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## Broadened Coverage Under the LHWCA

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This gives the indigent a short amount of time to secure the required money and likewise postpones immediately sending him to jail.

### Conclusion

It is submitted that the validity of *Frazier* rests in its application of the compelling state interest test to the question of the incarceration of indigents under the alternative sentence. Since *Griffin v. Illinois*,<sup>70</sup> there has been a growing concern to protect the rights of the poor in the administration of criminal justice. Also, the Supreme Court's recent questioning of the imprisonment of indigents, as indicated by *Williams, Morris, and Tate*, reveals that the Court will not hesitate to consider similar problems. It appears that the traditional "30 dollars or 30 days" fine, as applied to indigents, will be struck down by the Supreme Court when it is confronted with a factual situation paralleling *Frazier*.

Gerald E. Songy

### BROADENED COVERAGE UNDER THE LHWCA

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act.<sup>1</sup> In addition to raising benefits<sup>2</sup> and making administrative changes,<sup>3</sup> this recent legislation wrought considerable changes in the substantive maritime law of the United States. The provision dealing with third party liability was amended to restrict an injured employee's action against the shipowner to one based upon negligence, effectively denying the "warranty of seaworthiness" to longshoremen.<sup>4</sup> Also eliminated was the "warranty of workmanlike service," which had been read into maritime contracts to allow the shipowner to

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70. 351 U.S. 12 (1956).

1. 33 U.S.C. §§ 901-50 (1970), as amended by Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576 (Oct. 27, 1972), 86 Stat. 1251 [hereinafter cited as LHWCA 1972; reference to the former Act will be made to the 1970 edition of the United States Code].

2. LHWCA 1972 §§ 5, 10.

3. *E.g.*, the new legislation establishes a Benefits Review Board. LHWCA 1972 § 15.

4. LHWCA 1972 § 18. In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Supreme Court had extended this no-fault tort remedy to those who did work supposedly done by the members of the crew. For an analysis of the harbor worker's unseaworthiness remedy, see George, *Ship's Liability to Longshoremen Based on Unseaworthiness—Sieracki through Usner*, 3 J. MAR. & COMM. 45 (1971).

seek indemnification from the injured longshoreman's employer.<sup>5</sup> This Comment will deal with the third major substantive change made by the amendments, the broadened coverage provisions of the Act.

*Jensen: Situs and Status*

In 1917 the Supreme Court in *Southern Pacific Co. v. Jensen*<sup>6</sup> held that state workmen's compensation could not constitutionally apply to provide recovery for the death of a longshoreman occurring while unloading a vessel over navigable waters, reasoning that

"[t]he work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities . . . were clearly within the admiralty jurisdiction."<sup>7</sup>

The Court felt that to allow state legislation to apply to such an occurrence would prejudice the national uniformity of the maritime law envisioned by the constitutional grant of admiralty jurisdiction to the federal government.<sup>8</sup>

Implicit in *Jensen* was the premise that both of the bases of admiralty jurisdiction, locality and maritime subject matter,<sup>9</sup> had to be present before state workmen's compensation was

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5. LHWCA 1972 § 18. In *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the Court held that the shipowner could recover the amount paid to the injured longshoreman from his employer on the basis of an implied warranty of workmanlike service. See Proudfoot, "The Tar Baby": Maritime Personal-Injury Indemnity Action, 20 STAN. L. REV. 423 (1968).

6. 244 U.S. 205 (1917).

7. *Id.* at 217.

8. The federal judicial power extends to "all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2. It has always been assumed that this grant of judicial jurisdiction vested in the federal government the competency to formulate, judicially and legislatively, the rules for decision in admiralty cases. *Detroit Trust Co. v. Barlum S.S. Co.*, 293 U.S. 21 (1934). Since *Jensen* it has become axiomatic that federal legislative jurisdiction over maritime matters is to some extent exclusive. *Cf., e.g., Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). But see *American Waterways Operators, Inc. v. Askew*, 93 S. Ct. 1590 (1973).

