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The Longshoremen's Act and the Courts

The Longshoremen's and Harbor Workers' Compensation Act grew out of a ten year struggle to apply the principles of workmen's compensation to injuries incurred in maritime employments. Three attempts were made by the forces of labor to bring longshoremen and ship repairmen under the compensation acts of the various states. The United States Supreme Court blocked each of these three attempts upon the principle that the admiralty law of the United States must remain unhampered by state statutes. The storm of criticism and the attempts to analyze the underlying rule of these cases have become textbook material.

A new type of legislation—a federal compensation statute—was necessary to remedy the situation. A glance behind the bulky legislative history of the adoption of the Longshoremen's Act reveals a story

4 Compensation had been provided for United States government employees in earlier federal statutes. 39 Stat. (1916) 742-750, 5 U. S. C. (1926) §§751-795. The Longshoremen's Act, giving rights against private employers, did not follow the pattern of these earlier statutes.
of untiring effort on the part of advocates of the bill to push it through the chaotic Sixty-ninth Congress.

The act was first drawn up by the American Association for Labor Legislation in cooperation with the International Longshoremen's Association. The final draft of the bill as introduced in Congress included suggestions made when the bill was submitted to the compensation boards in every state in the country. It was recommended by resolutions of the International Association of Industrial Accident Boards and Commissions and of the American Federation of Labor. In spite of the general approval of the bill, even by employers (who objected only to the rate of compensation payments), the committee hearings on small changes in the bill were so lengthy and numerous that Congress adjourned for the summer before the bill could be enacted. When presented again to the short session in December, the passage of the bill seemed assured until, for political reasons, a filibuster was started in the Senate. Although the tie-up prevented the passage of other important legislation, the Longshoremen's Act slipped through during the closing hours of the session.

The new statute went into effect a few months after Congress had adjourned. It presented a new problem to the federal courts. The purpose of this article is to examine the treatment by the judiciary of problems arising under the act in the last seven and a half years.

I. INTERPRETATION OF COVERAGE PROVISIONS

Of the limitations placed upon the coverage of the act, the most difficult of definition are the requirements that the injury must have occurred outside the permissible scope of state compensation statutes and the requirement that the employee must not be a master or a member of a crew of any vessel. These requirements will be discussed separately.

0 The most active advocates of the bill appear to have been Dr. John B. Andrews, secretary of the American Association for Labor Legislation, and Anthony J. Chlopek, former president of the International Longshoremen's Association.

1 See Chadbourne, Harbor Workers' Compensation Bill an Emergency Measure (1926) 16 AM. LABOR LEGIS. REV. 262, 263.


9 Ibid. at 39-49.

10 See (1926) 23 MONTHLY LABOR REV. 1243, 1248.

11 See committee hearings, supra note 5.

12 See THE LITERARY DIGEST (Mar. 19, 1927) 5.

13 Approved March 4, 1927; substantive provisions effective July 1, 1927.

14 The full coverage provision reads as follows: "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the dis-
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A. Injuries on Navigable Waters to Which State Acts Cannot Apply

Congress chose to make this coverage limit coincide with the boundary that had been established in the struggle to extend the benefits of state workmen's compensation acts to longshoremen. The act applies only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." Congress thus undertook to dove-tail the provisions of state and federal statutes rather than to assert to its utmost limit its power under the constitutional grant of admiralty jurisdiction.

The result of controlling Supreme Court decisions as to the permissible scope of state workmen's compensation acts may be briefly stated. The requirement of uniformity announced in the Jensen case17 was there held to preclude recovery under a state act by a workman (1) whose employment was maritime and (2) whose injury occurred on navigable waters. That both these elements were essential to the decision was established in cases subsequently decided.18

These decisions mark the broad outlines of the pattern to which the Longshoremen's Act was to be fitted. Obviously they assume a set of canons for determining what employments are maritime19 and when an injury may be said to have occurred on navigable waters.20

ability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or
"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.
"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 44 Stat. (1927) 1426, 33 U. S. C. Supp. VII (1933) §903.

17 Ibid.
19 Grant-Smith-Porter Ship Co. v. Rhode (1922) 257 U. S. 469, 25 A. L. R. 1008, in which a non-maritime employee injured on navigable waters was held compensable under a state compensation act; State Industrial Comm'r v. Nordenholt Corp. (1922) 259 U. S. 263, 25 A. L. R. 1013, in which a maritime employee injured ashore was held compensable under a state compensation act.
20 The distinction between maritime and non-maritime contracts has a long history in demarking a limit of admiralty jurisdiction. Tradition declares that loading a ship, supplying her with materials, and making repairs are maritime; while it is not maritime to build a ship or supply the materials for her construction. 1 BENEDICT, ADMIRALTY (5th ed. 1925) §§65, 68; Stumberg, Harbor Workers' and Workmen's Compensation (1929) 7 Tex. L. Rev. 197.
Cases decided since the adoption of the Longshoremen's Act indicate that these two elements alone determine whether an employment is "local" or related to "navigation and commerce." It was far from clear from the opinion in the Jensen case that employees injured on navigable waters would be divided by the Supreme Court along the historical line between maritime and non-maritime contracts. In the seventeen years since the decision the Court appears to have put increasing emphasis on this point. The last Supreme Court decision on this point rests entirely upon the distinction.21 Assuming the necessity for double jurisdiction over harbor workers' injuries, this seems a sensible place to draw the line, since it at least follows the "contract theory" of workmen's compensation.22

20 The term navigable waters has been interpreted in the United States to include not only the ocean, but rivers, lakes, and canals upon which commerce is carried. See 1 BENEDICT, ADMIRALTY (5th ed. 1925) §§44-46; HUGHES, ADMIRALTY (2d ed. 1920) §4; 3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) §§888-864. Since wharves and piers are considered "extensions of the shore" (The Mary Stewart (E. D. Va. 1881) 10 Fed. 137; HUGHES, op. cit. supra, §§96, 97), the chief question left open for litigation involved injuries on gangplanks extending from the ship to the pier. The similar question arising in regard to the limit of admiralty tort jurisdiction had been decided on the arbitrary rule that the place from which the injured man started his unsuccessful journey across the gangplank should take jurisdiction. The Atina (W. D. Wash. 1924) 297 Fed. 673. Since the facts of the Jensen case, supra note 17, would coincide with this rule (Jensen was injured while crossing the gangplank from the ship to the pier), it was assumed in early discussions (Note (1928) 28 COL. L. REV. 88, 90; U. S. Bureau of Labor Statistics, Bulletin No. 536 (1931) 57) and opinions (Longshoremen's Act, Opinion No. 5, 1927 Am. Mar. Cas. 1546; Longshoremen's Act, Opinion No. 16, 1927 Am. Mar. Cas. 1855) that a similar rule would apply as regards workmen's compensation jurisdiction.

