

# Labor Law 240 and Federal Jurisdiction under the LHWCA

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Federal jurisdiction can be imposed utilizing the Longshore and Harbor Worker's Compensation Act (LHWCA) in cases where the plaintiff-employee was injured during local land-based repair while on a vessel in the water. This remedy can be sought in addition to a state remedy under N.Y. Labor Law § 240.<sup>1</sup> Utilizing both federal and state law claims can enhance the compensation available to a plaintiff and, at times, provide a more plaintiff-friendly jurisdiction.

The LHWCA does not preempt the state claim even though two different theories of liability apply. A special verdict form can be used to present the different theories to the jury.<sup>2</sup> Judge Wexler confirmed this theory when he denied the defendant's motion for summary judgment based on preemption in *McAllister v. G & S Investors*.<sup>3</sup> In order to overcome a defendant's preemption-based motion for summary judgment, one must understand and correctly apply both the LHWCA and N.Y. Lab. Law § 240.

## NEW YORK LABOR LAW § 240

New York Labor Law § 240 covers scaffolding and other devices for the use of employees. It requires that the proper safety devices are furnished when the work involves the "erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure."<sup>4</sup> The devices have to provide the proper protection to a person working in such a manner. The statute is intended to impose strict liability for its violation.<sup>5</sup> The plaintiff only needs to show there was a violation of the statute and the violation was a proximate cause of the injury. The plaintiff's own comparative negligence does not matter; however, if the worker's conduct is the only proximate cause of the injuries, then liability may be precluded.<sup>6</sup>

The statute can be invoked when no safety device is provided or when a safety device fails to provide proper protection. The specific types of accidents covered must be elevation-related (or a.k.a. "gravity-related") in order for the worker to recover because the statute was designed to prevent only those types of accidents in which the protective device proved unable to adequately prevent harm flowing from the effects of gravity on the person.<sup>7</sup> Although the statute has been held to only apply to construction

work performed in connection with a building or structure, New York courts have held that the statute can include work being done via vessels, or floating barges, when the work involves land structures and the furtherance of a land-based operation.<sup>8</sup> The statute applies in these situations because the interest of New York in applying its labor law is not outweighed by the federal maritime law.<sup>9</sup>

## LONGSHORE AND HARBOR WORKER'S COMPENSATION ACT (LHWCA)

The LHWCA (the Act) is a federal maritime law encompassed by 33 U.S.C. § 901-950 (2006). The Act covers death or disability resulting from injuries occurring "upon the navigable waters of the United States."<sup>10</sup> The Act imposes negligence as the standard upon which liability is imposed, and it allows for the comparative negligence of the plaintiff to be considered when determining the liability of the owner/employer.<sup>11</sup> The Act was intended to protect workers covered by the federal maritime law and provide compensation to those injured. The Act does not allow for loss of consortium claims by spouses of injured workers.<sup>12</sup>

The LHWCA differs from New York State Labor Law § 240 because its standard of liability is negligence and it allows the court to consider a plaintiff's comparative negligence. Both statutes, however, are intended to help injured workers and to place liability upon contractors, owners, and their agents who are in the best position to prevent injury and provide a safe work environment.<sup>13</sup>

LHWCA coverage extends to a worker in maritime employment who satisfies a two-part test. The situs test requires that the injury "occur within an area adjoining navigable waters of the United States."<sup>14</sup> The situs can be satisfied if the injuries occur on navigable waters as well as "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel."<sup>15</sup> The second part of the test is the status test and requires that "the nature of the work performed by [the worker] must be maritime in nature."<sup>16</sup> The most important of Congress' concerns for present purposes, was the desire to extend coverage to longshoremen, harborworkers, and *others* who were injured while on piers, docks, and other areas customarily used to load and unload ships or to repair or build ships, rather than while actually afloat" (emphasis added).<sup>17</sup>

The defendant will attempt to rely on the Act as the only compensation available to the plaintiff in this

type of action in order to avoid being held liable for remedies under the New York State Labor Law. While the Act does provide those injured during maritime work with medical, disability, and survivor benefits, it does not bar an additional remedy under New York's Labor Law. The Act deals only with the worker, the employer and the vessel owner. No other rights or remedies were regulated by Congress.<sup>18</sup> In McAllister the employer was also the vessel owner and was sued under the LHWCA. The general contractors and the owners of the larger revitalization project were sued pursuant to N.Y. Labor Law § 240.<sup>19</sup> Thus, both claims could be brought because the LHWCA fails to discuss claims against third parties.<sup>20</sup>

## DEFEATING A PREEMPTION-BASED MOTION OF SUMMARY JUDGMENT

Preemption theories are based on the principle that the Supremacy Clause of the Constitution invalidates state laws that are contradictory to or interfere with federal laws.<sup>21</sup> Preemption can be clear through express language in a federal statute or it may be implied based on the legislative intent and language used.<sup>22</sup> A state law is only preempted implicitly if it is impossible for both the federal and state laws to be complied with.<sup>23</sup> The "exercise of federal admiralty jurisdiction does not result in automatic displacement of state law."<sup>24</sup> In the instant situation the LHWCA does not preempt N.Y. Lab. Law § 240 because the state labor law does not interfere with or contradict the federal maritime law.

