

## **SECTION 5**

### **Section 5(a)**

Under Section 5(a), the liability of an employer for benefits as required by Section 4 “shall be exclusive and in place of all other liability of such employer to the employee” and anyone else entitled to recover damages from the employer on account of the employee’s injury or death. 33 U.S.C. §905(a). If, however, the employer fails to secure the payment of compensation as required by the Act, employer loses this immunity, and claimant may elect to claim compensation or bring a suit at law or in admiralty for damages against the employer. In such a suit, moreover, the employer may not rely on the defenses that the injury was caused by the negligence of a fellow employee, assumption of the risk or contributory negligence.

Where claimant works for a subcontractor, the subcontractor enjoys the Section 5(a) immunity from suit, and the contractor is deemed the employer for purposes of tort immunity only if the subcontractor fails to secure the payment of compensation under Section 4. This provision, added in the 1984 Amendments, overrules the Supreme Court’s holding in *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925 (1984), that a general contractor that purchased compensation insurance covering its subcontractors could enjoy the Section 5(a) immunity. In enacting the 1984 Amendments, Congress explicitly overruled the *Johnson* decision, stating that this decision altered key components of what had been widely regarded as the proper rules governing contractor and subcontractor liability and immunity under the Act. *Joint Explanatory Statement of the Conference Committee*, H.R. Rep. 98-1027, 98th Cong., 2d Sess., 24, reprinted in 1984 U.S.C.C.A.N. 2772, 2774.

Thus, only if the subcontractor actually fails to obtain insurance or secure the payment of compensation under the Act and the general contractor then provides the compensation benefits does the general contractor obtain immunity from suit. *See Louviere v. Marathon Oil Co.*, 755 F.2d 428, 17 BRBS 56(CRT) (5th Cir. 1985); *Frederick v. Mobil Oil Corp.*, 765 F.2d 442 (5th Cir. 1985). *See* Section 4.

In a case where the claimant sought an opinion as to whether his employer had secured the payment of compensation in order to determine whether he could elect to file suit against employer pursuant to Section 5(a), the Board held that the administrative law judge was limited to deciding the question of employer’s insurance coverage when the claimant had moved the issues be so limited. By proceeding with other issues in the case, the administrative law judge may have forced the claimant to elect the compensation remedy. The Board acknowledged that such a limited decision may be in the nature of a declaratory judgment but was persuaded this procedure was necessary in order to protect claimant’s rights under Section 5(a). *Rice v. McKendree United Methodist Church*, 6 BRBS 242 (1977) (Order).

## Digests

The Fifth Circuit indicated that Section 5(a), which provides that an employer's liability under the Longshore Act is "exclusive," precludes injury-related tort claims brought pursuant to state law. Decision includes extensive discussion of when state actions, and federal proceedings not explicitly provided for by the Longshore Act, are preempted by the Longshore Act's scope. *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *cert. denied*, 490 U.S. 1035 (1989).

The Fifth Circuit held that the exclusivity provision of Section 5(a) precludes a claimant from bringing a suit against an agent of his employer, the administrator of a fund established by the self-insured employer for payment of claims under the Act, for alleged bad faith in terminating compensation payments, even though the Act does not contain any language explicitly precluding such a lawsuit. The exclusive remedy for nonpayment of benefits is provided by the Act, specifically Section 14. The court rejected claimant's argument that her suit does not arise out of her work-related injury and that Section 5(a) immunity attaches only to employer and not to its agent. The court indicated, in a footnote, that its holding may be inconsistent with the First Circuit decision in *Martin v. Travelers Ins. Co.*, 497 F.2d 329 (1<sup>st</sup> Cir. 1974), but elected to follow *Sample v. Johnson*, 771 F.2d 1335 (9<sup>th</sup> Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986), and *Hall v. C & P Tel. Co.*, 809 F.2d 924 (D.C. Cir. 1987). *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808, 21 BRBS 1(CRT) (5th Cir. 1988).

The Eleventh Circuit rejected the argument that Section 5(a) provides contractor status to a vessel owner whose agent hired the contractor employing decedent, who was engaged in underwater cleaning of the hull of the vessel at the time of his death. Since the shipowner had not claimed any immunity under the Section 5(a) exclusive remedy provision, Section 5(a) was irrelevant. Moreover, vessel owner could not be considered a general contractor. *Roach v. M/V Aqua Grace*, 857 F.2d 1575 (11th Cir. 1988).

1984 Amendment to Section 5(a), under which a contractor is deemed the employer of a subcontractor's employees only if the subcontractor fails to secure payment of compensation, did not abolish the borrowed employee doctrine. Since the District Court properly applied the nine factors relevant in determining whether the employee is a borrowed employee, the district court's finding that the suit against the borrowing employer must be dismissed based on exclusivity provision is affirmed. *Capps v. N.L. Baroid-NL Indus., Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 479 U.S. 838 (1986).

