**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

# *RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 257 November 2013*

*Stephen L. Purcell*
*Chief Judge*

*Paul C. Johnson, Jr.*
*Associate Chief Judge for Longshore*

*Yelena Zaslavskaya*
*Senior Attorney*

*William S. Colwell*
*Associate Chief Judge for Black Lung*

*Seena Foster*
*Senior Attorney*

## I. Longshore and related Acts

### A. U.S. District Courts[1]

### ***In re Natures Way Marine LLC*, __ F.Supp.2d__, 2013 WL 6157978 (S.D.Ala. 2013).**

Barge owner Natures Way executed a charter agreement with Apex, which planned to use the barge to transport "rainwater/wastewater" cargo. A condition of the agreement was that Apex would return the barge to Natures Way in a "gas free" and clean condition. After transferring the rainwater/wastewater from its facility to the barge tanks and back out for processing, Apex hired USES to remove the rainwater and clean the barge. Pursuant to a labor staffing contract between USES and Flexicrew, USES hired Flexicrew to provide two laborers to clean the barge's tanks. One of the laborer's, Charles Brunson, subsequently filed various claims arising from his alleged exposure to toxic chemicals while cleaning the barge. He also filed an LHWCA claim against Flexicrew, which was controverted by Flexicrew.

As part of resulting litigation among the five parties, Natures Way filed an action against charterer Apex, cleaning company USES, and staffing company Flexicrew to limit its liability in connection with Brunson's claim for damages under § 5(b) of the LHWCA. Charterer Apex filed cross-claims against cleaning company and staffing company for indemnity and contribution. Flexicrew and USES moved for summary judgment.

---

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at *__) pertain to the cases being summarized and refer to the Westlaw page identifier.

Because employer is subject to liability to compensate an injured employee regardless of fault, *see* 33 U.S.C. § 904(b), Section 5(a) makes this recovery the exclusive liability of an employer (to an employee). Section 5(b) provides that a covered employee may also sue the vessel as a third party if his injury was caused by the negligence of a vessel. Because the employer is liable to the maritime employee regardless of fault, the LHWCA immunizes the employer from suits for contribution or indemnity by the vessel. Section 5(b) expressly provides that where an injured employee brings an action against a vessel for damages, "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."

In this case, the court granted Flexicrew's motion for summary judgment, holding that: (1) the laborer hired to clean the barge was a statutory "employee" and Flexicrew was his statutory employer under the LHWCA; (2) the charterer Apex was a "vessel" owner under the LHWCA; and (3) the staffing company Flexicrew was immune from liability to charterer Apex for indemnity or contribution. The court's reasoning is detailed below.

Statutory Employee: The court observed that employee status can be based upon the maritime nature of the employment as a whole or on the maritime nature of the claimant's activity at the time of the injury. Here, Brunson had the requisite status based on the following five elements. First, there was no dispute that Brunson was injured "in the course of his employment" and was not merely "transiently or fortuitously" on the barge. He was hired to clean the barge and was on the barge on the navigable waters when he received his alleged injuries. He was not merely taking the barge to and from his jobsite. Because almost all of Brunson's workday was spent performing job responsibilities on navigable waters, on the barge, he was acting "in the course of his employment." Second, it was undisputed that Brunson's employer, Flexicrew, had employees engaged in maritime employment. Approximately 65% of Flexicrew's employees are employed in longshore positions. Third, Brunson was engaged in maritime employment as defined in § 2(3) at the time of his injuries because he was hired to assist in unloading the barge's cargo. Further, Brunson qualified as a statutory employee under § 2(3) due to being hired to clean the tanks on the barge. Fourth, Brunson was working on a barge located on the navigable waters of the United States-the Theodore Industrial Canal-when he was allegedly injured.

Statutory Employer: The court further concluded that the LHWCA extends coverage to Flexicrew because it is a statutory employer under § 2(4). The court observed that 65% of Flexicrew's employees are employed in longshore positions upon the navigable waters of the United States. Additionally, when an injured worker meets the LHWCA definition of

"employee," his employer automatically qualifies as a statutory employer under § 2(4).

Apex's Indemnity and Contribution Claims Against Flexicrew: Next, the court determined that the charterer Apex was a "vessel" owner under the LHWCA, and, therefore, the staffing company Flexicrew was immune from liability to charterer Apex for indemnity or contribution. The court observed that, to skirt being deemed a "vessel" for purposes of § 5(b), Apex sought to characterize itself as a time charter -- with no responsibility or control over the barge. The court concluded, however, that Apex's characterization ignores its charter status and the LHWCA's clear definition of vessels in § 2(21) which specifically includes a "charter." While charter or bare boat charterer is expressly mentioned in § 2(21), and "time charterer" is not, courts have held that a time charterer is likewise amenable to suit under § 5(b). In the Eleventh Circuit, the rule is that "[a] time charterer who has no control over a vessel assumes no liability for negligence of the crew or unseaworthiness of the vessel absent an agreement to the contrary." The court observed that there are essentially two types of charters -- a voyage/time charter, and a bareboat/demise charter. In determining what type of charter was created, the critical issue is who controls the vessel -- with a typical time charter, the vessel remains under the possession and control of the vessel's owners; however, with a bareboat charter, full or complete possession and control of a vessel is transferred to a charterer. A vessel charter need not be in writing to constitute a bareboat charter.

