STATE *vs.* FEDERAL COMPENSATION FOR LONGSHOREMEN

BY

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What are the rights of a longshoreman under the workmen's compensation system? During the past ten or fifteen years it has been well-nigh impossible to give a clear or definite answer to this question. The exact legal status of claims for injuries on the seacoast has remained uncertain during the entire period while the States of the Union were gradually, one after another, adopting compensation systems for the benefit of workers within their respective borders. This uncertain and indefinite status was due in the main to the conflict between State and National sovereignty. In the early days of compensation it was assumed, although not without considerable doubt, that the laws of the individual States embraced within their scope men engaged in loading or unloading of freight on board vessels or in the repair of ships lying alongside piers and docks. This assumption, however, was rudely shattered by the decision of the United States Supreme Court handed down on May 21, 1917, in the case of Southern Pacific Company v. Jensen (244 U.S. 205).

The Jensen case involved a claim under the New York Act for death resulting from injuries sustained while the deceased was on board and engaged in loading freight on a vessel. In holding that the claim did not come within the purview of the New York Act, the court expressed the view that the work of a stevedore is maritime in nature, that the employment is in connection with a maritime contract, that the injuries received were likewise maritime and the rights and obligations of the parties in connection therewith were matters clearly within admiralty jurisdiction.

It is not my purpose to treat at length the legal reasoning employed by the court in the Jensen and subsequent cases, but it may be well to review briefly the effect of this decision and its consequences insofar as the rights of longshoremen for compensation are concerned. No less an authority than Justice Holmes has expressed the view that the reasoning of the court in the Jensen case and the cases following it has never satisfied him. And Justice Brandeis of the same court has stated that the far-reaching and unfortunate results of the rule declared in that case could not

have been foreseen when the decision was rendered. A brief recital of the legislative and judicial events following that decision may not be out of place. As a reminder to the student of casualty insurance who is not familiar with the nice distinctions created by the Constitution and its interpreters as between Federal and State jurisdiction, let me point out that the admiralty jurisdiction of the Federal Courts extends over navigable waters, including vessels designed for and capable of the navigation of such waters in the execution of maritime contracts. By the term "navigable" are described waters which form a continuous highway for interstate or international commerce. For example, in the State of New York, the Hudson, St. Lawrence and Niagara Rivers, Lakes Erie and Ontario, and the streams and lakes within the State that are commercially tributary to them, including the canals, come within the definition of navigable waters.

Insofar as industrial accidents are concerned, it appears to be well settled that the Federal law takes cognizance of claims relating to maritime contracts in cases where the accident occurs on board a vessel operating on navigable waters, while the laws of the individual States are permitted to recognize only accidents that occur on land or any extension thereof. According to the rule laid down by the Federal Courts, maritime jurisdiction will not extend to accidents incurred in the construction of new vessels which have not been put in commission, nor will the Federal Courts assume jurisdiction in cases involving injuries to longshoremen or other harbor workers engaged in work on maritime contracts when the accident takes place on the dock or on the pier, docks and piers being regarded as extensions of the land and therefore subject to State jurisdiction. Under this rule, the place of accident is the important point in deciding the question of jurisdiction. To illustrate: A longshoreman who is pushing a hand truck loaded with freight from a dock or pier to a vessel lying alongside such dock or pier, may sustain an injury while he is on the dock or on the gangplank or after reaching the boat. If injured on the dock, the claim comes within the State Compensation Law. Should the accident occur while on the gangplank, the claim might come within State or Federal jurisdiction, depending on the facts and circumstances of the case. If the injury is sustained on board the vessel, the claim comes within the provisions of the Federal Law. The Federal Law will prevail if he should fall off the dock and meet

with an injury in the water. And similar situations may arise with respect to ship carpenters or other mechanics engaged in ship repair work.

In declaring certain torts as maritime in nature and bringing them within the scope of the Federal authority, the courts have been prompted by the belief that this was the best way of securing uniformity as respects maritime rights and obligations of the kind contemplated by the Constitution, relieving maritime commerce from restrictions which may be incident to control exercised by individual States. It is difficult, however, to see how such uniformity can prevail if employees of independent contractors, such as stevedores, who do not stand in direct relation with the owner of the ship are subjected to different systems of compensation depending upon the place of the accident. This very point is argued by Mr. Justice Brandeis in his dissenting opinion rendered in "The State of Washington v. Dawson" (264 U. S. 219).

