employee may maintain a workers' compensation claim *and an intentional tort claim,* we hold that the LHWCA does not preempt Talik's state law claim.

(Appx. 10, App. Op. 7.) The majority further held that longshore workers injured at Ohio ports could assert a "substantial certainty" *Fyffe* claim – i.e., their intentional tort claim is governed by state, not federal common law – and that the record contained a "genuine issue of material fact to be litigated" under the *Fyffe* standard (Appx. 21, App. Op. 18).

Judge Cooney dissented, citing two Ohio appellate cases which correctly hold that: 1) the LHWCA preempts state tort causes of action (Appx. 24, App. Op. (dissent) 21, citing *Daley v. Aetna Cas. & Sur. Co.* (1988), 61 Ohio App.3d 721); and 2) proof that the maritime employer failed to secure payment of compensation is required before a longshore worker pursue an action at law against that employer (Appx. 25, App. Op. (dissent) 22, citing *Cornell v. Parsons Coal Co.* (1993), 96 Ohio App.3d 1, 4).

Federal Marine filed this appeal, seeking review of both: 1) the majority's reversal of the Trial Court's summary judgment; and 2) the majority's resolution of motions that neither ruled upon by the Trial Court nor part of the appeal. This Court accepted review, but only as to the first proposition of law.

II. ARGUMENT

Proposition of Law No. 1

Ohio's common law "substantial certainty" tort conflicts with, and is preempted by, the immunity accorded compliant employers under the LHWCA, 33 U.S.C. § 905(a).

A. The LHWCA Provides Broad Coverages and a Single Recovery.

Although it is a "typical workers' compensation program" (Appx. 9, App. Op. 6) in that it provides no-fault benefits to workers injured in the workplace, the LHWCA has several unique provisions arising out of the overlap of land and maritime jurisdictions, and Congress' *quid pro quo* balancing of the interests of longshore workers, their maritime employers, and the owners of the vessels they unload. That balance is based on tripartite philosophies of broad coverages, a single recovery, and expansive immunities from litigation.

1. Congress extended LHWCA coverages landward to include "twilight zone" workers.

Enacted in 1927, the LHWCA was amended in 1972 to extend its coverages to longshore workers engaged in maritime activities on piers, terminals and other facilities appurtenant to navigable waterways. The purpose of the amendments was to resolve inequities that sometimes resulted from the exclusive nature of admiralty jurisdiction, by providing concurrent state/federal jurisdiction over compensation benefits for these "twilight zone" longshore workers. Counsel for Federal Marine cannot improve upon the succinct explanation of these amendments as set forth by the Tenth Appellate District in

State ex rel. Pittsburgh & Conneaut Dock Co. v. Industrial Commission of Ohio (2005), 160 Ohio App.3d 741, 743-744, ¶ 6-9:

> In 1927, Congress enacted a federal compensation law for maritime workers, the Longshoremen's and Harbor Workers' Compensation Act, Section 901 et seq., Title 33, U.S. Code. The act was Congress' answer to United States Supreme Court decisions invalidating previous congressional efforts to provide compensation to maritime employees through state compensation laws. The 1927 law provided compensation for injuries "occurring upon the navigable waters of the United States *** if recovery *** through workmen's compensation proceedings may not validly be provided by State law." Section 903, Title 33, U.S. Code, 44 Stat. 1426, cited *in Sun Ship, Inc. v. Pennsylvania* (1980), 447 U.S. 715, 717-718, 100 S.Ct. 2432, 65 L.Ed.2d 458. This effort to provide compensation for injuries occurring "upon the navigable waters," however, led to confusion for maritime workers whose work could be characterized as "maritime but local," and decades of litigation ensued. Id. at 718, 100 S.Ct. 2432, 65 L.Ed.2d 458.
>
> In 1972, Congress amended the LHWCA. Congress broadened the definition of "navigable waters of the United States" to include "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." Section 903(A), Title 33, U.S. Code. Thus, Congress extended the LHWCA's coverage inland, where state compensation laws had in the past applied exclusively. Importantly, Congress also removed the provision precluding federal recovery if a state remedy was available. Section 903(e), Title 33, U.S. Code; *Kelly v. Pittsburgh & Conneaut Dock Co.* (C.A.6, 1990), 900 F.2d 89, 92.
>
> In *Sun Ship*, 447 U.S. at 720, 100 S.Ct. 2432, 65 L.Ed.2d 458, the Supreme Court analyzed the reach of the 1972 amendments vis-à-vis state compensation systems and concluded:

> [T]he 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law. Given that the pre-1972 Longshoremen's Act ran concurrently with state remedies in the "maritime but local" zone, it follows that the post-1972 expansion of the Act landward would be concurrent as well. For state regulation of worker injuries is even more clearly appropriate ashore than it is upon navigable waters. ***
>
> The language of the 1972 amendments cannot fairly be understood as pre-empting state workers' remedies from the field of the LHWCA ***.
>
> Thus, we must conclude as a preliminary matter, as the court did in *Sun Ship*, that the LHWCA does not preclude a state workers' compensation award to a state maritime worker, like claimant, injured in an "adjoining area."

See, also, *Edwards v. Stringer* (1978), 56 Ohio App.2d 283, 285-286, explaining the reason for and development of the "twilight zone" concept in *Davis v. Dept. of Labor* (1942), 317 U.S. 249, and extension of the "twilight zone" concurrent jurisdiction shoreward in the 1972 amendments to the LHWCA.

As this history establishes, the state and federal "concurrent jurisdiction" under the LHWCA is over compensation *benefits*, not common law tort remedies. Simply because the LHWCA engrafts state *benefit* schemes onto its own federal benefit scheme, does not mean that the LHWCA engrafts state *tort* remedies onto its workers' compensation scheme. See *Seide v. Bethlehem Steel Corp.* (1985), 212 Cal.App.3d 985, 987-989 (emphasis in original):

> Plaintiff correctly argues that *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 *** recognizes concurrent state and federal jurisdiction over *compensation claims* relating to injuries sustained by maritime employees ***. [P]laintiff argues that because a state may apply its own workers' compensation law to claims arising under the LHWCA, it may also apply its own tort law under such concurrent jurisdiction. *** In recognizing concurrent federal and state jurisdiction over maritime compensation claims, *Sun Ship, Inc.* neither discussed tort law nor a state's power to apply its own tort law to claims arising under the LHWCA.

In short, longshore workers engaged in maritime work in the "twilight zone" are governed by the LHWCA, which obligates their employer to secure appropriate state and federal coverages for workplace injuries.[3] The worker can seek benefits under the LHWCA, Ohio workers' compensation scheme, or both.[4]

2. The LHWCA's amendments expanded coverages and increased benefits, while limiting longshore workers to a single recovery and strengthening immunities from lawsuits.

The 1972 amendments were consistent with the three primary goals of the LHWCA: 1) ensuring compensation; 2) prohibiting double recoveries; and 3) trading higher benefits for the *quid pro quo* of exclusive liability.

Amendments in 1959, for example, increased LHWCA coverages, maintained the "single recovery" rule and strengthened employer immunities, by enacting a *quid pro quo* for injured longshore workers seeking recoveries from vessel owners under the maritime

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[3] The maritime employer contributes to the Ohio Industrial Commission and purchases a private policy of insurance for LHWCA coverages. *Edwards*, 56 Ohio App.2d at 285.

[4] The maritime employer is entitled to a "credit" for the lower benefits. See 33 U.S.C. § 903(e) (Appx. 35-36).

"seaworthiness" doctrine. On the one hand, the amendments eliminated a prior "election of remedies" provision, and specified that a longshore worker who chose to pursue a third party in tort did not thereby "forfeit" rights to compensation under the LHWCA. See S.Rep. No. 428, 86 Cong., 1st Sess. 1959, 2134 P.L. 86-171 at 2135:

Purpose of the Bill

> The bill as amended by the Committee would revise Section 33 of the Act so as to permit an employee to bring a third-party suit without forfeiting his right to compensation under the Act.

On the other hand, the amendments confirmed a "single remedy." If the employee prevailed in his third-party suit:

> *** he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery.

Id. at 2134. And the amendment reconfirmed employer immunity from suit:

> Like other workmen's compensation laws the Longshoremen's and Harbor Workers' Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under the Act.
>
> * * *
>
> Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment.

Id. at 2134.

Court decisions have followed these objectives, giving broad interpretations to both the coverage and exclusive liability provisions of the Act. The Act, for example, contains an expansive definition of compensable "injury," to include "willful" acts by third persons. See 33 U.S.C. § 902(2) (Appx. 29). Courts have construed "third persons" to include co-employees, effectively providing LHWCA benefits for longshore workers injured by co-worker assaults. See *Penker Constr. Co. v. Cardillo* (C.A.D.C. 1941), 118 F.2d 14 (fatal assault arising out of job-related altercation was covered under the LHWCA):

> The finding that the "employment *** was responsible for the assault" is equivalent to a finding that the injury was "caused by the willful act of a third person directed against an employee because of his employment." The statute makes such an injury compensable.

Id. at 169 (footnotes omitted). Concomitant with those broad coverages, the 1959 amendments included a comprehensive *immunity* for workers who injure their co-workers:

> The rationale of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that he might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow worker. It simply means that rights and liabilities arising within the "employee family" would be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

P.L. 86-171 at 2135. Courts agreed. See *Sharp v. Elkins* (W.D. La. 1985), 616 F.Supp. 1561, 1567 (33 U.S.C. § 933(i) gives immunity to co-workers that is "complete and without exception").

The employer "exclusive liability" section of the LHWCA has remained virtually unchanged from the 1927 enactment of the statute:

> The liability of an employer *** shall be exclusive and in place of all other liability of such employer to the employee *** except that if an employer fails to secure payment of compensation as required by this chapter ***.

33 U.S.C. § 905(a) (Appx. 40). By its plain terms, Section 905(a) provides workers' compensation benefits as the *exclusive* remedy for Talik's injury. The *only* exception arises when an employer fails to secure the payment of compensation for the employee. See *Cornell v. Parsons Coal Co.* (1993), 96 Ohio App.3d 1, 4:

> It should be noted that, by provisions of the foregoing law, an employee may claim or maintain an action at law if an employer fails to secure payment of compensation as required by that chapter. It would appear to us that this places a burden on a plaintiff to establish, as a prerequisite to his pursuit of an action at law, that the employer failed to secure payment of compensation.

Here, it is undisputed that Federal Marine secured compensation benefits for Talik. He therefore cannot assert *any* claim against his compliant employer.

B. The "Potential" Intentional Tort Exception to Employer Immunity Under the LHWCA Assumes that the Core Compensation Purpose of the Act Has Not Been Met.

The appellate majority here erroneously interpreted an employee *coverage* provision of the LHWCA as implicitly trumping the employer *immunity* provision of the

Act; that is, because: 1) § 902(2) defines compensable "injury" as including "willful" torts by third persons; and 2) employers are not "third persons"; therefore, 3) the Act does not cover "intentional" torts. (See Appx. 8, App. Op. 5.) This flawed reasoning is borrowed from a Louisiana court of appeals case – *Taylor v. Transocean Terminal Operators, Inc.* (La.App. 2001), 785 So.2d 860.

The facts of *Taylor* – like *Penker Constr. Co.* – involved an employment-related altercation between two longshoremen. See 785 So.2d at 861:

> Plaintiff Frank Taylor was a longshoreman. *** Mr. Taylor alleges that while at work, he was stabbed by Bobby Young, who was another of Transocean's employees. Mr. Taylor also alleges that the stabbing occurred within the course and scope of his employment and Bobby Young's employment, as a result of an employment-related altercation ***.

Such an injury would be covered pursuant to the inclusion of "willful acts" by a "third party" that are "directed against an employee because of his employment." 33 U.S.C. § 902(2) (Appx. 29); *Penker*, 118 F.2d 14. Taylor nevertheless sued his employer, alleging that his employer was vicariously liable for the intentional assault by his co-worker.[5]

The *Taylor* court reversed the trial court's dismissal of the action, based on an apparent assumption that Taylor was *not* eligible for benefits under the LHWCA and would receive no compensation for his workplace injury *unless* the court permitted the suit to go forward. See id. at 863-864 (emphasis in original):

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[5] The *Taylor* court declined to address the issue of whether an employer *can* be held vicariously liable for an intentional assault during an altercation at the workplace. 785 So.2d at 864.

