

Chapter 21

FEDERAL EMPLOYERS' LIABILITY ACT, JONES ACT, AND LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

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I. (§21.1) Overview

Remedies for certain employment-related injuries are provided by federal legislation enacted by Congress pursuant to its constitutional powers. The distinctive provisions in these federal statutes and the construction given them by the courts can create pitfalls for lawyers unfamiliar with handling such cases. This chapter will deal with three such statutes:

1. Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et seq.* (railway employees)
2. Merchant Marine Act of 1920 (commonly known as the Jones Act) (seamen), 46 U.S.C. app. §§ 688, *et seq.*
3. Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901, *et seq.* (maritime employees)

Federal preemption is determined on whether the employee's injury comes within the subject matter of the federal legislation enacted by Congress under its admiralty or interstate commerce powers. Thus, the particular employment relationship is not sufficient in itself to give rise to an exclusive federal right of action. In fact, because of the hardship sometimes imposed on an injured worker who must face a state-federal dilemma by virtue of the facts surrounding his or her injury or employment, there is mounting evidence, especially under the LHWCA, of a trend toward concurrent state-federal jurisdiction. This trend makes necessary a somewhat theoretical approach to the issue of determining the availability or exclusive applicability of federal remedies. The discussion of each federal Act is undertaken with a goal to aiding in the proper choice of remedy. There is no attempt made to exhaustively detail the substantive and procedural features of the respective Acts.

II. Federal Employers' Liability Act

A. (§21.2) Generally

The Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51, *et seq.*, governs the relationship between rail carriers and their employees who sustain injuries or death in the course of employment. FELA provides railroad employees a right of action in negligence against their employer.

B. (§21.3) Liability

Under 45 U.S.C. § 51, a common carrier by railroad engaged in interstate commerce is liable for damages to the injured employee (or the employee's personal representative) when:

- the employee suffers injury or death while employed by the carrier; and
- the injury or death results "in whole or in part from the negligence of any of the officers, agents, or employees" of the carrier.

Liability for injury or death may also arise by reason of defects or insufficiency due to the negligence of the carrier "in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or

other equipment.” *Id.* Negligence may be based on the railroad’s failure to furnish:

- a safe place for work;
- safe methods of work; or
- safe tools, equipment, or appliances for work,

Recovery may also be based on work-related disease or illness if employer negligence can be established.

C. (§21.4) Quantum of Proof

With respect to the quantum of proof necessary to support an action, the Supreme Court of the United States has stated:

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee’s contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due ‘in whole or in part’ to its negligence.

Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 506—07(1957).

When violation of a federal safety statute is proven, fault is strict liability, and no further showing of negligence is required. The injured employee only needs to establish the causal relation between the violation and the injury. These statutory provisions are referred to as the federal;

- Safety Appliance Acts, 49 U.S.C. §§ 20301—20306 (these acts require certain safety appliances and equipment on railroad engines and cars for the use and protection of employees and travelers, such as efficient brakes, automatic couplers, secure handholds, and grabirons); and

- Boiler Inspection Acts, 49 U.S.C. §§ 20701—20703 (these acts require the use of safe locomotives and safe parts and appurtenances).

See *Urie v. Thompson*, 337 U.S. 163 (1949); *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430 (1949).

D. (§21.5) Defenses

The common-law defenses of assumption of risk and the fellow servant doctrine have been abolished under FELA. 45 U.S.C. § 54. Contributory negligence is a defense only in mitigation of damages, thus creating a comparative negligence defense. It is not available even for that limited purpose when violation of a federal safety statute is proven. 45 U.S.C. 53; *Tiller v. Atl. Coast Line R. Co.*, 318 U.S. 54 (1943).

E. (§21.6) Damages

The measure of damages is governed by federal rather than state rules. The elements of damages include:

- loss of wages;
- loss of earning capacity;
- pain and suffering; and
- medical expenses.

Damages in a FELA case are for the jury to determine. There is no limitation on the damages that may be awarded by juries except by the courts' limited right of review. See *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156 (1968).

Although FELA's central focus is on physical injuries, FELA also provides compensation for negligently inflicted emotional injury sustained by workers within the "zone of danger." *Consol. Rail Corp. v. James E. Gottshall Consol. Rail Corp.*, 512 U.S. 532, 554 (1994). Under this test, workers within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to themselves, whereas workers outside the "zone of danger" will not. *Id.* at 554-58. But an employee may not recover under FELA for negligent infliction of emotional distress unless and until the

employee manifests symptoms of the disease. *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 429-30(1997).

F. (§21.7) Death Claims

In case of a work-related employee death, the cause of action survives to the personal representative of the decedent for the benefit of the surviving spouse and children. The courts have interpreted the wrongful death provisions of 45 U.S.C. § 51 to be strictly compensatory. The surviving spouse is entitled to recover the reasonably anticipated monetary contributions over the life expectancy of the decedent, and the children are entitled to damages for the remaining years of their minority or, in the event of invalid children, for their reasonable years of expected dependency. The surviving spouse also has a right to recover the value of the services of the deceased spouse. Children are entitled to recover for the following benefits the parent would have given them during their minority:

- intellectual moral, and physical care;
- attention;
- instruction
- training;
- advice; and
- guidance.

There is no recovery for loss of consortium, love, or affection, or for grief. A cause of action also survives to the personal representative for the conscious pain and suffering of the decedent. 45 U.S.C. § 59.

If a decedent is not survived by a spouse or children, the parents have a cause of action for any economic damages that may have been suffered by them. It would be necessary for a parent to show contributions or expectancy of contributions from the deceased child. If the decedent is not survived by spouse, children, or parents, the cause of action is held by any dependent next of kin. Lacking anyone in any of these classes, there would be no recovery. It has been held that when Congress provided for recovery by a dependent next of kin,

it intended that there be actual dependency, i.e., a need for support on the part of the beneficiary and actual financial contributions or the furnishing of other valuable elements of support by the deceased. *See Auld v. Terminal R.R. Ass'n of St. Louis*, 463 S.W.2d 297 (Mo. 1970), *cert., denied*, 401 U.S. 940 (1971). The fact that a next of kin may have depended on the deceased for companionship, entertainment, and even incidental services would not be sufficient to qualify for recovery under FELA.