With the desire to meet and overcome the objections presented by the Supreme Court in the Jensen case, an appeal made to Congress for relief resulted in an amendment to the Judicial Code which was adopted on October 6, 1917, and provided that in all civil cases of admiralty and maritime jurisdiction the claimants should have not only the right of a common law remedy, where the common law is competent to give it, but in addition thereto the rights and remedies provided under the workmen's compensation laws of the particular State where the accident occurred.

The question as to the constitutionality of this Act came up before the Supreme Court in the case of Knickerbocker Ice Co. v Stewart (253 U. S. 149). The decision was handed down on May 17, 1920. The Knickerbocker case involved a claim under the New York law on account of the death of a bargeman who was drowned in the Hudson River. The court held that Congress had no authority to legislate that the workmen's compensation laws of individual States could be made applicable to injuries arising out of maritime torts. Emphasis was given to the point that since the beginning of our Constitution, Federal Courts recognized and applied rules and principles of maritime law somewhat distinct from the law of the several States, that the Constitution referred to a system of law operating uniformly in the whole country and that it was not the intention of the Constitution to place the rules of the maritime law under the disposal and regulation

of the several States since that would defeat the purpose of uniformity and consistency which was aimed at on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.

Following the defeat of this amendment, another effort was made in 1922 when Congress was prevailed upon to legislate again on the subject. Another amendment to the Judicial Code known as the Johnson-Mills amendment was then enacted, having the same object of bringing harbor workers under the compensation laws of the several States. This amendment was so framed as to deprive the district courts of their jurisdiction in maritime torts. It was quite logical that this second amendment should have met with the same fate as the preceding legislation. The power of Congress in enacting it was first challenged in the United States Court for the Southern District of Alabama, and the challenge was upheld by the Supreme Court on February 25, 1924, in the cases of "State of Washington v. Dawson" and "The Industrial Commission of California v. Rolph." Both cases involving the same point were heard together and were decided by one opinion. The Dawson case raised the question as to whether an employer engaged in the business of stevedoring, whose employees work only on board ships in the navigable waters of Puget Sound, could be compelled to contribute to the accident fund provided for by the Workmen's Compensation Act of Washington. In the Rolph case, the Industrial Accident Commission of California made an award of compensation on the death of a workman killed while actually engaged in maritime work under a maritime contract upon a vessel moored at her dock in San Francisco Bay and discharging her cargo. The majority of the court held that the States of Washington and California had no jurisdiction in the cases at bar and that the Act of June 10, 1922 (the Johnson-Mills Amendment), was unconstitutional and beyond the power of Congress. These decisions handed down on February 25, 1924, embodying as they did the nullification of the Congressional Act, ended apparently for all time the efforts to bring longshoremen within the purview of State Compensation Acts. The obligations of the employer and the rights of the employee were again to be determined under the admiralty rule unless the accident occurred on land or any extension thereof.

A modification of the rule to some extent was introduced in the

decision handed down on October 18, 1926, in the case of International Stevedoring Company v. Haverty (269 U. S. 549). If anything, this decision served to intensify the difficulty of determining rights and obligations under the admiralty rule. Here a claim was prosecuted by a longshoreman who was injured while stowing freight in a vessel's hold in a harbor in Seattle. The opinion written by Mr. Justice Holmes is to the effect that the common law fellow-servant doctrine is not available to the employer as a defense, the claimant being entitled to the benefits of the Merchant Marine Act of 1920. In effect the longshoreman in this case is declared by the court to be a seaman on the ground that work of this nature was a maritime service formerly rendered by the ship's crew.

The search for some legislative remedy to bring the longshoremen under a compensation system has finally resulted in the enactment of a special measure. I refer, of course, to the Federal Act recently adopted by Congress for the benefit of harbor workers, entitled "Longshoremen's and Harbor Workers' Compensation Act" approved on March 4th to become effective on July 1, 1927. This Act appears to be modeled very closely after the New York Statute. A synopsis of its provisions covering the essential points may be of some service: It provides for a system of compulsory compensation for maritime workers in cases of disability or death occurring upon the navigable waters of the United States, including any dry dock, except the master and members of the crew of any vessel, persons engaged by the master to load, unload or repair any small vessel under eighteen tons, officers or employees of the United States or any State or foreign government. Insurance of the employer's obligation is compulsory, but self-insurance is permitted upon proof of financial ability. Occupational diseases or infections arising naturally out of the employment or unavoidably resulting from accidental injury are covered under the Act. The schedule of compensation is based on 66 2/3% of average weekly wages, with a maximum of $25 and a minimum of $8 per week, and is subject to a maximum limit of $7,500. Compensation to the wife continues during widowhood with an allowance upon remarriage as provided in the New York law; the other provision as to distribution of awards among dependents is also similar to that provided in New York. The average wage in death cases is subject to an upper limit of $37.50 and a lower of $12 per week.