9. Traditionally, tort jurisdiction was "exclusively dependent upon the locality of the act." *Thomas v. Lane*, 23 F. Cas. 957, 960 (C.C.D. Me. 1813). Contract jurisdiction "extends over all contracts . . . which relate to the navigation, business, or commerce of the sea . . ." *DeLovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815).

barred. Later cases explicitly required that the injury take place over navigable waters<sup>10</sup> and that the injured employee be engaged in work of a maritime nature.<sup>11</sup> Should either of the criteria be missing, the cases indicated navigation or commerce was not unconstitutionally affected by application of state compensation legislation.<sup>12</sup>

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10. *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922). Not yet envisioned were the cases allowing recovery for personal injury wherein admiralty jurisdiction was based solely upon the employment relationship. *See Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943) (maintenance and cure); and *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943) (Jones Act).

11. "In . . . [*Jensen*] the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here . . . their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential." *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 477 (1922). *Compare* *Ex parte Rosengrant*, 213 Ala. 202, 104 So. 409, *aff'd mem. sub nom. Rosengrant v. Harvard*, 273 U.S. 664 (1927), (held that maritime contract jurisdiction over the contract of employment was necessary to preclude the application of a state workmen's compensation statute), *with In re Lahti v. Terry & Tench Co.*, 240 N.Y. 292, 148 N.E. 527 (1925), *rev'd per curiam sub nom. State Indus. Bd. v. Terry & Tench Co.*, 273 U.S. 639 (1926) (state court had held that occurrence of the accident over navigable waters was sufficient to preclude recovery under state law). Examples of instances in which state compensation legislation was found applicable included injuries sustained in new ship construction, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922); the drowning of a marine diver sawing logs to aid the navigability of a channel, *Millers' Indem. Underwriters v. Braud*, 270 U.S. 59 (1926); injuries to those engaged in logging operations, *Sultan Ry. v. Department of Labor*, 277 U.S. 135 (1928); and injury to a cannery worker, *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 276 U.S. 467 (1928). On the other hand, injuries to those engaged in maritime employment could not be compensated under state law. Such occupations included seamen, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); longshoring, *Washington v. Dawson & Co.*, 264 U.S. 219 (1924); and the repairing of completed vessels, *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 (1928).

12. At the same time the Court allowed the application of state statutes other than workmen's compensation laws where "the specified modification of or a supplement to the rule applied in admiralty courts . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921). In *Garcia*, the application of a state wrongful death statute and its limitations provision was allowed. While the case is important to the present discussion in that it meant that an injured employee whose remedy lay under state law could find his action time-barred if he delayed by mistakenly proceeding in admiralty, confusion can arise from the attempt to discover if employment is non-maritime from an analysis of such a case. The term "maritime but local," used to describe situations in which state compensation laws were found to be constitutional because the employment was non-maritime (in that it did not affect navigation), has been used to describe all those situations in which state legislation concerning an arguably maritime matter was found to be permissible.

*The Longshoremen's Act of 1927: Structure and Traditional Interpretation*

*Jensen* left longshoremen and harbor workers burdened by nineteenth century concepts of industrial compensation, constrained to sue in tort subject to the defenses of contributory negligence, assumption of risk, and the fellow servant doctrine.<sup>13</sup> Desirous of affording the waterfront worker a compensation remedy, Congress attempted on two occasions to make state compensation applicable in those situations so affected.<sup>14</sup> Both were rejected as unconstitutional delegations of federal competence to the states.<sup>15</sup> It was obvious that only a complete scheme of federal compensation would meet the constitutional test set forth by the Court, and in 1927 Congress enacted the Longshoremen's and Harbor Workers' Compensation Act.<sup>16</sup>

Three provisions of the Act determined the employees to be covered. An "employee" was defined in the negative: "The term employee does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."<sup>17</sup> An "employer" under the Act was "an employer any of whose

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13. These comprise the so-called "unholy trinity." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 526-27 (4th ed. 1971). Land-based workers could recover under state compensation schemes and seamen could recover maintenance and cure without proof of fault.

14. Act of Oct. 6, 1917, ch. 97, 40 Stat. 395; Act of June 10, 1922, ch. 216, 42 Stat. 634.

15. In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), the widow of a bargeman drowned in navigable waters brought an action under the New York Compensation Law, as approved by the 1917 legislation, which had amended the savings clause to preserve "to claimants the rights and remedies under the workmen's compensation law of any state." The Court held since *Jensen* had found that the Constitution precluded states from altering the maritime law governing such an injury, Congress could not authorize such legislation.