Although a cause of action may be brought by the decedent's personal representative, there is no cause of action on behalf of the decedent's estate. Recovery is strictly for the designated beneficiaries and does not become an asset of the estate. *Marshall v. N.Y. Cent. R.R. Co.*, 218 F.2d 900 (7th Cir. 1955).

G. Procedural Matters

1. (§21.8) Jury Instructions

In a FELA action, the jury is to be instructed that its award is not subject to income taxes. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980). In addition, an award to the plaintiff must reflect the present value of future loss of earnings. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). State courts may not award prejudgment interest in FELA suits. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988). Punitive damages are not available under FELA. *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971). Finally, an award of attorney fees is not authorized. *Norfolk & W. Ry. Co.*

2. (§21.9) Federal vs. State Laws

FELA supersedes state laws relating to the liability of an interstate rail carrier for injuries to employees engaged in interstate commerce; FELA provides the exclusive remedy for such injuries. Accordingly, FELA supersedes state workers' compensation acts. *N.Y. Cent. R.R. Co. v. Winfield*, 244 U.S. 147 (1917); *Bowers v. Wabash R. Co.*, 246 S.W.2d 535 (Mo. App. E.D. 1952). An injured worker may waive his or her federal FELA claim by proceeding and accepting benefits under a state workers' compensation act. *See Ahern v. S. Buffalo Ry. Co.*, 104 N.E.2d 898 (N.Y. 1952), *aff'd*, 344 U.S. 367 (1953).

A defendant railroad may not avoid liability under FELA simply by virtue of being a state agency (state-owned railroad). See *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 203 (1991). But see *Alabama State Docks Terminal Railway v. Lyles*, 797 So.2d 432 (Ala. 2001), in which a state supreme court ruled that an injured railroad worker could not sue a state agency under FELA when the state constitution provided the state agency with absolute, unwaivable sovereign immunity.

In every FELA case, suit can be brought either in state or federal court. FELA provides for concurrent jurisdiction between federal and state courts, and an action filed against a railroad in state court is not removable to federal court. 45 U.S.C. § 56; 28 U.S.C. § 1445(a).

3. (§21.10) Statute of Limitations

Under FELA, there is a three-year statute of limitations regardless of the state law where the injury occurred. 45 U.S.C. § 56. This statute of limitations is absolute in that taking a non-suit will not enable the injured worker to extend the time in which suit must be filed.

4. (§21.11) Venue

Venue in federal courts lies in the “district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.” 45 U.S.C. § 56. It has been held that the plaintiff’s choice of venue is a substantial choice to be given deference by the courts. *Miles v. Ill. Cent. R. Co.*, 315 U.S. 698 (1942); *Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263(1949).

The Missouri venue statute expressly permits an action against a railroad either:

- in the county where the cause of action accrued;
- in any county where the railroad owns, controls, or operates a railroad; or

- In any county where the railroad has or usually keeps either an office or agent for the transaction of its usual and customary business.

Section 508.040, RSMo 2000.

Missouri courts entertain motions to dismiss based on *forum non conveniens* in FELA cases to be applied in the discretion of the trial judge. *State ex rel. Chicago, Rock Island & Pac. R.R. Co. v. Riederer*, 454 S.W.2d 36 (Mo. banc 1970). That was reaffirmed in *Besse v. Missouri Pacific Railroad Co.*, 721 S.W.2d 740 (Mo. banc 1986). For an additional case involving the application of the *forum non conveniens* doctrine in Missouri, see *Anglim v. Missouri Pacific Railroad Co.*, 832 S.W.2d 298 (Mo, banc 1992).

As a general rule, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). State court decisions that are in harmony with federal court decisions, however, are persuasive.

H. (§21.12) Protection of Fellow Employees (45 U.S.C. § 60)

Under 45 U.S.C. § 60, railroad employees who desire to voluntarily furnish information to the injured employee or to the representatives of an injured or deceased employee are protected.

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than \$1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

45 U.S.C. § 60.

Under FELA, the free exchange of information is essential to the proper investigation and prosecution of a claim, and access to

information is vitally important. With this provision, Congress sought to provide to injured workers and their representatives, and to the families of workers killed and their representatives, the same access to sources of information that the railroads have. Section 60 of 45 U.S.C., which protects a railroad employee who furnishes voluntary information to a person in interest as to the facts incident to the injury or death of any railroad employee, is designed to prevent any direct or indirect chill on the availability of information to any party in interest in a claim under FELA.

III. Jones Act

A. (§21.13) Applicability of Seamen Injured in Employment

Most of what has been set forth in §§21.2—21.12 above applies equally to seamen injured in the course of their employment. As stated in 46 U.S.C. app. §§ 688, of the Jones Act, 46 U.S.C. app. §§ 688, *et seq.*:

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 such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in 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, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

Thus, the Jones Act makes the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51, *et seq.*, applicable to such injuries and thereby gives the seamen a right of action in negligence against the ship owner-employer through the conditions prescribed by FELA. The quantum of evidence necessary to support a finding of Jones Act negligence is identical to that which is necessary under FELA. The common-law defenses of assumption of risk and the fellow servant doctrine have been eliminated. Likewise, contributory negligence is not a complete bar to recovery, but there is a comparative negligence standard whereby the award is diminished in proportion to the employee's negligence. The Jones Act has, therefore, enlarged the rule of liability under the maritime law.

Before the passage of this legislation, the seaman was, for all intents and purposes, limited to maintenance-and-cure along with unseaworthiness as general maritime remedies against the employer. *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). With the

passage of the Jones Act, injured seamen may avail themselves of the ancient remedy of maintenance-and-cure and, in addition, either a Jones Act or an unseaworthiness recovery, with both theories submitted simultaneously to the trier of fact. It is important to note that the mere happening of an accident on a vessel does not automatically establish the vessel as unseaworthy. See *Johnson v. Bryant*, 671 F.2d 1276, 1279 (11th Cir. 1982); *Logan v. Empresa Lineas Maritimas Argentinas*, 353 F.2d 373 (1st Cir. 1965), *cert. denied*, 383 U.S. 970 (1966). The current weight of authority is that a Jones Act case may be brought either as a suit in admiralty (without a jury) in the federal court or as a civil action (with a jury) in the state or federal court. GRANT GILMORE & CHARLES BLACK, *THE LAW OF ADMIRALTY* (2nd ed. 1975).

