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GREATER NEW ORLEANS PORT SAFETY COUNCIL MEETING UPDATE

On September 12, 2012, the Greater New Orleans Port Safety Council ("PSC"), which counts as its members the firm and a number of firm vessel owners and shipyard clients, along with representatives of the U.S. Coast Guard and the U.S. Army Corps of Engineers, held its meeting to discuss and consider the impacts of Hurricane Isaac on the navigation community of the Lower Mississippi River titled, "Just a Category One." Hurricane Isaac made landfall on August 28, 2012, near the mouth of the Mississippi River and still managed to cause significant interruption in river operations and several pollution and casualty incidents that required participation from many varied interests throughout the Lower Mississippi River to safely and effectively remedy the incidents. Interests from both the public and private sectors, including pilot associations and salvage contractors, responded to a number of ship grounds and barge strandings caused by the river surge and high winds associated with the slow-moving storm.

According to reports from the Coast Guard, Hurricane Isaac forced the closure of the Lower Mississippi River to all vessel traffic from Mile Marker 235 to the Sea Buoy beginning at noon CDT on August 28, 2012, only through 10 p.m. CDT on August 31, 2012, when Port Condition Normal with Restrictions was ordered by the Captain of the Port. The Coast Guard credited the swift re-opening of the river following Hurricane Isaac to the "remarkable team effort" and cooperation among the entire navigation community of the Lower Mississippi River. According to figures provided to the PSC, as a result of Hurricane Isaac, the Coast Guard handled more than 200 pollution and hazardous materials cases and addressed another 50 salvage cases, of which at least 21 were still ongoing at the time of the PSC meeting on September 12, 2012.

For the navigation community of the Lower Mississippi River, Hurricane Isaac was also an opportunity to participate in some untested procedures regarding pre-storm preparation and recovery that had only been previously considered by the Coast Guard. In many cases, these procedures were deemed "best practices" by the Coast Guard, but in the agency's ever evolving quest to balance safety with commercial interest, these procedures were not promulgated as part of any formal hurricane preparedness plan prior to Hurricane Isaac. All post-storm reports from the Coast Guard to the PSC were that

these previously untested procedures went very well for Hurricane Isaac and prevented significant potential damage to operations and facilities throughout the Lower Mississippi River. In its comments to the PSC about ongoing post-storm efforts, the Coast Guard indicated that given the degree of success of some of these procedures, it is entirely likely that some of these procedures could become fixtures in future formal hurricane preparedness plans and procedures following some additional input from the industry. Some highlights of the more successful plans and procedures implemented for Hurricane Isaac discussed by the Coast Guard included:

- Implementing Port Condition Whiskey early in advance of the storm for purposes of information gathering and monitoring;
- Moving vessels that remained in the river during the storm to locations as far upriver as possible and preferably at terminals to avoid the continuing issues with vessels that remained at mid-stream buoys lower in the river during the storm and that were involved in groundings, strandings, breakaways, etc.;
- Ordering that no vessel over 500 gross tons that was located north of the Huey P. Long Bridge could transit south of the bridge with the intention to remain in the river during the storm; and
- Re-opening the river by starting with shallow draft vessels and moving to deeper draft vessels as information on channel depth and storm debris became available.

Additionally, as with all new storms, the Coast Guard's experience through Hurricane Isaac taught many lessons, and in its comments to the PSC, the Coast Guard identified several notable issues that remain open for possible implementation in the future. These issues included:

- The possibility of dividing the area of the river that is under the command of Sector New Orleans into zones due to the unique geographical nature of the Lower Mississippi River. As conditions are markedly different from the Southwest Pass to Baton Rouge, shutting down operations needs to begin earlier down river in the face of any storm;
- The development, in conjunction with Sector New Orleans, of plans and policies on the best locations in the river to safely and securely moor vessels of varying designs and sizes during hurricanes; and
- The development of better coordination among the navigation community to ensure that commercial fishing vessels return to port well in advance of any hurricane's landfall.

As with many endeavors that necessarily impact the navigation community, the Coast Guard expressed its willingness to work with the industry as a whole and consider any input the industry might offer on the issues noted.

— Lance M. Sannino

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IN *BEECH V. HERCULES DRILLING CO., L.L.C.*, THE FIFTH CIRCUIT DEFINES "SCOPE OF EMPLOYMENT" IN VICARIOUS LIABILITY CASES UNDER THE JONES ACT

The Jones Act provides an injured seaman with a private civil cause of action against his employer in the event of personal injury or death arising from an employer's or co-employee's negligent conduct and occurring in the course of employment. For an employer to be found vicariously liable for an employee's negligence, the employee must be acting "in the course of employment." In *Beech v. Hercules Drilling Co., L.L.C.*, the court defined the meaning of the phrase "in the course of employment" when analyzed in the context of a Jones Act lawsuit, 2012 U.S. App. LEXIS 17476 at *11 (5th Cir. 2012).

