Recent decisions applying LHWCA Section 33(g) forfeiture provision

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Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA) requires that "a person entitled to compensation" obtain prior written approval from his employer and its carrier if the person "enters into a settlement" with a third party for an amount less than the compensation to which he would be entitled under the Act. 33 U.S.C. § 933(g).[1] Failure to comply with section 33(g) produces the result that "all rights to compensation and medical benefits under th[e] Act shall be terminated." *Id*. The 1992 *Cowart* Supreme Court decision[2] triggered a wave of litigation seeking to impose forfeiture in countless cases.[3] In the wake of *Cowart*, LHWCA litigants who may have been previously "unwary" of section 33(g)'s "trap," were seemingly more conscientious about conforming their conduct to avoid running afoul of the

[1] LHWCA section 33(g), 33 U.S.C. § 933(g), provides in pertinent part:

> (g) Settlement with third person.
> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

[2] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992).

[3] *See e.g., Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385 (5th Cir. 1996) *withdrawing and superseding on rehearing* 81 F.3d 561; *Gladney, et al. v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) and 33 BRBS 103 (1999); *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994), 1994 DOLBRB Lexis 666; *Harris v. Todd Pacific Shipyards Corp*., 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996); *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Yates*], 519 U.S. 248, 31 BRBS 5(CRT) (1997); *Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000).

section 33(g) bar. Disputes involving section 33(g) became scarcer – or at least fewer cases on the point made their way to the Benefits Review Board and the courts. However, the issue appears to have reemerged.

Three recent cases reflect a resurgence in section 33(g) disputes and underscore the importance that provision can have on claims for benefits under the LHWCA. One of the recent cases, like many of the older cases, arose in the context of third-party suits against multiple manufacturers and distributors of asbestos products; the other two did not. The three cases are *Parfait v. Director, OWCP*, 903 F.3d 505 (5th Cir. 2018), *Hale v. BAE Systems, et al.*, 52 BRBS ___ (2018), BRB No. 17-0523, October 10, 2018 (2018 WL), Ninth Circuit No. 18-72869 (pending), and *Simon v. Longnecker Properties, Inc.*, BRB No. 17-0579, October 11, 2018 (unpub.). Each addresses a sub-issue within section 33(g) that has not been fully explored in earlier decisions. In *Parfait*, the Court relied on the notice requirement of section 33(g)(2) to summarily dismiss the appeal. In *Hale*, the Board rejected claimant's counsel's arrangement under which the deceased worker's surviving spouse purportedly disclaimed any third-party recovery in favor of exclusively pursuing LHWCA death benefits notwithstanding settlement agreement language that included the claimant. In *Simon*, the Board concluded that state law rules determining whether a person has "entered into a settlement" are not pre-empted by any unique federal interpretation of that phrase under section 33(g) and that an earlier federal court ruling on the settlement question should, as a matter of collateral estoppel, apply in the LHWCA proceeding. The cases are described in more detail below.

The Statutory Scheme

LHWCA section 33 recognizes that "a person entitled to compensation" (sometimes shorthanded to a PETC) may file a claim for benefits and simultaneously seek to recover damages from third parties ultimately at fault for the disability or death that is the subject of the LHWCA claim. Pursuant to section 33(a), 33 U.S.C. § 933(a), a claimant may proceed in tort against a third party who might be liable for damages for the work-related injuries. An employer's liability under the LHWCA is not fault-based. *See* 33 U.S.C. § 904(b). Section 33(f) implements Congress' intent that a third-party tortfeasor should be held primarily liable for a workplace injury, while the employer's LHWCA liability is reduced by any recovery from the third party. *See e.g., Chavez v. Todd Shipyards Corp*., 27 BRBS 80, 85 (1993), *on remand from*, *Chavez v. Director, OWCP*, 961 F.2d 1409 (9th Cir. 1992). As construed by the courts, section 33(f) allows the employer a lien on the claimant's net tort recovery so that the employer can recoup compensation already paid. See *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 80-81 & n.6 (1980). By its terms, section 33(f) establishes an employer's right to credit third-party recoveries toward its future LHWCA compensation liability. If a PETC obtains damages from a third-party for the same disability or death that gives rise to longshore entitlement, the compensation owed (either in the past or the future) by the employer is reduced by the net amount of damages recovered from the third-party. 33 U.S.C. § 933(f).