B. (§21.14) Definitional Problems Regarding Seamen

Definitional problems are inherent in the determination of who are “seamen” under the Jones Act, 46 U.S.C. app. §§ 688, *et seq.* In 46 U.S.C. § 10101, “seaman” is defined as “an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed in any capacity on board a vessel.”

The term “vessel” has been defined in 1 U.S.C. § 3 as including “every description of watercraft or other artificial contrivance used . . . as a means of transportation on water.”

Thus, any person employed aboard a vessel by the owners, regardless of the capacity in which the person is employed, is a seaman. The term embraces all of those who work in and around the engines or who are involved in the navigation, maintenance, operation, or general welfare of the ship or her personnel. It has been held to include persons who, on land, would be regarded as welders, machinists, cooks, musicians, entertainers, drillers, etc., where they are involved in the general business of a vessel. It has been said that classification as a seaman attaches only when:

- the vessel is in navigation;
- there is more or less permanent connection with the vessel; and
- the worker is aboard primarily to aid in navigation.

MARTIN J. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 1:6 (4th ed. 1990). *See also Bowery v. Hanford Accident & Indem. Co.*, 202 S.W.2d 790 (Mo. 1947), *cert. denied*, 332 U.S. 838(1947), *reh'g denied*, 332 U.S. 849 (1948 (an employee on a barge who was to help construct the wooded mat for foundation of a dike was held not to be under the Jones Act), *and see* E. H. Schopler, Annotation, *Applicability of Jones Act (46 U.S. C. § 688) to Workers Connected With Operation of Dredges, Drilling Platforms, Derricks, or Similar Special-Purpose Equipment*, 75 A.L.R.2D 1312 (1961).

In determining whether a structure is a vessel in navigation under the Jones Act (as compared to a stationary object, e.g., a work platform), the United States Supreme Court articulated that such a determination is a fact-intensive question that is normally for the jury and not the court to decide, and removing the issue from the jury's consideration is only appropriate when the facts and law will reasonably support only one conclusion. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). To aid in this determination, courts look at whether the structure maintains or possesses:

- navigational aids;
- lifeboats and other life-saving equipment;
- a raked bow;
- bilge pumps;
- crew quarters; and
- registration with the Coast Guard as a vessel.

See Davis v. Mo. Gaming Cc., 51 S.W.3d 168, 174 (Mo. App. W.D. 2001).

A former requirement that the worker 'aid in navigation' to be considered a seaman has been expressly rejected by the U.S. Supreme Court. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991), the Court focused on the "connection" between the worker and the vessel and whether the worker contributes to attaining the vessel's mission. The Court has stated:

The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all

details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. See *Maryland Casually Co. v. Lawson*, 94 F.2d 190, 192 (CA5 1938) (“There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise”), cited approvingly in *Norton*, 321 U.S., at 573 ... In this regard, we believe the requirement that an employee’s duties must “contribute[e] to the function of the vessel or to the accomplishment of its mission” captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel but a seaman must be doing the ship’s work

Id. at 355.

The Court further explained the “connection to the vessel” requirement necessary for “seaman status” in *Chandris*, 515 U.S. at 368. In *Chandris* the Court stated, repeatedly, that the definition of “seaman” within the meaning of the Jones Act was intended to separate land-based maritime workers, who are not entitled to the benefits of the Jones Act, from the vessel-based workers who are “seamen” and entitled to its benefits. *Chandris*, 515 U.S. at 358—60. Ultimately, the question of whether an employee is a “seaman” is a mixed question of fact and law. *Chandris*, 515 U.S. at 359—60. The facts that are pertinent to answering this question are broad and, in fact, “the total circumstances of an individual’s employment must be weighed.” *Chandris*, 515 U.S. at 370. The relevant facts, however, are not the employee’s particular job but rather the employee’s connection with a vessel or an identifiable fleet of vessels. *Chandris*, 515 U.S. at 366—68. If the employee’s connection to the vessel is substantial both in duration and nature, the employee is a seaman. An employee who is a seaman may, thereby, be entitled to recover under the Jones Act although an injury is sustained “on shore.”

In contrast, a land-based maritime employee who is not a seaman is not entitled to recover under the Jones Act even if the employee is injured on board a vessel operating in navigable waters. Although the Court declined to adopt a detailed test, it did provide a “rule of thumb” to determine whether an employee’s connection to a vessel met the “substantial in...duration” requirement. The Court stated that, in the ordinary case a worker who spends less than about 30% of the time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.

But the threshold question concerning who is a “seaman” under the Jones Act was again addressed by the U.S. Supreme Court in an effort to clarify its previous statement that a worker may establish seaman status based on the substantiality of his or her connection to

“an identifiable group of vessels.” See *Chandris*, 515 U.S. 347. This statement had been subject to varying interpretations by the courts, which caused confusion and uncertainty. In *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), the U.S. Supreme Court clarified its holding in *Chandris*, which held, in pertinent part:

[T]he essential requirements for seaman status are twofold. First, ... “an employee’s duties must contribute[e] to the function of the vessel or to the accomplishment of its mission.” ... Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

Chandris, 515 U.S. at 368 (citations omitted).

While the seaman inquiry is a mixed question of law and fact, the Court recognized that seaman status most frequently turns on the second standard set forth in *Chandris*. As such, the Court in *Harbor Tug*, 520 U.S. 548, took several steps to clarify its holding in *Chandris* to provide guidance as to whether an individual has a sufficient “connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature” so as to attain the status of a seaman. *Id.* at 554.