> [B]ecause the LHWCA does not provide benefits for injuries caused by an employer intentional tort, application of the LHWCA's exclusive remedy provision to bar an employee tort action in the case of an employer intentional tort would result in the employee having *no remedy at all* in the case of an employer intentional tort, in either tort or compensation under the LHWCA – a result that we cannot believe that Congress would have so intended in enacting the LHWCA.

But there is no indication that Taylor was left with "no remedy at all" – to the contrary, the LHWCA specifically anticipates compensation for job-related "willful" assaults, as pointed out by the case *Taylor* cites for its holding – *Sharp v. Elkins* (W.D. La. 1985), 616 F.Supp. 1561.

The longshore worker in *Sharp*, who worked on an oil rig, had requested a helicopter for immediate, onshore treatment of a hand injury. His request was denied and the hand wound became infected, causing permanent injury. 616 F.Supp. at 1562. The worker asserted an intentional tort claim against his employer and the two employees who refused his request for a helicopter. The issue before the federal district court was whether the claims against the employees must be dismissed, thereby maintaining diversity jurisdiction. The *Sharp* court concluded that the employees were *not* properly named as defendants, because their "complete and without exception" immunity under 33 U.S.C. § 933(i) included intentional tort claims. Id. at 1567.

Sharp distinguishes this absolute co-employee immunity of § 933(i) from the employer intentional tort "that some courts have recently carved out" from the exclusive immunity provisions of § 905(a). Because it requires "a specific intent *** on the part of the employer to injure an employee," the employer intentional tort:

> *** is not compensable under the Act. Under this rationale, an intentional tort exception is appropriate, *** otherwise an injured employee would be left without a remedy for his injury. He would have no common-law remedy because of the exclusivity provision of § 905(a) and no workmen's compensation remedy because the "injury" would not come under any existing definition.

Id. at 1565. In contrast, injuries caused by the intentional torts of co-employees *are* compensable, making an immunity exception unnecessary:

> Since an injury caused by the intentional tort of a fellow worker is compensable under the Act, no disservice is done to the injured employee by upholding § 933(i) immunity. He is certain to receive compensation regardless of fault and is saved the time, expense and perils of litigation.

Id. at 1566.

An examination of *Taylor's* precedents thus shows that the existence of any intentional tort exception to LHWCA immunity is based on theory, not fact. In *theory,* an employer intentional tort *would be* available if the longshoreman could not be compensated for his injuries through the LHWCA. In *fact,* no such tort has ever been allowed. See, e.g., *Bordelon v. Avondale Industries, Inc.* (La.App. 2003), 846 So.2d 993, 996:

> We find no cases that permitted an intentional act exception to the exclusive remedy provision of 33 U.S.C. § 905(a). Although some cases refer to the possibility that such an exception could be made under appropriate facts, we find none that actually did so.

The appellate majority thus erred in both its interpretation and application of a Louisiana state court case. Ohio cases and statutes provide the proper framework for the proper rule of law.

C. Any Such Exception Would Be Governed by the Uniform Application of Federal Common Law, Requiring a Specific Intent to Injure the Employee.

The dissent in this case agreed with the holding of Ohio's Seventh Appellate District that the plain language of 33 U.S.C. § 905(a) requires, as a predicate to *any* action by a longshore worker against his or her employer, proof "that the employer failed to secure payment of compensation ***." (Appx. 25, App. Op. (dissent) 22; *Cornell v. Parsons Coal Co.* (1993), 96 Ohio App.3d 1, 4). Such an application of the Act's plain language is fully consistent with the reasoning of courts that have suggested the propriety of an intentional tort exception to an employer's exclusive liability when the alternative is no compensation at all for work-related injuries. It is also consistent with the fundamental purpose of the Act to provide broad coverages but only a single recovery.

Here, it is undisputed that Talik *is* receiving "no-fault" compensation benefits secured by his employer. It is therefore unnecessary for this Court to speculate on potential or theoretical causes of action that might be recognized to prevent an injured longshore worker from receiving "no remedy at all." *Taylor*, 785 So.2d at 863. A reversal and reinstatement of the Trial Court's summary judgment in favor of Federal Marine is supported on that basis alone.

The Eighth District decision, however, not only allows longshore workers injured at Ohio ports to file intentional tort claims against their compliant employers, but also applies state law – the *"Fyffe"* standard – to that tort. That holding is erroneous; federal common law would govern any potential intentional tort claim asserted against a

maritime employer. See, e.g., *Hess v. Norfolk S. Ry. Co.* (2005), 106 Ohio St.3d 389 (applying federal common law to claims asserted by railroad workers subject to the compensation scheme of the FELA).

The same cases (including Louisiana cases) recognizing that an intentional tort exception might apply to avoid a "no remedy" scenario under the LHWCA, also confirm that federal common law would govern the scope of any such intentional tort exception, requiring:

> *** nothing short of a specific intent to injure the employee falls outside the scope of 33 U.S.C.A. 905(a). Absent such specific intent, the employee is foreclosed from maintaining a tort action against his employer.

Peralta v. Perazzo (La.App. 2006), 942 So.2d 64, 67, citing *Houston v. Bechtel Associates Professional Corp.* (D.C.D.C. 1981), 522 F.Supp. 1094; *Sample v. Johnson* (C.A.9, 1985), 771 F.2d 1335, 1345 ("general maritime law," which "is probably the most ancient body of Federal common law," applies to longshore claims); *Austin v. Johns-Manville Sales Corp. v. Bath Ironworks Corp.* (D.Me. 1981), 508 F.Supp. 313.

As explained in *Houston*, the "overwhelming weight of authority" requiring "a specific intent to injure the employee," is "consistent with the intent of § 905(a)." 522 F.Supp. at 1096. Further, "[t]he legislative history of the 1972 amendments reveals that the integrity of the exclusivity principle was a paramount concern of congress." Id. Accord *Sample,* 771 F.2d at 1346, n.10 (rejecting an expansive interpretation of available tort remedies and noting that the Act's 1972 amendments were "chiefly for the purpose of *strengthening* the exclusivity of LHWCA remedies" (emphasis in original)). In addition,

Houston notes that New York's workers' compensation statute "provided the model for the federal Act" (id. at 1095 n.4), and that New York follows the nearly universal rule that "[n]othing short of a specific intent to injure the employee" falls outside the scope of workers' compensation exclusivity. (Id.)

The principles utilized by the above decisions are the same that this Court applied in *Hess v. Norfolk S. Ry. Co.*, 106 Ohio St.3d at 394, citing *Schadel v. Iowa Interstate R.R., Ltd.* (C.A.7, 2004), 381 F.3d 671. *Schadel* applies a two-pronged test to determine the nature and scope of the law to be applied to a complaint with state and federal claims: 1) "what law governs; [state] law *** or federal common law"; and, if it is federal law, 2) "the content of that federal rule" – "federal common law may either create a single rule of law that is applicable to all cases in a particular area, or it may adopt as federal law the rule of the state in which the case arises." 381 F.3d at 675, 677. *Schadel* applied federal common law and a single rule to the worker claims before it, because "[i]n the case of the FELA, the emphasis has always been on uniformity of result," derived from the interstate nature of claims under the FELA:

> A single railroad typically operates in more than one state. If we were to choose the incorporation of state law for this issue, results would vary depending on where the particular employee happened to be injured. In our view, this is therefore an instance of a case in which "application of state law would frustrate specific objectives of the federal program[]."

Id. at 677, quoting *United States v. Kimbell Foods, Inc.* (1979), 440 U.S. 715, 728.

The same uniformity is necessary under the LHWCA. See, e.g., *In re Complaint of Wepfer Marine, Inc.* (W.D. Tenn. 2004), 344 F.Supp.2d 1130, 1138 n.3:

> In amending the LHWCA in 1972, that house committee determined that third-party negligence actions thereunder would be "developed as a matter of uniform federal maritime law, not by incorporating the tort law of the particular state in which the action arose," as it did not intend "that the [statute] shall be applied differently in different ports depending on the law of the State in which the port may be located *** but that legal questions *** shall be determined as a matter of federal law." *Gravatt v. City of New York* (C.A.2, 2000), 226 F.3d 108 at 118 (quoting H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4705).

Such uniformity would be destroyed if longshore workers injured at an Ohio port had access to a "*Fyffe*" remedy against their maritime employer, while longshore workers injured at a Wisconsin, Louisiana or California port did not have access to a *"Fyffe"* remedy. Thus, as in *Schadel*, allowing the application of state law – either directly or through "borrowing" the state law as federal common law – would stand as an obstacle to the effectuation of the goals of Congress.

D. The Ohio Common-Law Tort Action Described in *Fyffe* Is Expressly Preempted or, in the Alternative, Impliedly Preempted Because It Stands as an Obstacle to the Effectuation of the Goals of Congress in Enacting the LHWCA.

The Ohio "substantial certainty" tort described in *Fyffe v. Geno's, Inc.* (1991), 59 Ohio St.3d 115, deviates, in two important respects, from the principles of uniform application described above. *First,* contrary to the "single recovery" purpose of the LHWCA, the *"Fyffe"* intentional tort permits employees to receive a "double recovery" of compensation benefits; i.e., a successful employee need not reimburse the employer

for compensation payments out of the proceeds of the recovery. Compare *Jones v. VIP Development Corp.* (1984), 15 Ohio St.3d 90, paragraph three of the syllabus ("An employer who has been held liable for an intentional tort is not entitled to a setoff of the award in the amount of workers' compensation benefits received by the employee or his representative") with 33 U.S.C. § 903(e) (Appx. 35-36) (providing the maritime employer a "credit" in the amount of the lower benefits when an employee receives both state and federal benefits); and 33 U.S.C. § 933(e) (a longshoreman who is successful in an action against a third party must reimburse his maritime employer out of the proceeds obtained).

Second, contrary to the *quid pro quo* of strengthened employer immunity under the LHWCA, the *"Fyffe"* intentional tort permits recovery upon a showing of:

> (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

Fyffe, paragraph one of the syllabus. Compare *Austin v. Johns-Manville Sales Corp.* (D. Me. 1981), 508 F.Supp. 313, 317 ("[e]ven if the alleged conduct *** includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering a claimant to perform an extremely dangerous job, willfully failing to furnish a safe place to work, or even willfully and unlawfully violating a safety statute, this still

falls short of the kind of actual intention to injure that robs the injury of accidental character"). Because it stands as an obstacle to the effectuation of Congress' purposes, Ohio's "substantial certainty" employer intentional tort is preempted. *Daley v. Aetna Casualty & Surety Co.* (1988), 61 Ohio App.3d 721.

The plaintiff longshore worker in *Daley* filed suit against his maritime employer in state court, asserting a "*Balyint*"[6] tort. *Balyint* held that Ohio employees could assert an intentional tort against self-insured employers who wrongfully terminated their workers' compensation benefits, on the grounds that the employer's conduct fell "outside the scope of the Workers' Compensation Act." 61 Ohio App.3d at 723.

In analyzing whether a *Balyint* intentional tort could be maintained by a longshore worker against his maritime employer, the Eighth District first set out the two types of preemption – express and implied. Express preemption must be clear on the face of the statute, while implied preemption comes in two forms – "[c]onflict *** when compliance with both laws is impossible" and "conflict *** when state law hinders the attainment of federal objectives." 61 Ohio App.3d at 723. The Court concluded that Section 905(a) of the LHWCA did not expressly preempt the *Balyint* action, because "[t]he Act does not indicate *** whether the exclusivity provision was intended to encompass liability beyond that arising from the injury or death of an employee." Id. at 724. The court found that implied preemption, however, did bar the action:

---

[6] *Balyint v. Arkansas Best Freight System, Inc.* (1985), 18 Ohio St.3d 126.

> [P]reemptive intent is apparent both from the pervasiveness of the federal regulation and the likelihood of conflicts between state and federal law.

Id. Given the "comprehensive regulation of the manner by which an employer or insurer may contest its liability" under the LHWCA and the "patent" probability "of conflict between state and federal law," the court concluded that measuring the self-insured employer's conduct according to the *Baylint* standards of good faith "would inject an element into the Act which Congress has not seen fit to include." Id. at 725.

Here, unlike *Daley,* a longshore worker is asserting employer liability arising from a workplace injury. Such liability is *expressly* preempted by § 905(a), which makes employer liability for securing "no-fault" compensation "exclusive and in place of all other liability ***." (Appx. 40.)