One purpose of section 33(f) is to prevent a claimant from obtaining a double recovery for the same disability. *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Yates*], 519 U.S. 248, 261 (1997). A second, equally important, purpose of section 33 is to protect employers and carriers who may be liable to pay LHWCA compensation even if not at fault for the injury. Longshore employers have been described as the real parties-in-interest when a third-party settlement might reduce

their liability. *See Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT). To protect an employer's section 33(f) offset right, a claimant, under certain circumstances, must either give the employer notice of a third-party settlement or a judgment in her favor, or she must obtain the employer's and carrier's prior written approval of the third-party settlement. Thus, section 33(g) is intended to ensure that an employer's rights are protected in a third-party settlement and to prevent the claimant from unilaterally bargaining away funds to which the employer or its carrier might be entitled under 33 U.S.C. §§ 933(b)-(f).

Pursuant to section 33(g)(1), the LHWCA employer's and carrier's prior written approval of the settlement is necessary when the PETC enters into a settlement with a third party for less than the amount to which she is entitled under the Act. *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT); *see Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002); 20 C.F.R. § 702.281. Failure to obtain prior written approval of a "less than" settlement results in the forfeiture of all benefits, both compensation and medical, under the Act. 33 U.S.C. § 933(g)(2); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b).

COWART

Prior to *Cowart*, whether section 33(g) applied to a case turned on whether the LHWCA claimant was deemed to be a "person entitled to compensation." The Benefits Review Board had held that if a claimant was not receiving LHWCA benefits at the time a claimant entered in a third-party settlement, he was not a PETC and thus 33(g) did not constitute a bar. See *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980); *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986), appeal dismissed, 826 F.2d 1011 (11th Cir. 1987). In an unpublished decision in *Kahny v. OWCP,* 729 F.2d 777 (5th Cir.1984) (Table), *aff'g Kahny v. Arrow Contractors,* 15 BRBS 212 (1982), the United States Court of Appeals for the Fifth Circuit accepted the interpretation of PETC advanced by both the Board and the Director, Office of Workers' Compensation Programs, that the phrase "person entitled to compensation" as used in 33 U.S.C. § 933(g) meant a person either receiving compensation benefits or the beneficiary of an ALJ award.

The Board's interpretation of section 33(g) was overturned in *Cowart*. There, an Outer Continental Shelf worker injured his hand while working on an oil drilling platform. The LHWCA employer and carrier paid temporary disability compensation for 10 months following the injury and then his treating physician released him to return to work. Cowart also had a permanent partial scheduled disability to his hand, however, which entitled him to an additional $35,000 in compensation. In the meantime, Cowart settled a third-party action against the platform owner without obtaining the prior written approval of the LHWCA employer and carrier. The employer did not give its consent to the settlement and declined to pay the additional LHWCA compensation on the ground that Cowart had forfeited his benefits by failing to comply with section 33(g)(1).

Adhering to the Board precedent, the ALJ held the employer's consent was not necessary since, at the time Cowart executed the settlement, he was not a PETC under 33 U.S.C. § 933 (g)(1) because he was not receiving benefits. After the Board affirmed, a panel of the Fifth Circuit reversed holding that the plain language of section 33(g) allowed for no exceptions to the

approval requirement and it therefore applied without regard to whether the employer or carrier was paying LHWCA benefits at the time of the settlement. Cowart's entry into the third-party settlement without obtaining prior written approval forfeited his LHWCA rights. Sitting *en banc*, the Fifth Circuit resolved the conflict between the panel and its *Kahny* decision by finding that the plain language was unambiguous and countenanced no other interpretation.

After the Supreme Court granted certiorari to review the Fifth Circuit's *en banc* decision, the government changed its position relying on the statute's plain language. By a 6-3 majority, the Supreme Court agreed with the Director and affirmed. As a result of the government's change in position, the Court did not have to decide what it described as "difficult" issues regarding whether to accord the Director deference. 505 U.S. at 477, 480. The Court reasoned that the normal meaning of "entitlement" included a right for which a person qualifies by satisfying the prerequisites attached to the right, and is not dependent upon whether that right was adjudicated or acknowledged. 505 U.S. at 477. Thus, Cowart became a person "entitled" to compensation when his right to recover under the terms of the LHWCA vested – it did not need to await an admission of liability by his employer. The Court noted that Cowart's LHWCA employer had prior notice of the settlement amount and, indeed, had even funded the settlement under an indemnification agreement it had with the platform owner, but declined to address whether the employer's participation in the third-party settlement impacted the application of section 33(g), because that issue was not fairly included within the question on which certiorari was granted. 505 U.S. at 483. In passing, the Court rejected the argument that interpreting 33(g)(1) to require prior written approval would render the notification requirement of 33(g)(2) superfluous and without meaning. 505 U.S. at 482. The Court reasoned that only notice, and not approval, is required where the injured worker obtains a judgment, rather than a settlement and where the settlement is for an amount greater than or equal to the employer's total liability. *Id*. The Court also recognized that section 33(g)'s "forfeiture penalty creates a trap for the unwary." 505 U.S. at 483. Nevertheless, the Court held that Congress had spoken with absolute clarity to the precise question at issue and "however much [the Court] might question [Congress'] wisdom or fairness," *id*. at 484, the Court was compelled to enforce Congress' will.