First, citing *Chandris*, 515 U.S. 347, the *Harbor Tug*, 520 U.S. 548, Court confirmed that the employee’s prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer, an assignment with different “essential duties” from his or her previous ones. The Court clarified that its language “particular employer” in *Chandris* emphasized the point that the inquiry into the nature of the employee’s duties for seaman status purposes may concentrate on a narrower, not broader, period than the employee’s entire course of employment with his or her current employer. *Harbor Tug*, 520 U.S. at 556—57.

Second, the *Harbor Tug*, 520 U.S. 548, Court held that, in determining whether there is an identifiable group of vessels of relevance for a Jones Act seaman status determination, the question is whether the vessels are subject to common ownership or control. *Id.* at 557. The Court expressly rejected Papai’s argument that the requisite link between the injured party and an identifiable group of vessels was established as a result of the employer’s use of the same union hiring hall, which draws from the same pool of potential employees. *Id.*

Third, the *Harbor Tug*, 520 U.S. 548, Court held that prior employment with independent employers should not be considered in determining Jones Act seaman status because such consideration would undermine “the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers’ workers’ compensation obligations, who will be covered by the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 U.S.C. §§ 901, et seq.) before a particular work day begins.” *Id.* at 558 (quoting *Chandris*, 515 U.S. at 363). The Court reasoned that there would be no principled basis for limiting which prior employments are considered for determining seaman status and that the “substantial connection” standard must be given workable and practical confines. *Id.* at 558.

Fourth, the *Harbor Tug*, 520 U.S. 548, Court held that the union agreement articulating the employee’s job title does not advance the accuracy of the seaman status inquiry. *Id.* at 559. Specifically, the fact that Papai was classified as a “satisfactory helmsman and lookout” or “qualified deckhand” in accordance with the IBU Deckhands Agreement was not sufficient to conclude that he was a seaman under the Jones Act. The Court reiterated that the question is “what connection the employee had in actual fact to vessel operations, not what a union agreement says.” *Id.* at 559.

Finally, and in addition to the foregoing, the *Harbor Tug*, 520 U.S. 548, Court concluded that Papai did not establish a substantial connection with the employer’s fleet of vessels so as to satisfy the Jones Act requirement of seaman status by virtue of his 12 prior employment engagements with the same employer over a two and one-half month period before his injury. *Id.* at 559—60, The Court noted that these discrete engagements were separate from the one in question where Papai was injured, which is the sort of “transitory or sporadic” connection to a vessel or group of vessels that does not qualify one for seaman status, *Id.* at 560 (quoting *Chandris*, 515 U.S. at 368). Furthermore, the Court found that Papai did not have a substantial connection with a fleet of vessels when his only connection among the vessels where he previously worked was that each vessel hired some of its employees from the same union hiring hall where Papai was hired from. *Harbor Tug*, 520 U.S. at 560.

C. (§21.15) Nonapplicability to Longshore Workers

The longshore worker, not being a master or member of the crew, is precluded from recovery against his or her employer under the Jones Act, 46 U.S.C. app. §§ 688, *et seq.* *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946); 33 U.S.C. 905. Furthermore, a longshore worker cannot recover against a third party ship owner under the Jones Act because such an action is restricted to the employer-employee relationship. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949). Before the 1972 amendment of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, *Seas Shipping Co. v. Sierachi*, 328 U.S. 85 (1946), permitted an action for breach of the warranty of seaworthiness by the longshore worker against the ship owner. But the amendment extinguished this right, thereby limiting the longshore workers' actions to suits based on negligence.
33 U.S.C. § 905(b).

The question of whether an individual is a “master or member of a crew” and, consequently, a “seaman” is a mixed question of law and fact. So some workers may still be Jones Act “seamen” even though they perform work specifically enumerated by the LHWCA. See *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), where the Court held that a ship repairman was entitled to have a jury decide his status as “seaman” where he spent most of his days performing ship repair work from floating platforms, and he alleged the floating platforms were a group of vessels to which he had been permanently assigned. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347—49 (1991).

The LHWCA and the Jones Act are, for all intents and purposes, mutually exclusive. See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355—56 (1995).

D. (§21.16) Applicability to Masters and Ships' Officers

Masters and ships' officers are embraced within the Jones Act, 46 U.S.C. app. §§ 688, *et seq.* Seamen employed by the United States, if covered by the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101, *et seq.*, have that Act as their exclusive remedy and cannot succeed under the Jones Act. 5 U.S.C. § 8116(c).

E. Covered Matter

1. (§21.17) Course of Employment

The right of action afforded a seaman or his or her representative by the Jones Act, 46 U.S.C. app. §§ 688, *et seq.*, extends only to injuries or death incurred in the course of the seaman's employment. The term "in the course of his employment" has greater coverage than accorded in compensation acts and has been equated with the maintenance-and-cure test of "service of the ship." *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129 (1959).

2. (§21.18) Activities Ashore

Contrary to the long-accepted rule, activities ashore are covered if they occur in the course of employment. *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943). An injury sustained aboard ship is deemed to be sustained in the course of employment, regardless of whether the seaman is on or off duty at the time of the injury. See J. A. Bock, Annotation, *Liability of Master for Injury or Death of Servant on Master's Premises Where Injury Occurred Outside Working Hours*, 76 A.L.R.2D 1215 (1961).

3. (§21.19) Death

Before the passage of the Jones Act, 46 U.S.C. app. §§ 688, *et seq.*, maritime law afforded no remedy when the injury resulted in death. The Jones Act now provides such a remedy for seamen. 46 U.S.C. app. § 688. The general maritime law provided no right of action against an employer for the death of a seaman, *Lindgren v. United States*, 281 U.S. 38 (1930). In accordance with the provisions of FELA, adopted by reference in the Jones Act an action to recover damages for negligence causing the death of a seaman may be instituted against the employer by the personal representative of the deceased. Although the proper party plaintiff in such an action is the seaman's personal representative, the cause of action is for the benefit, not of the seaman's estate, but of his or her spouse and children, or, if none, of the seaman's parents, and, if none, of the seaman's dependent next of kin. As stated in §21.7 above, if there are no survivors in any of the classes designated, no right of action exists under the statute.