In 1922, Congress tried again, this time excepting "masters and members of the crew" from the delegation, *i.e.*, amended the savings clause to preserve "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State . . . ." Apparently Congress had read *Knickerbocker Ice* as merely prohibiting federal legislation delegating competency to prescribe compensation remedies for seamen, as a seamen had been involved in that case. Congress apparently had not read *Jensen*, however, and in *Washington v. Dawson & Co.*, 264 U.S. 219 (1924), the Court reiterated its earlier position: stevedoring is a maritime employment, the injuries took place over navigable water, ergo delegation to the states would disrupt the uniformity of the maritime law required by the Constitution.

16. Act of March 4, 1927, ch. 509, 44 Stat. 1424.

17. 33 U.S.C. § 902 (3) (1970).

employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."<sup>18</sup> The real problems arose from the provision titled "Coverage":

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.*"<sup>19</sup> (Emphasis added.)

The requirement that the injury take place over navigable waters presented no real difficulty;<sup>20</sup> if the injury took place elsewhere, compensation under the Act was expressly excluded. Under the traditional view, the "validly provided by State law" phrase was an attempt to allow the state compensation schemes to operate to the limits of their constitutionality.<sup>21</sup> Thus, if the claimant was engaged in non-maritime employment, state compensation was available, and the Longshoremen's Act was inapplicable by its own terms. On the other hand, if the claimant was engaged in maritime employment, state compensation schemes were constitutionally inapplicable, and federal compensation would be recoverable.

The mutual exclusivity of the state and federal compensation schemes presented grave problems. It placed the claimant in the quandary of deciding which remedy to pursue, negating

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18. *Id.* § 902 (4).

19. *Id.* § 903 (a).

20. In his article, *The Conflict of Laws Problem Between the Longshoremen's Act & State Workmen's Compensation Acts*, 45 S. CAL. L. REV. 699, 712 (1972) [hereinafter cited as Larson, *The Conflict of Laws Problem*], Professor Larson discusses the few problems that did arise in determining whether the injury took place over navigable waters.

21. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-46, at 339 (1957) [hereinafter cited as GILMORE & BLACK]. Those who were to administer the Act were informed that the "validly provided by State law" phrase was to be so interpreted. *Longshoremen's Act, Opinion No. 30*, United States Employees' Compensation Comm'n, Washington, D.C., Jan. 26, 1928. The traditional interpretation was finally discarded in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). Few have been willing to accept the theory expressed by Justice Brennan's majority opinion that Congress did not intend to incorporate the Court's "maritime but local" doctrine into the Act. *See, e.g.*, the authorities cited in D. ROBERTSON, *ADMIRALTY & FEDERALISM* 304-05 nn. 3-7 (1970). Prof. Robertson is one of the few who accord some credence to Justice Brennan's ideas. *Id.* at 214.

one of the prime functions of a compensation remedy—alacrity and certainty. It placed on the Deputy Commissioners the burden of determining the constitutionality of the state act.

*Motor Boat, Davis, and the "Twilight Zone"*

In 1938, a janitor in a boat store made a one-time excursion upon navigable waters to help a fellow employee test an out-board engine. He was drowned when the boat capsized, and his widow sought compensation under the Longshoremen's Act. Under prior jurisprudence, compensation would have been barred, because such employment was obviously non-maritime. The Supreme Court, however, upheld an award under the Act<sup>22</sup> in a decision that seemed to abolish the "maritime but local" doctrine:<sup>23</sup>

"For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made."<sup>24</sup>

Apparently the situs of the injury was to be the sole criterion for recovery of federal compensation. Assuming that federal and state compensation were mutually exclusive (as the language of the Act indicates), the "Jensen line" dividing navigable waters from the shore would apparently delimit the application of state and federal compensation.

A year later, however, the Court rendered its startling<sup>25</sup> decision in *Davis v. Department of Labor & Industries*,<sup>26</sup> which made it clear that state compensation statutes still retained some vitality seaward of the "Jensen line." In *Davis*, an em-

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22. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

23. GILMORE & BLACK § 6-49, at 348: "Did the Motor Boat case mean that the entire 'maritime but local' doctrine had been overruled? And did it mean that the Court, as a matter of statutory construction . . . had returned to what might be called a strict Jensenism: that the States could not 'validly' provide relief for any injury occurring on navigable waters? Considering the facts of the case, both questions might have to be answered Yes . . ." See note 12 *supra*, for a discussion of the "maritime but local" doctrine.

24. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 247 (1941).

25. Professors Gilmore and Black indicate that "had it been suggested in a law review article, [it] would have been dismissed as academic fantasy bordering on insanity." GILMORE & BLACK § 6-49, at 348.

26. 317 U.S. 249 (1942).

ployee engaged in dismantling a bridge was killed while working on a barge situated on navigable waters, and his widow sought state compensation. The Supreme Court reversed the Washington court's denial of recovery,<sup>27</sup> stating that "there is . . . a twilight zone in which the employees must have their rights determined case by case . . . ."<sup>28</sup> The gist of the decision was that situations in which, under the "maritime but local" jurisprudence, uncertainty would exist as to which statute was applicable, the presumptive constitutionality of the state statute would compel an award under the state act; presumptive correctness of the Deputy Commissioner's administrative decision would uphold an award under the federal act.<sup>29</sup>

#### *Calbeck and Nacirema: Strict Situs Orientation*

The "twilight zone" was a concession by the Court to the demands of functional necessity<sup>30</sup>—so long as state and federal compensation were supposedly mutually exclusive, some means of administering the compensation schemes was needed which did not require a determination of a state's constitutional competency to provide recovery for injuries incurred over navigable waters. In 1962, the Supreme Court abrogated the need for the "twilight zone" by holding, in *Calbeck v. Travelers Insurance Co.*,<sup>31</sup> that in passing the Longshoremen's Act,

"Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."<sup>32</sup>

State and federal compensation were therefore no longer mutually exclusive.

In *Calbeck*, an employee engaged in new ship construction was killed, and his widow sought federal compensation. In *Grant*

27. *Davis v. Department of Labor and Industries*, 12 Wash. 2d 349, 121 P.2d 365 (1942).

28. 317 U.S. at 256.

29. GILMORE & BLACK § 6-49, at 353.

30. Justice Frankfurter concurred in *Davis*, but recognized that "[t]heoretic illogic is inevitable so long as the employee in a situation like the present is permitted to recover either under the federal act or under a state statute." 317 U.S. at 259 (citations omitted).

31. 370 U.S. 114 (1962).

32. *Id.* at 117.

*Smith-Porter Ship Co. v. Rohde*,<sup>33</sup> the Court had previously held that ship construction was not maritime employment, and that injuries sustained in such employment were compensable under state law. The Fifth Circuit, relying on *Rohde*, found the Long-shoremen's Act inapplicable, as recovery could be provided by state law.<sup>34</sup> The Supreme Court held that a consideration of the employee's status was unnecessary, so long as the situs of the injury was over navigable waters. While much criticized for apparently reading out of the Act the problematical provision "if recovery . . . may not be validly provided by state law,"<sup>35</sup> situs orientation certainly accommodated administration of the Act.

Some courts, however, viewed *Calbeck* not as a construction of the Act as situs-oriented, but as simply a call for expanded coverage of the federal act and its more liberal

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33. 257 U.S. 469 (1922).