21 Nougueira v. New York, N. H. & H. R. R. (1930) 281 U. S. 128. In this case an employee was engaged by the defendant railroad company "as one of a gang of freight handlers in loading freight into cars" upon a railroad car float. While on the float he was injured. He brought an action under the Federal Employers' Liability Act. The Supreme Court held in favor of the defendant on the ground that the plaintiff's only remedy was a claim under the Longshoremen's Act. The reasoning of the opinion, delivered by Mr. Chief Justice Hughes, may be analyzed as follows: (1) loading freight upon a vessel is a maritime service; (2) the plaintiff was engaged in loading a vessel ("From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship."); (3) therefore, the plaintiff's injury is subject to maritime law.

22 For discussion of the "contract theory," see Goodrich, CONFLICT OF LAWS (1927) §98; Dwan, Workmen's Compensation and the Conflict of Laws (1927) 11 MINN. L. REV. 329, 337-345; Greene, The Workmen's Compensation Act and the Conflict of Laws (1933) 10 N. Y. L. Q. REV. 518. The adoption of the "integration of employment theory" is apparently urged in The Federal Longshoremen's and Harbor Workers' Compensation Act (1934) 43 YALE L. J. 640, 643, which suggests that "to take account of practical problems of insurance" the act should be held to cover only employments "which normally and habitually require the workers' presence" on navigable waters.
One case, but that a Supreme Court decision, refuses to conform to this neat distinction. In the *Linseed King*, the gasoline launch sank drowning a large number of men, some of them non-maritime employees of the launch owner. The owner sought protection of statutes limiting his liability to the value of the vessel. After extensive litigation limitation was refused. On the question whether the representatives of the deceased employees should be returned to make claim under the New Jersey workmen's compensation act, the Court ruled that they should be awarded damages in admiralty, not making clear why the New Jersey workmen's compensation act did not bar such an award. In view of the fact that the coverage of the Longshoremen's Act is broad enough so that it could easily be construed to cover non-maritime employees if necessary, the point need not be unduly labored. In fact this interesting question may never be decided since, except in rare circumstances, no substantial interest of an employee or an insurance company turns on the issue.

With the above exception, the remaining cases in the federal and

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24 The accident occurred December 20, 1926, six months before the substantive provisions of the Longshoremen's Act became effective, so the alternative to compensation under the New Jersey act was a claim in admiralty for damages.
25 44 Stat. (1927) 1424-1426, 33 U. S. C. Supp. VII (1933) §§902-903. By section 903 (of the United States Code) coverage is extended to "an employee" injured under certain conditions, but there is no requirement that his employment shall be of a maritime nature. In giving definitions section 902 (3) merely provides: "The term 'employee' shall not include a master or member of a crew of any vessel nor any person engaged by the master to load or unload or repair any vessel under eighteen tons net." But peculiarly enough subsection (4) defines employer in the following language: "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

It would seem from the above that it is necessary only that the employer have some maritime employees, if his other employees are not compensable under state law due to the constitutional grant of admiralty powers to the federal government, it seems they could receive the benefits of the Longshoremen's Act. This view has not been taken by the United States Employers' Compensation Commission, possibly due to the fact that no actual case of a denial of state compensation has arisen. In Longshoremen's Act, Opinion No. 16, 1927 Am. Mar. Cas. 1859, the decision was rested upon the assumption that the act could not apply to non-maritime employees. In a letter to the author, the chief counsel of the commission stated that the "suggestion that the coverage of the Longshoremen's Act is broad enough to include non-maritime employees departs from the view which the Commission has always held."

20 The differences in benefits in two compensation acts would not justify the expense of an appeal to the United States Supreme Court. Consequently a substantial conflict in interest of employee and insurance company would arise only if there was an issue of whether the employee was engaged in interstate commerce or whether his employment was subject to one of the four states not having compensation laws. A suit might arise between employer and insurance company where the insurance did not cover injuries subject to the admiralty law, or vice versa.
state courts deciding that an employee (injured upon navigable waters) is compensable only under the Longshoremen's Act27 or that he should recover under a state workmen's compensation act28 divide along the

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27 In the following cases an award under the Longshoremen's Act has been held the proper remedy when the employee was injured on navigable waters: Nogueira v. New York, N. H. & H. R. R. (1930) 281 U. S. 128 (employee engaged as a freight handler on a car float—judgment under Federal Employers' Liability Act reversed); Moss Tie Co. v. Tanner (C. C. A. 5th, 1930) 44 F. (2d) 928, 1931 Am. Mar. Cas. 478, cert. den., (1931) 283 U. S. 829 (employee stenciling ties on a barge—award under Longshoremen's Act held proper); Buren v. Southern Pac. Co. (C. C. A. 9th, 1931) 50 F. (2d) 407, 1931 Am. Mar. Cas. 1865, and Richardson v. Central R. R. of N. J. (1931) 233 App. Div. 603, 253 N. Y. Supp. 789 (railroad brakemen injured while operating cars on car float—judgment under Federal Employers' Liability Act reversed. Accord: Longshoremen's Act, Opinion No. 29, 1928 Am. Mar. Cas. 413); Lake Washington Shipyards v. Bruegeman (W. D. Wash. 1931) 56 F. (2d) 655 (employee caulking a ship that had been stripped, rebuilt, and launched—award under Longshoremen's Act held proper); Dawson v. Jahncke Dry Dock Co. (1931) 18 La. App. 11, 137 So. 376, s. c., 18 La. App. 368, 131 So. 743 (employee injured while inspecting a dry docked vessel preparatory to bidding on repairs—award under state act held properly denied); Pfister v. Bagdett Const. Co. (Mo. App. 1933) 65 S. W. (2d) 137 (employee working on a floating pile driver—award under state act held improper); Bell v. West Island Corp. (N. Y. 1930) 231 App. Div. 774 (memo. op.—for full facts, see N. Y. Dept. of Labor, Special Bulletin No. 177 (1932) 262) (real estate salesman in charge of a launch—award under state act held improper); McKinnon v. Kinsman Transit Co. (1934) 240 App. Div. 359, 270 N. Y. Supp. 583 (employee engaged as a ship-keeper—award under state act held improper); Czaplicki v. Ocean Steamship Co. (N. Y. City Ct. 1934) 1934 Am. Mar. Cas. 1220 (longshoreman injured—award under Longshoremen's Act held to bar action for damages in state court); American Shipbuilding Co. v. Aros (1934) 128 Ohio St. 258, 191 N. E. 2 (employee engaged "in a purely maritime employment"—award under state act held improper); Johnson v. Elliott, Inc. (1929) 152 Va. 121, 146 S. E. 298 (employee of a shellfish company engaged to work both afloat and ashore but principally as engineer of a seven ton power boat—award under state act held properly denied).