F. Fault

1. (§21.20) Degree of Causation

The Jones Act, 46 U.S.C. §§ 688, *et seq.*, is an attractive remedy insofar as the courts have expanded the negligence concept, minimizing the degree of causation necessary to make a case. The law requires only the employer's negligence to have played any part, even the slightest, in producing the injury or death for which damages are sought. *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500 (1957). The *res ipsa loquitor* doctrine is also available as in other litigation. See *Johnson v. United States*, 333 U.S. 46 (1948). The attractiveness of the Jones Act is occasioned by the broadly defined negligence concepts and the absence of fellow servant, assumption of risk, and contributory negligence as absolute defenses. Nevertheless, there are circumstances under which state compensation remedies may be sought as the only possible means of recovery because of the absence of any negligence. See *Toland v. Atl. Gahagan Joint Venture Dredge #1*, 271 A.2d 2 (N.J. 1970); *Md. Cas. Co. v. Toups*, 172 F.2d 542(5th Cir.1949).

2. (§21.21) Treatment

Aside from any question of fault, a seaman who is injured or becomes ill (e.g., stroke, heart attack, pneumonia) is entitled to receive treatment at a medical facility of his or her choosing. The injured seaman may also invoke certain additional rights and benefits under the general rules of "maintenance, cure, and pay," for which the ship owner or operator is liable. Over the years, the courts have broadened the duty to pay maintenance and cure, and it is now well settled that maintenance and cure is payable even though the ship owner is not at fault and regardless of whether the seaman's employment caused the injury or illness as long as the injury or illness was aggravated or manifested itself while the seaman was in the ship's service. See *West v. Midland Enters., Inc.*, 227 F.3d 613, 616 (6th Cir. 2000).

The injured seaman is entitled to medical treatment (cure) until he or she reaches maximum medical recovery from the illness or injury involved and daily compensation (maintenance) at the expense of the ship owner or operator during the course of the cure. See J. E. Macy, Annotation, *Seaman's Right to Recover for Maintenance and Cure as Including Expenses Which he has Not Paid or Become Liable for*, 13 A.L.R.2D 628 (1950). Specifically, to

recover for maintenance and cure, a plaintiff only needs to show that:

- the plaintiff was working as a seaman;
- the plaintiff became ill or injured while in the vessel's service; and
- the plaintiff lost wages or incurred expenditures relating to the treatment of the illness or injury.

West, 227 F.3d at 616. As to maintenance and cure, courts have determined that seamen can recover without showing physical impact (e.g., emotional trauma/injury). *Id.* at 616—17.

G. Limitation on Liability

1. (§21.22) Value of Vessel and Pending Freight

Jones Act, 46 U.S.C. app. §§ 688, *et seq.*, claims, as well as claims for other damages (not including maintenance and cure), whether instituted in state or federal courts, are subject to the maritime defense of limitation of liability by the ship owner authorized by 46 U.S.C. app. §§ 183, *et seq.* This statute allows the employer, if the owner or “bare-boat” charterer of the vessel, to limit its liability for damage claims arising out of the voyage or casualty to the value of the vessel and pending freight at the time of the casualty if the vessel was seaworthy and only if the employer or ship owner lacked privity or prior knowledge (actual or constructive) of the cause of the loss.

When an employer-vessel owner files a complaint for limitation of liability in federal district court in accordance with the Limited Liability Act (popularly known as the Limitation of Liability Act, 46 U.S.C. app. §§ 181, *et seq.*, which grants federal courts exclusive jurisdiction to determine whether a vessel owner is entitled to limitation of liability), state courts, with all of their remedies, may adjudicate claims (including Jones Act claims) against vessel owners as long as the vessel owner's right to seek limitation of liability in federal court is and remains protected. See *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001). This is true even though the injured employee did not expressly seek a jury trial in the state court proceedings. In *Lewis* the Court expressly rejected the vessel owner's argument that personal

injury actions involving vessels should be a matter of exclusive federal jurisdiction except when the claimant seeks a jury trial, *Id.* at 455—56. In *Lewis* the Court determined that the vessel owner’s right to seek limitation of liability in federal court was adequately protected because the injured employee stipulated that his claim did not exceed the limitation fund, and the injured employee waived any defense of *res judicata* with respect to limitation of liability. *Id.* at 451—52. But a vessel owner does not have a right to seek *exoneration* from liability, in addition to limitation of liability, in federal court when the employee’s cause of action is properly filed in state court. *See id.*

2. (§21.23) Owners and Operators

Although the liability contemplated by the Jones Act, 46 U.S.C. app. §§ 688, *et seq.*, is generally limited to owners of ships plying navigable waters, it may also be imposed on those who control or operate such vessels, provided that the necessary employer-employee relationship is shown to exist between the parties.

H. (§21.24) Procedural Matters

Similar to FLSA, rights created by the Jones Act, 46 U.S.C. app. §§ 688, *et seq.*, are federal rights protected by federal rather than by local rules of law. Accordingly, substantive matters involved in a suit under the Jones Act are determinable on the basis of federal law and decisions, though the action is tried in state court, whereas matters of practice and procedure are generally governed by the law of the forum. Under the Jones Act, as under FELA, state and federal courts have concurrent jurisdiction, and an action in the state court may not be removed to the federal court. 45 U.S.C. § 56; 28 U.S.C. § 1445(a). Suits must be commenced within three years. *Id.* The Jones Act provides injured seamen’s exclusive remedy, and such injuries are not compensable under Missouri workers’ compensation law. See § 287.110.1, RSMo 2000; *Commercial Union Ins. Co. v. McKinnon*, 10 Fed 1352(8th Cir. 1993).

IV. Longshore and Harbor Workers' Compensation Act

A. (§21.25) Applicability

The Longshore and Harbor Workers' Compensation Act of 1927 (LHWCA), 33 U.S.C. §§ 901, *et seq.*, as amended in 1972, is an ordinary compensation law. It is expressly applicable to an employee who suffers disability or death 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. § 903(a). State workers' compensation statutes and the LHWCA have concurrent jurisdiction. *Sun Ship, Inc. in Pa.*, 447 U.S. 715 (1980). The injured employee may select to be compensated under state law or under the LHWCA. The LHWCA generally provides benefits more liberal than those of state workers' compensation acts. In addition, the injured worker may file concurrently under both the Jones Act, 46 U.S.C. app. §§ 688, *et seq.*, and the LHWCA but may ultimately only recover under one of these statutes.