But even if express preemption did not apply, the implied preemption found in *Daley* applies equally to *"Fyffe"* torts. See, e.g., *Hill v. Knapp* (Md.App. 2007), 914 A.2d 1193. *Hill,* which issued after the appellate decision below, analyzes the claim of a longshore worker who "was injured when a load of plywood dropped on him from a forklift" operated by a co-employee. 914 A.2d at 1194. The worker filed a negligence action against the co-employee forklift operator, as permitted under Maryland law. Id. at 1199. To determine whether the state tort was preempted, the court engaged in an extensive analysis of the legislative history of the LHWCA and its amendments, including the *quid pro quo* in the 1972 amendments:

> Congress acknowledged that employers were only willing to increase benefits for injured workers if third party claims by longshoremen were reduced.

Id. at 1201. Those same amendments extended coverage of the LHWCA landward "specifically to eliminate the disparity in benefits available to longshoremen depending on 'the fortuitous circumstance of whether the injury occurred on land or over water.'" Id. at 1202 (citation omitted). Thus, the legislative history demonstrated an intent to provide a "uniform compensation system" for maritime employees. Id. (cite omitted). Because the LHWCA did not permit suits against co-employees, the Maryland tort claim was preempted. Id. at 1203.

The *Hill* court rejected the longshore worker's arguments that there was no preemption because: 1) the landward extension of coverages expressly gave state and federal courts concurrent jurisdiction; and 2) he had only sought and received state-based workers' compensation benefits. First, the court held that plaintiff's status as a "twilight zone" worker did not give him greater rights than maritime workers injured on a navigable waterway:

> "We can perceive no greater conflict than that which would be presented if we allowed this employee to sue his co-employee because he was a land-based maritime worker, and a maritime worker injured on a navigable waterway would be precluded from maintaining such a suit ***."

Id. at 1203, quoting *Fillinger v. Foster* (Ala. 1984), 448 So.2d 321, 326.

Second, plaintiff's choice of state compensation benefits did not affect the application of LHWCA immunities:

> Permitting the negligence claim disrupts the uniformity of benefits Congress intended to provide to longshoremen in the 1972 amendments and does not further the availability of no-fault compensation. Hill and Knapp were longshoremen operating within the jurisdiction of the LHWCA, and Knapp is entitled to the immunity established in § 933, even where Hill did not file an LHWCA claim. Maryland law, which conflicts with his immunity, must therefore yield.

Id. (footnotes omitted). Accord *Peter v. Hess Oil Virgin Islands Corp.* (C.A.3, 1990), 903 F.3d 935, 943 (quoting *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205, 216, emphasis added), holding that a state law claim is preempted to the extent that it "'contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or *interferes with the proper harmony and uniformity of that law in its international and interstate relations.*'"

The *Peter* court similarly recognized that preempting inconsistent state tort remedies was necessary to effectuate the strict *quid pro quo* that is fundamental to the LHWCA:

> This section's [33 U.S.C. § 905(a)] plain language evinces an unmistakable intention to codify the *quid pro quo* that underlies most workmen's compensation statutes – the employer provides no-fault compensation in exchange for immunity from tort liability for damages.
>
> Indeed, the Supreme Court has often opined that the LHWCA embraces this *quid pro quo*: the Act is not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and the employers on the other. Employers relinquished their

> defenses to tort actions in exchange for limited and predictable liability. Employees accepted the limited recovery because they received prompt relief without the expense, uncertainty, and delay that tort actions entail.

In short, allowing "twilight zone" workers additional or different remedies would discriminate against co-employees injured in other ports or on navigable waters. To paraphrase the Alabama Supreme Court:

> We can perceive no greater conflict than that which would be presented if we allowed this employee to sue his [employer] because he was a land-based maritime worker, and a maritime worker injured on a navigable waterway would be precluded from maintaining such a suit; therefore, we are persuaded to hold that the exclusivity provisions of 33 U.S.C. [§ 905(a)] apply and that the state action was barred.

Fillinger, 448 So.2d at 326.

III. CONCLUSION

Since its enactment in 1927, the LHWCA has unambiguously provided that the liability of a maritime employer to secure "no-fault" compensation for employees injured in maritime pursuits "shall be exclusive and in place of all other liability of the employer to the employee ***." 33 U.S.C. § 905(a). The *only* exception arises "if an employer fails to secure payment of compensation as required by this chapter ***." Id.

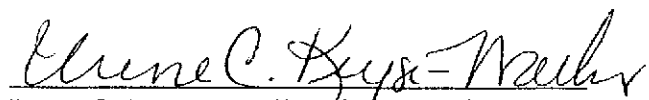
The majority decision below contains two errors requiring this Court's clarification of the proper analytical framework to be used by state courts faced with claims implicating the LHWCA.

First, any tort claim asserted by a longshore worker against his maritime employer is governed by federal – not state – common law. Talik has never attempted to assert facts meeting the "specific intent" federal standard for any intentional tort exception to the exclusive remedy provisions of the LHWCA. Where the claims asserted by a plaintiff and the proofs offered to support them "do not suggest in any way" that the defendant maritime employer acted "with a deliberate intent to injure" him, a court "need not decide whether § 905(a) foreclose[s]" an intentional tort claim. *West v. Dyncorp*, unpub., U.S. App., 11th Cir. No. 04-14536, 2005 WL 1939445 at *1-*2 (Appx. 27-28).

Second, a longshore worker receiving benefits for a workplace injury cannot assert Ohio's "substantial certainty" intentional tort against a maritime employer. A *"Fyffe"* tort is both expressly preempted by the exclusive liability provisions of the LHWCA and impliedly preempted by the requirement for uniformity in the application of the Act. Allowing "twilight zone" workers to assert an Ohio *"Fyffe"* claim against their maritime employers would stand as an obstacle to the effectuation of Congress' intent to: 1) provide uniform benefits to longshoremen working in ports in Ohio and elsewhere, and 2) impose uniform standards of conduct on maritime employers operating on and near waterways throughout the United States.

For all of these reasons, as more fully stated above, Federal Marine Terminals, Inc. respectfully requests an order reversing the majority decision below and reinstating the Trial Court's order granting summary judgment in its favor.

Respectfully submitted,



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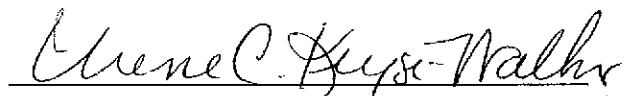

One of the Attorneys for Appellant Federal Marine Terminals, Inc.

APPENDIX

No. 06-1808

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-05-87073

JOSEPH TALIK,
Plaintiff-Appellee,

v.

FEDERAL MARINE TERMINALS, INC.,
Defendant-Appellant.

NOTICE OF APPEAL OF APPELLANT FEDERAL MARINE TERMINALS, INC.

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NOTICE OF APPEAL OF APPELLANT FEDERAL MARINE TERMINALS, INC.

Appellant Federal Marine Terminals, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Court of Appeals Case No. CA-05-87073 on August 14, 2006.

This case is one of public or great general interest.

Respectfully submitted,

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87073

JOSEPH TALIK,	:	
	:	
	:	JOURNAL ENTRY
Plaintiff-Appellant	:	
	:	AND
v.	:	
	:	OPINION
FEDERAL MARINE TERMINALS, INC.,	:	
	:	
	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT OF DECISION: AUGUST 3, 2006

CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Case No. CV-546597.

JUDGMENT: REVERSED AND REMANDED.

DATE OF JOURNALIZATION: AUG 14 2006

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VOL0618 PG0232

CHRISTINE T. McMONAGLE, J.:

Plaintiff-appellant, Joseph Talik ("Talik"), appeals the trial court's judgment granting summary judgment in favor of defendant-appellee, Federal Marine Terminals, Inc. ("Federal Marine").

Federal Marine employs longshoremen for its cargo handling operations on waterways, including the Great Lakes. Talik, one of Federal Marine's longshoremen, suffered a workplace injury on September 10, 2004, while working at the Port of Cleveland. Specifically, the injury occurred when a stack of pipes collapsed and fell on Talik's right leg, and resulted in amputation of the leg. As a result of his injury, Talik filed a lawsuit in Common Pleas Court seeking damages from Federal Marine under a common law employer intentional tort theory.

Federal Marine filed a motion for summary judgment in which it contended that the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "the Act") preempted Talik's state law tort claim. Alternatively, Federal Marine argued that even if Talik's state law tort claim was not preempted by the LHWCA, he failed to satisfy his burden of proof for such a claim. The trial court granted Federal Marine's motion for summary judgment.[1] Talik appeals, raising two assignments of error for our review.

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[1]The court's entry does not specify upon which of Federal Marine's arguments it based its grant of summary judgment.

In his first assignment of error, Talik contends that the trial court erred in granting summary judgment in favor of Federal Marine because his intentional tort claim was not preempted by the Act. We agree.

Summary judgment is appropriate pursuant to Civ.R. 56(C) when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. Our standard of review on summary judgment is de novo. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445, 666 N.E.2d 316.

33 U.S.C. §902(2) of the LHWCA provides that "'injury' means accidental injury or death arising out and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

Further, 33 U.S.C. §905(a) of the LHWCA reads as follows:

"(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in

section 904 of this title 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, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter or to maintain an action at law or admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title."

Federal Marine argues that 33 U.S.C. §905(a) provides the exclusive remedy for covered workers and embodies Congress' intention for employers to provide no-fault compensation in return for immunity from tort liability.[2] Talik, on the other hand,

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[2]Talik applied for and received Ohio workers' compensation benefits and Federal Marine also opened a file on Talik's behalf for federal benefits under the LHWCA.

argues that there is an intentional tort exception to the otherwise exclusive provisions of 33 U.S.C. §905(a), when read in tandem with 33 U.S.C. §902(2). Specifically, Talik contends that:

"There is no express inclusion of the concept of an 'intentional tort' in the definition of 'injury' except that the concept of a 'willful act' is included if the injury arises from the actions of a 'third party.' Significantly, the definitional section of the LHWCA does not equate the identity of a 'third party' with that of the employer. See, 33 U.S.C. §902."

In support of his argument, Talik relies upon a Fourth Circuit Court of Appeals case, *Taylor v. Transocean Terminal Operators, Inc.* (2001), 785 So.2d 860. In that case, the court held that Taylor, a longshoreman who was stabbed at work by a fellow employee, had properly filed an intentional tort claim because the exclusive remedy provision of the LHWCA was not applicable to an intentional tort by or attributable to the defendant/employer.

In so holding, the Fourth Appellate Circuit noted that:

"The notion that a claim for an intentional tort committed by an employer is an exception to a statutory exclusive remedy compensation scheme is familiar in the context of Louisiana's worker's compensation law. Louisiana's worker's compensation statute provides that it does not affect the liability of the employer for civil liability resulting from an intentional act. La. R.S. 23:1032.B. Thus, it has been held that an intentional

tort by an employer is not subject to the "exclusive remedy" provision of Louisiana's workers' compensation law and may give rise to a tort action by the employee against the employer. See, e.g., *Bazley v. Tortorich*, 397 So.2d 475 (La. 1981). This is typical of state worker's compensation laws. *Bazely*, 397 So.2d at 480 (citing 2A Larson, The Law of Workmen's Compensation §§ 68-69 (1976)." Id. at 862.

The United States Supreme Court has held that the LHWCA is a typical workers' compensation program. *Northeast Marine Terminal Co. v. Caputo* (1977), 432 U.S. 249, 97 S.Ct. 2348.

In *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572, the Supreme Court of Ohio determined that the immunity bestowed upon employers under Ohio's workers' compensation laws did not reach intentional torts committed by an employer. The Court reasoned that an employer's intentional tort occurs outside the employment relationship. In *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046, the Court clarified that an injury that is the product of an employer's intentional tort is one that also "arises out of and in the course of employment" and, thus, an injured worker may both recover under the workers' compensation system and pursue an action against his or her employer for intentional tort. See, also, *Brady v. Safety-Kleen* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph one of the syllabus.

Thus, because the LHWCA is a workers' compensation program, and because in Ohio an employee may maintain a workers' compensation claim and an intentional tort claim, we hold that the LHWCA does not preempt Talik's state law claim.

We find the cases cited by Federal Marine distinguishable from this case. For instance, in *Cornell v. Parsons Coal Co.* (1993), 96 Ohio App.3d 1, the employee filed an intentional tort complaint for on-the-job injuries. The employee dismissed the complaint, and upon refiling, asserted claims for negligence, gross negligence and intentional tort. On the first day of trial, the employee announced that he was going to proceed on a claim of negligence under the federal law found in the LHWCA. The employer objected to the new theory of liability. The trial then proceeded on the intentional tort claim. The jury rendered a verdict on the employer's behalf and the employee appealed to the Seventh Appellate District. The court of appeals reversed the trial court on the claim of negligence, finding that the trial court should have permitted the employer to proceed on the negligence claim under the LHWCA.