Provision is made for a seven-day waiting period unless the disability lasts more than forty-nine days. The employer must furnish medical treatment as the nature of the injury or process of recovery may require. The administration of the Act is under the authority of the United States Employees' Compensation Commission. Deputy Commissioners must order hearings upon application of either party, and the Federal district courts are given the power to suspend compensation orders and to set aside proceedings by injunction. In case of accident due to the negligency of a third party, the injured has the option to take compensation or to sue the third party for damages, and the acceptance of compensation operates as an assignment of the claim for damages to the party liable for the compensation. The Act contains the usual provisions respecting posting of notices, reports to be filed by the employer, regulation of attorneys' and physicians' fees, and also imposes on the Commission an obligation to study conditions and to make recommendations to Congress for accident prevention.

The frequent changes in the statute law and its interpretation by the courts have been followed very closely by the insurance companies with the object of safeguarding the employers, by means of their policy contracts, against loss because of the peculiar and conflicting nature of the obligations imposed by State and Federal authority. At first the regular standard form of workmen's compensation and employers' liability policy was regarded as sufficient to provide the necessary cover on the assumption that the principal obligation of the employer was under the State Compensation Act with only incidental liability for negligence.

About September 15, 1920, two forms of cover were established for the stevedoring classifications, Cover I providing unlimited compensation and limited liability for damages at common law to an amount not exceeding $5,000 per person, and $10,000 per accident involving two or more persons. Higher limits were made available at increased rates, the highest limits providing $50,000 per person and $100,000 per accident, at an additional cost of 10%. Cover II provided insurance without limits both as to compensation and liability at a higher cost. These forms of cover with several fluctuations in rates remained in force until August 19, 1922.

Following the enactment of the Johnson-Mills amendment to the Judicial Code, the single form of unlimited compensation

and liability cover was restored in the belief that this amendment definitely fixed the compensation status for longshoremen. Soon after the Supreme Court declared the Johnson-Mills Act unconstitutional, the companies again erected two forms of cover. This time Cover I was so constructed as to provide compensation for accidents coming under the State acts with a limit for liability against negligence of $5,000 per person, and placing no limit on the number of cases resulting from a single accident. Cover II, with rates about 30% higher than those for Cover I, was constructed to provide so-called voluntary compensation and unlimited liability under the negligence provision of the policy. By voluntary compensation it was intended that a carrier should offer to each injured employee a settlement on the basis of the State Compensation Law, even though the accident may have been subject to Federal jurisdiction. The employee was of course free to accept or reject the offer, and in case of rejection had the right to maintain an action at common law or at admiralty.

Subject to several fluctuations in rates, these forms of cover continued in force until the fall of 1926 when the Supreme Court announced its decision in the Haverty case. This disturbing decision caused another change, and on January 1, 1927, steps were taken to modify the liability feature of Cover II, limiting it in the same manner as provided under Cover I and the rates were increased to the extent of 30% for Cover I and 10% for Cover II.

The enactment of the Longshoremen's and Harbor Workers' Compensation Act presents a new problem both as to cover and rates. The subject is still under discussion and therefore nothing definite can be expressed at the present time. It appears, however, that a solution will be reached by giving the employer protection under a special endorsement to be attached to the standard policy which will insure him against the obligations imposed by the Federal Act, while under the standard policy he will be protected against any losses incurred under the State Compensation Act or on account of any incidental claims which may arise under the negligence provisions of the policy. The latter possibility, however, seems remote since the enactment of the Federal statute will bar recovery on the theory of negligence.

The problem of rates will be determined ultimately along State lines, not along National lines, as many employers seem to think. Due cognizance will be given to the proportionate number of

accidents occurring on water as compared with the number occurring on land or any extensions thereof. A National schedule of rates under the Federal Act does not seem possible because of the inherent difficulties involved in segregating payroll as between workers on land and workers on ships. Employees engaged in loading freight or in ship repair work interchangeably on ship and on shore, and the same men may be subject to accidents on land in the morning and to maritime injuries in the afternoon. The exposure of a given risk under two separate jurisdictions requires a single system of rates reflecting average conditions. The division of accidents as to place of occurrence must remain for some time a matter of judgment since no conclusive data are available, but in the course of time and with the accumulation of combined experience under State and Federal authority, proper and dependable average rates will automatically develop.