It is important to note that the issue of preemption is an issue of federal law. Federal courts are not bound by any state court decision regarding preemption.<sup>25</sup> Multiple federal courts have held that the LHWCA does not preempt state law, and, therefore, that the LHWCA does not provide an exclusive remedy.<sup>26</sup> These cases enforce the idea that Congress did not intend for the LHWCA to regulate any claims besides those relating to the relationship between the long-shoreman/harbor worker, the employer, and the vessel owner.<sup>27</sup>

The defense in a preemption case of this kind will rely on the two statutes' differing theories of liability and the theory that the LHWCA provides an exclusive remedy. As previously stated, the LHWCA does not provide a remedy as to third parties and therefore does not preempt the state labor law statute. [The reliance on differing theories of liability as the reason for preemption is negated because both claims can be litigated successfully on the plaintiff's behalf regardless of the liability theory used.] A special verdict form can be used to present the jury with the two theories.<sup>28</sup> The state law was enacted to protect the health and

safety of workers; it does not unduly interfere with the fundamental characteristics of maritime law or commerce.<sup>29</sup> The court in Cammon v. City of New York held "local regulations that do not affect vessel operations but rather govern liability issues with respect to landowners and contractors within the State, have no extraterritorial effect."<sup>30</sup> Further, there is no express preemption language in the LHWCA, and it shares its objective with the state labor law claim. Both statutes seek to protect workers and place responsibility on those who are "most likely to be able to prevent injury."<sup>31</sup>

A plaintiff's claim must satisfy certain elements in order to bring the claim under both theories of liability, and avoid only the LHWCA applying and not state labor law. The plaintiff must show that his work on the vessel or barge was a "land-based operation." This is necessary to ensure that New York's labor law will apply in addition to the federal maritime law. In McAllister the plaintiff was performing land-based work that was part of a large urban revitalization project. His work was not strictly related to the water, but was building a bulkhead to prevent land from entering the river as part of the revitalization project.<sup>32</sup> Without a claim under New York's labor law the plaintiff would be reduced to only a worker's compensation remedy. In addition, it is necessary to show that the plaintiff's work did not interfere with maritime commerce or the characteristics of maritime law. Interference with federal maritime law might result in the federal claim being dismissed and leave the plaintiff in a more defendant-friendly state court. If the plaintiff was engaged in work on a vessel doing a land-based operation that did not affect maritime commerce, then the plaintiff has established the criteria needed to have both claims litigated.

In Cammon v. City of New York, the plaintiff was engaged in a land-based work project that did not interfere with maritime commerce, so both the NY Labor Law and LHWCA claims could be pursued. Mr. Cammon was a dock builder. He was injured repairing part of the South Bronx Marine Transfer station. Although he often worked from a float station in navigable waters, he was secured to the land-based transfer station. Also, the repairs were aimed at preventing the transfer station from being damaged by boats nearby. The court found that simply because federal maritime law was invoked did not mean state labor law would not apply. The court felt the "maritime but local" rule allowed state law to be applied because "as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes."<sup>33</sup> The state also has an interest in protecting

the health and safety of its workers through its police powers. Ensuring that safe construction practices are utilized is one way of protecting workers and, therefore, another reason why state law can be utilized to supplement maritime law.<sup>34</sup>

In Gravatt v. City of New York, the plaintiff was employed as a dock builder and pile driver. His injuries occurred while he was working on repairing a bridge in New York City, the 145<sup>th</sup> Street Bridge. Gravatt was working on the fender system of the bridge which is "a structure that looks like a pier, which is attached to and surrounds the stone and mortar center stanchion of the bridge."<sup>35</sup>

He was injured while attempting to move materials from one barge to another. In that case state labor law was specifically written into the contracts between the City and the contractor and sub-contractors. The court applied a three-pronged preemption test to determine whether the federal maritime law preempted the state law claims. The court found the state law would only be preempted if it was impossible to comply with both federal and state laws.<sup>36</sup> Further the court found that the state Labor Law would especially not be preempted because of New York's interest in regulating the field of safe construction practices and there would be no conflict with the objectives of the LHWCA.<sup>37</sup>

In McAllister the plaintiff was injured performing carpentry work at a demolition and reconstruction site on the Byram River. The plaintiff brought claims under both the LHWCA and N.Y. Lab. Law § 240 and the defendant sought to dismiss the New York labor law claim based on preemption. The defendant was denied summary judgment on the preemption motion because previous case law found in favor of the plaintiff and Judge Wexler properly found that both claims could be litigated regardless of the differing theories of liability.<sup>38</sup> The defense had relied on the dissent in Cammon which stated "in a single cause of action, strict liability and comparative negligence cannot occupy the same ground."<sup>39</sup> The dissent failed to take into account the use of a special verdict form which allows for two different theories of liability to be argued in the same action. Therefore the plaintiff was able to seek compensation not only under the federal maritime worker's compensation act, but also under the New York labor law. Thus, the plaintiff was able to benefit from a more plaintiff-friendly federal jurisdiction and the increased compensation available through state law.