On remand, the employer filed a motion for summary judgment, in which it argued that the employee was not entitled to proceed on his negligence claim under the Act. The trial court granted the employer's motion and the employee appealed, contending that the employer's ground for summary judgment was an affirmative defense,

that was not raised by way of a pleading and, thus, was waived. The Seventh District held that the negligence claim could go forward only if the employee established that the employer had failed to secure the necessary workers' compensation coverage. The court did not address the appropriateness of an intentional tort claim in light of the exclusivity provisions of the LHWCA.

Similarly, in *White v. Bethlehem Steel Corp.* (1995), 900 F.Supp. 51, also cited by Federal Marine, the Fourth Circuit Court of Appeals did not address the issue of the appropriateness of an intentional tort claim in light of the exclusivity provisions of the LHWCA. Rather, the court considered whether a borrowed servant of Bethlehem Steel was precluded from asserting a negligence claim against it in light of the Act.

In another case cited by Federal Marine, *Hall v. C&P Tel. Co.* (C.A.D.C.1986), 793 F.2d 1354, the Court of Appeals for the District of Columbia considered the issue of whether the District's workers' compensation act precluded the employee from asserting a civil claim against an employer in addition to a workers' compensation claim.

Other cases cited by Federal Marine relate to claims relative to the administration of benefit payments under the Act. See *Atkinson v. Gates, McDonald & Co.* (1987), 665 F.Supp. 516; *Daley v. Aetna Cas. and Sur. Co.* (1988), 61 Ohio App.3d 721; *Texas Emp. Ins.*

Assn. v. Jackson (1987), 820 F.2d 1406; and *Kelly v. Pittsburgh & Conneaut Dock Co.* (C.A.6, 1990), 900 F.2d 89.

For example, in *Daley*, supra, this court held that the LHWCA preempted state law claims. The issue in that case, however, was a limited one and distinguishable from the issue in this case. In *Daley*, the plaintiff sued the carrier who insured his employer's liability under the Act, for bad faith and intentional infliction of emotional distress when his total temporary disability payments were discontinued. In finding preemption as to the plaintiff's claims, this court noted that specific provisions of the Act, namely Sections 914(c)-(f), 928, and 931(a)-(c), allow insurers to discontinue payments and set forth the procedure for same and the penalties for a wrongful discontinuation. This court noted that "*[t]hese provisions* comprise a comprehensive regulation of the manner by which an employer or insurer may contest its liability[,]" and thus found preemptive intent. (Emphasis added) Id. at 724. In finding preemption relative to the above-mentioned provisions, this court noted that "[i]t is questionable whether an express intent to preempt state claims *** may be gleaned from Section 905(a), considered alone." Id.

In this case, Talik alleged a totally different tort (i.e., an intentional tort) than did the plaintiff in *Daley* (i.e., bad faith and intentional infliction of emotional distress). The intentional tort is not covered under Ohio worker's compensation law, nor is it

specifically mentioned and resolved in the LHWCA. The intentional tort is, therefore, not preempted by the Act.

We note the United States Supreme Court case of *Morrison-Knudsen Construc. Co. v. Director, Officer of Workers' Comp. Programs, U.S. Dept. of Labor* (1983), 461 U.S. 624, 103 S.Ct. 2045, cited by Federal Marine, and the language therein. The Court, however, did not consider the specific issue of whether an employee can maintain an intentional tort claim in light of the LHWCA. Rather, the issue before the Court in *Morrison-Knudsen* was whether Congress intended to include employer contributions to union trust funds in the Act's definition of "wages."

Accordingly, we find that Talik's intentional tort claim was not preempted by the LHWCA and sustain his first assignment of error.

In his second and final assignment of error, Talik argues, alternatively, that if the LHWCA preempts his intentional tort claim, the trial court still erred in granting Federal Marine's motion for summary judgment because the exclusivity provisions of the Act are in the nature of an affirmative defense, and were waived by Federal Marine because they were never raised as such. Because we find that Talik's intentional tort claim is not preempted by the LHWCA, his second assignment of error is moot and we decline to address it. See App.R. 12(A)(1)(c).

We consider a final issue, however, not assigned as an error by Talik, but raised by Federal Marine in its brief before this court and in its motion for summary judgment in the trial court.[3] In particular, Federal Marine argues, alternatively, that if Talik's intentional tort claim is not preempted by the Act, then the federal "deliberate" or "specific" intent standard, rather than the Ohio "substantial certainty" standard applies to his claim. Federal Marine cites *Hess v. Norfolk Southern Ry. Co.* (2005), 106 Ohio St.3d 389, in support of its argument. *Hess*, however, is distinguishable from this case.

In particular, the employees in *Hess* sued the employer railroad company in the state trial court under the Federal Employers' Liability Act ("FELA"). The Supreme Court of Ohio held that the substantive law is the federal law in actions filed under the FELA. Here, Talik did not sue under the LHWCA; rather, he brought an independent intentional tort claim, and state law governs.

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[3]The crux of Federal Marine's argument in its motion for summary judgment was that Talik's intentional tort claim was preempted by the LHWCA. However, as previously mentioned, Federal Marine did argue that even if Talik's claim was not exempted, he failed to demonstrate an intentional tort. The trial court did not specify the grounds upon which it granted Federal Marine's motion. Moreover, Talik filed a motion for summary judgment, wherein he argued that pursuant to *Fyffe*, there was no genuine issue of material fact on his intentional tort claim and, thus, he was entitled to judgment as a matter of law.

In *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, the Supreme Court of Ohio set out the test used to determine whether an employer has committed an intentional tort. In such a case, the plaintiff must prove:

"1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;

"2) knowledge by the employer that if the employee is subjected by his employment to such a dangerous process, procedure, instrumentality, or condition, then harm to the employee will be a substantial certainty; and

"3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. Id. at 118.

According to *Fyffe*, a plaintiff must offer proof beyond that required for negligence, or recklessness. Id. In the absence of direct evidence of intent, a plaintiff may prove such a claim by inferred intent. Id.

The Ohio legislature passed R.C. 2745.01, effective October 20, 1993. This legislation was intended to revise the requisite elements and standards of an employer intentional tort. The statute, however, was found to be unconstitutional because it imposed excessive standards and a heightened burden of proof for plaintiffs seeking a remedy for an employer intentional tort. See

Johnson v. BP Chem., Inc., 85 Ohio St.3d 298, 1999-Ohio-267, 707 N.E.2d 1107 ("Because R.C. 2745.01 imposes excessive standards (deliberate and intentional act), with a heightened burden of proof (clear and convincing evidence), it is clearly not a "law that furthers the *** comfort, health, safety, and general welfare of all employees.'" Id. at 1114 (citation omitted).

Since that time, the Ohio legislature repealed R.C. 2745.01 and passed H.B. 498, revising R.C. 2745.01 effective April 4, 2005. The revised statute is less stringent than the former. The injury in this case occurred on September 10, 2004, and Talik filed his action on November 1, 2004. Hence, there is no controlling statute, and *Fyffe* and its progeny control our determination.

In support of his motion for summary judgment relative to his intentional tort claim pursuant to *Fyffe*, Talik submitted, among other items, the following evidentiary materials: his affidavit; excerpted deposition testimony from his immediate supervisor, Mark Chrzanowski; Federal Marine's "Injury/Death or Illness Investigation Report"; five coworkers' affidavits; and an expert's report.

In its brief in opposition to Talik's motion for summary judgment, Federal Marine first challenged the five coworkers' affidavits. Specifically, Federal Marine pointed out that Talik's counsel contacted the coworkers, without notice to it, and questioned them under oath in the presence of a court reporter.

Their testimony was later transcribed and purportedly summarized in their affidavits.

Upon discovering that the "secret interviews," as Federal Marine referred to them, had been conducted, Federal Marine sought, and received, disclosure of the transcripts of the sworn testimony. Federal Marine argued that the affidavits reflected neither the sworn testimony given by the coworkers, nor their subsequent deposition testimony. Thus, Federal Marine argued that the trial court should not consider the affidavits. Federal Marine further argued that the trial court should not consider the affidavits because they contained inconsistent or contradictory statements from the transcripts of the interviews and the subsequent deposition testimony of the coworkers.

Initially, we find that the affidavits were properly before the trial court for its consideration. The means by which Talik's counsel obtained the affidavits did not render them unacceptable evidentiary evidence pursuant to Civ.R. 56. The affidavits were sworn to by each of the coworkers and, thus, adopted as their statements.

In regard to Federal Marine's argument about the inconsistencies or contradictions in the affidavits as compared to the transcripts of the interviews, the coworkers' sworn testimony has not been made a part of the record for our review and, thus, we are unable to compare the alleged offending statements.

The depositions of the coworkers, however, are part of the record. Upon review of those depositions in comparison with the affidavits, we find that several of alleged inconsistencies or contradictions really are not inconsistencies or contradictions. For example, one of the coworkers, averred in his affidavit as follows:

"I am aware that Joe [Talik] and Bob [Talik's partner on the day of the accident] had complained to Mark Chrzanowski [their supervisor] over the course of two to three weeks that they needed time to properly break down and sort that pile."

Federal Marine points to that same coworker's deposition testimony, wherein he testified that "I wasn't present when Joe and Bob talked to Mark directly." These two statements, however, are not inconsistent or contradictory. The coworker did not aver in his affidavit that he was present when Talik and his partner complained to Federal Marine's management; he only averred that he was aware that complaints had been made.

In regard to other statements provided by the coworkers that arguably could be inconsistent or contradictory, we note that, generally, inconsistencies in a party or witness's affidavit, as compared to deposition testimony, creates a question of credibility to be resolved by the trier of fact. See *Turner v. Turner* (1993), 67 Ohio St.3d 337, 617 N.E.2d 1123, paragraph one of the syllabus.

Thus, not only were the affidavits properly before the court, they, along with the deposition testimony, created a genuine issue of material fact.

Secondly, Federal Marine, in opposition to Talik's motion for summary judgment, challenged the opinions of Talik's expert. On this issue, we agree with Federal Marine.

Evid.R. 702 provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Additionally, Evid.R. 704 provides:

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

Thus, Evid.R. 702 and 704 permit expert testimony on the ultimate issue to be determined by the trier of fact if (1) the witness is qualified as an expert and (2) scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to decide an issue of fact. *Lee v. Baldwin* (1987), 35 Ohio App.3d 47, 49; *McQueen v. Goldey* (1984), 20 Ohio App.3d 41, 48. While testimony on an ultimate issue to be decided by the trier of fact is not per se inadmissible, it is

within the discretion of the trial court to refuse to admit the testimony of an expert witness on an ultimate issue where the expert's testimony is not essential to the trier of fact's understanding of the issue and the trier of fact is capable of coming to a correct conclusion without it. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, paragraph three of the syllabus. Further, "an expert may not offer an opinion which embraces the 'ultimate issue' if that opinion is essentially a bare conclusion significantly lacking in supporting rationale." *Gannett v. Booher* (1983), 12 Ohio App.3d 49, 52.

Here, Talik's expert opined that Federal Marine "knew" the following: "that stacking pipe without blocking, or other means of positive support was improper and created a dangerous workplace;" "that said improperly stacked pipe could release, without warning causing the pile to collapse;" and "with a substantial degree of certainty, that said collapsing pile would result in injury to personnel[.]"

In *Wesley v. Northeast Ohio Regional Sewer Dist.* (Feb. 22, 1996), Cuyahoga App. No. 69008, this court affirmed the trial court's exclusion of the plaintiff's expert's affidavit in an intentional tort action. In so holding, this court noted that "[a] review of the expert's affidavit and supporting evidence shows it to be replete with conclusory statements regarding NEORSD's knowledge." Id. at 13. The Twelfth Appellate District similarly

stated in *Sanfrey v. USM Corp.* (Dec. 17, 1990), Clinton App. No. CA90-02-003, that the expert's "credentials did not qualify him to testify as to the mindset or knowledge of [the employer's] or its employees at the time of the accident." Id. at 14-15.

Thus, we find that the opinions expressed in Talik's expert report regarding what Federal Marine "knew" (or "should have known") were not proper.

