Does The Longshore And Harbor Workers' Compensation Act Preempt New York State Labor Law In Maritime Construction Accident Cases

DANIEL G. McDERMOTT*

Whether a case falls within the purview of admiralty jurisdiction, either in State or Federal Court, can have a significant impact on remedies available to an injured employee. The threshold test is whether the struct ure on navigable waters can be classified as a "vessel". If so, the Federal Longshore and Harbor Workers' Compensation Act ("LHWCA") will apply. If not, the New York State Labor Law §§240(1) and 241(6) will apply. The standards utilized, the burden of proof needed and the applicability of comparative negligence are all effected.

Whether the LHWCA preempts the New York State Labor Law in maritime construction accidents involves the interplay between the two statutes, and a question of whether the dock builder or some other maritime worker who does not go to sea can receive the benefits of the New York State Labor Law, which has strict liability requirements. The short answer to the question is - "It depends!"

Before discussing the interplay between the two statutes, it is imperative that they be reviewed briefly.

Initially, there are three sections of the Labor Law which are relevant to this topic. The first is §200, which essentially is a codification of the duty the employer had at common law to provide a safe work place for its employees. It requires a showing of negligence on the employer's part before liability can attach. The Labor Law basically applies to construction workers or individuals involved in renovation, cleaning of buildings, and things of that nature.

The next section is Labor Law §240(1) which deals with elevation-related hazards. This is a strict liability statute, meaning that there is no requirement that negligence be established. Basically, all that an employee needs to show is that he/she was injured on the job and that there was a casual connection between a violation of the statute and the injury sustained. Essentially, the employer is liable for the injuries even if the employer argues that it did not do anything wrong.

The third section of the Labor Law that has applicability is §241(6). This section requires that an employer of an individual involved in construction0, excavation or demolition work shall have a work area that is constructed so as to provide reasonable and adequate protection and safety to the persons employed or frequenting the work area.

New York Labor Law §§200, 240(1) and 241(6) apply to: all contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.

Now, §905 (b) of the LHWCA is also directed to a specific class of employees, namely, maritime workers who are not seamen. Seamen are covered under a different statute, 46 U.S.C. §688, commonly known as the Jones Act. This act extends the Federal Employer's Liability Act (FELA) to seamen. What is the different between a seaman and a non-seaman maritime employee? Essentially, the seaman is involved in the operation of the vessel, while the maritime worker is land-based. The maritime worker may work on a vessel when it is stationary, such as a barge. If the employee is injured during the course of his employment, he cannot sue his employer, but must take benefits as provided in the statute. Essentially, the LHWCA is a maritime employee's workers compensation scheme. On the other hand, if he is not the employee of the vessel and is injured as the result of negligence of the owner of the vessel, or by the vessel itself, §905(b) provides that he may sue the vessel owner even if the vessel is owned by his employer. In such a case, the employer is known to have a "dual capacity". In such a case, the employer can be sued as "vessel owner' but not in his capacity as employer. §905(b) is not a strict liability statute, but it allows the employee to recover

* *Daniel G. McDermott is a Member of the law firm Marshall Dennehey Warner Coleman & Goggin in their New York City office.*

Does The Longshore And Harbor Workers' Compensation Act Preempt New York State Labor Law In Maritime Construction Accident Cases

if he can establish that there was negligence on the part of the vessel that resulted in or proximately caused the employee's injuries.

The LHWCA set forth the requirements for coverage. "Status" refers to the nature of the work performed; "situs" refers to the place of performance. The employee claiming benefits under the LHWCA must be engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, including any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. There are specific exclusions which apply to status.

The jurisdictional trigger for a claim under the LHWCA is an injury 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). Jurisdictional questions based on issues of situs are fact-sensitive.

The key question to be asked is "what is a vessel?" That answer can be found in 33 U.S.C. §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."

These issues were raised and determined in a case entitled *Lee v. Astoria Generating Co., et al.*, 13 NY 3d 382 (Ct. of Appeals 2009), *cert. denied* US, 131 S.Ct. 215 (2010).

The Gowanus Gas Turbines Electric General Facility in Brooklyn, New York, owned and operated by Astoria Generating Company and Orion Power, maintained four barges on the Gowanus Canal that supported gas turbine generating units. The barges were attached to a power grid but were moved approximately once per decade for maintenance. Two of the barges had been moved for use as additional power sources.

Elliot Turbomachinery Co., Inc. and Elliot Company ("Elliot") were hired to overhaul the turbines at the Gowanus facility and employed the plaintiff, Lee. The plaintiff was injured when he slipped off a ladder entering a hatch on Barge No. 1, and he subsequently received benefits under the LHWCA as a land-based maritime employee.