PARFAIT

Relying on *Cowart's* fealty to the plain language of the statute, the Fifth Circuit recently went out of its way to apply section 33(g)(2)'s notice provision to find that a worker awarded $1,493.60 in LHWCA compensation had forfeited any further LHWCA rights. In *Parfait v. Director, OWCP*, 903 F.3d 505 (5th Cir. 2018), the worker was injured in a June 30, 2013 accident. While working as a pipefitter for Performance Energy Services, he was assigned to re-install a shutdown valve affixed to an oil production platform's wellhead. He was struck in the chest by an unsecured 45-pound high-pressure union cap's flange which fell from atop the wellhead and knocked him to the ground. He filed a LHWCA claim seeking disability compensation for chest and back injuries. The employer conceded that he suffered a compensable chest injury but contested any back injury.

On June 30, 2014, the injured worker filed a civil suit in United States District Court for the Southern District of Texas, against Apache Corporation, an oil and gas exploration and production company, and Wood Group, the oil platform's operator, seeking recovery for the June 30, 2013 accident.

In an October 2, 2015 decision on the LHWCA claim, the ALJ found that the claimant did not sustain a back injury but awarded a closed period of temporary total and partial disability benefits for the chest injury yielding compensation benefits in the total amount of $1,493.60. The Board affirmed in a decision dated August 5, 2016. The claimant appealed and the Fifth Circuit docketed the petition on October 5, 2016. On December 13, 2016, the employer and carrier moved to dismiss the appeal alleging for the first time in the case, that the claimant had failed to comply with section 33(g). See Docket for Fifth Cir. No. 16-60662. The employer contended that the claimant had entered an unapproved settlement for which it had not been provided notice by the claimant. Counsel for the employer/carrier stated that it first learned about claimant's unapproved settlement in May, 2016 from counsel for Apache.

In response to employer/carrier's motion, the Director suggested that the record before the court was not sufficiently developed regarding the purported settlement to allow proper determination on the merits of the motion and posited that because additional fact-finding was necessary to determine the effect of any third-party settlement, the court should remand the case for further consideration by the ALJ. On January 9, 2017, the Fifth Circuit issued an order stating that the motion to dismiss for violation of section 33(g) would be "carried" with the case. Changing gears, an August 3, 2018 letter from the Fifth Circuit Clerk's Office directed the claimant to file a supplemental letter brief with the court to assist the court in determining whether factual issues existed that required remand of the case for further fact-finding. The court ordered the claimant to answer a series of questions, including: (1) a statement of the net amount the claimant received in the two settlements that he entered with third parties; and (a) a description of any notification of the settlements claimant provided to the employer or carrier.

Claimant's August 13, 2018 response to the court's questions "divulged" that: (1) on April 25, 2016, claimant compromised his suit against Apache Corporation in return for a net recovery of $325,000 to the claimant from Apache; and (2) following a favorable jury verdict after an April 2017 trial against Wood Group, a judgment was entered on the record on June 2, 2017 and the claimant received a net recovery of $41,542.17 from Wood. 903 F.3d at 507-08. With respect to notification, claimant's counsel contended that the LHWCA employer/carrier had been invited to attend a March 2016 mediation session that resulted in the Apache settlement and the employer/carrier was, like the rest of the world, notified of the District Court judgment against Wood Group on June 2, 2017 when that judgment was published in the court docket.

The Fifth Circuit viewed the claimant's August 13, 2018 letter as a concession that he had not given any notice to the LHWCA employer or carrier of either the settlement with Apache or the judgment obtained from Wood Group. In any event, the court held that the manner of notifications outlined by the claimant were not adequate to satisfy section 33(g)(2)'s notice requirement. Finding no reason to remand the case for further fact-finding regarding the third-party recoveries, the court held that the plain language of section 33(g)(2) imposes an affirmative duty of notice on the claimant and that duty was not met here. Purporting to apply *Cowart's* language regarding section 33(g)(2)'s notice requirement, the court held that "at a bare minimum, the employee must give notice of the settlement or judgment to his employer" and here he did not. 903 F.3d at 511. Holding that the claimant's failure to provide adequate notice required termination of his rights to any LHWCA compensation or medical benefits, the Court dismissed the appeal without further consideration.