## CONCLUSION

The LHWCA and federal maritime law do not automatically preempt NY labor law claims. If properly

pleaded both claims can be argued and the plaintiff can recover under both theories of liability. The LHWCA and NY state labor law both seek to protect workers and hold responsible those in the best position to provide a safe work environment. It makes perfect sense that both statutes can be used by the plaintiff regardless of their differing theories of liability. What is important is that the plaintiff is able to recover for injuries and those that are in the best position to provide a safe work environment are held responsible for their failure to do so. 

- 1 Cammon v. City of New York, 95 N.Y.2d 583, 590 (2000).
- 2 Gravatt v. City of New York, 1998 WL 171491 (S.D.N.Y. April 10, 1998). A final judgment in Gravatt was reversed on other grounds in Gravatt v. City of New York, 226 F.3d 108 (2nd Cir. 2000).
- 3 358 F. Supp. 2d 146 (E.D.N.Y. 2005).
- 4 N.Y. Lab. Law § 240 (Consol. 2008).
- 5 See Larabee v. Triangle Steel, Inc., 86 A.D.2d 289, 292 (3rd Dep't 1982); Crawford v. Leimzider, 100 A.D.2d 568, 569 (2nd Dep't 1984); Di Vincenzo v. Tripart Dev., Inc., 278 A.D.2d 903, 905 (4th Dep't 2000).
- 6 Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555, 562-63 (1993).
- 7 Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993).
- 8 Cammon v. City of New York, 95 N.Y.2d 583, 590 (2000).
- 9 Gravatt v. City of New York, 1998 U.S. Dist. LEXIS 4886, 1998 WL 171491 (S.D.N.Y. April 10, 1998).
- 10 33 U.S.C. § 903 (2006).
- 11 McAllister v. G&S Investors, 358 F. Supp. 2d 146, 149 (E.D.N.Y. 2005).
- 12 Gravatt, 1998 U.S. Dist. LEXIS 4886.
- 13 McAllister, 358 F. Supp. 2d at 150.
- 14 McLaurin v. Noble Drilling Inc., 529 F.3d 285, 289 (5<sup>th</sup> Cir. 2008).
- 15 Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 280 (1977).
- 16 McLaurin, 529 F.3d at 289.
- 17 Herb's Welding, Inc. v. Gray, 470 U.S. 414, 420 (1985).
- 18 Gravatt, 1998 U.S. Dist. LEXIS 4886.
- 19 McAllister, 358 F. Supp. 2d 146.
- 20 Garvin v. Alumax of South Carolina, Inc., 787 F.2d 910, 917.
- 21 Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 414 (2d Cir. 2002).
- 22 McAllister, 358 F. Supp. 2d at 150.
- 23 Long Island Lighting Co. v. Shoreham-Wading River Central Sch. District, 628 F. Supp. 654 (E.D.N.Y. 1986).
- 24 Grubart v. Great Lakes Dredges & Dock, Co., 513 U.S. 527, 545 (1995).
- 25 Hurwitz v. Sher, 789 F. Supp. 134, 138.
- 26 See Vega-Mena v. U.S., 990 F.2d 684 (1st Cir. 1993);

Aaron v. Nat'l Union Fire Ins. Co. Of Pittsburg, Penn., 876 F.2d 1157 (5th Cir. 1989); Eagle-Picher Industries, Inc. v. U.S., 937 F.2d 625 (D.C. 1991); Hernandez v. Todd Shipyards Corp., 2004 U.S. Dist. LEXIS 12777 (D. La. July 8, 2008).

27 Gravatt v. City of New York, 1998 U.S. Dist. LEXIS 4886, 1998 WL 171491. (S.D.N.Y. April 10, 1998) (final judgment in Gravatt was reversed on other grounds in Gravatt v. City of New York, 226 F.3d 108 (2nd Cir. 2000).

28 McAllister, F. Supp. 2d at 150; see also Gravatt, 1998 U.S. Dist. LEXIS 4886.

29 Cammon v. City of New York, 95 NY2d 583, 589 (N.Y. 2000).

30 Id.

31 McAllister, F. Supp. 2d at 150

32 See generally, Id.

33 Cammon, 95 NY2d at 588.

34 Id.

35 Gravatt, 1998 U.S. Dist. LEXIS 4886 at \*5.

36 Id. at \*31.

37 Id. at \*38.

38 See generally, McAllister, F. Supp. 2d. 114.

39 Cammon, 95 NY2d at 594 (dissent by J. Rosenblatt).

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