An unreported case in accord with the above decisions is Lumbermen's Mutual Casualty Co. v. Marshall (W. D. Wash., Dec. 24, 1932, No. 937), in which the employee was engaged as a "boom man whose duties were to see that the logs upon said vessel, after they had been lowered into the water, were straightened out and bunched and kept from floating away." He was injured while standing on logs alongside the barge. The district court held an award under the Longshoremen's Act proper. [Cases designated as "unreported" herein are those which have not been published in the Federal Reporter, the Federal Supplement, or the American Maritime Cases. Facts and quotations here given are taken from mimeographed copies of the opinions made by the United States Employees' Compensation Commission.]

28 In the following cases an award under a state workmen's compensation act has been held the proper remedy when the employee was injured on navigable waters: United States Cas. Co. v. Taylor (C. C. A. 4th, 1933) 64 F. (2d) 521, 1933 Am. Mar. Cas. 1200, cert. den., (1933) 290 U. S. 639, (1933) 46 Harv. L. Rev. 711, (1933) 7 Tul. L. Rev. 291 (employee engaged in construction of a launched ship 96 or 97% complete—award under Longshoremen's Act held properly denied); Ketchikan Lumber, etc., Co. v. Bishop (C. C. A. 9th, 1928) 24 F. (2d) 63, 1928 Am. Mar. Cas. 1553 (employee engaged in "non-maritime employment" was killed "by falling from a boom into the water and drowning, or else by striking his head on a log as he fell"—award under Alaska workmen's compensation act held proper); Sunny Point Packing Co. v. Faigh (C. C. A. 9th, 1933) 63 F. (2d) 921, 1933 Am.,
distinction between maritime and non-maritime employment. These cases have consisted chiefly of attempts to classify as to maritime status numerous types of unusual or miscellaneous lines of work.

The second limit to state jurisdiction is drawn at injuries occurring on navigable waters. Although puzzling from a constitutional aspect, this limit apparently has the merit of ease of administrative application. Only two cases report litigation on the question whether the locus of the injury was on navigable waters. Both have been "gangplank" cases, and both adopted without much discussion the rule which gives jurisdiction to the place from which the employee started his unsuccessful trip across the gangplank. Injuries upon a ship on a marine railway have given rise to a special group of cases due to the wording of the act. According to the act, coverage is extended to "injuries occurring upon Mar. Cas. 600 (employee engaged as a watchman for an anchored fish-trap—award under Alaska workmen's compensation act held proper); Teahan v. Industrial Accident Comm. (1930) 210 Cal. 342, 292 Pac. 120 (employee acted as wharfinger securing manifest papers from vessels—denial of award under state act held improper. Cf. Longshoremen's Act, Opinion No. 26, 1928 Am. Mar. Cas. 406); In re Herbert's Case (1933) 283 Mass. 348, 186 N. E. 554, (1934) 38 Monthly Labor Rev. 99, (1933) 4 Detroit L. Rev. 36 (employee engaged to sweep the deck of a garbage scow—award under state act held proper); Mark v. Portland Gravel Co. (1929) 130 Ore. 11, 278 Pac. 956 (engineer on a dredge—award under state act held proper barring a later action for damages); W. R. Grace & Co. v. Department of Labor & Industries (Wash. 1934) 33 F. (2d) 659 (employee engaged as a watchman and caretaker of a decommissioned vessel—denial of state award held improper).

In Merchants & Miners' Trans. Co. v. Norton (E. D. Pa. 1929) 32 F. (2d) 513, 1929 Am. Mar. Cas. 926, a repairman fell from a ladder, extending between the pier and the ship, while he was climbing from the ship to the pier. The deputy commissioner found that, "As he was getting off the last rung, the ladder tilted or was in some way displaced, so that he was precipitated into the water and was drowned." An award of compensation under the Longshoremen's Act was held proper by the district court. In Wolf's Case (Mass. 1934) 189 N. E. 85, an employee who steered and assisted loading a coal barge was drowned when he fell while leaving the barge by means of a ladder extending from the barge to a wharf. An award under the state workmen's compensation act was held improper. The court said: "A movable ladder resting upon but not fastened to a wharf and partly on a vessel is not considered an extension of the land. Admiralty law governs jurisdiction and liability where a person leaving the vessel by such a ladder falls therefrom into the water." The case of L'Hote v. Crowell (C. C. A. 5th, 1931) 34 F. (2d) 212, 1932 Am. Mar. Cas. 27, rev'd on other grounds, (1932) 286 U. S. 528, is not at variance with the suggested "gangplank rule." There a longshoreman who was riding a slingload from the wharf to the ship was injured. In holding an award under the Longshoremen's Act proper, the court said, "In this case the longshoreman Payne had finished his work on the wharf and from the time he was lifted from it by the sling by means of the ship's tackle was under the control of an instrumentality of the ship. We are of opinion that his situation was the same as it would have been had he been physically on board the ship." The case of Seeley v. Phoenix Transit Co. (1934) 241 App. Div. 183, 272 N. Y. Supp. 127, may be distinguished in the same manner. The case holds proper an award under a state act to the master of a tugboat who was injured while leaving the ship. It appears, however, that he had safely reached the wharf and then fell.
Litigation as to whether "dry dock" includes a marine railway resulted in squarely opposing decisions by two of the circuit courts of appeals. One of these cases, Norton v. Vesta Coal Company, which had ruled that injuries on a ship upon a marine railway were not compensable under the Longshoremen's Act, was taken on writ of certiorari to the United States Supreme Court. After hearing argument, the Court dismissed the case saying: "As it appears that the government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this Court, the writ of certiorari herein is dismissed."