Perhaps in light of the apparent increased volume in section 33 disputes, the Benefits Review Board on June 26, 2018, held oral argument in two cases presenting nearly identical factual scenarios and legal issues under that provision: *Hale v. BAE Systems, et al.*, 52 BRBS ___ (2018), BRB No. 17-0523, October 10, 2018 (2018 WL 5734479), Ninth Circuit No. 18-72869 (pending); and *Verducci v. BAE Systems, et al*., BRB No. 17-0551, October 30, 2018. Both cases involved claimants represented by the same attorney and law firm (although separate appellate counsel supplemented the claimants' representation for purposes of the oral arguments). This article discusses only *Hale* because *Verducci* presented the same issues and the Board reached the same result.

The issue in *Hale* was not whether the LHWCA claimant was a PETC within the meaning of section 33(g) with respect to a series of third-party settlements; it was undisputed that she was. 2018 WL 5734479, slip op. at 4. Likewise, there was no dispute that the claimant did not obtain prior written approval from or provide notice to the LHWCA employer and carrier. Rather, the question was whether, under the facts of the case, the claimant could be considered to have entered into the admittedly unapproved third-party settlements.

The claimant in *Hale* was the surviving spouse of a deceased worker who allegedly was exposed to asbestos in the course of his shipyard employment with employer. In 2007, the worker filed suit in California state court against dozens of third-party defendants who were producers, manufacturers, distributors, and purchasers of asbestos. In August 2011, the worker died of cardiac arrest secondary to lung cancer. On May 16, 2012, the deceased worker's adult daughter was appointed by the state court to be the worker's successor-in-interest in the civil action. On May 17, 2012, in exchange for $2,000, the daughter executed documents in the civil action releasing CBS Corporation from liability for personal injury and wrongful death binding "Decedent's heirs … as defined by California Code of Civil Procedure Section 377.60."[4]

On July 20, 2012, the deceased worker's spouse filed a LHWCA claim seeking death benefits. On July 31, 2012, the deceased worker's successor-in-interest daughter and another adult child of the deceased worker, filed a wrongful death suit in state court against numerous third-party defendants. Previously, on April 12, 2012, the LHWCA claimant had signed two documents purporting to disclaim her interest in the third-party actions and in the deceased worker's estate. These disclaimers, however, were not disclosed to anyone, filed in any court, signed by or even provided to any other party, until the LHWCA ALJ ordered the claimant to turn them over to defense counsel in 2016 during the late stages of discovery shortly before the June 2016 ALJ hearing. On April 30, 2014, decedent's daughter executed a second settlement with Pfizer, Incorporated receiving $7,000 "on behalf of the estate, for myself, and the decedent's heirs" releasing "any and all claims of any kind whatsoever" including "loss of companionship and consortium," and recognizing that the release bound "the decedent's heirs … in every way." 2018 WL 5734479, slip op. at 3.

The ALJ concluded that although the claimant did not physically sign the third-party settlement papers, the terms of those settlement agreements and releases fully released the claimant's rights

[4] That provision of the California Code provides that "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf: (1) The decedent's surviving spouse…." Cal. Civ. Proc. Code § 377.60.

without her recovering anything (although an expert testified that he would have expected objectively that some portion of the third-party settlement would have been allocated to the claimant as the deceased worker's surviving spouse). The ALJ reasoned that the claimant was a presumptive heir under state law, both settlements stated that the daughter was authorized to, and did, waive the claims of the deceased worker's heirs and terminated the wrongful death action against the third-party defendants, and neither third-party defendant knew the claimant was excluded from the settlement. Further, the ALJ found that the settlements could not be interpreted to exclude the claimant from them and the claimant never disclosed the disclaimers to the third parties. The ALJ concluded that the claimant was bound by the CBS and Pfizer settlement agreements. Accordingly, the ALJ found that the claimant forfeited her LHWCA rights pursuant to section 33(g).

Agreeing with the Director, the Board affirmed the ALJ's decision as well as a decision denying the claimant's motion for reconsideration. It held that the ALJ properly applied state law in relying on the California definition of the term "heirs" to conclude that the claimant was bound by the third-party settlements. The Board rejected the claimant's contention that the statutory phrase "entered into" had to be given special meaning under LHWCA section 33(g) and that the phrase could yield a different result from that under California law. The Board also rejected the claimant's alternative argument that even if California law controlled the question whether claimant "entered into" the critical third-party settlements, the settlement documents were facially ambiguous thus requiring resort to parole evidence to discern the settlors' intent which the claimant contended was to exclude the claimant from the settlements. Noting that settlements are contracts and contracts are matters of state law, the Board held that state law governs the determination whether a settlement was "entered into." 2018 WL 5734479, slip op. at 6. The Pfizer settlement met all the elements of a contract under California law and was fully executed.