Fifth Circuit declined to reconsider the holding rejecting the argument that Section 5(a) as amended in 1984 precludes a finding that the subcontractor's employee is the borrowed employee of the contractor. *Alexander v. Chevron, U.S.A.*, 806 F.2d 526 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987).

The court held that claimant, employed by a contractor, was a borrowed employee of Amoco and upheld dismissal of suit against Amoco as the Longshore Act is claimant's exclusive remedy. The 1984 Amendments to Sections 4(a) and 5(a) do not restrict borrowed employee status only to instances when the lending employer fails to secure workers' compensation coverage, and the borrowing employer does. *Melancon v. Amoco Prod. Co.*, 834 F.2d 1238 (5th Cir. 1988).

Two oil workers injured in collapse of an oil platform operated under a joint operating agreement (JOA) between the owners which designated one owner, ODECO, as the "operator," and the others as "non-operators", brought suit against the non-operators, arguing ODECO was their employer. The court held that a joint venture may be an employer under the Act and rejected claimant's arguments that it look to state law in determining whether the JOA created a joint venture entitling all parties to a shield from tort liability under Section 5(a). Instead, the court looked to four common-law factors and held that in this case the JOA did not create a joint venture because it stated in unmistakably clear language that, "it is not the intention of the parties to create a partnership, association, trust, or other semblance of business entity." *Davidson v. Enstar Corp.*, 848 F.2d 574, vacated on rehearing en banc, 860 F.2d 167 (5th Cir. 1988). On rehearing en banc, the court held that the facts in the instant case were indistinguishable from those in *Bertrand v. Forest Oil Corp.*, 441 F.2d 809 (5th Cir. 1971), in which the court held that despite language similar to that in the instant case, the operator and nonoperators were engaged in a partnership or joint venture as a matter of law and nonoperators were entitled to immunity from tort liability under the Act. The court thus vacated its earlier holding. *Davidson v. Enstar Corp.*, 860 F.2d 167 (5th Cir. 1988), vacating 848 F.2d 574 (5th Cir. 1988).

The First Circuit held that an uncontested finding of compensability, rendered by way of approval of a settlement under the Longshore Act, as extended by the Nonappropriated Fund Instrumentalities Act (NFIA), is sufficient to bar a related lawsuit against a U.S. Navy hospital for medical malpractice brought under the Federal Tort Claims Act, since the Longshore Act provides the employee's exclusive remedy for injury-related recovery in this situation, noting that: 1) because the employee in this case did not appeal the deputy commissioner's approval of his Longshore Act settlement, he was collaterally estopped from later contesting Longshore Act coverage; and 2) because the NFIA exclusivity provision, 5 U.S.C. §8173, prohibits third-party actions against the U.S., the employee was barred from bringing his lawsuit against the U.S. Navy hospital. *Vilanova v. U.S.*, 851 F.2d 1, 21 BRBS 144(CRT) (1st Cir. 1988), cert. denied, 488 U.S. 1016 (1989).

In this state law tort claim, the Fourth Circuit found no conflict between the LHWCA and South Carolina statute and held that the contractor is entitled to immunity from negligence claims conferred upon it by South Carolina law. The court noted that Section 5(a) immunity applies to a contractor only if he secured the payment of compensation for the subcontractor's employees. The court reasoned that the South Carolina rule of immunity of a contractor is different from that under the LHWCA but not in conflict with it since

Congress did not intend to prescribe the immunity rules to be applied by states in actions brought upon state law claims. Thus, the federal immunity rule is to be applied when the third party claim is a federal claim, *e.g.*, Section 5(b), but when the third party claim is a state law claim, the immunity rules of that state are to be applied. *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910 (4th Cir. 1986), *cert. denied*, 479 U.S. 914 (1986).

The Sixth Circuit held that claimant was precluded from recovering concurrently for his injuries under both the Longshore Act and FELA as concurrent jurisdiction is not permissible under two distinct federal statutes, given the language of Section 5(a) of the Act, which provides that the Longshore Act shall be “exclusive and in place of all other liability.” Moreover, the court noted that, historically, Longshore Act coverage and state workers’ compensation overlapped, while coverage under FELA never overlapped with coverage under the Act. The court also rejected claimant’s contention that the “exclusive remedy” provision of the Act is to be interpreted liberally as evidenced by earlier Supreme Court decisions holding that an employee may recover benefits under the Longshore Act and sue his employer under the “unseaworthiness” doctrine. In rejecting this argument, the court noted that the 1972 Amendments to the Act eliminated any concurrent “unseaworthiness” remedy. Finally, the court addressed the Supreme Court’s holding in *Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989), that railroad workers injured while maintaining or clearing equipment that is used to load and unload ships are covered by the Longshore Act, not FELA. Provided that a claimant’s injuries are covered by the Longshore Act, the remedy provided by that Act is exclusive. *Kelly v. Pittsburgh & Conneaut Dock Co.*, 900 F.2d 89 (6th Cir. 1990).