In *Beech*, the court was tasked with deciding whether or not an employee on an oil rig was acting in the course of employment when he accidentally discharged a firearm resulting in the death of a coworker. On December 13, 2009, Michael Cosenza was assigned to work a night shift aboard a jack-up drilling rig and was the only crew member on duty. His duties that night were to monitor the rig's generator, to check certain equipment, and to report any suspicious activity or problems, which were performed at the direction of his employer while watching television and commiserating with fellow employees in the break room. Keith Beech, who was not on duty that night, but was subject to the call of duty, was also in the break room. During the two men's conservation, Cosenza retrieved his firearm which he had accidentally brought onboard in order to display to Beech. As Cosenza sat back down, his arm accidentally bumped a part of the couch and the firearm discharged, mortally wounding Beech. *Id*. at *2-4.

The district court concluded that Cosenza was acting within the course of employment because at the time of discharge, he had "abandoned his purpose of showing off the gun and was in the process of sitting down on the couch to watch television." Because Hercules encouraged its night watchmen to watch television, doing so was within the scope of employment. After so ruling, the district court awarded Beech's survivors a total of $1,194,329.

On appeal, Hercules alleged, and the Fifth Circuit agreed, that the district court had erred in finding Cosenza's conduct to be within the scope of his employment. The court quoted a prior holding in which it held that "an employer is only liable for the wrongful acts committed by its employee when the employee's tortious conduct *is in furtherance of the employer's business*." *Stoot v. D&D Catering Serv. Inc.* 807 F.2d 1197, 1199 (5th Cir. 1987). The Court of Appeals rejected Beech's argument that *Stoot* only applied to intentional torts. In so ruling, the Fifth Circuit took advantage of an opportunity to explicitly state its rule for vicarious liability under the Jones Act. Specifically, the court stated that "whether the underlying injurious conduct was negligent or intentional, the test for whether a Jones Act employee was acting within the course and scope of his employment is whether his actions at the time of the injury were in furtherance of his employer's business interests." Showing off one's handgun clearly falls outside this scope.

Jones Act employers should take comfort in this holding as it eliminates from the scope of employment activity undertaken for private purposes which lack a causal relationship with the actor's employment. Instead, employers can be confident that vicarious liability will only arise from employee conduct undertaken in furtherance of their business

interests. As always, Jones Walker will continue to monitor all issues that can potentially impact our clients. Should there be any changes in the law, we will provide updates in future E*Lerts.

—William C. Baldwin

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THE FIFTH CIRCUIT HOLDS THAT CURE AWARDS SHOULD ONLY INCLUDE THE COSTS OF ACTUAL PAYMENT TO MEDICAL PROVIDERS

"Cure" is a shipowner's obligations under general maritime law to pay necessary medical services for seamen injured while in a vessel's service. In an issue of first impression for the Fifth Circuit, the court was tasked with determining whether an award for cure should include the difference between the amount the seaman's medical providers charged and the lesser amount they actually accepted from his insurer as full payment.

The collateral source rule is a substantive rule of law that bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor. A majority of state courts addressing the issue have held that the rule prohibits in tort actions a reduction of compensatory damages by the difference between the amount billed for medical services and the amount actually paid. However, because maintenance and cure is not based on an employer's negligence, it is unrelated to any duty of care under tort law. Accordingly, because of the unique nature of maintenance and cure, normal rules of damages, such as the collateral source rule in tort, are not strictly applied.

The Fifth Circuit has identified an exception to this general prohibition of the collateral source rule in maintenance and cure lawsuits: where a seaman has alone purchased medical insurance, the shipowner is not entitled to deduct from its maintenance and cure obligation moneys the seaman receives from his insurer. However, an injured seaman is still only permitted to recover maintenance and cure for those expenses actually incurred.

In *Manderson v. Chet Morrison Contractors, Inc.*, 666 F.3d 373 (2012), the injured seaman paid his own insurance premiums. The district court, having found Manderson purchased his own medical insurance, made no deduction from the cure award for payments by Manderson's insurer. In doing so, however, the district court determined that the amount of cure owed was actually the greater amount originally charged by Manderson's health-care providers. On appeal, Manderson's employer contended that the appropriate amount for cure was the lesser amount the medical providers actually accepted as full payment from Manderson's insurer. The Fifth Circuit agreed.

Specifically, the court held that the amount needed to satisfy an employer's cure obligation is the amount needed to satisfy a seaman's medical charges. Thus, for Manderson, regardless of what his medical providers charged, those charges were satisfied by the much lower amount actually paid by his insurers (i.e., the amount actually incurred). Consequently, the district court exceeded the scope of cure by awarding the higher charged amount.

The Fifth Circuit's holding should comfort employers who employ seamen. After *Manderson*, these employers are assured that they will only owe an amount of cure equal to the amount actually paid to medical providers. This holding should effectively eliminate the possibility that employers will be stuck with cure obligations that are out of proportion with amounts actually paid. As always, Jones Walker will continue to monitor all legal issues that may affect our clients. Should any developments arise, we will relay them in future editions of E*Lerts.

