Longshore Act or Jones Act?
The Uncertainty Zone

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Confusion in Two Acts

- My company (AEU) writes workers’ compensation insurance under the Longshore and Harbor Workers’ Compensation Act. The Longshore Act excludes Jones Act seamen from coverage.

- The Jones Act only covers seamen (crewmembers of a vessel).

- The cost of coverage is based primarily on the exposed payroll.

- Underwriters struggle constantly with issues of payroll that can go either way because of coverage uncertainty between the two Acts.
The Longshore and Harbor Workers’ Compensation Act (33 U.S.C. 901) is a workers’ compensation law. It was enacted in 1927 in delayed response to the U.S. Supreme Court’s decision in Southern Pacific Ry. Co. v. Jensen, 244 U.S. 205 (1917)

The extension of the new state workers’ compensation laws to workers injured over the navigable waters of the U.S. was unconstitutional

State workers’ compensation law coverage ended at the water’s edge – at the Jensen line
The Jones Act is a cabotage law and liability remedy. Cabotage – “A vessel may not provide any part of the transportation of merchandise by water, or by land or water, between points in the U.S. to which the coastwise laws apply, either directly or via a foreign port ...”, generally unless the vessel is built (and rebuilt) in the U.S., crewed by Americans, and owned by Americans.” 46 U.S.C. 55102.

Applies to U.S. navigable waters and points on the outer continental shelf of the U.S.

The Jones Act is protectionist and also a key element in national defense – the nation needs a domestic shipbuilding capacity and a trained merchant marine.
The Jones Act is also a liability remedy for seamen. Section 27 of the Merchant Marine Act of 1920 (Jones Act) (46 U.S.C. 30104) was enacted in response to the U.S. Supreme Court’s decision in The Osceola, 189 U.S. 158 (1903). The Court in The Osceola had summarized seamen’s rights under the general maritime law. These rights unseaworthiness, maintenance and cure) did not include a tort remedy for negligence. The Jones Act extended to seamen the rights given to railroad workers by the Federal Employers Liability Act (FELA) in 1908.
“Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, ... and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury ....”
Both the Longshore Act and the Jones Act arose out of and were part of the sweeping legislation on behalf of workers enacted during the Progressive Era in the U.S. (1890–1920)

These were considered to be “remedial” laws, addressing abuses and providing protection to workers following the Industrial Age.

They are liberally interpreted and are still referred to today as remedial statutes by the courts.

Seamen are emphatically “wards of the court.”
An Insurance Problem

- It is often difficult to distinguish liability under the Jones Act and the general maritime law from workers’ compensation liability under the Longshore and Harbor Workers’ Compensation Act.
- The Jones Act covers crewmembers of vessels and the Longshore Act covers land based maritime workers.
- The two laws are mutually exclusive by design but in practice coverage often seems to overlap.
Two Laws

- Vessel owners must insure their liability for the illness, injury, or death of crewmembers under the Jones Act and the general maritime law (the judicially created, international remedies of maintenance and cure, unseaworthiness, wrongful death and retaliatory discharge available to seamen).

- Maritime employers must provide workers’ compensation insurance under the Longshore and Harbor Workers’ Compensation Act for employees who work on or around vessels but who are not crewmembers.
Two remedies

- Supreme Court affirms Ninth Circuit
- Injured maritime worker can accept payments under the Longshore Act while filing a Jones Act lawsuit – in fact, the Longshore Act contemplates this: Section 913(d) – time for filing a claim tolled while Jones Act suit is pending, and Section 903(e) – employer gets a Longshore Act credit for any amounts paid under the Jones Act
Coverage – Longshore Act

- The Longshore Act states that, “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....” (33 U.S.C. Section 902(3)) This is the status test for coverage, and it covers hundreds of occupations.

- The Longshore Act expressly excludes from coverage “a master or member of a crew of any vessel”. (33 U.S.C. Section 902(3)(G))
Coverage – Longshore Act

- The Longshore Act states that, “... compensation shall be payable under this Act 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).” (33 U.S.C. Section 903(a))
- This is the \textit{situs} test for coverage
The Longshore Act does not define key terms such as “maritime employment”, “harbor worker”, “navigable waters”, and “other adjoining area”; the Jones Act does not define who is a “seaman”. And neither law defines a “vessel”.