As compared with the extensive litigation following the Jensen case, the above decisions represent a marked decrease in the amount of litigation on the division between state and federal jurisdiction. Why this question, once a favorite of legal discussion and lengthy decisions, should have dropped out of the limelight, requires some explanation. The change might be attributed to the judicial wisdom of the line drawn. But a better explanation for the apparent lack of friction may be found in the existence of "gentlemen's agreements" between federal deputy commissioners and state industrial accident boards to prevent conflicts of jurisdiction. Another factor must be the liberal policy of the United States Employees' Compensation Commission not to invoke penalties where a claimant in a doubtful case files for an award under both state and federal acts. This makes it unnecessary for a claimant to select his tribunal at his peril and be forced to litigate his rights there to the highest court to escape being left with no compensation.

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31 In Continental Casualty Co. v. Lawson (C. C. A. 5th, 1933) 64 F. (2d) 802, 1933 Am. Mar. Cas. 794, injuries which were incurred on a ship upon a marine railway were held compensable under the act, but Norton v. Vesta Coal Co. (C. C. A. 3rd, 1933) 63 F. (2d) 165, 1933 Am. Mar. Cas. 425, reached a contrary result from similar facts.
32 (1933) 290 U. S. 613.
33 (1934) 291 U. S. 641.
34 Jerome G. Locke (former deputy commissioner for the second district), in an address to the International Association of Industrial Accident Boards and Commissions, responding to a question regarding the frequency of conflicts in jurisdiction between the federal commission and state commissions, replied as follows: "As a matter of practice this is about the way it is done: If the case goes over to the New Jersey commission, it is first reported to that commission and if it thinks it is without jurisdiction, it sends us the papers and we assume jurisdiction and settle the case. The same applies to New York." U. S. Bureau of Labor Statistics, Bulletin No. 485 (1929) 26-52. Mr. Locke later made a similar statement in U. S. Bureau of Labor Statistics, Bulletin No. 536 (1931) 55-56.
B. Master and Members of the Crew

By the general maritime law a seaman could recover damages for personal injuries only if the vessel was “unseaworthy.” To add to these rights, section 33 of the Merchant Marine Act was passed which gave to “any seaman [who] shall suffer injury or death in the course of his employment” the remedies open to railroad workers under the Federal Employers’ Liability Act of 1908. Due to judicial sympathy with the plight of the injured longshoreman, the definition of the term “seaman” was stretched so that longshoremen were permitted to recover under this section of the Merchant Marine Act.

When the enactment of a compensation statute was advocated, the original plan was to have the act cover all maritime employees. But the International Seamen’s Union had meanwhile decided in its 1926 convention that in spite of its former decision generally to cooperate with the International Longshoremen’s Association, it did not favor compensation which left the employee no right to sue for damages. When this fact appeared in the congressional debates the coverage provisions were changed to exclude from compensation “a master or member of a crew of any vessel.” It seems, then, that the word “crew” is used to

of the United States Employees’ Compensation Commission) was asked by William W. Kennard (of Massachusetts) about the policy of the commission in regard to doubtful cases which might be covered by either a state or the federal act. The dialogue is reported as follows:

“Mr. Kennard. Does it sum up to this: That the suggestion we should make or the advice that we should give to one whose right is perhaps a little hazy is to file under both acts and then to proceed under the one from which, on the face of it, he is going to get the greater benefits, until he has determined that he is or is not.

“Mr. Verrill. I say that protects the interests of the claimant to the greatest extent.

“Mr. Kennard. And without damage.

“Mr. Verrill. Our commission is not disposed to be contentious in any of these matters and not disposed to invoke penalties where the parties are acting in good faith and within their best knowledge.”

36 1 BENDIXT, ADMIRALTY (5th ed. 1925) 83.
40 See (1926) 23 MONTHLY LABOR REV. 289.
41 See (1924) 31 AM. FEDERATIONIST 63.
43 (1927) 68 CONG. REC. 5402-5414, 5908.
44 44 STAT. (1927) 1426, 33 U. S. C. Supp. VII (1933) §903 (1). Definition of the term “member of a crew” will become increasingly important if the Interstate Workmen’s Compensation Act introduced for the third time by Senator Robert F.
designate only a portion of the larger group that had heretofore been known as "seamen."

The general groups that Congress sought to identify by the terms "crew" and "longshoremen" are easy to identify. But, as invariably happens, border-line cases appear in which a more exact definition is necessary. The statute does not make clear whether the terms are to apply to the general occupation of the employee or to the specific piece of work he was doing when injured. For example, if a longshoreman happens to be assisting with the ship's lines when injured, does he cease to be compensable under the act? Conversely if a member of the crew is injured while helping to load or unload the ship, may he receive the benefits of the act?

There are few cases on this problem. The decisions that have been made seem to be guided more by the sympathy of the court than to follow any consistent principle. When a longshoreman who occasionally assisted a tug crew was killed while so engaged, an award under the act was held proper; and in another case where a ship repairman was drowned while piloting a boat, the widow was granted compensation under the act. But on the other hand employees who were regularly part of the crew of a barge have been permitted to recover under the act for injuries received when they undertook to unload the barge.

Wagner as S. 1320 (73d Cong. 1st Sess. (1933) 77 Cong. Rec. 1624) is adopted. This draft of the act excludes from the compensation to be given to employees injured in interstate commerce by railroad, "a master or member of a crew of any vessel." §3 (b) (1). According to sponsors of the bill, the clause excluding the crew from compensation may be removed from either the Interstate Act or the Longshoremen's Act. It would be arguable that even without such a change, seamen would be entitled to compensation under the Interstate Act on the theory that section 33 of the Merchant Marine Act (supra note 37), in giving seamen the benefits of statutes "modifying or extending the common-law right or remedy in cases of personal injury to railway employees," should be construed as referring to future statutes as well as the existing Federal Employers' Liability Act (supra note 38).