—Matthew S. Lejeune

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IN *NEW ORLEANS DEPOT SERVICES, INC. V. DIRECTOR*, THE FIFTH CIRCUIT CONTINUES TO EXPAND LHWCA COVERAGE

The Longshore and Harbor Workers' Compensation ("LHWCA") provides a federal workers' compensation scheme for the benefit of maritime workers. For a claimant to be eligible for benefits under the LHWCA (1) his injury must occur on a maritime situs, and (2) his status must be that of a maritime employee. The situs requirement is fulfilled when the injury occurs upon navigable water, including any 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.

In *New Orleans Depot Services, Inc. v. Director*, a former container repair mechanic who repaired both marine and land based containers sought permanent partial disability benefits under the LHWCA as a result of hearing loss, 2012 U.S. App. LEXIS 15336. The repair yards in which the claimant worked were 300 yards or less from the Industrial Canal, but did not have docks, piers, or wharfs. Considering the above facts, the Administrative Law Judge ("ALJ") held that the claimant satisfied both the situs and status requirements of the LHWCA. On December 3, 2010, the Benefits Review Board ("BRB") affirmed the ALJ's decision. The claimant's employer then appealed the BRB's decision to the Fifth Circuit.

On appeal, the Fifth Circuit affirmed the BRB's decision. In doing so, the court stated that when deciding whether or not a location satisfies the LHWCA's situs requirement, courts should consider both the geographic proximity to the water's edge and also the functional relationship of the location to maritime activity. In other words, the perimeter of an area is defined by its function. The Court found that the repair yard satisfied the situs test as it was used to store and repair containers which were used in or had previously been used in marine transportation. Furthermore, "if a particular area is associated with items used as part of the loading process, the area need not itself be directly involved in loading or unloading a vessel or physically connected to the point of loading or unloading." The court found that the containers being repaired "were used as part of the loading process," thus satisfying the situs requirement. Furthermore, the court determined that claimant's work on maritime containers met the status requirement as the maintenance or repair of tools essential to the loading process are covered by the LHWCA. The court deemed it irrelevant that the skills utilized by the claimant were "essentially nonmaritime."

The Court's ruling is troubling for any business operating in close proximity to navigable waters. As Judge Clement notes in her dissent, there are no facts indicating that the container repair work done at the repair yard is part of any loading or unloading process. Thus, she argues that the yards lack the required functional nexus to maritime activity. Judge Clement states that "'loading and unloading' cannot reasonably be interpreted to encompass every step in the overall supply chain surrounding marine shipping." Her dissent concludes by stating that "[t]he majority's reasoning sweeps so broadly that it threatens to swallow every employer with even a tangential relation to the maritime industry. If a worker whose sole responsibility is to repair containers is covered by the LHWCA, why not the factory work who manufactures the same containers?" For now, employers operating near navigable water should be aware that even the most attenuated relationship to the loading and unloading of vessels may lead to LHWCA liability. As the caselaw continues to develop in

this uncertain area of maritime law, Jones Walker will continue to monitor it and will relate any developments in future editions of our E*Lerts.

—Stephen H. Clement

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FPSO: PLATFORM OR VESSEL

The challenge of producing and storing hydrocarbon after drilling is completed in the deep waters of the Outer Continental Shelf in the Gulf of Mexico has been addressed with the emergence of Floating Production Storage and Offloading ("FPSO"), Floating Storage and Offloading ("FSO"), and Floating Storage Units ("FSU"). In September 2012, the Houston Marine Insurance Seminar reported on the risks associated with these floating engineering systems anchored to the sea floor. Currently there are 8 deployed in North America and 200 worldwide. The BW Pioneer is the largest FPSO operation in the Gulf of Mexico. The first FSO was used in the Gulf of Mexico in 1998 under contract to PEMEX. In 2011 Royal Dutch Shell announced the planned development of a floating LNG FPSO. These structures are becoming prevalent as remote site drilling increases.

Originally, in 1977, the FPSO was a converted super tanker that was not more or less permanently attached to the ocean's floor and helped to produce and store hydrocarbons from multiple wells where pipeline transport was not practical. Presently, many FPSOs are more or less permanently moored but can be disconnected from a submerged well head in adverse weather. Some FPSOs are positioned and anchored in other manners so that they can be easily moved and redeployed to other developing fields.

In *Mendez v. Anadarko*, 2012 U.S. App. Lexis 6405 (5th Cir. 2012), a worker was injured on a SPAR, a floating production platform, using a mooring system which anchored it to the bottom of the Gulf of Mexico. The Fifth Circuit held that it was not a vessel in navigation under 1 USC 3 or as defined in *Stewart v. Dutra Const. Co.*, 543 US. 481 (2005). The Fifth Circuit focused on whether the structure was designed primarily to serve as a platform; whether it was more or less permanently secured; and whether its transportation function went beyond theoretical mobility and incidental movement as set forth in Fields v. Pool Offshore, 182 F.3d 353 (5th Cir. 1999). This fall the U.S. Supreme Court will consider these factors in the context of a floating , but moored, casino in *Lozman v. City of Riviera* Doc. 11-626 (U.S. S. Ct. 2012).

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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