The Fifth Circuit held that where claimant has already filed a claim and received compensation under the Longshore Act, his concurrent tort claim under the Texas Deceptive Trade Practices Act is preempted pursuant to the exclusivity provisions of Section 5(a). The court discussed the history of cases in the “twilight zone”, *i.e.*, where there exists, as in the instant case, concurrent jurisdiction between the Act and state law. It concluded that, assuming Texas would allow a claim under the DTPA instead of under the state workers’ compensation law, inasmuch as claimant elected his federal remedy, his state claim is preempted. *Hetzell v. Bethlehem Steel Corp.*, 50 F.3d 360 (5th Cir. 1995).

The Fifth Circuit held, under “the highly unusual fact pattern” of this case, Claimant’s Louisiana state-tort claim was not preempted by the Longshore Act. In reversing the district court’s dismissal with prejudice of Claimant’s state-tort claim, the court held that although typically a claimant cannot receive both Longshore Act compensation and make a claim in tort under state law, Claimant, in this instance under Louisiana law, eschewed any Longshore Act claim and therefore had the option to bring a state claim in tort. The court reasoned because Claimant alleged his significant exposure to asbestos first occurred in 1969, his state remedy for his mesothelioma fell outside the scope of the Louisiana Workers’ Compensation Act (WCA) in effect at that time (mesothelioma was not covered by the WCA until it was amended in 1975). As such, concurrent jurisdiction existed

enabling Claimant to seek relief under either the Longshore Act or state tort law. Emphasizing “that the category of claims we address here is small,” the court stated its holding is limited to: 1) maritime workers; 2) injured in the “twilight zone” of coverage; 3) in Louisiana; 4) who neither seek nor obtain Longshore Act compensation; and 5) whose injuries are not covered by the relevant version of the WCA. *Barosse v. Huntington Ingalls, Inc.*, 70 F.4th 315, 57 BRBS 1(CRT) (5th Cir. 2023).

The Act is premised on the notion that employers will accept the burden of no-fault compensation recovery in exchange for predictable liability for injuries suffered by workers. The language of Section 5(a) evinces an unmistakable intention to codify this *quid pro quo*--the employer provides no-fault compensation in exchange for immunity from tort damages. Thus, the Third Circuit held that where an employer has obtained coverage for its employee under both the Act and the state or territorial statute, Section 5(a) and the Supremacy Clause bar a state or territorial tort recovery against employer, since to allow a tort action would simply obstruct the purpose of the Act by depriving maritime employers of their side of the Act’s *quid pro quo*. Further, the Third Circuit agreed with the Fourth, *see Huff v. Marine Testing Corp.*, 631 F.2d 1140 (4th Cir. 1980), and Fifth Circuits, *see Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), and with the Board, *see Edwards v. Willamette W. Corp.*, 13 BRBS 800 (1981), that the concept of “employer” under the Act includes firms considered borrowing employers under the borrowed servant doctrine. Borrowing employers, therefore, are entitled to whatever immunity is available under Section 5(a) of the Act. The 1984 Amendments to Section 5(a) were not intended to overrule the borrowed servant doctrine. In this case, the evidence is clear that claimant was a borrowed servant of Hess and that Hess is entitled to Section 5(a) immunity. Claimant had explicitly agreed to work under conditions controlled solely by Hess, his work was directed and supervised by Hess, and Hess provided safety equipment. Claimant, therefore, acquiesced in working for Hess and Hess paid his salary and provided longshore coverage. *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh’g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991).

Claimant, who was receiving benefits under the Act, filed suit in tort. Affirming the district court’s finding that claimant was covered under the status and situs provisions of the Act, the Fifth Circuit expressed its concerns regarding litigation of a request for compensation in a federal district court after the request was addressed via Longshore Act proceedings. In this case, however, the issue was not raised by the parties and the court’s determination that the claimant is covered under Section 2(3) is consistent with the administrative findings. *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 24 BRBS 81(CRT) (5th Cir. 1991).

The Board held that if a general contractor is the employee’s true employer under the borrowed employer doctrine, the contractor is liable for the employee’s compensation under Section 4(a) and has tort immunity under Section 5(a) regardless of whether its behavior as a general contractor or insurance guarantor would otherwise cause it to be

“deemed” an employer under the amended statutory scheme. *Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994), *aff’d sub nom. Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996).

The Board rejected employer’s argument that Section 5(a) precludes an award of interest under the Act. It noted that the purpose of Section 5(a) is to make the Act a claimant’s exclusive remedy against an employer for a work-related injury and that, although not addressed in the Act, interest satisfies the purpose of the Act and is mandatory. Thus, the Board concluded that, as interest is awarded on compensation payable under the Act, it cannot be said that claimant sought recovery “at law or in admiralty” in violation of Section 5(a). *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160 (1994) (Dolder, C.J., concurring and dissenting).

A borrowed servant becomes the employee of the borrowing employer and is not the servant of the nominal employer. For more on this case, see Section 33(i). *Perron v. Bell Maint. & Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993).