That notwithstanding, we find that the other evidence in the record still created a genuine issue of material fact to be litigated. We have already referenced the coworkers' affidavits and deposition testimony. Additionally, we note the deposition testimony of Talik's supervisor, Mark Chrzanowski (that he was aware of the risks associated with handling a stack of pipes, had witnessed a spontaneous collapse of such a stack of pipes, prior to the accident, Talik had complained to him and that he had, prior to Talik's accident, made recommendations to Federal Marine, to improve the safe handling of the pipes); Federal Marine's "Injury/Death or Illness Investigation Report" (indicating the responsible party for the injury was Federal Marine, that the accident occurred during Talik's normal work duties, that the accident occurred when "Joe was standing in front of a pile of pipe that was not stable and some pipe shifted trapping Joe's leg," and that "management issues - inadequate procedures" played a part in the accident); Talik's affidavit and deposition testimony (that in

the two-to-three week period leading up to his accident, he complained to Chrzanowski about the working conditions); and the experts' opinions (that the pipes were improperly stacked).

Accordingly, we find that the trial court erred in granting Federal Marine's motion for summary judgment.

Judgment reversed.

This cause is reversed and remanded for further proceedings consistent with the opinion herein.

It is, therefore, ordered that appellant recover from appellee costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. MCMONAGLE
JUDGE

KENNETH A. ROCCO, J., CONCURS.

COLLEEN CONWAY COONEY, P.J., DISSENTS WITH DISSENTING OPINION.

FILED AND JOURNALIZED
PER APP. R. 22(E)

AUG 14 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

AUG 3 - 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

0618 0025

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87073

JOSEPH TALIK	:	
	:	
Plaintiff-Appellant	:	D I S S E N T I N G
	:	
vs.	:	O P I N I O N
	:	
FEDERAL MARINE TERMINALS, INC.	:	
	:	
	:	
Defendant-Appellee	:	

DATE: AUGUST 3, 2006

COLLEEN CONWAY COONEY, P.J., DISSENTING:

I respectfully dissent.

I would affirm the trial court's grant of summary judgment because the LHWCA preempts Talik's state law tort claim.

I would follow the precedent set in *Daley v. Aetna Cas. & Sur. Co.* (1988), 61 Ohio App.3d 721, in which we found an employee's bad faith and intentional infliction of emotional distress claims preempted by the LHWCA. We found Section 905(a) of the LHWCA provides immunity to the employer and the insurance provider. We chose to adopt the view of the Fifth Circuit and held "that preemptive intent is apparent from both the pervasiveness of the federal regulation and the likelihood of conflicts between state and federal law." Id. at 724.

Moreover, another Ohio case found that the LHWCA places a burden on a plaintiff-employee to establish, as a prerequisite to pursuing an action at law, that the employer failed to secure payment of compensation for the employee. *Cornell v. Parsons Coal Co.* (1993), 96 Ohio App.3d 1, 4.

In the instant case, Talik has failed to sustain his burden to show that his employer failed to secure compensation for him. Therefore, I would affirm the trial court's grant of summary judgment because the LHWCA provides the exclusive remedy for Talik's claim.

35374702

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOSEPH TALIK
Plaintiff

FEDERAL MARINE TERMINALS INC. ET AL
Defendant

Case No: CV-04-546597

Judge: RONALD SUSTER

JOURNAL ENTRY

96 DISP.OTHER - FINAL

MOTION OF FEDERAL MARINE TERMINALS INC (FILED 06/02/2005) FOR SUMMARY JUDGMENT IS GRANTED. THE COURT, HAVING CONSIDERED ALL THE EVIDENCE AND HAVING CONSTRUED THE EVIDENCE MOST STRONGLY IN FAVOR OF THE NON-MOVING PARTY, DETERMINES THAT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION, THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT, AND THAT FEDERAL MARINE TERMINALS INC IS ENTITLED TO JUDGMENT AS A MATTER OF LAW. FINAL.

COURT COST ASSESSED TO THE PLAINTIFF(S).

Ronald Suster 8.26.05
Judge Signature Date

RECEIVED FOR FILING
AUG 30 2005
GERALD E. FUERST, CLERK
By Deputy

THE STATE OF OHIO } SS. I, GERALD E. FUERST, CLERK OF
Cuyahoga County } THE COURT OF COMMON PLEAS
WITHIN AND FOR SAID COUNTY.
I HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
TAKEN AND COPIED FROM THE ORIGINAL
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 31st
DAY OF August A.D. 20 05
GERALD E. FUERST, Clerk
By Deputy

-96
08/26/2005

H

Briefs and Other Related Documents

West v. DyncorpC.A.11 (Fla.),2005.Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Eleventh Circuit Rule 36-2. (FIND CTA11 Rule 36-2.)

United States Court of Appeals, Eleventh Circuit.

Lawrence E. WEST, Jr., Renn West, Plaintiffs-Appellants,

v.

DYNCORP, Defendant-Appellee,

DYNAIR CFE SERVICES, INC., n.k.a. Swissport CFE, Inc., et. al., Defendants.

No. 04-14536.

D.C. Docket No. 01-00146-CV-ORL-31-KRS.

Aug. 15, 2005.

Appeal from the United States District Court for the Middle District of Florida.

Bradley J. Stoll, Philip J. Ford, Christopher J. Cerski, The Wolk Law Firm, Philadelphia, PA, for Plaintiffs-Appellants.

Thomas Emerson Scott, Jr., Shook, Hardy & Bacon, Miami, FL, for Defendant-Appellee.

Before TJOFLAT, PRYOR and ALARCON,[FN*] Circuit Judges.

FN* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM.

*1 In this case, appellee DynCorp had a contract with the U.S. State Department to eradicate coca plants in Columbia, S.A. The contract called for fixed wing pilots to fly aircraft and conduct aerial spraying missions. [FN1] DynCorp had no pilots to fly its aircraft, so it subcontracted with EAST to provide qualified fixed wing pilots. Appellant Lawrence E. West, Jr., was one of the pilots EAST provided. On February 6, 2000, an OV-10 aircraft West was piloting crashed near Larandia, Columbia. West survived the crash and brought this common law tort action against DynCorp (and others not before us) to recover compensatory and punitive damages.[FN2] His third amended complaint asserted the following personal injury claims against DynCorp: Count I, negligence, Count III, strict liability; Count IV, fraud and misrepresentation; Count V, willful, wanton, and reckless misconduct.

FN1. As part of its contract responsibilities, DynCorp was responsible for overseeing the modification of a fleet of OV-10 aircraft, so that they could carry and spray herbicide, and providing support and maintenance services for the fleet.

FN2. His wife joined him as a plaintiff. Since her recovery depends on the merits of West's claims, we refer only to West in this opinion.

DynCorp's answer, in addition to denying that it had committed these torts, alleged that it was immune from suit under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq., because at the time of the crash, and the events leading up to it, West was functioning as DynCorp's borrowed servant. The parties agreed that whether West was a borrowed servant presented a question of law for the district court to decide.

DynCorp moved the court for summary judgment on the borrowed-servant issue, and the district court held oral argument on the motion. At the end of the hearing, the court denied the motion, concluding that material issues of fact remained to be litigated, and scheduled "[a] pretrial evidentiary hearing." On the scheduled hearing date, the court stated: "This hearing today was noticed as a bifurcated bench trial." West's counsel participated in the ensuing fact-finding proceedings without objection. A represented party forfeits his or her right to a jury trial by participating in a bifurcated bench trial without timely objection. *Southland Reship, Inc. v. Flegel,* 534 F.2d 639, 645 (5th Cir.1976).[FN3]

FN3. West's first two complaints demanded a jury trial; his third amended complaint did not. For purposes of this appeal, we treat West as having made a timely demand for a jury trial.

The bench trial took place on April 20 and 21, 2004. After hearing the evidence and resolving any factual disputes it presented, the court held that West was DynCorp's borrowed servant and that consistent with LHWCA's exclusivity provision, 33 U.S.C. § 905(a), West could not maintain his Count I and Count III claims against DynCorp. It then ordered the parties to brief the question of whether § 905(a) precluded West's Count IV and Count V claims.

In an order entered on August 3, 2004, the court concluded that the claims asserted in those counts "are unexceptional," and that such claims and the proof West offered to support them "do not suggest in any way that DynCorp acted or failed to act with a deliberate intent to injure" him. In other words, Counts IV and V were duplicitous of Counts I and III. After the court held that the "dual-capacity" doctrine did not apply in the context of this case, it gave DynCorp final judgment dismissing all of West's claims. West now appeals.

*2 First, he contends that because he demanded a trial by jury, the district court erred in resolving the borrowed servant issue at a bench trial. We find no error. Our examination of the record leaves us with no doubt that West consented to the bench trial and thereby waived his Seventh Amendment right to have a jury decide the issues of fact involved in the application of the borrowed servant doctrine. Further, we find no error in the court's resolution of those issues of fact and its conclusion that West was a borrowed servant. Therefore, as the court properly held, § 905(a) foreclosed the negligence and strict liability claims asserted in Counts I and III.

We need not decide whether § 905(a) foreclosed West's Count IV and Count V claims because the allegations of those counts do not rise to the level of intentional tort. For this reason, the court properly dismissed them. Finally, we agree with the court's ruling that the dual capacity doctrine does not apply in this case.

AFFIRMED.

C.A.11 (Fla.),2005.
West v. Dyncorp
Slip Copy, 2005 WL 1939445 (C.A.11 (Fla.))

Briefs and Other Related Documents (Back to top)

• 2005 WL 3569159 (Appellate Brief) Repey Brief (Feb. 02, 2005) Original Image of this Document (PDF)

• 04-14536 (Docket) (Sep. 03, 2004)

END OF DOCUMENT

33 U.S.C.A. § 902

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 18. Longshore and Harbor Workers' Compensation (Refs & Annos)

→§ 902. Definitions

When used in this chapter--

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(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--

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon 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, or building a vessel).

(5) The term "carrier" means any person or fund authorized under section 932 of this title to insure under this chapter and includes self-insurers.

(6) The term "Secretary" means the Secretary of Labor.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

(13) The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" includes stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child", "grandchild", "brother", and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) of this section.

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.

(17) The terms "adoption" or "adopted" mean legal adoption prior to the time of the injury.

(18) The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is–

(A) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof,

(B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body,

(C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the Secretary,

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his control from pursuing his education. A child shall not be deemed to be a student under this chapter during a period of service in the Armed Forces of the United States.

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

(20) The term "Board" shall mean the Benefits Review Board.

(21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter 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.

(22) The singular includes the plural and the masculine includes the feminine and neuter.

CREDIT(S)

(Mar. 4, 1927, c. 509, § 2, 44 Stat. 1424; June 25, 1938, c. 685, § 1, 52 Stat. 1164; Oct. 27, 1972, Pub.L. 92-576, § § 2(a), (b), 3, 5(b), 15(c), 18(b), 20(c)(1), 86 Stat. 1251, 1253, 1262, 1263, 1265; Sept. 28, 1984, Pub.L. 98-426, § § 2, 5(a)(2), 27(a)(1), 98 Stat. 1639, 1641, 1654.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1984 Acts. House Report No. 92-1441, see 1972 U.S. Code Cong. and Adm. News, p. 4698.

House Report No. 98-570(Parts I and II) and House Conference Report No. 98-1027, see 1984 U.S. Code Cong. and Adm. News, p. 2734.

References in Text

The phrase "a student as defined in paragraph (19) of this section", referred to in par. (14), probably means a student as defined in paragraph (18) of this section.

Amendments

1984 Amendments. Par. (3). Pub.L. 98-426, § 2(a), designated former exclusions as subpars. (G) and (H) and

added subpars. (A) to (F) and closing provision.

Par. (6). Pub.L. 98-426, § 27(a)(1), substituted "The term 'Secretary' means the Secretary of Labor" for "The term 'commission' means the United States Employees' Compensation Commission".

Par. (10). Pub.L. 98-426, § 2(b), inserted "; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title".

Par. (13). Pub.L. 98-426, § 2(c), substituted "The term 'wages' means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. § 3101 et seq.] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement" for " 'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer".

Par. (21). Pub.L. 98-426, § 5(a)(2), substituted "Unless the context requires otherwise, the" for "The".

1972 Amendments. Par. (3). Pub.L. 92-576, § 2(a), defined "employee" to mean any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker and substituted "or" for "nor" preceding "any person engaged by the master".

Par. (4). Pub.L. 92-576, § 2(b), defined "employer" to include an employer any of whose employees are employed in maritime employment upon 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, or building a vessel.

Par. (14). Pub.L. 92-576, § 3(b), defined "child, grandchild, brother, and sister" to include a student as defined in par. (19) of this section.

Par. (16). Pub.L. 92-576, § 20(c)(1), consolidated provisions of former par. (16) definition of "widow" and former par. (17) definition of "widower" in one definition of "widow or widower"; and in redefining "widower", substituted provision for decedent's husband living with or dependent upon wife for support at time of her death for prior provision for decedent's husband living with and dependent upon wife for support at time of her death, and included decedent's husband living apart from wife for justifiable cause or by reason of her desertion at time of her death.