The courts try to define the geographic and occupational tests for Longshore Act coverage (status and situs) and the Jones Act’s occupational, status based test for who is a member of a crew of a vessel on a case by case basis.
The case law has established that a seaman under the Jones Act is the same as the Longshore Act’s “master or member of a crew of any vessel”. It has also been determined that a “vessel” under the Longshore Act is the same as a “vessel” under the Jones Act. But the courts recognize an “Uncertainty Zone” where many occupations seem to fit the coverage requirements of both Acts. And we still have not adequately defined a vessel
Once again, the Longshore Act covers “maritime” employees, but not Jones Act seamen, and the Jones Act covers only masters (captains) and crewmembers (Jones Act seamen). The two are mutually exclusive; the Longshore Act covers land based maritime workers, and the Jones Act covers sea based crewmembers.

The problem is that it’s not always possible to determine who’s who before a loss occurs, and there’s a big downside for the employer if he gets it wrong.
Longshore Act Insurance Requirement

- The Longshore Act in Section 932 requires that every maritime employer obtain Longshore Act coverage from an insurance carrier authorized by the U.S. Department of Labor, or obtain the Department’s authorization to self-insure. If an employer fails to meet this insurance requirement, the following provisions apply:
Section 905(a)

“If an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, 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.”
Section 938(a)

“Any employer required to secure the payment of compensation under this Act who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.”

The corporate President, Secretary, and Treasurer are also liable
Section 938(a)

“… where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said Act ....”
Jones Act insurance coverage is liability coverage usually provided in the vessel owner’s protection and indemnity policy, or by adding the maritime coverage endorsement to the workers’ compensation and employer’s liability policy, or by adding a marine liability endorsement to the commercial general liability policy.

Given the potential size of jury verdicts, not to mention the expense of defending against a Jones Act lawsuit, the vessel owner must have adequate maritime liability insurance coverage.
“It is impossible to define the phrase ‘member of a crew’ in general terms: the words are colloquial and their fringe will always be ragged. Perhaps the best hope is that, as the successive variants appear, they will finally serve rudely to fix the borders.” Bodden v. Coordinated Caribbean Transport, Inc., 369 F. 2nd 273 (5th Cir. 1966)
“Thus, despite our continued insistence that a Jones Act ‘seaman’ and a ‘crew member’ excluded from the Longshore Act are one and the same (in other words that the statutes are mutually exclusive) we recognize that in a practical sense, a ‘zone of uncertainty’ inevitably connects the two Acts.” McDermott inc. v. Boudreaux, 679 F. 2nd 452 (5th Cir. 1982)
“The recognition by this circuit that the Jones Act and the Longshore Act each requires a ‘liberal application in favor of claimants to affect purposes’ has further contributed to the zone of uncertainty and to the dilemma of injured workers within it.” Simms v. Valley Lines Co., 709 F. 2nd 409 (5th Cir. 1983)

Employers face the same dilemma
“… drawing the distinction between those maritime workers who should qualify as seamen and those who should not has proved to be a difficult task and the source of much litigation particularly because ‘the myriad circumstances in which men go upon the water’ confront courts not with discrete classes of maritime employees, but rather with a spectrum ranging from the blue water seaman to the land based longshoreman.” Brown v. ITT Rayonier, Inc., 497 F. 2nd 234 (CA5 1974)
“The federal courts have struggled over the years to articulate generally applicable criteria to distinguish among the many varieties of maritime workers, often developing detailed multi-pronged tests for seaman status. Since the 1950s, this Court largely has left definition of the Jones Act’s scope to the lower courts. Unfortunately, as a result, ‘the perils of the sea, which mariners suffer and ship owners insure against, have met their match in the perils of judicial review’”. The U.S. Supreme Court in Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) quoting from Gilmore & Black, The Law of Admiralty.)
Uncertainty Zone – Last One

“We have made a labyrinth and got lost in it. We must find our way out.” Johnson v. John F. Beasley Construction Co., 742 F. 2nd 1954 (CA7 1984)
The Longshore Act has both a status (occupational) and a situs (geographical/functional) test for coverage. An employee’s occupation must be “integral” to the unloading/loading of cargo or shipbuilding/ship repair (status) and he must be working over the navigable waters of the U.S., on an “enumerated” site, or in an adjoining area customarily used by an employer for covered activity (situs). Coverage includes a wide range of occupations, including maintenance and repair workers, construction workers, contractors of all kinds, and everyone whose work requires them to be on the navigable waters.
The Jones Act covers crewmembers of vessels