Here, the court determined that Apex had control of the barge and assumed the rights and obligations of the owner during the charter; as such, Apex was a "vessel" as a matter of law. While the charter agreement was silent as to whether or not Apex would control the barge and its crew, it did require Apex to clean the barge tanks before returning the vessel to Natures Way. Additionally, the division of responsibility between Natures Way and Apex clearly showed that Natures Way turned the barge completely over to Apex and relinquished all of its control. Apex had 100% control over the barge, the crew, the loading/unloading of the rain/wastewater cargo, etc. Natures Way did not have any involvement with Apex and/or the barge until the conclusion of the charter. Thus, Apex had the right to use the barge for its own purposes and Apex assumed responsibility for the command and operation of the barge. Accordingly, vessel Apex's indemnity claim against employer Flexicrew was prohibited.

Further, contrary to Apex's contention that Flexicrew waived its LHWCA immunity under the terms of Flexicrew's labor staffing contract with USES, § 5(b) specifies that an employer cannot waive immunity by any agreements or warranties. Finally, the court rejected Apex's contention that Flexicrew's denial of Brunson's LHWCA claim destroyed its immunity. Apex

argued that the maintenance of insurance coverage is insufficient to satisfy the § 5(a) requirement to "secure payment" of compensation. The court concluded that this assertion mischaracterized the clear language of the statute and overlooked precedent. Rather, Flexicrew was immune from Apex's claims because it is a statutory employer which "secured payment" as required by the statute by maintaining insurance. Because Flexicrew discharged its statutory obligation for compensating Brunson by maintaining insurance coverage, Flexicrew retained its immunity under the LHWCA.

Staffing Company's Motion for Summary Decision: Apex also sought indemnity/contribution from the staffing company USES as a third party beneficiary to the USES–Flexicrew contract. In its motion for summary judgment, USES asserted that as Brunson's "employer" it is immune from his suit under § 5(a) and (b) because (assuming Apex's status as a vessel), USES is Brunson's "borrowing employer" and Brunson's claims are thus barred. The court concluded that genuine issues of material fact existed as to USES' status as a "borrowing employer" under *Langfitt v. Federal Marine Terminals, Inc.*, 647 F.3d 1116 (11th Cir.2011).

**[Topic 2.21 DEFINITIONS -- SECTION 2(21) VESSEL; Topic 5 EXCLUSIVITY OF REMEDY AND THIRD PARTY LIABILITY]**

***Mason v. Sallyport Global Holdings, Inc.*, __ F.Supp.2d __, 2013 WL 6504625 (E.D.Va. 2013).**

Relevant to this review, the district court dismissed plaintiff's tort claims against Sallyport on the grounds that claimant's exclusive remedy is under the Defense Base Act ("DBA"). Plaintiff's complaint alleged that Corey Edge, his supervisor at Sallyport, assaulted him while they were both working for Sallyport at Camp Speicher, a military base in Iraq. Plaintiff further alleged that Sallyport is liable for the assault both because it was negligent in hiring Edge and allowing the assault to take place and under the theory of *respondeat superior.* Plaintiff additionally alleged that Sallyport is liable for intentional infliction of emotional distress for failing to provide him with timely medical care following the assault.

The court stated that the DBA incorporates the LHWCA's definition of injury as "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, ... includ[ing] an injury caused by the willful act of a third person directed against an employee because of his employment." 33 U.S.C. § 902(2). Based on this language, some courts have recognized an exception to the DBA and LHWCA's exclusive jurisdiction where the employer acted with specific intent to injure the employee.

Here, the court concluded that the DBA applies and provides plaintiff's exclusive remedy against Sallyport as long as the assault at issue falls within the DBA's definition of "injury." Plaintiff contended it did not, because Edge intentionally injured him and Edge's actions are not those of a "third party," but rather are imputed to Sallyport, both because Edge was plaintiff's supervisor at the time of the attack and because Sallyport was on notice of Edge's disposition for violence when it hired him. Thus, plaintiff asserted that his injuries as a result of his supervisor's assault fell within the exception that applies when an employer acts with specific intent to injure its employee.

The court found this argument unpersuasive. It concluded that the exception cited by plaintiff applies only where the employer itself specifically intends the injury; it is not sufficient that an employee, even one in a supervisory role, acts with specific intent to injure. While plaintiff alleged that Sallyport was negligent in hiring Edge, he did not allege that Sallyport in any way directed the assault or intended for it to take place. Plaintiff did allege that Sallyport intentionally inflicted emotional distress on him after the attack, but even accepting that such a claim can fall within the exception to the DBA, plaintiff failed to allege facts that would make that claim plausible. The disfavored tort of intentional infliction of emotional distress requires conduct, resulting in severe emotional distress, that is "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at *2 (citation omitted). Here, there were no facts to meet this high standard. As the DBA provided plaintiff's exclusive remedy against Sallyport, the court lacked jurisdiction to consider his claims.

**[Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy; Topic 2.2.3 Injury (fact of)]**

### B. Benefits Review Board

There have been no published Board decisions under the LHWCA in November 2013.

## II. Black Lung Benefits Act

[There are no black lung decisions to report for the month of November 2013]