Par. (17). Pub.L. 92-576, § 20(c)(1), redesignated former par. (18) definition of "adoption" or "adopted" as par. (17). Former par. (17) definition of "widower" incorporated in par. (16).

Par. (18). Pub.L. 92-576, § § 3(a), 20(c)(1), added par. (19) definition of "student" and redesignated such par. (19) as par. (18). Former par. (18) definition of "adoption" or "adopted" redesignated par. (17).

Par. (19). Pub.L. 92-576, § § 5(b), 20(c)(1), added par. (20) definition of "national average weekly wage" and redesignated such par. (20) as par. (19). Former par. (19) definition of "student" redesignated par. (18).

Par. (20). Pub.L. 92-576, § § 15(c), 20(c)(1), added par. (21) definition of "Board" and redesignated such par. (21) as par. (20). Former par. (20) definition of "national average weekly wage" redesignated par. (19).

Par. (21). Pub.L. 92-576, § § 18(b), 20(c)(1), added par. (22) definition of "vessel" and redesignated such par. (22) as par. (21). Former par. (21) definition of "Board" redesignated par. (20).

Par. (22). Pub.L. 92-576, § § 3(a), 5(b), 15(c), 18(b), 20(c)(1), redesignated former par. 19 definition of "singular" as pars. (20), (21), (22), (23), and (22) again. Former par. (22) definition of "vessel" redesignated par. (21).

1938 Amendments. Par. (14). Act June 25, 1938, included within the definition of child, "a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury", and within the definition of child, grandchild, brother, and sister "persons who, though eighteen years of age or over, are wholly dependent upon the deceased employee and incapable of self-support by reason of mental or physical disability".

Effective and Applicability Provisions

1984 Acts. Amendment of pars. (3) and (21) by Pub.L. 98-426 applicable with respect to any injury after Sept. 28, 1984, see section 28(c) of Pub.L. 98- 426, set out as a note under section 901 of this title.

Amendment of par. (10) by Pub.L. 98-426 effective Sept. 28, 1984, and applicable both with respect to claims filed after such date and to claims pending as of such date, see section 28(a) of Pub.L. 98-426, set out as a note under section 901 of this title.

Amendment of pars. (6) and (13) by Pub.L. 98-426 effective Sept. 28, 1984, see section 28(e)(1) of Pub.L. 98-426, set out as a note under section 901 of this title.

1972 Acts. Section 20(c)(3) of Pub.L. 92-576 provided that: "The amendments made by this subsection [which enacted par. (16), struck out par. (17), and redesignated as pars. (17) to (22) paragraphs previously designated as (18) to (23) of this section and substituted "widow or widower" for "surviving wife or dependent husband" wherever appearing in section 909 of this title] shall apply only with respect to deaths or injuries occurring after the enactment of this Act [Oct. 27, 1972]."

Section 22 of Pub.L. 92-576 provided that: "The amendments made by this Act [see Short Title of 1972 Amendment note set out under section 901 of this title] shall become effective thirty days after the date of enactment of this Act [Oct. 27, 1972]."

Transfer of Functions

" 'Secretary' means the Secretary of Labor" was substituted for " 'Administrator' means the Federal Security Administrator" in par. (6), pursuant to Reorg. Plan No. 19 of 1950, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271, which transferred the functions of the Federal Security Administrator to the Secretary of Labor.

Previously, " 'Administrator' means the Federal Security Administrator" was substituted for " 'Commission' means the United States Employees' Compensation Commission" pursuant to Reorg. Plan No. 2 of 1946, § 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095, which abolished the United States Employees' Compensation Commission and transferred its functions to the Federal Security Administrator.

33 U.S.C.A. § 902, 33 USCA § 902

Current through P.L. 110-12 approved 03-15-07

33 U.S.C.A. § 902

END OF DOCUMENT

33 U.S.C.A. § 903

C

Effective: October 19, 1996

United States Code Annotated Currentness
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 18. Longshore and Harbor Workers' Compensation (Refs & Annos)

→§ 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, 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 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).

(b) Governmental officers and employees

No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) Intoxication; willful intention to kill

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(d) Small vessels

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee--

(A) who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or

(B) if the employee is not subject to coverage under a State workers' compensation law.

(3) For purposes of this subsection, a small vessel means--

(A) a commercial barge which is under 900 lightship displacement tons; or

(B) a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross as measured under section 14502 of title 46, United States Code, or an alternate tonnage measured under section 14302 of that title as prescribed by the Secretary under section 14104 of that title.

(e) Credit for benefits paid under other laws

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed by this chapter.

CREDIT(S)

(Mar. 4, 1927, c. 509, § 3, 44 Stat. 1426; Oct. 27, 1972, Pub.L. 92-576, § § 2(c), 21, 86 Stat. 1251, 1265; Sept. 28, 1984, Pub.L. 98-426, § 3, 98 Stat. 1640; Oct. 19, 1996, Pub.L. 104-324, Title VII, § 703, 110 Stat. 3933.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1972 Acts. House Report No. 92-1441, see 1972 U.S. Code Cong. and Adm. News, p. 4698.

1984 Acts. House Report No. 98-570(Parts I and II) and House Conference Report No. 98-1027, see 1984 U.S. Code Cong. and Adm. News, p. 2734.

1996 Acts. Senate Report No. 104-160 and House Conference Report No. 104- 854, see 1996 U.S. Code Cong. and Adm. News, p. 4239.

References in Text

Section 688 of Title 46, Appendix, referred to in subsec. (e), was repealed by Pub.L. 109-304, § 19, Oct. 6, 2006, 120 Stat. 1710.

Amendments

1996 Amendments. Subsec. (d)(3)(B). Pub.L. 104-324, § 703, added provisions relating to measurement under sections 14302 or 14502 of Title 46.

1984 Amendments. Subsec. (a). Pub.L. 98-426, § 3(a), inserted introductory language relating to exceptions provided for elsewhere in this section, redesignated existing par. (1) as subsec. (b), and struck out existing par. (2) which had excepted from coverage masters and crew members or person engaged by such masters or crew members to load, unload, or repair vessels under 18 tons net.

Subsec. (b). Pub.L. 98-426, § 3(a), redesignated as subsec. (b) provisions formerly set out in subsec. (a)(2). Former subsec. (b) was redesignated (c).

Subsec. (c). Pub.L. 98-426, § 3(a), redesignated former subsec. (b) as (c).

Subsec. (d). Pub.L. 98-426, § 3(a), added subsec. (d).

Subsec. (e). Pub.L. 98-426, § 3(b), added subsec. (e).

1972 Amendments. Subsec. (a). Pub.L. 92-576, § 2(c), substituted provisions respecting coverage of injuries occurring upon 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, or building a vessel, for prior provisions respecting coverage of such injuries upon navigable waters and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

Subsec. (a)(1). Pub.L. 92-576, § 21, substituted "or" for "nor" preceding "any person engaged by the master".

33 U.S.C.A. § 903

Effective and Applicability Provisions

1984 Acts. Amendment of subsecs. (a) to (d) by Pub.L. 98-426 applicable with respect to any injury after Sept. 28, 1984, see section 28(c) of Pub.L. 98- 426, set out as a note under section 901 of this title.

Enactment of subsec. (e) applicable both with respect to claims filed after Sept. 28, 1984, and to claims pending on that date, see section 28(a) of Pub.L. 98-426, set out as a note under section 901 of this title.

1972 Acts. Amendment by Pub.L. 92-576 effective thirty days after Oct. 27, 1972, see section 22 of Pub.L. 92-576, set out as a note under section 902 of this title.

District of Columbia

The Longshore and Harbor Workers' Compensation Act [this chapter] was made applicable in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, by Act May 17, 1928, c. 612, 45 Stat. 600, as amended. See D.C.Law 3-77 (D.C.Code, § 36-301 et seq.).

33 U.S.C.A. § 903, 33 USCA § 903

Current through P.L. 110-12 approved 03-15-07

END OF DOCUMENT

33 U.S.C.A. § 904

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 18. Longshore and Harbor Workers' Compensation (Refs & Annos)

→§ 904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

CREDIT(S)

(Mar. 4, 1927, c. 509, § 4, 44 Stat. 1426; Sept. 28, 1984, Pub.L. 98-426, § 4(a), 98 Stat. 1641.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1984 Acts. House Report No. 98-570(Parts I and II) and House Conference Report No. 98-1027, see 1984 U.S. Code Cong. and Adm. News, p. 2734.

Amendments

1984 Amendments. Subsec. (a). Pub.L. 98-426 substituted "only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation" for "the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment" and added: "A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor."

Effective and Applicability Provisions

1984 Acts. Amendment of subsec. (a) by Pub.L. 98-426 applicable both with respect to claims filed after Sept. 28, 1984, and to claims pending on that date, see section 28(a) of Pub.L. 98-426, set out as a note under section 901 of this title.

33 U.S.C.A. § 904, 33 USCA § 904

Current through P.L. 110-12 approved 03-15-07

33 U.S.C.A. § 904

END OF DOCUMENT

33 U.S.C.A. § 905

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 18. Longshore and Harbor Workers' Compensation (Refs & Annos)

→§ 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title 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, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel

In the event of injury to a person covered under this chapter 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 933 of this title, 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 chapter.

(c) Outer Continental Shelf

In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this Act by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

CREDIT(S)

33 U.S.C.A. § 905

(Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426; Oct. 27, 1972, Pub.L. 92-576, § 18(a), 86 Stat. 1263; Sept. 28, 1984, Pub.L. 98-426, § § 4(b), 5(a)(1), (b), 98 Stat. 1641.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1972 Acts. House Report No. 92-1441, see 1972 U.S. Code Cong. and Adm. News, p. 4698.

1984 Acts. House Report No. 98-570(Parts I and II) and House Conference Report No. 98-1027, see 1984 U.S. Code Cong. and Adm. News, p. 2734.

Amendments

1984 Amendments. Subsec. (a). Pub.L. 98-426, § 4(b), added: "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title."

Subsec. (b). Pub.L. 98-426, § 5(a)(1), substituted "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" for "If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel".

Subsec. (c). Pub.L. 98-426, § 5(b), added subsec. (c).

1972 Amendments. Pub.L. 92-576 designated existing provisions as subsec. (a) and, as so designated, substituted "the chapter" for "this chapter", and added subsec. (b).

Effective and Applicability Provisions

1984 Acts. Amendment of subsec. (a) by section 4(b) of Pub.L. 98-426 applicable both with respect to claims filed after Sept. 28, 1984, and to claims pending on that date, see section 28(a) of Pub.L. 98-426, set out as a note under section 901 of this title.

Amendment of subsec. (b) and addition of subsec. (c) by section 5 of Pub.L. 98-426 applicable with respect to any injury after Sept. 28, 1984, see section 28(c) of Pub.L. 98-426, set out as a note under section 901 of this title.

1972 Acts. Amendment by Pub.L. 92-576 effective 30 days after Oct. 27, 1972, see section 22 of Pub.L. 92-576, set out as a note under section 902 of this title.

33 U.S.C.A. § 905, 33 USCA § 905

Current through P.L. 110-12 approved 03-15-07

33 U.S.C.A. § 905

END OF DOCUMENT

33 U.S.C.A. § 906

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 18. Longshore and Harbor Workers' Compensation (Refs & Annos)

→§ 906. Compensation

(a) Time for commencement

No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 907 of this title: *Provided, however,* That in case the injury results in disability of more than fourteen days the compensation shall be allowed from the date of the disability.

(b) Maximum rate of compensation

(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

(c) Applicability of determinations

Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

CREDIT(S)

(Mar. 4, 1927, c. 509, § 6, 44 Stat. 1426; June 24, 1948, c. 623, § 1, 62 Stat. 602; July 26, 1956, c. 735, § 1, 70 Stat. 654; July 14, 1961, Pub.L. 87-87, § 1, 75 Stat. 203; Oct. 27, 1972, Pub.L. 92-576, § § 4, 5(a), 86 Stat. 1252; Sept. 28, 1984, Pub.L. 98-426, § 6, 98 Stat. 1641.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Senate Report No. 1315 and Conference Report No. 2329, see 1948 U.S. Code Cong. Service, p. 1979.