What Is a Crewmember?
The Jones Act uses an occupational test, related to the worker’s relationship to a vessel. The worker’s duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have an employment connection to a vessel in navigation, or to an identifiable group of vessels under common ownership, that is substantial in terms of both duration and nature (Chandris inc. v. Latsis, 515 U.S. 347 (1995))
Courts use a 30% rule of thumb in reference to the substantial duration measure in Jones Act cases. A worker who spends less than 30% of his work time on board a vessel is probably not a Jones Act seaman, but this test is not conclusive.
The crewmember must be “injured in the course of employment”

Common law principle – while furthering the employer’s (or the ship’s) business

Often cited test – does the employee act entirely of his own impulse, for his own amusement, and for no purpose of or benefit to the employer?

Cited in Amanda Beech v. Hercules Drilling Company, LLC, 691 F.3d 566 (5th Cir. 2012) – deceased accidentally, fatally shot by fellow crewmember while a handgun was being displayed on a jack-up drilling rig. This was not “in the course of employment”

U.S. Supreme Court has denied review
What Is a Vessel?

Stewart v. Dutra Construction Co., 543 U.S. 481 (2005) – Super Scoop dredge – the Supreme Court adopted a very broad definition of vessel, applying 1 U.S.C. Section 3: “The word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”

Anything that floats?
What is a vessel?

A conflict in interpretation persisted even after the Supreme Court’s decision in [Stewart](#)

An array of owner’s of property, such as floating casinos, dockside restaurants, and a wide variety of special purpose work platforms, still were not satisfied with the vessel status question

The federal Fifth and Seventh Circuits Courts of Appeals continued to factor in the owner’s intent in resolving vessel status questions while the Eleventh Circuit emphasized ability to float
Lozman v. The City of Riviera Beach, Florida, (133 S. Ct. 735 (2013)) decided on January 15, 2013, involved a floating home that the Eleventh Circuit Court of Appeals had decided was a vessel.

The Supreme Court agreed to hear the appeal, raising expectations, or hopes, that an improved vessel status test would be forthcoming.

The Court took a close look at the language of 1 U.S.C. Section 3, which defines a vessel as “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”
In *Lozman*, the Supreme Court determined that, “a reasonable observer, looking to the home’s physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water.”

The Court acknowledged that its “reasonable observer” test “is neither perfectly precise nor always determinative. Nonetheless, we believe the criterion we have used, taken together with our example of its application here, should offer guidance in a significant number of borderline cases. Moreover, borderline cases will always exist.”
Remedies

- The initial choice of remedy is with the injured worker.
- The Longshore Act is a workers’ compensation law providing no fault, prompt payment of statutory benefits and medical treatment. It is designed to be predictable for the employer and quick for the worker. It is administered by the U.S. Department of Labor, which offers levels of informal dispute resolution services and formal adjudication with judicial review.
Remedies

- The Jones Act provides a negligence remedy, enforced by filing a lawsuit with the right to a jury trial. The potential recovery can far exceed the limit of workers’ compensation benefits. Factors for recovery include pain and suffering, past and future wage loss, past and future fringe benefit value, medical costs, loss of quality of life, and a host of other damage measures.

- There is no government agency involved. The remedy is with the courts, and the courts afford favorable treatment to seamen.
Fees for the successful claimant’s attorney provide additional motivation in choice of remedies. Under the Longshore Act an attorney’s fee must be approved by the adjudicator at the U.S. Department of Labor, based on a detailed fee request listing services rendered and the amount of time spent for each component of work as well as the hourly rate charged. Under the Jones Act, attorney’s fees typically amount to 33% to 40% (plus costs) of the total recovery, depending on whether the matter is settled or goes to a judgment.
An injured worker in the “uncertainty zone” can be expected to seek recovery under both the Jones Act and the Longshore Act either simultaneously or sequentially. The employer must defend twice. The courts are not uniform on the application of such issues as res judicata and collateral estoppel – when and how a claim under one law will be affected or precluded by a claim under the other. The acceptance of voluntary payments under the Longshore Act will not preclude a Jones Act suit by the injured worker. A final Order of a court, however, which adjudicates the factual issue of seaman status and awards damages under the Jones Act will likely preclude a Longshore claim. Likewise, a final administrative Award under the Longshore Act, adjudicating the worker’s non-seaman status, will likely preclude a subsequent Jones Act suit.
Example One

- A Cargo Operations Manager, employed by a terminal operator which is also the owner of a fleet of barges, is injured when he falls while climbing a ladder from the dock to one of the barges. His duties require him to spend about 75% of his time on board the employer’s barges, supervising the loading of cargo.