34. *Travelers Ins. Co. v. Calbeck*, 293 F.2d 52 (5th Cir. 1961). It might be noted that two post-Davis decisions had intimated that prior decisions finding certain types of employment to be compensable under state or federal law did not preclude a finding that such employment fell within the "twilight zone" and was hence compensable under either scheme of compensation. *Moore's Case*, 323 Mass. 162, 80 N.E.2d 478, *aff'd mem. sub nom.* *Bethlehem Steel Co. v. Moore's*, 335 U.S. 874 (1948); and *Baskin v. Industrial Accident Comm'n*, 89 Cal. App. 2d 632, 201 P.2d 549, *rev'd per curiam*, 338 U.S. 854 (1949), *on remand to the state court*, 97 Cal. App. 2d 257, 217 P.2d 733, *aff'd mem. sub nom.* *Kaiser Co. v. Baskin*, 340 U.S. 886 (1950). Both cases involved injuries to ship repairmen who sought state compensation. In *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 (1923), the Supreme Court had held such to be maritime employment and hence noncompensable by the states. In *Moore's Case*, however, the Massachusetts court decided to "treat the *Davis* case as intended to be a revolutionary decision . . . designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea . . . even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other." 323 Mass. at 167, 80 N.E.2d at 481. Accordingly, state compensation was awarded, and the Supreme Court affirmed, citing *Davis*. 335 U.S. 874, 875 (1948). The California court, on the other hand, decided that the "case instead of being in the 'twilight zone' is definitely on the same side of the line as the numerous cases . . . which have followed the rule which *Southern Pac. Co. v. Jensen* [citations omitted] laid down . . ." *Baskin v. Industrial Accident Comm'n*, 89 Cal. App. 2d 632, 637, 201 P.2d 549, 553 (1949), and denied state compensation. The Supreme Court reversed, citing *Davis* and *Moore's*, 338 U.S. 854 (1949). This reasoning of the Court could easily have been applied in *Calbeck* to expand the twilight zone on the federal side (*i.e.*, in a situation where the precedent was clear that state compensation could "validly be provided by State law").

35. Mr. Justice Stewart in dissent wrote, "The Court concludes that Congress did not really mean what it said. I cannot join in this exercise in judicial legerdemain. I think the statute still means what it says, and what it has always been thought to mean . . ." *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 132 (1962). The literature has been equally harsh with the Court's reasoning, though generally approbative of the result. See authorities cited in D. ROBERTSON, *ADMIRALTY & FEDERALISM* 304-05 nn. 3-7 (1970).

recovery.<sup>36</sup> However, in *Nacirema Operating Co. v. Johnson*,<sup>37</sup> the Court concluded that Congress "chose . . . the line in *Jensen* separating water from land at the edge of the pier"<sup>38</sup> to limit coverage of the Act rather than covering all maritime employment irrespective of the situs of the injury. While perhaps questions could arise concerning the extent to which state workmen's compensation statutes applied seaward of the "Jensen line,"<sup>39</sup> the coverage of the federal act was definitively delimited. Thus, a discussion of the status of the employee was no longer necessary.

### *Coverage under the Amended Act*

The coverage provisions of the Longshoremen's and Harbor Workers' Compensation Act were amended by changing three provisions of the Act. The term "employee" now means "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and a harborworker including a ship repairman, shipbuilder and shipbreaker."<sup>40</sup> Second, "employer" was redefined as "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, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."<sup>41</sup> Finally, the section titled "Coverage" was amended by deleting the cryptic phrase, "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law," and by adding that recovery was available for injuries occurring upon navigable waters of the United States "including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."<sup>42</sup>

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36. *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968), *rev'd sub nom. Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *Michigan Mut. Liab. Co. v. Arrien*, 233 F. Supp. 496 (S.D.N.Y. 1964), *aff'd*, 344 F.2d 640 (2d Cir. 1965).

37. 396 U.S. 212 (1969).

38. *Id.* at 224.

39. For an exhaustive treatment of the jurisprudence dealing with this problem, see Larson, *The Conflicts of Laws Problem*, *supra* note 20, at 721.

40. LHWCA 1972 § 2, *amending* 33 U.S.C. § 902 (3) (1970).

41. *Id.*, *amending* 33 U.S.C. § 902 (4) (1970).

42. *Id.*, *amending* 33 U.S.C. § 903 (a) (1970).

In *Nacirema Operating Co. v. Johnson*,<sup>43</sup> the Supreme Court indicated that extension of the coverage of the Longshoremen's Act to all injuries within the admiralty jurisdiction would meet constitutional muster.<sup>44</sup> The Court's later decision in *Victory Carriers v. Law*,<sup>45</sup> however, denied extension of admiralty jurisdiction to shoreside injuries solely on the basis of the injured employee's status as a longshoreman.<sup>46</sup> The amended coverage provisions would be unconstitutional if solely based upon the power to legislate in the field of maritime affairs. Furthermore, even if status was enough to confer admiralty jurisdiction, extension of the coverage to ship builders is constitutionally questionable, as traditionally building a ship is not a maritime contract, and therefore such employment is non-maritime.<sup>47</sup> However, it is a fundamental tenet of constitutional law that if Congress has the power to enact legislation under *any* of its enumerated powers, it will be upheld against constitutional attack, irrespective of an effect which could not be reached directly (e.g., the extension of the admiralty jurisdiction).<sup>48</sup> As Congress could legislate under the commerce clause to provide a system of compensation for employees who so directly affect international and interstate commerce, the amendments should withstand constitutional attack.