The Fifth Circuit determined that because employer failed to secure compensation, claimants exercised the right provided to them under Section 5(a) to elect to bring a civil action. The court examined the question of whether the LHWCA mandates application of a *pro tanto* (dollar-for-dollar) approach to a credit when an employee elects to bring a civil action under Section 5(a). The language of Section 5(b) does not suggest application of a *pro tanto* rule, and the Supreme Court, in *McDermott, Inc. v. AmClyde*, 114 U.S. 1461 (1994), rejected application of the dollar-for-dollar credit method in maritime cases in favor of the proportionate share method. The court further noted that the language of Section 5(a) demonstrates Congress’s ability to expressly modify state laws if it decided to do so and held that Congress did not intend to undercut Louisiana’s proportionate fault method of calculating the offset. Accordingly, the court vacated the district court’s judgment to the extent it deducted a dollar for dollar credit and remanded for a determination of the employer’s proportionate share of the jury award. *Brown v. Forest Oil Corp.*, 29 F.3d 966, 28 BRBS 78(CRT) (5th Cir. 1994).

The Fourth Circuit explicitly adopted the “authoritative direction and control” test for determining whether an employee is a borrowed employee. In doing so, it rejected the nine-factor test. In applying the test to this case, the Fourth Circuit held that the plaintiff was a borrowed servant of employer’s because, in practice, he worked as if he were an employee of employer’s for 26 years: he was supervised by employer, assigned to jobs by employer, paid by employer in pass-through form, and he could have been terminated by employer. Thus, the court affirmed the district court’s dismissal of the tort action, holding that plaintiff’s exclusive remedy was the LHWCA. *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 34 BRBS 61(CRT) (4<sup>th</sup> Cir. 2000).

In a case arising in the Fourth Circuit, the Board affirmed the administrative law judge's use of that circuit's "authoritative direction and control" test set forth in *White*, 222 F.3d 146, 34 BRBS 61(CRT), rather than the nine-factor test set forth by the Fifth Circuit in *Ruiz*, 413 F.2d 310, and *Gaudet*, 562 F.2d 351. The Board further affirmed the administrative law judge's determination that, as the interactions between claimant's employer and Magann reflected nothing more than the parties' practical need to coordinate various aspects of the contracted work, Magann was not claimant's borrowing employer since claimant was neither directly nor indirectly under the authoritative direction and control of Magann. Thus, Magann is not liable for claimant's benefits. *E.B. v. Atlantico, Inc.*, 42 BRBS 40 (2008).

Claimant was injured while working for a borrowing employer. Claimant filed a claim under the Act against the nominal (lending) employer, which they settled pursuant to Section 8(i). Claimant then filed a claim against the borrowing employer for benefits under the Act after his lawsuit in federal district court was dismissed. The Board affirmed the administrative law judge's finding that as the statutory (borrowing) employer was not a party to the claim that was settled, the settlement does not discharge its liability. This result is consistent with *Alexander*, 297 F.3d 805, 36 BRBS 25(CRT) (9<sup>th</sup> Cir. 2002) and *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5<sup>th</sup> Cir. 2003), which stand for the proposition that the responsible employer is fully liable to the claimant notwithstanding his recovery in settlement from other potentially liable employers. Thus, the award of benefits against the borrowing employer is affirmed. *Sears v. Norquest Seafoods, Inc.*, 40 BRBS 51 (2006).

The Eleventh Circuit articulated three criteria for application of the borrowing employer doctrine, hold that when a general employer transfers its employee to another person or company, the latter is the employee's borrowing employer for purposes of the Act, is liable for the Act's compensation, and has the benefit of the Act's tort immunity, if: (1) the employee has given deliberate and informed consent to the new employment relationship with the borrowing principal (court stated that this is an objective test and that the employee's consent may be shown to have been given either expressly or impliedly); (2) the work being performed by the employee at the time of the injury must be shown to have essentially been that of the borrowing principal, *i.e.*, it was the borrowing principal's interests that were being furthered by the employee's work; (3) the borrowing principal must be shown to have received, from the employee's general employer, the right to control the manners and details of the employee's work (the court provided 5 explicit examples of evidence which might establish this criterion). Applying this test, the Eleventh Circuit affirmed the district court's finding that the borrowing principal was claimant's borrowing employer for purposes of the Act and that, thus, claimant's negligence claim was barred under Section 5(a). *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 45 BRBS 47(CRT) (11<sup>th</sup> Cir. 2011).

In this case involving claimant, his direct employer, AG Jersey, and its sister and parent companies, AG UK and AG PLC, respectively, the Board noted that the

contractor/subcontractor relationship was not at issue. Because AG UK provided the DBA insurance for AG Jersey employees, for the benefit of AG Jersey, AG Jersey did not “fail” to provide insurance for its employees such that Section 5(a) applies. Thus, AG UK’s having secured insurance does not, by itself, render it claimant’s “employer.” *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, 47 BRBS 21 (2013) (see digest under Employee/Employer relationship for further details).