- Should this worker be covered under the Longshore Act or under the Jones Act (the courts use a 30% rule of thumb – if the worker spends less than 30% of his work time on board a vessel then he is probably not a Jones Act seaman)?
Example One

- In favor of Jones Act coverage is the fact that the employee spent 75% of his working time on board the employer’s vessels and was injured on one of the barges.
- In favor of Longshore Act coverage is the occupational analysis. The total circumstances of the worker’s duties must be considered. This employee’s primary duty involved the supervision of loading and unloading cargo. This is land based work.
Example One

- In this case, the worker was determined to be a Longshore Act land based worker by DOL’s Benefits Review Board
Example Two

- The employer operates a barge repair facility and owns two tugboats. The employee works as a welder/fitter, and also as a trainee mate/deckhand on the tug.
- The employee died while working on board one of the vessels when he fell overboard and drowned.
- The widow filed a Jones Act lawsuit, which she resolved with the employer for a cash settlement. She then filed a claim for widow’s benefits under the Longshore Act.
- Outcome?
Example Two

- After a detailed analysis of the time the employee spent in each of his job categories, to determine whether he performed a substantial part of his duties on board a vessel so that he could qualify as a seaman, the U.S. Department of Labor’s Administrative Law Judge found that the worker spent most of his time as a welder. The widow was awarded benefits under the Longshore Act.

- The widow was paid under two mutually exclusive statutes. There was no double recovery, however, since the employer is entitled to a credit for its Jones Act settlement payment against its Longshore Act liability under Section 903(e).

- But the employer did have to bear the expense of defending against both claims.
Example Three

- An ironworker works for a bridge building contractor. He spends a factually disputed amount of his time working from a derrick crane barge erecting work platforms around bridge pilings and setting bridge girders.
- He also has some factually disputed responsibilities assisting in the navigation and maintenance of the barge.
- He is land based in that he travels to and from the barge from his home each workday.
Example Three

- The crane barge is a vessel, so is the ironworker a member of the crew? Does he have a Jones Act remedy, or is he a land based worker with a workers’ compensation remedy, either Longshore Act or state act?
Example Three

- Remember the **Chandris** test
- **Part One** – assist in the mission or function of the vessel,
- **Part Two** – substantial employment connection to a vessel in terms of both nature and duration
- If he’s over 30% of his work time on the barge, he’s got a good claim for Jones Act seaman status
- These construction worker, floating work platform claims go both ways
Conclusion

- Employers with employees in this “uncertainty zone” should insure against both Jones Act and Longshore Act liability
- You can watch a $200,000 workers’ compensation loss turn into a $2,000,000 liability loss, and/or force the (uninsured) corporate officers to reach into their own pockets to defend themselves. Watch out if the employer does not have the coverage that he needs. A large uninsured Jones Act loss will have the vessel owner looking for someone to blame (errors and omissions?)
Conclusion

There are several key issues in this jurisprudence that are unresolved, or that are the subject of conflicts among the federal circuits.

Issues such as “in the course of employment”, the new “reasonable observer” test from Lozman, the factual disputes under the Chandris crewmember test, the many mixed duties employees, the wide variety of construction platforms and oil and gas platforms and the persistent questions involved in identifying Longshore Act coverage all put the maritime employer in a difficult position.
What’s the answer? “There ain’t no answer. There ain’t going to be any answer. There never has been an answer. That’s the answer.” (Gertrude Stein)

Actually, the answer is, if there is any doubt at all, get coverage for both exposures – always an unpopular option for employers who are buying insurance against two mutually exclusive exposures.
Questions?

- Thank you, and
- Check out AEU’s Longshore Blog at amequity.com