47 Ruffoney v. Chiarello Lighterage Corp. (U. S. Emp. Comp. Comm. 2d Dist.) 1929 Am. Mar. Cas. 1527 (Longshoremen's Act, Opinion No. 23, 1928 Am. Mar. Cas. 264, not followed); Travellers Ins. Co. v. Locke (E. D. N. Y., Jan. 3, 1933, No. E-6450), an unreported case in which an employee who was regularly the engineer of a lighter on one occasion undertook to unload the lighter with the captain's assistance. The deputy commissioner allowed the engineer an award for injuries received while so engaged. On appeal to the district court, the insurance carrier urged that the engineer was a "member of a crew." The court held the award proper. For authority contra, see Longshoremen's Act, Opinion No. 9, 1927 Am. Mar. Cas. 1562, which states that: "At no time, regardless of what work he may be doing, does the master or any member of the crew of a vessel come under the provisions of the Act."
rule applied, it seems, is to take whichever view is more favorable to the employee's receiving compensation. The duties of some employees are so varied that an attempt to classify them as to "crew" and "non-crew" is practically meaningless.\footnote{48}

The courts have not seen fit to adopt the interpretation of the word "crew" made in a different context in earlier decisions. Watchmen and caretakers of laid-up ships had been held\footnote{49} members of the "crew of the vessel" as used in the Ship Mortgage Act.\footnote{50} It was also the opinion of the United States Employees' Compensation Commission that such employees were not compensable under the act.\footnote{51} In spite of this authority, it is the judicial opinion that watchmen and caretakers should receive benefits under the act.\footnote{52}

The strongest manifestation of a liberal tendency on the part of the courts may be found in \textit{Union Oil Company v. Pillsbury},\footnote{53} in which a third mate who was injured while the ship was in a floating dry dock was permitted to show that he had been "re-engaged" as a night watchman and so had ceased to be a member of the crew.

A liberal attitude on the part of the courts is not open to criticism in so far as it extends the benefits of the act to all shore employees working casually aboard the ship without regard to the particular act in

\footnote{48} In \textit{De Wald v. Baltimore & O. R. R. (C. C. A. 4th, 1934)} 71 F. (2d) 810, 811, 1934 Am. Mar. Cas. 1110, 1111, \textit{cert. den.}, (1934) 293 U. S.—, 55 Sup. Ct. 94, the employee killed was a bargeman whose duties consisted of "checking and supervising the loading and unloading of cargo from barges to steamships and vice versa; . . . opening and closing hatches on barges, pulling in gangway boards; pumping water out of the barges; . . . and making lines fast and unfast at docks or alongside vessels when the barges were moved about the harbor." There was no finding as to whether he happened to be engaged in loading (or unloading) the barge when injured. (According to a statement of the chief counsel of the commission to the author, the deceased fell overboard unseen.) The court held an award proper on the ground that the employee was not a "member of a crew." However, in \textit{Jones v. Pillsbury} (S. D. Calif., Sept. 12, 1929, No. P-3-J), an unreported case, the employee injured was a "caretaker who lived upon land and cleaned, cared for, occasionally made minor repairs upon, and otherwise kept [the] yacht serviced for his employer." He did not ordinarily accompany the vessel to sea. However, "At times, at the suggestion of the owner, he did go out, and he had at some of these times, at least, assisted in navigating the boat." He was injured while putting a canvas cover on the yacht while it was at its anchorage. The district court held an award improper on the ground that the employee was a "member of a crew."

\footnote{49} The \textit{Herdis} (D. Md. 1927) 22 F. (2d) 304, 1928 Am. Mar. Cas. 119.


\footnote{51} Longshoremen's Act, Opinion No. 18, 1927 Am. Mar. Cas. 1859.


\footnote{53} \textit{Supra} note 52.
which they were engaged when injured. A rule which denies compensation in isolated cases to members of that class results in making awards depend upon the vague and unreliable evidence that was one of the evils of the old tort actions. On the other hand, proof of the unusual circumstances that would entitle one regularly a member of the crew to recover under the act would rest upon a gamble as to evidence that is the antithesis of the purpose of the act. Consequently the policy for the general good of workmen that recovery for their losses should not rest on the vagaries of court testimony might be strong enough to justify a refusal to go into the facts at the moment of injury, and a denial of any award under the Longshoremen’s Act to the professional sailor or employees living on and moving with the ship.

Another question remains to be discussed. The class known as “seamen” had a very wide range, extending from longshoremen on

An employee only casually aboard a ship should probably be classed as a member of a crew if he is a regular employee of some other ship of the same owner, as in the case of Perry v. United States Employees’ Compensation Commission (N. D. Calif. 1928) 27 F. (2d) 144. He is barred from compensation then, it would seem, because of his belonging to the crew of his own ship, not as a member of the crew of the ship he happens to be aboard when injured.

For discussion indicating that the sailor and the harbor worker are in different industrial classes, see Clark, The Longshoreman and Accident Compensation (1926) 22 MONTHLY LABOR REV. 753; Robinson, Legal Adjustment of Personal Injury in the Maritime Industry (1930) 44 HARV. L. REV. 223, 239. Armstrong, INSURING THE ESSENTIALS (1932) 276, describes as a shortcoming of American workmen’s compensation acts, the numerous “restricting clauses” which lead to litigation.

The earlier opinions of the United States Employees’ Compensation Commission followed neither the liberal tendency of the courts nor the rule suggested above which extends coverage to all shore employees. The commission at that time seemed to favor restriction of the act’s coverage on more traditional distinctions. For example, see Longshoremen’s Act, Opinion No. 22, 1928 Am. Mar. Cas. 263, which rules that a pilot who boards a ship only when she is entering the harbor is nevertheless a “master or member of a crew” of that ship, using as authority a statement in Kent’s Commentaries that a pilot is “master pro hac vice.” A recent decision of a deputy commissioner indicates a much better approach to the problem. In Murphy v. Wheeler Shipyards Inc. (U. S. Emp. Comp. Comm. 2d Dist.) 1934 Am. Mar. Cas. 1312, a ship painter who was killed while piloting a motorboat was held not “a member of a crew.” According to the deputy commissioner’s opinion, the claimant “denies that her husband was a seafaring man, and asserts instead that he was a shipyard-worker, a painter by trade, who came to his death while performing a duty which was incidental to and part of his contract of employment as a shipyard worker.” The deputy commissioner concluded, “It seems to me that the facts of this case, and a reasonable interpretation of the Longshoremen’s and Harbor Workers’ Compensation Act, both as to purpose and provisions, without any tendency to adhere to extreme technicalities, and still preserving the necessary uniformity of construction of the general maritime laws, permit the sustention of her claim.” 1934 Am. Mar. Cas. at 1313.

Supra note 39.
one hand, to a musician in a ship's orchestra on the other. The smaller class designated as "crew," we have seen from the above, does not include those "seamen" engaged in loading, unloading, or repairing a ship. Are there other ship's employees who are not "members of a crew"?