After determining that claimant’s employer failed to establish that claimant settled his tort claim with a third party, the Board addressed employer’s “election of remedies” and “exclusivity” contentions. In rejecting AG Jersey’s argument that claimant’s decision to pursue a tort claim in the United Kingdom, a right he had as a British citizen, precluded his right to pursue benefits under the Act, the Board explained that “exclusivity” and “election of remedies” are related but different concepts. That is, “exclusivity” is the pursuit of the same claim in different forums, whereas “election of remedies” is the pursuit of inconsistent claims. This case involves “exclusivity,” and specifically, the relationship between foreign law and the Act. The Board held that a foreign court’s decision applying that court’s own law and resulting in a recovery to the claimant cannot negate a claimant’s right under the DBA to receive compensation for his otherwise compensable work injuries. As international law may give rise to concurrent jurisdiction, AG Jersey, in knowing that the DBA was to be claimant’s “exclusive” remedy under Section 5(a), should have raised and pleaded that as a defense in the foreign court. Thus, the Board held that claimant’s right to benefits under the Act was not barred by the Act’s exclusivity provisions. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

As decedent’s death occurred on navigable waters and a majority of his time was spent working on navigable waters, see *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5<sup>th</sup> Cir.1999) (en banc), the Longshore Act provides the survivors’ exclusive remedy. Therefore, the district court properly dismissed a suit for exemplary damages filed pursuant to state law. *Anaya v. Traylor Bros., Inc.*, 478 F.3d 251 (5<sup>th</sup> Cir. 2007), cert. denied, 552 U.S. 814 (2008).

The Board rejected claimant’s contention that the administrative law judge erred in failing to find that the DBA does not apply because employer intended to harm decedent. Although the Act’s exclusive compensation remedy does not apply if employer intended to injure the employee (as the employer is not a third person and the harm was not accidental), this exception is very narrow. Wanton and reckless misconduct is not sufficient to show intent to harm. In this case, the administrative law judge drew all inferences in claimant’s favor, and rationally found that claimant’s allegations did not give rise to a triable issue of fact as to whether employer intended to injure decedent. The Board thus affirmed the administrative law judge’s finding that if DBA coverage otherwise exists, the Act is the claimant’s exclusive remedy. *Irby v. Blackwater Sec. Consulting*, 44 BRBS 17 (2010).

In a case where insurgents attacked a convoy and decedent, a truck driver, was killed, the Fifth Circuit held that the Defense Base Act precludes the plaintiffs' tort claims, as it is the exclusive remedy for compensation for the employee's death. Specifically, the court held that the death was "caused by the willful act of a third person directed against [decedent] because of his employment" pursuant to Section 2(2). That is, the attacks directly caused the death, and the attacks were not personal, but were "because of" decedent's employment driving in a supply convoy. Because the DBA is the exclusive remedy for an injury or death covered by the DBA, the court rejected the argument that the plaintiffs should, nevertheless, be permitted to proceed with the tort claims under the "substantially certain" theory of intentional tort liability, as the DBA provides no exceptions to the exclusivity rule. The court explicitly declined to address any other scenarios which could potentially permit injured employees to file tort claims, such as where the employer assaulted the employee or the employer conspired with a third party to do so. Additionally, the Fifth Circuit held that the plaintiffs' fraud claim was barred because they were not seeking to rescind the employment contract but, rather, to obtain damages for a death that is exclusively compensable under the DBA. The court vacated the district court's order and remanded for the district court to dismiss the tort claims. *Fisher v. Halliburton*, 667 F.3d 602, 45 BRBS 95(CRT) (5<sup>th</sup> Cir. 2012), *cert. denied*, 568 U.S. 941 (2012).

The claimants' claims of retaliatory discharge, breach of contract, and tortious conduct resulting from injuries allegedly sustained in the course of employment in Iraq were dismissed by the district court. Claimants cannot bring an original cause of action under 33 U.S.C. §948a in federal court; claimants must first proceed under the Act's administrative scheme. Claimants' common law claims are barred by doctrines of preemption. The DBA, through the Longshore Act, provides employers general immunity from tort suits by its employees for injuries covered by the Act. *Sickle v. Torres Advanced Enter. Solutions, LLC*, 17 F. Supp. 3d 10, 48 BRBS 37(CRT) (D.C.D.C. 2013) ), *aff'd in pert. part*, 653 F. App'x 763 (D.C. Cir. 2016).

Employee #1 was terminated by employer following a work injury and, with the help of documentation provided by Employee #2, obtained disability benefits under the DBA. Employer subsequently terminated Employee #2 as well. Both employees filed suit against employer raising common law tort and contract claims. The circuit court held that Employee #1's tort claims, including that for retaliatory discharge, are foreclosed by the DBA since they arise directly out of his application for compensation benefits under the DBA. However, the DBA does not preempt Employee #1's contract claim, which involves only the issue of whether employer provided the required notice of termination. Employee #2's tort and contract claims are not preempted by the DBA since each is unrelated to any claim for benefits under the Act. *Sickle v. Torres Advanced Enter. Solutions, LLC*, 884 F.3d 338, 52 BRBS 7(CRT) (D.C. Cir. 2018).