B. (§21.26) History and Development of Act

Before the 1972 amendments, the scope of the LHWCA permitted recovery only if a remedy under state workers' compensation law was not provided. This spawned much litigation regarding state versus federal jurisdiction conflicts. The 1972 amendments broadened the scope of the LHWCA and resolved these state versus federal jurisdiction issues by eliminating the condition that a state compensation remedy be unavailable to the claimant. Nevertheless, a general understanding of the evolution of the law of compensation for workers injured in maritime precincts will enhance understanding of the present law.

Before the LHWCA, no compensation type of remedy was available to longshore workers if injured over navigable waters, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), the Supreme Court of the United States held that workers' compensation remedies are inapplicable to a longshore worker injured between the ship and the pier. To permit state governments to control maritime activities was contrary to the theme of harmony and uniformity of the maritime law and was deemed unconstitutional, States were constitutionally

barred from applying their workers' compensation systems to maritime injuries. Thereafter, the U.S. Supreme Court ruled in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922), that state compensation governed an employee involved in construction of a vessel on navigable waters as he or she was performing activities "local" in character with no direct relation to navigation or commerce. The Court concluded that no prejudice resulted to the maritime law from this application. Hence, a "maritime but local" rule developed, allowing state remedies to be applied under these and similar facts.

C. Coverage of the Present Act

1. (§21.27) Scope of Coverage

This "maritime but local" rule, discussed in §21.26 above, served as the genesis for the original LHWCA. That statute provided, in pertinent part, that "[c]ompensation shall be payable... from an injury occurring upon the navigable waters of the United States. . . if recovery . . . through workmen's compensation proceedings may not validly be provided by State law." 44 Stat. 1426. Nevertheless, the rule's application failed to resolve the employee's state versus federal jurisdictional dilemma regarding the nature of the employee's work. The Supreme Court expanded the "maritime but local" rule in *Davis v. Department of Labor & Industries of Washington*, 317 U.S. 249 (1942), establishing a concept known as the "twilight zone," providing for the presumption of constitutionality and resolution of close cases in favor of coverage by the first act under which application was made by the claimant. A further refinement occurred in *Moore's Case*, 80 N.E.2d 478 (Mass. 1948), *aff'd per curiam*, *Bethlehem Steel Co. v. Moore*, 335 U.S. 874 (1948), holding that the state act governed when a "reasonable argument" could be made for its applicability, even though the weight of authority was contrary. *See also Baskin v. Indus. Accident Comm'n*, 217 P.2d 733 (Cal. Dist. Ct. App, 1950), *aff'd per curiam*, *Kaiser Co. v. Baskin*, 340 U.S. 886 (1950).

Finally, following an extended period of uncertainty, the Supreme Court endeavored to supply a definite yardstick for determining jurisdiction and ruled in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), that the site of the injury controlled the choice of law. Briefly, the holding effectively allowed the LHWCA to apply if the claimant was injured on navigable waters. The facts in *Calbeck* involved a construction worker whose claim arose aboard a vessel

afloat, yet still under construction, These facts were encountered 40 years previously in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922), which reached the opposite result. Nevertheless, the U.S. Supreme Court, lamenting the confusion that had long prevailed, reasoned that Congress intended to ensure that a compensation remedy existed for all injuries on navigable waters and meant to avoid uncertainty as to the source of the remedy, whether it is state or federal. The opinion in *Calbeck* provides a comprehensive dissertation on the evolution of the law of longshore remedies. Significantly, *Calbeck's* ruling that one of the employees in a consolidated case should not be held to have elected to pursue state remedies was necessarily premised on the view that state relief was concurrently available. *Ca/beck*, 370 U.S. at 131—32.

In spite of the more precise formula achieved in *Calbeck*, 370 U.S. 114, litigants continued to press the Supreme Court for expansion of maritime jurisdiction landward. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), involved three longshoremen who were injured on a pier that extended over navigable waters when cargo being hoisted by the ship's crane contacted and injured them. Recognizing that piers were mere extensions of land, not subjects traditionally considered maritime, the Court refused to apply the LHWCA. The *Ca/beck* line of demarcation was thus further entrenched. In *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), a longshoreman on a pier was transferring cargo to a point alongside the ship when he was injured by an allegedly defective forklift he was operating. Although no claim was asserted under the LHWCA, the Supreme Court reviewed the maritime boundaries, noting the time-honored distinctions between remedies afforded the longshoreman performing services on and off the ship. The Court recognized that longshoremen might receive unequal benefits, depending on the provision of the particular state compensation act, but Congress was implored to legislate uniformity if these results were deemed unjust. The state law was held in this case to provide this longshoreman's sole remedy.

Congress accepted the invitation and amended the LHWCA in 1972, enlarging the scope of coverage beyond navigable waters and dry docks to adjoining piers, wharves, terminals, building ways, marine railways, or other adjoining areas customarily used by employers in loading, unloading, repairing, dismantling, or building a vessel. Furthermore, the language that had created the

remedial conflicts—namely, “and if recovery for the disability or death through workmen’s compensation proceedings may not validly be provided by State law”—was finally abandoned. The rate of compensation to longshore workers was generously liberalized. 33 U.S.C. § 906. As if to balance these expanded rights and benefits, a provision prohibiting longshore claims against ship owners on the theory of unseaworthiness was enacted, extinguishing rights that had been judicially created under *Seas Shipping Co. v. Sieracki*, 328 U.S. 85(1946), and *Jackson v. Lykes Bros. 5.8. Co.*, 386 U.S. 731 (1967), reserving to longshore workers the right to sue ship owners on the theory of negligence, a more burdensome task than imposed by unseaworthiness (a form of strict liability).

Congress further invalidated the right of a ship owner to recover indemnity from the employer for payments made by the ship owner to an injured longshore worker, 33 U.S.C., § 905(b), which right had been recognized by the Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), based on a breach of warranty of workman-like service.