It would have been arguable that by the term "crew" Congress intended to designate only those persons engaged in the actual operation of the ship. This would mean that numerous miscellaneous employees on board a ship (e.g., the musician, or a bartender, radio operator, or steward) would not be barred as "crew" from compensation under the act. Only one reported case seems to have a bearing on this question. In United States Fidelity & Guaranty Company v. Sullivan, the injured workman's sole employment on a fishing trawler was "to extract the oil from the livers of fish caught and dressed by the fishing crew."

One ground for the district court's ruling that an award under the act was improper was, that the employee was a "member of a crew." The court said: "He did not perform deck-duty; but that is by no means inconsistent with his being a member of the crew. There are many positions on a vessel to which no deck-duty attaches, e.g., cooks, carpenters, engine-room force, stewards, etc."

The above decision indicates that the term "crew" might coincide with the traditional admiralty classification, "mariner." According to Benedict, "The term mariner includes all persons employed on board ships and vessels, during the voyage, to assist in their navigation and preservation, or to promote the purpose of the voyage. Masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, pilots, firemen, deck hands, wireless telegraph operators, waiters,—women as well as men,—are mariners." Writers have suggested that Congress intended to include such employees within the term "member of a crew." The opinions of the United States Employees' Compensation Commission take no consistent stand on this matter.

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69 In Morrison, Workmen's Compensation and the Maritime Law (1929) 35 Yale L. J. 472, 501, 502, it is suggested that such employees are still compensable under state statutes. If the conclusion is correct, these employees may not recover under the act, whether members of a crew or not, since they are not employees for whom "recovery . . . through workmen's compensation proceedings may not validly be provided by state law." See supra note 14.
71 Ibid. at 1908.
72 1 Benedict, Admiralty (5th ed. 1925) §79.
74 According to Longshoremen's Act, Opinion No. 6, 1927 Am. Mar. Cas. 1559, employees engaged in catching fish are members of a crew. But in Longshoremen's Act, Opinion No. 19, 1928 Am. Mar. Cas. 256, an employee engaged as a cruise director aboard a passenger ship is not a member of a crew.
II. CLARIFICATION OF DISABILITY BENEFIT SCHEDULES

When it became clear that only a federal statute could give longshoremen the benefits of workmen's compensation, the form chosen for the federal act followed the New York Workmen's Compensation Act almost word for word. The rules for computing compensation under the New York act were adopted as well. In actual operation these provisions have not fulfilled the confidence placed by Congress in the perfection of the New York act. Even after a very liberal interpretation by the federal courts, the disability benefit schedules were grossly unfair in certain cases. These difficulties led to the first major amendment to the Longshoremen's Act.

The money benefit schedules of workmen's compensation statutes generally contain separate provisions for the two major classifications into which non-fatal injuries usually fall. An employee who is so badly injured that he has no earning capacity is given a fraction of his weekly wage for the period of his incapacity. The size of the fraction varies from state to state but is generally from one-half to two-thirds. An employee who receives a permanent injury to only part of his body is given compensation according to a flat-rate schedule which lists the numerous possible injuries and gives the equivalent price for each. For example, a statute may read that for loss of an arm the employee shall receive two-thirds of his pay for 312 weeks, or for loss of hearing in one ear, 52 weeks at part pay.

Frequently an accident involves both the above types of injury. For example, a man who loses a leg has no earning capacity as a one-legged man immediately after the accident. He is invariably totally incapacitated while the injury is healing and only after that time does he have his partial earning capacity. To meet the changing needs of an employee who has received this type of injury, some states permit him to receive total disability allowances while his injury is healing as well as the price awarded by statute for his permanent partial disability. Other states consider the price for the permanent partial disability sufficient to cover the whole damage and so do not allow separate awards.

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67 Armstrong, Insuring the Essentials (1932) 258; Epstein, Insecurity A Challenge to America (1933) 538.
69 See Tracy, Awards of Compensation for Temporary Total and Permanent Partial Disabilities (1926) 22 Monthly Labor Rev. 440, 442, in which a statement is made that: "Where partial disability follows total disability or total disability
Strangely enough, neither the New York act nor the Longshoremen's Act (in its original form) made it clear which of the above rules was to be followed. The New York courts had already adopted an interpretation that gives an injured man more than his permanent partial disability award only in rare cases. Instead of using the decisions of New York as precedents, the federal courts interpreted the benefit schedules in their own way. The rule finally adopted, while not perfect, was considerably more liberal to the workmen than the New York interpretation.

In the simplest cases both the New York and the federal cases seem to be in complete accord. A workman whose injury heals in the usual time and results in a common type of permanent partial disability receives the same under either act, but hidden in the method of computing the award is really the key to the entire split of interpretation that developed. Under the New York act, the injured man is given exactly the schedule price of his permanent disability and no more. Under the Longshoremen's Act the same total award is given but it is split into two items, one for temporary total disability and the other for permanent partial disability. For example, if a New York workman is injured so that he is totally disabled for 30 weeks and in addition he loses the use of one leg for life, he receives only the statutory price for the loss of a leg, which is 288 weeks at two-thirds pay. A longshoreman who received the same injury would be given, under the original Longshoremen's Act, 30 weeks at two-thirds pay as a temporary total disability allowance and 258 weeks at two-thirds pay as a permanent partial disability allowance. This latter figure was computed by subtracting 30 weeks (the healing time) from 288 weeks (the schedule allowance for loss of a leg).

This latter method of computing awards marked a distinct improvement in the administration of the federal act as compared with the New York act; for, although the itemization of the award as part for temporary total disability and part for permanent partial disability resulted in no gain to the injured man supposed above, it makes a vast amount of difference to a workman who suffers only a part of one of the listed follows partial disability, consecutive awards are granted in many States, concurrent awards apparently being permissible in no State. Schedule provisions may provide for payments in addition to the period for total disability (healing period), or they may be exclusive, i.e., covering the entire allowance for the injury other than medical aid. Such payments are apparently exclusive in 19 States, and in addition to the healing period in 25. See also Note (1934) 88 A. L. R. 385; (1916) 11 N. C. C. A. 426. For fuller analysis of the various state laws, see Armstrong, supra, at 652-657; Jones, Digest of Workmen's Compensation Laws (12th ed. 1931).