Section 5(a) of the Act makes exclusive an employer's liability for compensation under Sections 7, 8 and 9 of the Act. Section 49 is omitted from the Act's exclusivity provision. However, the court held that, under the doctrine of implied pre-emption, a tort claim for

retaliatory discharge made by an employee who claimed or attempted to claim compensation under the Act is pre-empted. *Sickle v. Torres Advanced Enter. Solutions, LLC*, 884 F.3d 338, 52 BRBS 7(CRT) (D.C. Cir. 2018).

Plaintiffs brought a class-action suit stemming from benefits owed under the DBA, for injuries suffered while working for U.S. government contractors in Iraq and Afghanistan. In connection with their DBA claims, the plaintiffs also asserted several state law causes of action in tort, including: bad faith and tortious breach of the covenant of good faith; unconscionable, fraudulent, and deceptive trade practices; civil conspiracy; outrage; and, wrongful death. The Court of Appeals for the District of Columbia upheld the district court's determination that the plaintiffs' state law tort claims were precluded by the LHWCA, as incorporated into the DBA, as both acts contain exclusivity provisions stating that employer's liability under the statutes "shall be exclusive and in place of all other liability." 33 U.S.C. §905(a) (LHWCA); 42 U.S.C. §1651(c) (DBA). The court explained that the statutory scheme codifies a legislated compromise that the employees surrender common-law remedies against their employers for work-related injuries in return for the guarantee of compensation, while employers gain immunity from employee tort suits. In so finding, the court held that intentional torts fall within the Act's exclusivity provisions; however, the court noted that the exclusivity provisions do not preclude individuals from pursuing claims that arise independently of an entitlement to benefits under the Longshore Act, such as an ADA claim. *Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 49 BRBS 23(CRT) (D.C. Cir. 2015), *cert. denied*, 136 S.Ct. 824 (2016).

Claimant, who was injured while assigned to work for NASSCO, received benefits under the Act from her nominal employer, and filed a tort action against NASSCO. The Ninth Circuit affirmed the district court's dismissal of the suit on the grounds that the borrowing employer, who had authoritative direction and control over claimant at the time of her injury, was an "employer" for purposes of the Act and entitled to tort immunity under Section 5(a). *Cruz v. Nat'l Steel & Shipbuilding Co.*, 910 F.3d 1263, 52 BRBS 41(CRT) (9th Cir. 2018).

The Fifth Circuit held the defendant, a borrowing employer, is entitled to tort immunity under Section 5(a). Both the defendant and the plaintiff's employer had LHCWA insurance at time of the work injury, which is the sole requirement under Section 5(a). The court rejected the plaintiff's argument that Section 5(a) is inapplicable because he was not paid workers' compensation benefits under the Act. *Raicevic v. Fieldwood Energy, L.L.C.*, 979 F.3d 1027, 54 BRBS 73(CRT) (5th Cir. 2020).

## **Section 5(b), (c)**

Section 5(b) permits a claimant to sue a vessel for negligence. Claimant may not base a suit against a vessel on the strict liability theory of the warranty of seaworthiness. A vessel sued for negligence may not seek indemnity from the employer, thus preserving the employer's Section 5(a) immunity. *Castorina v. Lykes Bros. Steamship Co.*, 758 F.2d 1025, 17 BRBS 68(CRT) (5th Cir. 1985); *see McCarthy v. The Bark Peking*, 716 F.2d 130, 134 n.1, 15 BRBS 182, 186 n.1 (CRT) (2d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984). Basic principles governing a vessel's duty to longshoremen are found in *Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156 (1981). *See Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983).

If claimant's employer happens also to own the vessel, claimant can receive compensation benefits from employer as well as sue the employer for negligence in its capacity as vessel owner. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). Prior to the 1984 Amendments, the Act provided that the vessel would not be liable if the person was employed by the vessel to provide stevedoring, shipbuilding or repair services and the injury was caused by the negligence of persons engaged in providing such services. The 1984 Amendments continue this provision for persons providing stevedoring services. The Amendments increase protection for shipbuilding employers (who might be considered temporary vessel owners) by preventing claimants who provide shipbuilding, repairing or breaking services from employing the dual capacity doctrine and providing that such claimants may not maintain a suit against their employer or any employees of the employer. *Scheuring v. Traylor Brothers, Inc.*, 476 F.3d 781, 41 BRBS 9 (CRT) (9<sup>th</sup> Cir. 2007). *See Joint Explanatory Statement of the Conference Committee*, H.R. Rep. No. 98-1027, 98th Cong., 2d Sess., 23-24, reprinted in 1984 U.S.C.C.A.N. 2772, 2774.