The obvious intent of the amendments is to legislatively overrule *Nacirema Operating Co. v. Johnson*,<sup>49</sup> thus providing compensation "to a longshoreman or a ship repairman or builder . . ." that would "not depend on the fortuitous circumstance

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43. 396 U.S. 212 (1969).

44. "[W]e have no doubt that Congress had the power to choose either of these paths [strict situs orientation or coverage co-extensive with the admiralty jurisdiction] in defining the coverage of its compensation remedy . . . . The invitation . . . must be addressed to Congress, not to this Court." *Id.* at 223.

45. 404 U.S. 202 (1971).

46. The requirement of maritime subject matter set forth for admiralty tort jurisdiction in *Executive Jet, Inc. v. City of Cleveland*, 93 S. Ct. 493 (1973), would seem to be an additional requirement, not a substitute requirement, for maritime situs.

47. *E.g.*, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922). It might be argued that after *Executive Jet, Inc. v. City of Cleveland*, 93 S. Ct. 493 (1973) (held the mere occurrence of an injury over navigable waters not enough to confer admiralty jurisdiction), extension of coverage to shipbuilders injured even on navigable waters would be constitutionally questionable. The Calbeck decision, however, should be dispositive of this issue, and might even be read as abrogating the ancient rule withholding the jurisdiction from such contracts.

48. *E.g.*, *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964).

49. 396 U.S. 212 (1969).

of whether the injury occurred on land or over water."<sup>50</sup> Congress did, however, apparently intend to limit coverage under the amended Act to "high-risk maritime activity,"<sup>51</sup> and not extend compensation to anyone injured in the broadened area.<sup>52</sup> Formerly, recovery under the Act was restricted to high risk employment by the requirement that the injury occur over navigable waters, thus excluding clerical workers and the like. Now the Act accomplishes this same purpose by more narrowly defining "employee." Had Congress in its desire to cover all injuries sustained by longshoremen, ship repairmen, ship builders, and others protected by the original Act merely extended the coverage of the Act inland, any worker injured in that locality would have been covered. Under *Calbeck* and *Nacirema* coverage was situs-oriented; any employee, whether or not engaged in maritime employment, could recover for injuries sustained on navigable waters, provided only that his employer had "employees . . . employed in maritime employment."<sup>53</sup> Now, in order to recover, the employee must once again show his won status as a maritime employee before the broadened situs-oriented coverage provision will inure to his benefit.

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50. SENATE COMM. ON LABOR & PUBLIC WELFARE, LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972, S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972).

51. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 225 (1971) (appendix to dissenting opinion of Douglas, J.).

52. "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity [that part which occurs over navigable waters] . . . . The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo . . . . Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person . . . at least some of whose employees are engaged, in whole or in part in some form of maritime employment." SENATE COMM. ON LABOR & PUBLIC WELFARE, LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972, S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972).

53. In *Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 334 (1953), the Court said "§ 902 (4) is directed at the employer when it speaks of maritime employment, not at the work the employee is doing. . . . The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act." *Id.* at 340. What the Court neglected to say is that its "maritime but local" decisions had been incorporated into the Act in the clause excluding recovery if compensation could "validly be provided by State law," and these decisions turned on whether the *employee's* employment was maritime. *Cf.* text at note 12 *supra*.

It is submitted that the decision as to whether an injured employee is "engaged in maritime employment" may reintroduce the problems which were evident when a determination of whether compensation "may not validly be provided by State law" was required.<sup>54</sup> The issue is no longer of constitutional magnitude, as it was when the Deputy Commissioners were called upon to determine whether a state could have validly provided a remedy without unduly disturbing the uniformity of the maritime law. However, the question will certainly arise as to what standards are to be relied upon in determining what is "maritime employment." The "maritime but local" or the "twilight zone" jurisprudence could be reinvestigated; all cases allowing compensation under the federal act before *Davis* or under either act thereafter could be construed as having found the employment to have been maritime. The argument could also be made that the confusion over the basis of the Jensen decision has rendered all prior jurisprudence a hopeless maze, and that a new determination of what is "maritime employment" is required. Hopefully, the courts will not infer that Congress intended to eliminate compensation in areas to which it had previously been granted (*i.e.*, over navigable water), and leave the matter to be determined as a question of fact by the Deputy Commissioners, who presumably will construe it liberally.