70 See infra note 77.
permanent partial disabilities (e. g., a part of the use of a finger, or a part of the use of a leg). Both acts compensate the partial loss of a member by scaling down the price given for the full loss of the member. The board or commission fixes the approximate percentage of the loss and reduces the schedule price accordingly. Taking the illustration used above, let us assume that the workman is still totally disabled for 30 weeks but when the injury has healed his leg, instead of being wholly lost, retains 50% of its former usefulness. By following the rule adopted under the Longshoremen’s Act in its original form, he would still receive his full allowance for the 30 weeks total disability and in addition 50% of 258 weeks (which was the statutory period, less healing time). The total award would be 159 weeks (30 weeks plus 129 weeks). Under the New York practice of making only a single award, the employee would receive only 50% of the schedule price (288 weeks). So his total award would be for only 144 weeks.

The immediate observation to be drawn from the above is that awards under the Longshoremen’s Act were consistently higher than those given under the New York act. But aside from this, is there any choice between the two interpretations as a matter of sound legal principle? Granting the axiom that the greater the loss the greater the award should be, we must conclude that the interpretation used under the Longshoremen’s Act was preferable. To demonstrate the possible injustice in failure to itemize, let us assume that our hypothetical workman loses only 10%, instead of 50%, of the usefulness of his leg, but still requires 30 weeks for the injury to heal. Under the interpretation adopted in New York, he receives only 28.8 weeks of compensation (10% of 288 weeks, the statutory price); yet another workman who fully recovers at the end of 30 weeks total disability receives the full 30 weeks compensation.

If in more complex situations than the above, the federal courts had been able to read the same sound legal principles into the Longshoremen’s Act, no amendment would have been necessary. But when confronted with cases involving the so-called “excess healing time” the federal courts fell into an error not unlike that of the New York courts in cases involving no excess healing time.

The problem of excess healing time arose in the following way. The

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New York act and the Longshoremen's Act (in its original form) both contain a list of "normal healing times" for each of the listed permanent partial disabilities. Provision is made that if the injured man's healing time (the period of temporary total disability) is in excess of the normal schedule, such healing time that is "in excess of such number of weeks shall be added to the compensation period provided" for by the sections dealing with temporary total and permanent partial disability. Is this excess which is "added to" the other benefits to be reduced (in a case of only partial loss of a member) by the percentage applied to the permanent partial disability award or should the excess healing time be allowed at the full rate (as is the temporary total award)? Stated in this form, the problem the federal courts had to face seems simple enough. But due to the great complexity in dealing with these items and due to the fact that the fundamental difference between the New York and federal interpretations was nowhere fully recognized and discussed, the problem was not squarely met.

In New York the problem of excess healing time was not hard. Since all the other awards given an injured man during his period of total disability had been reduced by the percentage of his partial loss it was not granting him much to allow an award at the full rate for his excess healing time. When first presented with the problem of excess healing time, the federal courts blindly followed the results of the New York cases, adopting quite arbitrarily the New York method of computation in toto whenever excess healing time was involved.

The problem was first presented to the United States Supreme Court in the so-called Gube case. In that case claimant Gube suffered a permanent injury to his arm which robbed it of 40% of its former usefulness. It also took him two weeks excess healing time over the statutory "normal" for arm injuries. In accordance with the practice of the United

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States Employees' Compensation Commission, the deputy commissioner allowed Gube his full temporary total disability (including the two weeks excess) at the full rate of two-thirds pay and the balance payable as permanent partial disability benefit at the 40% rate. The employer and insurance carrier, citing the federal cases mentioned above, carried the case to the Supreme Court. The Court was confronted on the one hand with the commission's practice of allowing both the normal and the excess healing time at the full rates and on the other hand the claim of the employer that the strict New York rule should apply. The decision rendered by Mr. Justice Butler chose a middle course. The general theory of the federal interpretation was affirmed so that the award for the period of normal healing was left at the full rate. But the award for the two weeks excess healing time was at the 40% rate.

In its attempt to adopt a middle course, the Supreme Court unwittingly fell into the same trap as regards excess healing time awards that had ensnared the New York courts in regard to normal healing time awards. The difficulty with the rule may be exposed by the same process as was used a few pages back to demonstrate the unsoundness of the New York rule. Assume an extended period of excess healing time and a small per cent of permanent partial disability and the result is a smaller award for a larger loss. For example, if our workman, after 70 weeks of total disability, regains all but ten per cent of the use of his leg, under the Gube case he receives 40 weeks at the full rate for the normal temporary total disability. Added to this would first be ten per cent of 248 weeks for permanent partial disability, and then, in addition, the excess healing time of 30 weeks at ten per cent. The total award would be 67.8 weeks (40 for normal healing time; 24.8 for permanent loss;

80 Longshoremen's Act, Opinion No. 34, 1929 Am. Mar. Cas. 100.
81 The attorneys for the petitioners in this case seem to have been urging upon the court not simply the New York rule, but an even stricter interpretation that would reduce even the seldom-given total disability award by the percentage applied to the permanent partial disability award. See Brief for Petitioners, pp. 6-16. The only brief filed in the case besides that of the petitioners was a memorandum submitted by the United States Solicitor General stating that, “The Government has no interest in the merits of this controversy...” Memorandum for Respondent Augustus P. Norton, Deputy Commissioner, p. 1.
82 In an actual case it seems probable that the injured man would be receiving full payments regularly during the 70 weeks of this total disability. Only at the end of that time would the fact of permanent disability appear. In spite of this practical difficulty in the computation assumed above, the United States Employees' Compensation Commission agrees that it is the irresistible conclusion to be drawn from the Supreme Court decision. United States Employees' Compensation Commission, Seventeenth Annual Report (1933) 17. It is interesting to notice that in an order to deputy commissioners dated September 27, 1933, the commission said, "Make no awards for permanent partial disability until after the temporary total disability has ceased and compensation therefor has been fully paid."
and 3 for excess healing time). Another man who is totally disabled for the same 70 weeks, but who fully recovers after that time, receives the whole 70 weeks at compensation, or 2.2 weeks more than the permanently injured man.\textsuperscript{83}