Employers are further exposed under the LHWCA if they have any land-based employees whose work, in whole or in part, is maritime related. 33 U.S.C. § 902(4).

2. (§21.28) Navigable Waters

The question as to what are “navigable waters of the United States” looms basic in the determination of coverage, If it is assumed that the injury was occasioned directly on a body of water, determinative of the applicability of the LHWCA is whether the body of water is, in fact, navigable and if it by itself or through connection with other waters forms or affords a continuance channel or highway for commerce among the states or with foreign countries or whether by reasonable improvements it is susceptible of interstate navigability. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). In other words, the test is whether the commerce of one state is capable of being carried into another state or a foreign country.

3. (§21.29) Employees Not Covered

A ship’s master and its crew may not claim benefits under the

LHWCA, 33 U.S.C. § 903(a). Separate legislation, set forth in

§21.13 above, provides for the compensation that may be claimed by injured seamen. A governmental employee is excluded under the LHWCA, as is any person engaged by a master to load or unload or repair any small vessel under 18 tons net. 33 U.S.C. § 903(b). Special provision is made that no compensation shall be payable if an injury is occasioned solely by the intoxication of the employee or by “the willful intention of the employee to injure or kill himself or another.” 33 U.S.C. § 903(c).

Generally, public employees and those of a foreign government are not covered. 33 U.S.C. § 903(b). The Federal Employees’ Compensation Act, 5 U.S.C. §§ 8101, *et seq.*, provides coverage for United States civilian employees.

D. Compensation

1. (§21.30) Disability or Death

The LHWCA establishes a workers’ compensation system for those maritime workers whose injuries or death, arising in the course of their employment, come under the provisions of the LHWCA. The LHWCA is administered by the Secretary of Labor through the Office of Workers’ Compensation Programs. 33 U.S.C. § 939; 20 C.F.R. § 1.2. Territorial jurisdiction is exercised by deputy commissioners presiding over the 13 compensation districts established by law. *See* 20 C.F.R. §§ 1.1, 1.2.

Compensation for disability or death is payable under the LHWCA only if the disability or death results from an injury occurring on the navigable waters of the United States, 33 U.S.C. § 903(a). Federal compensation jurisdiction is now considered to extend to all injuries on navigable waters, whether or not a particular injury might also have been within the constitutional reach of the state workers’ compensation law. *See Ca/beck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). “Disability” is defined as an “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.” 33 U.S.C. § 902(10). “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.” 33 U.S.C. § 902(2). The term also includes an injury caused by the willful act of a third person

directed against an employee because of his employment. 33 U.S.C. § 903(c).

Under the terms of the LHWCA, an “employer” is one whose employees are engaged in “maritime employment, in whole or in part, upon the navigable waters of the United States” 3 U.S.C. § 902(4). But employment may be “maritime” even though the employees’ particular duties have no connection with the sea. *Pa. R. Co. v. O’Rourke*, 344 U.S. 334 (1953), *reh’g denied*, 345 U.S. 913 (1953).

Section 22 of the LHWCA, 44 Stat. 1437, as amended, 32 U.S.C. § 922, allows for modification of an employee’s disability award “on the ground of a change in conditions or because of a mistake in a determination of fact.” In *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995), the employee had received a disability award under the LHWCA for an injury he sustained while working as a longshore frontman. Subsequently, he acquired new skills and obtained longshore work as a crane operator, earning more than three times his pre-injury earnings, though his physical condition remained unchanged. The U.S. Supreme Court held that the disability award may be modified in accordance with the LHWCA when there is a change in the employee’s wage-earning capacity, even though his physical condition does not change.

Under the LHWCA, an employee is also required to provide notification to his or her employer and obtain written approval from the employer of any settlement with a third-party tortfeasor (unless the employee obtains a judgment, rather than settlement, or the employee settles for an amount greater than or equal to the employer’s total liability). LHWCA, § 33(g), (g)(1), (2), as amended, 33 U.S.C. § 933(g), (g)(1), (2). An employee who fails to comply with this provision may forfeit all future LHWCA benefits, including medical benefits. In *Estate of Cowan v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), the U.S. Supreme Court held that the LHWCA’s forfeiture provisions apply to a worker whose employer, at the time the worker settled with the third party, was neither paying compensation to the worker nor is yet subject to an order to pay under the LHWCA. In addition, the employer may withhold written approval of a third-party settlement for any reason or no reason at all.

2. (§21.31) Comparison With State Acts

Compensation under the LHWCA is generally more liberal than under state workers' compensation statutes. Therefore, employees will, in all probability, receive greater benefits under the LHWCA than under any comparable state legislation,

3. (§21.32) Medical Treatment

Under the LHWCA, the employer must furnish medical treatment, services, and supplies "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a). The injured employee is entitled to select an attending physician from a panel or list of physicians submitted by the employer and approved by the deputy commissioner. 33 U.S.C. § 907(b). The employee may obtain medical treatment from a physician of his or her own choice at the employer's expense if the employer fails to provide the necessary medical treatment after having been given notice that the employee is in need of medical treatment and is requesting that the necessary treatment be supplied.

E. (§21.33) Actions Against Third Persons

Actions against third persons to recover damages for injury or death are specifically permitted under the LHWCA. 33 U.S.C. § 933; *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); see 33 U.S.C. § 906(b).

2006 Supplement to Chapter 21

**FEDERAL EMPLOYERS' LIABILITY
ACT, JONES ACT, AND
LONGSHORE AND HARBOR
WORKERS' COMPENSATION ACT**

Supplemented:

§§ 21.6

21.7

21.11

21.13

21.14

21.24

21.25

21.28

21.29

21.30

21.32

21.33

Note: All citations to 46 U.S.C. app. §§ 688 *et seq.* should be changed to 46 U.S.C. app. § 688.

*Mr. Friedman's biographical information appears on page 21-1 of the original chapter.

II. Federal Employers' Liability Act

E. (§21.6) Damages

Moreover, under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, a party may bring a claim for intentional infliction of emotional distress. *Higgins v. Metro-N. R.R. Co.*, 318 F.3d 422, 425 (2nd Cir. 2003).