1956 Acts. House Report No. 2067, see 1956 U.S. Code Cong. and Adm. News, p. 3542.

1961 Acts. Senate Report No. 481, see 1961 U.S. Code Cong. and Adm. News, p. 2071.

1984 Acts. House Report No. 92-1441, see 1972 U.S. Code Cong. and Adm. News, p. 4698.

1984 Acts. House Report No. 98-570(Parts I and II) and House Conference Report No. 98-1027, see 1984 U.S. Code Cong. and Adm. News, p. 2734.

Amendments

1984 Amendments. Subsec. (b)(1). Pub.L. 98-426, § 6(a), substituted provisions setting a maximum compensation for disability or death of 200 per centum of the applicable national average weekly wage as determined by the Secretary for former provisions which had set out a schedule of progressive percentages of 125 per centum or $167, whichever is greater, during the period ending September 30, 1973, 150 per centum during the period beginning October 1, 1973 and ending September 30, 1974, 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975, 200 per centum beginning October 1, 1975.

Subsec. (c). Pub.L. 98-426, § 6(b)(1), redesignated subsec. (d) as (c). Former subsec. (c), which had directed that the maximum rate of compensation for a nonappropriated fund instrumentality employee be equal to 66 2/3 per centum of the maximum rate of basic pay established for a Federal employee in grade GS-12 by section 5332 of Title 5 and the minimum rate of compensation for such an employee be equal to 66 2/3 per centum of the minimum rate of basic pay established for a Federal employee in grade GS-2 by such section, was struck out.

Pub.L. 98-426, § 6(b)(2), substituted "under subsection (b)(3) of this section" for "under this subsection".

Subsec. (d). Pub.L. 98-426, § 6(b)(1), redesignated former subsec. (d) as (c).

1972 Amendments. Subsec. (a). Pub.L. 92-576, § 4, substituted "fourteen days" for "twenty-eight days".

Subsecs. (b) to (d). Pub.L. 92-576, § 5(a), added subsecs. (b) to (d) and struck out former subsec. (b) compensation for disability provisions which prescribed a $70 per week limit, an $18 per week minimum for total disability, and provided that if the employee's average weekly wages, as computed under section 910 of this title, were less than $18 per week he should receive as compensation for total disability his average weekly wages.

1961 Amendments. Subsec. (b). Pub.L. 87-87 increased the limitation on compensation for disability from "$54" to "$70" per week.

1956 Amendments. Subsec. (a). Act July 26, 1956 substituted "three days" for "seven days" and "twenty-eight days" for "forty-nine days".

Subsec. (b). Act July 26, 1956 substituted "$54" for "$35", and "$18" for "$12" in two places.

1948 Amendments. Subsec. (b). Act June 24, 1948 increased the maximum weekly compensation from $25 to $35 and the minimum from $9 to $12 in two places.

Effective and Applicability Provisions

1984 Acts. Amendment of subsec. (b)(1) by Pub.L. 98-426 applicable with respect to any death after Sept. 28, 1984, see section 28(d) of Pub.L. 98- 426, set out as a note under section 901 of this title.

Amendment of subsec. (c) by Pub.L. 98-426 applicable with respect to any injury, disability, or death after Sept. 28, 1984, see section 28(f) of Pub.L. 98-426, set out as a note under section 901 of this title.

1972 Acts. Amendment by Pub.L. 92-576 effective 30 days after Oct. 27, 1972, see section 22 of Pub.L. 92-576, set out as a note under section 902 of this title.

33 U.S.C.A. § 906

1961 Acts. Section 4 of Pub.L. 87-87 provided that: "The amendments made by the foregoing provisions of this Act [amending sections 906(b), 909(e), and 914(m) of this title] shall become effective as to injuries or death sustained on or after the date of enactment [July 14, 1961]."

1956 Acts. Section 9 of Act July 26, 1956, provided that: "The amendments made by the first section and sections 2, 4, and 5 of this Act [amending sections 906(a) and (b), 908(c)(1)-(12), 909(e), and 914(m) of this title respectively] shall be applicable only with respect to injuries and death occurring on or after the date of enactment of this Act [July 26, 1956] notwithstanding the provisions of the Act of December 2, 1942, as amended (42 U.S.C. sec. 1701 et seq.)."

1948 Acts. Section 6 of Act June 24, 1948, provided that: "The provisions of this Act [amending sections 906(a), 908(c), 909(a)-(c), (e), 910(a)-(c), and 914(m) of this title] shall be applicable only to injuries or deaths occurring on or after the effective date hereof [June 24, 1948]."

33 U.S.C.A. § 906, 33 USCA § 906

Current through P.L. 110-12 approved 03-15-07

END OF DOCUMENT

33 U.S.C.A. § 907

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 18. Longshore and Harbor Workers' Compensation (Refs & Annos)

➞§ 907. Medical services and supplies

(a) General requirement

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

(b) Physician selection; administrative supervision; change of physicians and hospitals

The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this chapter as hereinafter provided. If, due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him. The Secretary shall actively supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians or hospitals when in his judgment such change is desirable or necessary in the interest of the employee or where the charges exceed those prevailing within the community for the same or similar services or exceed the provider's customary charges. Change of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary.

(c) Physicians and health care providers not authorized to render medical care or provide medical services

(1)(A) The Secretary shall annually prepare a list of physicians and health care providers in each compensation district who are not authorized to render medical care or provide medical services under this chapter. The names of physicians and health care providers contained on the list required under this subparagraph shall be made available to employees and employers in each compensation district through posting and in such other forms as the Secretary may prescribe.

(B) Physicians and health care providers shall be included on the list of those not authorized to provide medical care and medical services pursuant to subparagraph (A) when the Secretary determines under this section, in accordance with the procedures provided in subsection (j) of this section, that such physician or health care provider--

(i) has knowingly and willfully made, or caused to be made, any false statement or misrepresentation of a material fact for use in a claim for compensation or claim for reimbursement of medical expenses under this chapter;

(ii) has knowingly and willfully submitted, or caused to be submitted, a bill or request for payment under this chapter containing a charge which the Secretary finds to be substantially in excess of the charge for the service, appliance, or supply prevailing within the community or in excess of the provider's customary charges, unless the Secretary finds there is good cause for the bill or request containing the charge;

(iii) has knowingly and willfully furnished a service, appliance, or supply which is determined by the Secretary to be substantially in excess of the need of the recipient thereof or to be of a quality which substantially fails to meet professionally recognized standards;

(iv) has been convicted under any criminal statute (without regard to pending appeal thereof) for fraudulent activities in connection with any Federal or State program for which payments are made to physicians or providers of similar services, appliances, or supplies; or

(v) has otherwise been excluded from participation in such program.

(C) Medical services provided by physicians or health care providers who are named on the list published by the Secretary pursuant to subparagraph (A) of this section shall not be reimbursable under this chapter; except that the Secretary shall direct the reimbursement of medical claims for services rendered by such physicians or health care providers in cases where the services were rendered in an emergency.

(D) A determination under subparagraph (B) shall remain in effect for a period of not less than three years and until the Secretary finds and gives notice to the public that there is reasonable assurance that the basis for the determination will not reoccur.

(E) A provider of a service, appliance, or supply shall provide to the Secretary such information and certification as the Secretary may require to assure that this subsection is enforced.

(2) Whenever the employer or carrier acquires knowledge of the employee's injury, through written notice or otherwise as prescribed by the chapter, the employer or carrier shall forthwith authorize medical treatment and care from a physician selected by an employee pursuant to subsection (b) of this section. An employee may not select a physician who is on the list required by paragraph (1) of this subsection. An employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

(d) Request of treatment or services prerequisite to recovery of expenses; formal report of injury and treatment; suspension of compensation for refusal of treatment or examination; justification

(1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless--

(A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or

(B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

(2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

(3) The Secretary may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee.

(4) If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

(e) Physical examination; medical questions; report of physical impairment; review or reexamination; costs

In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary. The Secretary shall order such review or reexamination unless he finds that it is clearly unwarranted. Such review or reexamination shall be completed within two weeks from the date ordered unless the Secretary finds that because of extraordinary circumstances a longer period is required. The Secretary shall have the power in his discretion to charge the cost of examination or review under this subsection to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk, in appropriate cases, or to the special fund in section 944 of this title.

(f) Place of examination; exclusion of physicians other than examining physician of Secretary; good cause for conclusions of other physicians respecting impairment; examination by employer's physician; suspension of proceedings and compensation for refusal of examination

An employee shall submit to a physical examination under subsection (e) of this section at such place as the Secretary may require. The place, or places, shall be designated by the Secretary and shall be reasonably convenient for the employee. No physician selected by the employer, carrier, or employee shall be present at or participate in any manner in such examination, nor shall conclusions of such physicians as to the nature or extent of impairment or the cause of impairment be available to the examining physician unless otherwise ordered, for good cause, by the Secretary. Such employer or carrier shall, upon request, be entitled to have the employee examined immediately thereafter and upon the same premises by a qualified physician or physicians in the presence of such physician as the employee may select, if any. Proceedings shall be suspended and no compensation shall be payable for any period during which the employee may refuse to submit to examination.

(g) Fees and charges for examinations, treatment, or service; limitation; regulations

All fees and other charges for medical examinations, treatment, or service shall be limited to such charges as prevail in the community for such treatment, and shall be subject to regulation by the Secretary. The Secretary shall issue regulations limiting the nature and extent of medical expenses chargeable against the employer without authorization by the employer or the Secretary.

(h) Third party liability

The liability of an employer for medical treatment as herein provided shall not be affected by the fact that his employee was injured through the fault or negligence of a third party not in the same employ, or that suit has been brought against such third party. The employer shall, however, have a cause of action against such third party to recover any amounts paid by him for such medical treatment in like manner as provided in section 933(b) of this title.

(i) Physicians' ineligibility for subsection (e) physical examinations and reviews because of workmen's compensation claim employment or fee acceptance or participation

Unless the parties to the claim agree, the Secretary shall not employ or select any physician for the purpose of making examinations or reviews under subsection (e) of this section who, during such employment, or during the period of two years prior to such employment, has been employed by, or accepted or participated in any fee relating to a workmen's compensation claim from any insurance carrier or any self-insurer.

(j) Procedure; judicial review

(1) The Secretary shall have the authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this chapter, which are necessary or appropriate to carry out the provisions of subsection (c) of this section, including the nature and extent of the proof and evidence necessary for actions under this section and the methods of taking and furnishing such proof and evidence.

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(2) Any decision to take action with respect to a physician or health care provider under this section shall be based on specific findings of fact by the Secretary. The Secretary shall provide notice of these findings and an opportunity for a hearing pursuant to section 556 of Title 5 for a provider who would be affected by a decision under this section. A request for a hearing must be filed with the Secretary within thirty days after notice of the findings is received by the provider making such request. If a hearing is held, the Secretary shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the findings of fact and proposed action under this section.

(3) For the purpose of any hearing, investigation, or other proceeding authorized or directed under this section, the provisions of section [FN1] 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents) shall apply to the jurisdiction, powers, and duties of the Secretary or any officer designated by him.

(4) Any physician or health care provider, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision, but the pendency of such review shall not operate as a stay upon the effect of such decision. Such action shall be brought in the court of appeals of the United States for the judicial circuit in which the plaintiff resides or has his principal place of business, or the Court of Appeals for the District of Columbia. As part of his answer, the Secretary shall file a certified copy of the transcript of the record of the hearing, including all evidence submitted in connection therewith. The findings of fact of the Secretary, if based on substantial evidence in the record as a whole, shall be conclusive.

(k) Refusal of treatment on religious grounds

(1) Nothing in this chapter prevents an employee whose injury or disability has been established under this chapter from relying in good faith on treatment by prayer or spiritual means alone, in accordance with the tenets and practice of a recognized church or religious denomination, by an accredited practitioner of such recognized church or religious denomination, and on nursing services rendered in accordance with such tenets and practice, without suffering loss or diminution of the compensation or benefits under this chapter. Nothing in this subsection shall be construed to except an employee from all physical examinations required by this chapter.

(2) If an employee refuses to submit to medical or surgical services solely because, in adherence to the tenets and practice of a recognized church or religious denomination, the employee relies upon prayer or spiritual means alone for healing, such employee shall not be considered to have unreasonably refused medical or surgical treatment under subsection (d) of this section.

CREDIT(S)

(Mar. 4, 1927, c. 509, § 7, 44 Stat. 1427; May 26, 1934, c. 354, § 1, 48 Stat. 806; June 25, 1938, c. 685, § § 2, 3, 52 Stat. 1165; Sept. 13, 1960, Pub.L. 86-757, 74 Stat. 900; Oct. 27, 1972, Pub.L. 92-576, § 6, 86 Stat. 1254; Sept. 28, 1984, Pub.L. 98-426, § 7, 98 Stat. 1642.)