Section 5(c) was added by the 1984 Amendments to allow vessels on the Outer Continental Shelf to enforce contractual indemnity agreements with employers. *Id.*

## **Digests**

The Fifth Circuit found that while the vessel was at sea for sea trials as required by its construction contract, employer was engaged in shipbuilding thereby barring claimant's negligence action against employer under Section 5(b). *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986).

A time chartered vessel is a vessel under Section 2(21) and the employer who chartered the vessel may be sued under Section 5(b), but only in its capacity as the charterer. Therefore, employer cannot be held liable unless the cause of the harm is within the charterer's traditional sphere of control and responsibility or has been transferred thereto

by the clear language of the charter agreement. Section 5(b) eliminated an injured worker's right to bring actions against third parties based on unseaworthiness but preserves the worker's right under prior law to recover for negligence. *Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987).

Where claimant sued employer for negligence in its capacity as owner of the vessel under Sections 5(b) and 33, and received a settlement from the vessel, employer's compensation insurer could enforce employer's lien against claimant, notwithstanding the vessel's agreement to indemnify claimant against the insurer's claim. The court rejected employer's argument that the insurer was suing its own insured in view of the fact that both the law of admiralty and the LHWCA treat a vessel as a third party which is distinct from its owner. *Taylor v. Bunge Corp.*, 845 F.2d 1323 (5th Cir. 1988).

In a case involving an individual who was exposed to asbestos while working for the U.S. Navy, the court holds that Section 5(b) of the Act as amended in 1972, which allows an employee to bring a third-party negligence suit against his employer in its capacity of vessel owner, does not allow a manufacturer of asbestos to bring a contribution action against the United States (in its capacity of vessel owner). The court based this holding on Section 3(a)(2) of the 1972 Act (Section 3(b) of the Act as amended in 1984), which excludes claims involving injuries to U.S. employees from Longshore Act jurisdiction and thus bars the type of suit brought in this case, reasoning that the existence of Section 3(a)(2) creates an exception to the U.S. government's general waiver of sovereign immunity (set forth in the Federal Tort Claims Act). Court notes that, in any event, Section 5(b) as amended in 1984 no longer permits an employee engaged in shipbuilding to sue his employer in its capacity of vessel owner. *Eagle-Picher Industries, Inc. v. U.S.*, 846 F.2d 888 (3d Cir. 1988), *cert. denied*, 488 U.S. 965 (1988).

The court held that the work platform on which an employee was injured was not a "vessel" pursuant to Section 5(b). The platform was anchored to a riverbed, was moved only once or twice a year to accommodate tide changes and could not be moved without assistance of motorized vehicles. *Davis v. Cargill*, 808 F.2d 361, 19 BRBS 65(CRT) (5th Cir. 1986).

A ship that is under construction on land, not on or in navigable waters, and that is incapable of flotation, is not a vessel for either admiralty jurisdiction or Section 5 negligence purposes. *Richendollar v. Diamond M Drilling Co., Inc.*, 819 F.2d 124 (5th Cir. 1987) (*en banc*), *cert. denied*, 484 U.S. 944 (1987). See also *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

The Fifth Circuit held that the term "repair" in Section 5(b) is interpreted to mean "to restore to a sound or healthy state." Therefore, a worker may be engaged in "repair" work whether he is employed by a large repair shop or an owner-operated welding business with only one employee. If, however, the worker is hired to preserve the vessel's condition rather than to restore it to a healthy state, he is performing routine maintenance, which

would not be excluded by Section 5(b), as amended in 1984. As a genuine issue of material fact existed as to whether claimant was performing routine maintenance, the case was remanded. *New v. Associated Painting Services, Inc.*, 863 F.2d 1205 (5th Cir. 1989).

Fifth Circuit held that a formerly navigable barge with no means of self-propulsion which was firmly moored to provide painting services, was not used for navigation and was seldom moved is not a vessel within the meaning of 1 U.S.C. §3, which defines “vessel” for purposes of Section 5(b). *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989).

The Ninth Circuit affirmed the district court’s grant of summary judgment in favor of employer on the ground that a floating fish processing plant is not a vessel for purposes of Section 5(b) of the LHWCA. *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992).