In *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 140—41 (2003), the Court held that, under FELA, a railroad worker suffering from the actionable injury asbestosis, caused by work-related exposure to asbestos, may recover, as part of the recovery for the asbestosis-related pain and suffering, mental anguish damages resulting from the fear of developing cancer. But such a complainant must prove that the alleged fear is “genuine and serious.” *Id.* at 157.

F. (§21.7) Death Claims

In the third sentence of the third paragraph of the original section, add the word “a” before the word “spouse.”

G. Procedural Matters

4. (§21.11) Venue

Because of recent extensive legislative changes in Missouri venue law, it would seem that the doctrine of *forum non conveniens* is now less significant in Missouri; thus, the law in the third paragraph of the original section may have already changed or may yet change.

Delete the second paragraph of the original section and replace with the following text:

Because of legislative changes that took effect in August 2005, § 508.010, RSMo Supp. 2005, now governs venue in a FELA case filed in a Missouri state court. The relevant provisions, for FELA purposes, of § 508,010 are as follows:

Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.

“A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested.” Section 508.010.14.

Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured outside the state of Missouri, venue shall be determined as follows:

(1) If the defendant is a corporation, then venue shall be in any county where a defendant corporation’s registered agent is located or, if the plaintiffs principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiffs principal place of residence on the date the plaintiff was first injured;

Section 508.010.5.

As used in this section, principal place of residence” shall mean the county which is the main place where an individual resides in the state of Missouri. There shall be a rebuttable presumption that the county of voter registration at the time of injury is the principal place of residence. There shall be only one principal place of residence.

Section 508.010.1.

“In all actions, venue shall be determined as of the date the plaintiff was first injured.” Section 508.010.9.

In any civil action, if all parties agree in writing to a change of venue, the court shall transfer venue to the county within the state unanimously chosen by the parties. If any parties are added to the cause of action after the date of said transfer who do not consent to said transfer then the cause of action shall be transferred to such county in which venue is appropriate under this section, based upon the amended pleadings.

Section 508.010.13.

III. Jones Act

A. (§21.13) Applicability to Seamen Injured in Employment (New Title)

Change the citation to 46 U.S.C. app. § 688 in the second sentence of the original section to the following:

46 U.S.C. app. § 688(a)

Add the following sentence to the end of the indented quote in the original section:

Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

B. (§21.14) Definitional Problems Regarding Seamen

The annotation has been superseded by the following annotation:

John F. Wagner, Jr., Annotation, *Applicability of Jones Act (46 U.S.C.A. § 688) to Workers Connected With Operation of Dredges, Drilling Platforms, Derricks, or Similar Special-Purpose Equipment*, 92 A.L.R. FED. 733 (1989).

H. (§21.24) Procedural Matters

Delete the citation to Id. in the original section and replace it with the following:

45 U.S.C. § 56.

IV. Longshore and Harbor Workers' Compensation Act

A. (§21.25) Applicability

Caveat: There is currently pending legislation that could affect 33 U.S.C. § 903. A bill introduced in the House of Representatives on March 17, 2005, is “[t]o amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States.” H.R. 1356, 109th Cong. (1st Sess. 2005). This bill provides a definition for “waters of the United States.” Section 5 of the bill, entitled “CONFORMING AMENDMENTS,” “~~strik[es]~~ ‘navigable waters of the United States’ each place it appears and insert[s] ‘waters of the United States’” and “~~strik[es]~~ ‘navigable waters’ each place it appears and insert[s] waters of the United States.” Hit. 1356 § 5 (citations omitted). The second Westlaw footnote to this pending legislation states that 33 U.S.C. § 903 is one of the sections where this change would take place. 2005 CONG US HR 1356 (Westlaw).

On March 17, 2005, H.R. 1356 was referred to the House Committee on Transportation and Infrastructure. On March 18, 2005, it was referred to the Subcommittee on Water Resources and Environment. Research and recent communication with the Subcommittee on Water Resources and Environment reveal that, as of lath 2005, no subsequent action has been taken on the bill.

C. Coverage of the Present Act

2. (§21.28) Navigable Waters

See the caveat in §21.25 of this supplement.

3. (§21.29) Employees Not Covered

Change the citation in the first sentence from 33 U.S.C. § 903(a) to the following citation:

33 U.S.C. § 902(3)(G).

On page 21—25, replace the first MU sentence—which begins with ‘A governmental employee . . . ‘—and the citation that follows it with the following sentence and citation:

A governmental employee is excluded under the Longshore and Harbor Workers’ Compensation Act of 1927 (LHWCA). 33 U.S.C. § 903(b). In addition, “any person engaged by a master to load or unload or repair any small vessel under 18 tons net” is excluded under the LHWCA. 33 U.S.C. § 902(3)(H).

D. Compensation

1. (fl.30) Disability or Death

See the caveat in §21.25 of this supplement.

Replace the second paragraph of the original section with the following text:

Compensation for disability or death is payable under the LHWCA only if the disability or death results from an injury occurring on the navigable waters of the United States. 33 USC. § 903(a). Federal compensation jurisdiction is now considered to

extend to all injuries on navigable waters, whether or not a particular injury might also have been within the constitutional reach of the state workers' compensation law. *See Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). "Disability" is defined as an:

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.

33 U.S.C. § 902(10).

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.

33 U.S.C. § 902(2).

In the first sentence of the second full paragraph on page 21—26, add an ellipsis [. . .] after the last word. Thus, the sentence should end as follows: fact.

In the last paragraph on page 21—26, the first sentence is followed by a citation that begins with "LHWCA, § 33(g)" The word "See" should be placed before that citation. Hence, the citation should begin as follows: *See* LHWCA § 33(g).

3. (§21.32) Medical Treatment

Replace the second sentence, which begins with "The injured employee..." with the following sentence:

"The employee shall have the right to choose an attending physician authorized by the Secretary..."

E. (§21.33) Actions Against Third Persons *Delete the citation to 33 U.S.C. § 906(b).*