[FN1] So in original. Probably should read "sections".

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1960 Acts. House Report No. 2187, see 1960 U.S. Code Cong. and Adm. News, p. 3556.

1984 Acts. House Report No. 92-1441, see 1972 U.S. Code Cong. and Adm. News, p. 4698.

House Report No. 98-570(Parts I and II) and House Conference Report No. 98-1027, see 1984 U.S. Code Cong. and Adm. News, p. 2734.

Amendments

1984 Amendments. Subsec. (b). Pub.L. 98-426, § 7(a), inserted "or where the charges exceed those prevailing within the community for the same or similar services or exceed the provider's customary charges".

Subsec. (c). Pub.L. 98-426, § 7(b), substituted provisions respecting physicians and health care providers not authorized to render medical care or services under this chapter for former provision respecting physicians designated by the Secretary as authorized to render such care and whose names shall be available to employees through posting or in such other form as the Secretary may prescribe.

Subsec. (d). Pub.L. 98-426, § 7(c), substituted provisions for the recovery by the employee of amounts spent on medical services which the employer failed to provide; for the procedure to be followed for recovery; and for suspension of any payments made if the employee unreasonably refuses to submit to treatment or examination for former provisions which required a request for treatment or services and the filing of a physician's report for recovery, and permitted the Secretary to excuse a failure to file a report when justified and to suspend payment if the employee unreasonably refuses treatment or examination.

Subsec. (j). Pub.L. 98-426, § 7(d), added subsec. (j).

Subsec. (k). Pub.L. 98-426, § 7(e), added subsec. (k).

1972 Amendments. Subsec. (a). Pub.L. 92-576 reenacted provisions without change.

Subsec. (b). Pub.L. 92-576, in revising the text, substituted provisions for employee's choosing of an attending physician authorized by the Secretary, for prior provisions for such a choosing from a panel of physicians named by the employer and employer's selection of a physician for an employee when nature of injury requires immediate medical treatment and care for prior provisions for employer's selection of a physician from the panel; required Secretary's supervision of medical care rendered and periodic reports of medical care furnished; provided for initiative of the Secretary or the request of the employer for making change of hospitals or physicians and that the change be in the interest of the employee; provided for change of physicians pursuant to regulations of the Secretary; and deleted prior provision authorizing a second choice of a physician from the panel and for selection of physicians for specialized services.

Subsec. (c). Pub.L. 92-576 substituted provisions respecting Secretary's designation of physicians in community authorized to render medical care and posting of their names for prior provisions respecting deputy commissioner's determination of size of panel of physicians (named by employer) following statutory criteria and approval of their qualifications, and requirement of posting of names and addresses of physicians so as to afford reasonable notice.

Subsec. (d). Pub.L. 92-576 substituted the Secretary for the deputy commissioner as the person to exercise the various authorities, eliminated introductory provisions respecting employer's failure to maintain a panel of physicians for examination purposes or to permit the employee to choose an attending physician from the panel and employee's procurement of treatment and services and selection of a physician at expense of employer, decreased from twenty to ten days the period within which to make the formal report of injury and treatment, and authorized suspension of compensation for refusal to submit to an examination by a physician of the employer.

Subsec. (e). Pub.L. 92-576 substituted provisions respecting physical examination to determine medical questions by a physician employed or selected by the Secretary, such physician's report of the physical impairment, review or reexamination of the employee, and the charging of costs to an employer, who is a self-insurer, or the insurance company carrying the risk or the special fund for prior provisions respecting examination of employee by a physician selected by the deputy commissioner (who shall submit a report of the disability) whenever the deputy commissioner was of the opinion that the employer's physician was partial in his estimate of the degree of permanent disability or the extent of temporary disability and charging cost of examination to the employer, if he was a self-insurer, or to the insurance company which was carrying the risk when the physician's estimate was not impartial.

Subsec. (f). Pub.L. 92-576 added subsec. (f). Former subsec. (f) redesignated (g).

Subsec. (g). Pub.L. 92-576 redesignated former subsec. (f) as (g) and substituted "medical examinations, treatment, or service" for "such treatment or service", "charges as prevail in the community for such treatment" for "charges as prevail in the same community for similar treatment of injured persons of like standard of living", "regulation by the Secretary" for "regulation by the deputy commissioner", and prescribed issuance of regulations respecting medical expenses chargeable against employer. Former subsec. (g) redesignated (h).

Subsec. (h). Pub.L. 92-576 redesignated former subsec. (g) as (h) and inserted the word "that" preceding "suit".

Subsec. (i). Pub.L. 92-576 added subsec. (i).

1960 Amendments. Subsec. (a). Pub.L. 86-757 designated the first sentence as subsec. (a). Remainder of former subsec. (a) redesignated (d).

Subsecs. (b), (c). Pub.L. 86-757 added subsecs. (b) and (c). Former subsecs. (b) and (c) redesignated (e) and (f).

Subsec. (d). Pub.L. 86-757 redesignated all but first sentence of former subsec. (a) as (d), substituting "If the employer fails to provide the medical or other treatment, services, and supplies required to be furnished by subsec. (a) of this section, after request by the injured employee, or fails to maintain a panel of physicians as required by subsec. (c) of this section, or fails to permit the employee to choose an attending physician from such panel, such injured employee may procure such medical or other treatment, services, and supplies and select a physician to render treatment and services at the expense of the employer" for "If the employer fails to provide the same, after request by the injured employee, such injured employee may do so at the expense of the employer." Former subsec. (d) redesignated (g).

Subsecs. (e) to (g). Pub.L. 86-757 redesignated former subsecs. (b) to (d) as (e) to (g), deleting "unless and until notice of election to sue has been given as required by section 933(a) of this title" and "without the giving of such notice" preceding and following "or suit has been brought against such third party" in subsec. (g).

1938 Amendments. Subsec. (a). Act June 25, 1938, § 2, authorized deputy commissioner to excuse failure to furnish prescribed medical report.

Subsec. (d). Act June 25, 1938, § 3, added subsec. (d).

1934 Amendments. Subsec. (a). Act May 26, 1934, authorized deputy commissioner to suspend payment of compensation for refusal, without justification, to submit to medical or surgical treatment.

Effective and Applicability Provisions

1984 Acts. Amendment of subsec. (b) by Pub.L. 98-426 effective 90 days after Sept. 28, 1984, and applicable both with respect to claims filed after such 90th day and to claims pending on such 90th day, see section 28(b) of Pub.L. 98-426, set out as a note under section 901 of this title.

Amendment of subsecs. (c) and (d) by Pub.L. 98-426 effective 90 days after Sept. 28, 1984, see section 28(e)(2) of Pub.L. 98-426, set out as a note under section 901 of this title.

Enactment of subsec. (j) effective 90 days after Sept. 28, 1984, see section 28(e)(2) of Pub.L. 98-426, set out as a note under section 901 of this title.

Enactment of subsec. (k) effective 90 days after Sept. 28, 1984, and applicable both with respect to claims filed after such 90th day and to claims pending on such 90th day, see section 28(b) of Pub.L. 98-426, set out as a note under section 901 of this title.

1972 Acts. Amendment by Pub.L. 92-576 effective 30 days after Oct. 27, 1972, see section 22 of Pub.L. 92-576, set out as a note under section 902 of this title.

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Transfer of Functions

For transfer of functions to the Secretary of Labor, see note set out under section 902 of this title.

Claims Filed Under Black Lung Benefits Act

Section 28(h)(1) of Pub.L. 98-426 provided that: "The amendments made by section 7 of this Act [amending this section] shall not apply to claims filed under the Black Lung Benefits Act (30 U.S.C. 901 et seq.)."

33 U.S.C.A. § 907, 33 USCA § 907

Current through P.L. 110-12 approved 03-15-07

END OF DOCUMENT

33 U.S.C.A. § 933

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 18. Longshore and Harbor Workers' Compensation (Refs & Annos)

→§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) Payment into section 944 fund operating as assignment

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to--

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section. Such lien shall have priority over a lien under paragraph (3) of this subsection.

(h) Subrogation

Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

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CREDIT(S)

(Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 685, § § 12, 13, 52 Stat. 1168; Aug. 18, 1959, Pub.L. 86-171, 73 Stat. 391; Oct. 27, 1972, Pub.L. 92-576, § 15(f)-(h), 86 Stat. 1262; Sept. 28, 1984, Pub.L. 98- 426, § 21, 98 Stat. 1652.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1959 Acts. Senate Report No. 428, see 1959 U.S. Code Cong. and Adm. News, p. 2134.

1972 Acts. House Report No. 92-1441, see 1972 U.S. Code Cong. and Adm. News, p. 4698.

1984 Acts. House Report No. 98-570(Parts I and II) and House Conference Report No. 98-1027, see 1984 U.S. Code Cong. and Adm. News, p. 2734.

Amendments

1984 Amendments. Subsec. (b). Pub.L. 98-426, § 21(a), substituted "Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance" for "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award" and added "If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board."

Subsec. (e)(2). Pub.L. 98-426, § 21(b), struck out ", less one-fifth of such excess which shall belong to the employer" after "or to the representative".

Subsec. (f). Pub.L. 98-426, § 21(c)(1) inserted "net" before "amount recovered".

Pub.L. 98-426, § 21(c)(2), added "Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees)."

Subsec. (g)(1). Pub.L. 98-426, § 21(d), designated existing provisions of subsec. (g) as par. (1), and in par. (1) as so designated, substituted "If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative)" for "If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter the employer shall be liable for compensation as determined in subsection (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made" and added: "The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into."

Subsecs. (g)(2) to (4). Pub.L. 98-426, § 21(d), added pars. (2) to (4).

1972 Amendments. Subsec. (b). Pub.L. 92-576, § 15(f), inserted "or Board" following "deputy commissioner".

Subsec. (e)(1)(A). Pub.L. 92-576, § 15(g), inserted "or Board" following "deputy commissioner".

Subsec. (g). Pub.L. 92-576, § 15(h), substituted "if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made" for "if such compromise is made with his written approval".

1959 Amendments. Subsec. (a). Pub.L. 86-171 inserted "or a person or persons in his employ" following "employer" and substituted "he need not elect whether" for "he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide,".

Subsec. (b). Pub.L. 86-171 added "unless such person shall commence an action against such third person within six months after such award".

Subsec. (c). Pub.L. 86-171 deleted ", whether or not the representative has notified the deputy commissioner of his election" following "third person".

Subsec. (d). Pub.L. 86-171 reenacted subsec. (d) without change.

Subsec. (e). Pub.L. 86-171 substituted "Secretary" for "Commission" in par. (1)(D) and added in par. (2) "less one-fifth of such excess which shall belong to the employer".

Subsec. (f). Pub.L. 86-171 deleted "or the representative elects to recover damages against such third person and notifies the Secretary of his election and" preceding "institutes" and substituted "subdivision (b) of this section" for "section 913 of this title" and "Secretary" for "Commission".

Subsec. (g). Pub.L. 86-171 corrected reference to "subdivision (e)" to read "subdivision (f)".

Subsec. (h). Pub.L. 86-171 redesignated former subsec. (i) as (h), and eliminated former subsec. (h), which permitted the deputy commissioner to make an election for a minor or to authorize the parent or guardian to make the election.

Subsec. (i). Pub.L. 86-171 added subsec. (i) and redesignated former subsec. (i) as (h).

1938 Amendments. Subsec. (b). Act June 25, 1938, § 12, inserted "under an award in a compensation order filed by the deputy commissioner" and deleted at the end of the sentence "whether or not the person entitled to compensation has notified the deputy commissioner of his election".

Subsec. (e). Act June 25, 1938, § 12, redesignated par. (1)(C) as par. (1)(C) and (D) and included in said par. (1)(D) the present value of the cost of benefits furnished.

Subsec. (i). Act June 25, 1938, § 13, added subsec. (i).

Effective and Applicability Provisions

1984 Acts. Amendment by Pub.L. 98-426 effective Sept. 28, 1984, and applicable both with respect to claims filed after such date and to claims pending on such date, see section 28(a) of Pub.L. 98-426, set out as a note under section 901 of this title.

33 U.S.C.A. § 933

1972 Acts. Amendment by Pub.L. 92-576 effective 30 days after Oct. 27, 1972, see section 22 of Pub.L. 92-576, set out as a note under section 902 of this title.

33 U.S.C.A. § 933, 33 USCA § 933

Current through P.L. 110-12 approved 03-15-07

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