The plaintiff commenced suit against Astoria/Orion alleging New York Labor Law §§200, 240(1) and 241(6) claims and common law negligence claims. Astoria/Orion filed a third-party complaint against Elliot for indemnification. The defendants both moved for summary judgment on the basis that the State Labor Law claims were preempted by the LHWCA and Federal Maritime Law. The New York Supreme Court granted summary judgment in favor of the defendants on the basis that 33 U.S.C. §905(a) precluded the claims against them as an employer (Elliot) and *via* preemption (Orion). The Appellate Division, Second Department, reversed and granted summary judgment for the plaintiff, holding that the barge did not constitute a vessel and the New York Labor Law claims were therefore not preempted. The Appellate Division awarded summary judgment pursuant to Labor Law §240(1). The Appellate Division granted the defendants' leave to appeal to the Court of Appeals. The Court of Appeals reversed, and the Order of the trial court was reinstated.

The Court of Appeals first examined whether the barge in controversy could be classified as a vessel in order to determine if the LHWCA were applicable law in this case. Under the LHWCA, an injured person cannot assert an action directly against his employer, but the Act does allow for negligence claims against third parties or any vessel involved in the injury. To evaluate whether the barge in question could be classified as a vessel, the Court looked to the U.S. Supreme Court's definition of a vessel, a "watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Stewart v. Dutra Construction Co.,* 543 U.S. 481 (2005)). Using this description, the Court reasoned that because the barge was located on navigable waters, was capable of being moved for maintenance and in emergencies and was not permanently anchored or moored, it fell within the Supreme Court's definition of a vessel. The Court therefore held that the LHWCA was the applicable law.

The Court then analyzed the second issue, whether the LHWCA, as federal law, preempted the New York Labor Law claims asserted by the plaintiff. Under the Supremacy Clause, a state law

is preempted by a federal law by "express provision, by implication, or by a conflict between federal and state law." The Court found that 33 U.S.C. §905(b) expressly preempted the New York Labor Laws because the LHWCA explicitly states that any remedy derived from an action brought against a vessel under the LHWCA "shall be exclusive of all other remedies." The Court consequently held that because the LHWCA was the applicable federal maritime law, the plaintiff's state law claims were preempted and the Order of the trial court was to be reinstated. This decision holds great importance because New York Labor Law §240(1) (so-called "Scaffold Law") imposes strict liability on contractors and property owners for elevation-related injuries at construction sites.

The Court of Appeals distinguished its holding in this case from *Cammon v. City of New York*, 95 NY 2d 583 (2000) which involved an injured worker receiving benefits under the LHWCA against a defendant landowner (City of New York). The distinction was based on the fact that *Cammon* did not involve §905(b)'s "Negligence of Vessel" as set forth in the LHWCA. The Court stated, "While it is true that Federal Maritime Law does not generally supersede state law, in this case, where Congress explicitly limited claims against the vessel owner to that Federal Act, state law claims are preempted."

Since the decision in *Lee,* there have been two cases in the Second Department more or less addressing related issues. The first involved Elsayed Eldoh, *Eldoh v. Astoria Generating Co.,* 81 AD 3d 871, (2d Dept. 2011) was also injured at the Astoria Generating plant. Eldoh was an employee of a company charged with overhauling one of the turbines on the barges. Among the parties he sued was the general contractor (Eldoh was an employee of a sub-contractor) which was retained by the owners of the vessel and the plant to repair the turbines. The Court found that Eldoh's suit against the general contractor could go forward because the general contractor was neither the owner of the vessel nor the plaintiff's employer. Thus, he could bring the action against the general contractor under Labor Law §240(1) and Labor Law §241(6). The Court found that these causes of actions were not preempted and, as well, that common law negligence claims against the general contractor were also not preempted. It should be noted that if the general contractor were found liable, he could not seek indemnity from Eldoh's employer because of the exclusivity provision of §905(b). The general contractor could probably be able to proceed against the vessel owner for indemnity but only for negligence – not strict liability.

In another case, *Ashjian v. Orion Power Holdings*, 70 AD 3d 738 (2d Dept. 2010), plaintiff was also working on an overhaul of a turbine engine which was located on a barge at the same work project as in the *Lee* case. In this case, the plaintiff fell into an unguarded open hatch on the deck of the barge. The Court, citing *Lee*, threw out his claims under §240(1) and §241(6) on the grounds that they were preempted by the LHWCA. The Court also threw out on the merits, *Ashjian's* common law negligence claim, as well as his claim under §200 because the plaintiff could not establish that the owner had notice of the alleged defective condition, *i.e.*, the open hatch.

A more recent case that seems to revert to the reasoning of *Cammon* may clarify the apparent dichotomy between *Lee* and *Cammon*. In *Scheller v. Turner* (Index No. 14508/06, Kings County) (2010) (unpublished), the plaintiff suffered injuries when he fell into the water from a jerry-rigged gangway leading from a pier to a barge during a construction project at Pier 12 of the Brooklyn-Port Authority Terminal. Various parties were sued and each of the defendants made a motion to dismiss. The Court identified each party, and depending upon their role, applied LHWCA to the maritime defendants and Labor Law to the land-based defendants. The Court found that state laws were not preempted by the LHWCA as against the general contractor and land-based defendants. The case went up on appeal to the Appellate Division, Second Department but the appeal was never perfected.

The takeaway point from this article is that an injured maritime employee is covered by §905(b) of the LHWCA as to the owners of the vessel and the vessel itself. If the responsible parties were land-based, then the state labor laws will be applicable.