Further, the Board agreed with the ALJ that the fact the claimant did not sign the settlement agreement documents did not create ambiguity as to whether the claimant was a party to, and bound by, them. The Board found itself "hard-pressed" under the circumstances of the case "to accept claimant's assertion that she did not participate in the third-party settlement." 2018 WL 5734479, slip op. at 8. The Board held that an ALJ is entitled to rely on credible circumstantial evidence to infer a party's intent and the claimant's outward conduct here was consistent with the statements in the settlement documents. Nothing in the settlements expressly excluded the claimant. To the contrary, the documents disclosed a clear intent to protect the third-party defendants from any and all claims brought by decedent's heirs including claims for loss of consortium and death. Under California law, the claimant, as the deceased worker's surviving spouse, is an heir and, in a wrongful death action, all heirs must be joined. Moreover, the only plaintiff allowed to bring a claim for loss of consortium is a surviving spouse. Accordingly, the plain language of the Pfizer settlement agreement established that the claimant was a party to the settlement.

SIMON

In an unpublished decision issued October 11, 2018, the Benefits Review Board reaffirmed *Hale's* holding that section 33(g)(1)'s phrase "enters into a settlement with a third person," neither modifies nor pre-empts state law for determining whether a person has "entered into" a settlement with a third party. *Simon v. Longnecker Properties, Inc.*, BRB No. 17-0579, October

11, 2018 (unpub.). It also considered whether the doctrine of collateral estoppel may be relied upon to establish the fact that a LHWCA claimant executed a valid settlement with a third-party. The Board held that the ALJ properly found the claim barred by section 33(g) because the claimant was collaterally estopped from arguing that no third-party settlement occurred.

The claimant in *Simon* was injured on November 1, 2011 when he slipped and fell while loading drill pipe on to a vessel while it was docked at port. In February, 2012, the claimant filed a claim for benefits under the LHWCA. On May 7, 2012, claimant filed a suit in federal court. He sued his LHWCA employer under the Jones Act, 46 U.S.C. § 30104, alleging that he was a seaman, and sued other third-party defendants under general maritime law.[5] The Jones Act claim was dismissed but the employer remained a party to the civil suit. In September 2015, the claimant agreed to a consent judgment dismissing his third-party claims against one defendant in return for $2,500 and agreed not to oppose another third-party defendant's motion for summary judgment in exchange for $8,000. Upon learning of these developments, and never having approved the third-party settlements, the employer moved to dismiss the LHWCA claim as barred by section 33(g). The ALJ initially denied the employer's motion to dismiss finding the existence of a genuine factual dispute regarding whether any third-party settlements had been fully executed. The employer obtained email exchanges between claimant's counsel and the third-party defendants. It then moved the federal court for a determination that the correspondence between the claimant's counsel and defendants formed a contract and constituted a settlement under Louisiana state law. The district court found that there was an enforceable settlement. The Fifth Circuit subsequently affirmed rejecting the claimant's appeal and his petition for rehearing. After the Fifth Circuit denied rehearing, the ALJ again considered the employer's motion to dismiss under section 33(g). The ALJ found that the claimant was collaterally estopped from contending that he did not enter into a settlement.

The Board requested that the Director state his views in the case. The Board then agreed with the Director's position. Finding all the criteria for collateral estoppel satisfied, the Board affirmed. The Board noted the elements of collateral estoppel include: (1) the issue to be addressed is identical to one previously litigated; (2) the issue was fully litigated/actually determined in the prior proceeding; (3) the issue was a necessary part of the prior judgment; and (4) the prior judgment is final and valid. The Board also noted that collateral estoppel effect will not be given where the legal standards between the two forums considering the question differ but found that here, the burden of proof in the two forums was identical. Finally, the Board recognized that although the LHWCA has no definition of the term "settlement" or the meaning of the phrase "entered into a settlement," section 33(g) does not pre-empt the use of state law in determining whether a third-party settlement has been executed.

[5] Jones Act seamen are expressly excluded from coverage under the LHWCA. 33 U.S.C. § 902(3)(G). The Jones Act and the LHWCA are mutually exclusive compensation regimes: section 2(3)(G)'s "master or member of a crew of any vessel" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. *McDermott Intern., Inc. v. Wilander,* 498 U.S. 337, 347 (1991).