Plaintiff was a mechanic at the employer’s shipyard who was injured while substituting for a crewman on a barge owned by the employer. He filed suit against the employer under the Jones Act. Upholding a district’s court grant of summary judgment, the Fifth Circuit held that since a substantial amount of plaintiff’s work contributed to the shipbuilding/repair process, he was a maritime employee covered under Section 2(3) of the Act, and therefore was not covered under the Jones Act, and was excluded under Section 5(b) from bringing an action for negligence against the employer or the vessel. The Supreme Court vacated the judgment and remanded for further consideration in light of its decision in *Gizoni*, 112 U.S. 486, 26 BRBS 44(CRT) (1991). On remand, the Fifth Circuit again affirmed the summary judgment. It held that claimant was not a seaman under the Jones Act as he was not permanently assigned to a vessel, nor did he perform a substantial part of his work on the vessel (only 11.5 percent of his work was aboard a ship). The Fifth Circuit also held that its LHWCA analysis was unaffected by *Gizoni*, and that, because claimant was a ship repairer within the meaning of Section 2(3), he was expressly barred from bringing a negligence action against employer-shipowner under Section 5(b). *Easley v. S. Shipbuilding Corp.*, 936 F.2d 839 (5th Cir. 1991), *vacated and remanded*, 503 U.S. 930 (1991), *aff’d on remand*, 965 F.2d 1 (5th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

The Supreme Court held that the *Super Scoop*, a floating platform with a dredging bucket used to dig a trench beneath Boston Harbor, is a “vessel” under the Jones Act. The dredge has some characteristics of sea-going vessels such as navigational lights, ballast tanks and a crew dining area, but had limited means of self-propulsion. Under 1 U.S.C. §3, a “vessel” is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment. Dredges carry machinery, equipment and crew over water. Because the *Super Scoop* was engaged in maritime transportation at the time of claimant’s injury, it was a “vessel” within the meaning of both the Jones Act and the Longshore Act, specifically, Sections 2(3)(G) and 5(b). *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005).

The Second Circuit held that a worker covered under the Longshore Act has a cause of action for negligence against the vessel owner under Section 5(b) even if the vessel is owned by the worker's employer, subject to the restrictions contained in the second and third sentences of the section. *Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381 (2d Cir. 1993).

Decedent, a barge welder/cleaner who was engaged in ship repair at the time of his death was found covered under the Act. Accordingly, pursuant to Section 5(b), his estate could not recover in tort against employer. Section 5(b) prohibits recovery from employer by a covered longshoreman who was engaged in ship repair. *Johnson v. Cont'l Grain Co.*, 58 F.3d 1232 (8th Cir. 1995).

The Ninth Circuit held that as claimant was employed to provide repair services, rather than maintenance work, he is barred from filing a negligence action against employer by Section 5(b) of the Act. *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996).

A Section 5(b) action against the vessel owner permits only the assertion of a claim for a maritime tort, which requires that the injury occur on navigable waters. As the plaintiff was injured on land, the circuit court held that the district court properly dismissed the Section 5(b) suit. However, as the vessel owner is an entity separate from employer, the plaintiff can sue the vessel owner for negligence under Section 33(a) as a "third party" potentially liable in damages. Thus, the state law negligence claim may go forward and the district court's finding to the contrary is reversed. *McLaurin v. Noble Drilling (U.S.), Inc.*, 529 F.3d 285, 42 BRBS 31(CRT) (5<sup>th</sup> Cir. 2008).

In a case involving a death which occurred when a lifeboat fell from its moorings on a floating, tension leg platform on the Outer Continental Shelf, Shell Oil Company filed a M/SJ. The plaintiffs (the decedent's family) filed claims under LHWCA §5(b) for negligence in failing to maintain the lifeboat's hook and cable system and alleged defective system elements. The court granted Shell's motion because Section 5 is limited to maritime torts under admiralty law (involving a vessel or a vessel's negligence). Although the lifeboat crashed onto the Gulf waters, it was connected to the platform and "was inextricably linked to the development of minerals on the OCS, and not traditional maritime activity." Accordingly, the court held state law, not Section 5 of the Act, would apply for any tort claims. *Dupre v. Palfinger Marine USA, Inc. et al.*, 593 F.Supp.3d 451 (W.D. LA 2022).

Where an employee was injured when removing coal from a barge, the court affirmed the district court's grant of summary judgment in favor of the vessel owner. The court found the employee did not establish evidence of a breach of the "turnover duty" necessary to establish the vessel owner's negligence under Section 5(b), as he produced no evidence the

vessel owner knew or should have known of the defect on the hopper floor. *Smith v. Crounse Corp.*, 72 F.4th 799 (7th Cir. 2023).

Where an employee was injured when he slipped on cargo dust particles and fell from the deck of a cargo barge to the deck of an adjacent vessel, the district court granted the vessel owner's motion for summary judgment. The court affirmed and agreed the employee did not present evidence to support either his claim of being a Jones Act seaman for the vessel or his alternative claim under Section 5(b) for vessel negligence. The court noted he had been receiving benefits under the Longshore Act since his injury, and he did not establish any evidence to show the vessel owner breached its turnover duty or active control duty. *Johnson v. Cooper T. Smith Stevedoring Co., Inc.*, 74 F.4th 268 (5th Cir. 2023).

The district court held the government, as vessel owner, did not breach any of the three duties (turnover, active control, or intervene), and was not liable for negligence under Section 5(b) in this case where a wire rope holding a lifeboat davit arm in place failed, and the arm slid down the trackway and crushed and killed the decedent. *Provence v. United States*, 661 F.Supp.3d 459 (D.C.S.C. 2023).