#### *Preemption of State Compensation Legislation*

Presumably, recovery will be available under state statutes in those instances where federal compensation is found to be inapplicable. Problems may arise, however, if state compensation is sought in areas included by the expanded coverage. The problem is not a constitutional bar to application of state compensation schemes, for even the jurisprudence prior to the 1927 Act, generally restrictive of state legislation, recognized that injuries sustained in maritime employment are constitutionally compensable by the states if not incurred over navigable waters.<sup>55</sup> The problem arises, then, as a matter of statutory

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54. *E.g.*, would coverage be extended to a cannery worker or a lumberman? In *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 276 U.S. 467 (1928), and *Sultam Ry. & Timber Co. v. Department of Labor*, 277 U.S. 135 (1928), status as maritime employees was denied to these categories of workers.

55. *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922).

construction: does the extended coverage preempt state legislation from applying concurrently in areas in which state legislation could constitutionally apply in the absence of federal legislation? The problem could not arise under the old Act, because it expressly recognized the validity of state legislation within their constitutional limits.<sup>56</sup> Approaching the problem as *res nova*, then, it is submitted that no such preemption should be found. The purpose of expanding federal coverage was to insure a substantial remedy.<sup>57</sup> In light of the confusion likely to arise as to the coverage of the amended Act, it would seem contrary to this purpose to force an injured employee to seek compensation under the state or federal scheme, only to be told his guess was incorrect.<sup>58</sup> Dual coverage would seem to aid rather than hinder this function.<sup>59</sup> The employer is in no way disadvantaged, as the cost of insuring for both acts is minimal,<sup>60</sup> and double recovery would of course not be allowed.<sup>61</sup>

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56. See Larson, *The Conflicts of Laws Problem* at 721 for an excellent analysis of the constitutional range of state workmen's compensation statutes in the era from *Davis* until *Nacirema*.

57. In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), the Supreme Court set forth the criteria by which to judge the validity of state legislation challenged under the supremacy clause. All of those criteria would seem to support the validity of state compensation schemes although federal compensation would also be available. "Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the . . . powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 230 (citations omitted). In spite of *Jensen*, federal interest in compensating injured employees should not be found to be "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.*

Note should be taken of *Askew v. The American Waterways Operators, Inc.*, 93 S. Ct. 1590 (1973), which perhaps foreshadows a tendency to allow the states great latitude in supplementing federal legislation in the area of maritime affairs.

58. The federal compensation should not then be "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

59. This is not an area where "state policy may produce a result inconsistent with the objective of the federal statute," as state legislation should only be allowed to supplement, not restrict, federal recovery. *Id.*

60. 3 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 89.70, at 460 n.85 (1971).

61. In *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), the Court held that acceptance of state benefits did not constitute an election of remedies to bar later supplemental recovery under the Longshoremen's Act. Later cases, however, held that an adjudication of the applicability of the state act would preclude recovery under the federal act. *Cf., e.g.,* *Shea v. Texas Employers' Ins. Ass'n*, 383 F.2d 16 (5th Cir. 1967). Similar standards could be formulated for determining when a claimant has made a binding election of remedies, to protect employers and their insurers from the vexation of multiple claims.

*Conclusion*

In principle, the amended coverage provisions are to be welcomed. Recovery for "these hard-working men, engaged in a somewhat hazardous employment,"<sup>62</sup> should not depend upon whether the injury takes place on the vessel or a few feet away on the dock. However, once again calling for a determination of whether the employee's status can be classified as "maritime" may reopen the Pandora's Box which was closed by *Calbeck* and *Nacirema*.

*Harold K. Watson*

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62. SENATE COMM. ON THE JUDICIARY, COMPENSATION FOR EMPLOYEES IN CERTAIN MARITIME EMPLOYMENTS, S. REP. No. 973, 69th Cong., 1st Sess. 16 (1926).