The necessity of amending the benefit schedules of the act was immediately apparent. In 1932 bills were introduced\textsuperscript{84} which would have greatly increased the amounts payable to longshoremen and, in addition, would have solved the problem suggested by the \textit{Gube} case. An injured man would have received his compensation during the full healing time and, added to this, the whole amount payable for his permanent loss without any reduction for the amount paid as total disability.\textsuperscript{85} The bills were referred to the committees on judiciary and no further action taken.\textsuperscript{86} The United States Employees' Compensation Commission expressed its official approval of such an amendment.\textsuperscript{87} Benefit schedules of the proposed Interstate Workmen's Compensation Act\textsuperscript{88} are patterned after this proposed amendment.\textsuperscript{89}

The amendment finally adopted by Congress in 1934\textsuperscript{90} is radically different from that which had been proposed before. The amendment makes awards for permanent partial disability "in addition to compen-

\textsuperscript{83} Facts such as supposed above, where the limitation on temporary total disability works a definite hardship, did not arise in any litigation. In Jones & Son v. Marshall (W. D. Wash., Sept. 22, 1933, No. 496), an unreported case, the claimant was totally disabled for 56 % weeks after an arm injury. According to the opinion of the court "The Deputy Commissioner awarded the Claimant-Defendant, Fred Bustrin, $25.00 per week ... for 56\% weeks, the full period of total disability, instead of limiting such allowance to 32 weeks [normal healing time for arm injury]. ... Such award was contrary to the provisions of the Act." The all-important fact, whether the claimant's permanent partial disability was the full loss of his arm or only the partial loss, does not appear.

\textsuperscript{84} As S. 3530 and H. R. 8821, 72d Cong. 1st Sess. (1932).

\textsuperscript{85} Section 2 of the amendment was worded, "Compensation ... for permanent partial disability shall be in addition to compensation allowed for temporary total disability ... , and the awards for temporary total and permanent partial disability shall run consecutively."

\textsuperscript{86} See (1932) 75 CONG. REC. 3348, 3400; (1932) 22 AMER. LABOR LEGIS. REV. 56, 109.

\textsuperscript{87} U. S. Employees' Compensation Commission, Seventeenth Annual Report (1933) 17. Earlier reports also suggested amendment of these provisions.

\textsuperscript{88} \textit{Supra} note 44.

\textsuperscript{89} The bill (S. 1320, 73d Cong. 1st Sess. (1933)) provides in section 8 (c) that compensation for "permanent partial disability ... shall be in addition to compensation for temporary total disability."

sation for temporary total disability." But a wholly new schedule of permanent partial disability awards is also provided. This new schedule, it appears, was made up by subtracting the number of weeks normal healing time from the schedule of permanent partial disability awards formerly in effect. For example, under the old schedule, the award for loss of a leg was 288 weeks (normal healing time, 40 weeks). Under the new schedule, the award is 248 weeks (and normal healing time provisions are abolished).

What is the result from a social point of view of the amendment to the act? Does it increase or decrease the total awards made to all injured men? Let us divide the men sustaining both permanent partial and temporary total disability into the following classes: (a) those whose healing time is exactly equal to the former statutory "normal," (b) those whose healing time is less than "normal" and (c) those whose healing time is more than "normal." It is obvious that the group that heals in just the normal will receive the same compensation under the new schedule as the old. Those who heal in less time receive a smaller amount of compensation under the new act. For example, if a man after losing his whole leg heals in 30 weeks he receives only 278 weeks under the new schedule rather than the 288 weeks given under the old schedule. Of those who recover only after a longer healing time, some will receive just the same compensation and some will be given more. The part of this group that receives the same amount of award consists of those whose permanent disability consists of the loss of an entire member. For example, if our workman recovers in 50 weeks and loses his whole leg, he receives 298 weeks under either the new or the old schedule. The part of this group that receives an increased award under the new act is made up of those whose permanent disability consists in the loss of only a part of a member. For example, if our workman recovers in the same 50 weeks, but loses only one half of the use of his leg, he receives 174 weeks instead of the former 169.

The class that gains under the new schedule is restricted to only those men having excess healing time and partial loss of a member. The class that loses is made up of all the men whose injuries heal in less than the statutory "normal." How many men gain and how many lose? If the statutory normal were a true arithmetic average as many men would heal in less than the normal as would heal in more than the normal. Since only a part of this latter class gains by the new schedule (i.e., that part which loses only a part of a member), it would appear from this alone that more men lose than gain. But, in addition to this, it appears

91 48 STAT. (1934) 806, 33 U. S. C. SUPP. VIII (1934) §908.
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from statistics gathered by the Industrial Commission of Wisconsin\textsuperscript{92} that the time usually necessary for recovery is considerably less than the "normal healing times" formerly in the act. The table below lists the comparable injuries\textsuperscript{93}. It, therefore, appears that there are more men in the less-than-normal-healing-time class than in all of the more-than-normal class.

Since a much larger number of men loses by the new schedule than gains, it is quite probable that the total cash benefits for the entire group are less. In view of the fact that all writers on workmen's compensation agree that the benefit schedules in American compensation acts are too low,\textsuperscript{94} one wonders how the assent of organized labor was obtained\textsuperscript{95} to a bill which made such a sacrifice to correct the \textit{Gube} case.\textsuperscript{96}

III. EXTENSION OF THE JUDICIAL REVIEW PROVISIONS

Most state workmen's compensation acts restrict the judicial review of awards by an administrative officer to questions of law. The findings of fact made by the officer must, according to statute, be taken as final if supported by evidence.\textsuperscript{97} The state courts have in general accepted this restriction on the judicial power and have followed the terms of the statutes.\textsuperscript{98}

The judicial review provisions of the Longshoremen's Act were modeled along similar lines. The act provides that the deputy commissioner's order may be set aside by injunction in the district court if the proceedings before him were "not in accordance with law."\textsuperscript{99} For the

\begin{table}
\begin{tabular}{|l|l|l|}
\hline
Member Injured & Normal healing time under Longshoremen's Act healing time & Arithmetic average of actual healing time \\
\hline
Arm & 32 weeks & 18.8 wks. (113 days lost)* \\
Leg & 40 weeks & 54.8 wks. (329 days lost) \\
Thumb & 24 weeks & 6.7 wks. (40 days lost) \\
1st finger & 18 weeks & 5.3 wks. (32 days lost) \\
\hline
\end{tabular}
\end{table}

*Six day week.

\textsuperscript{92} \textit{Healing Period in Permanent Partial Disabilities, Wisconsin} (1926) 22 MONTHLY LABOR REV. 464.

\textsuperscript{93} The opinion of the writers cited in notes 67 and 68, supra.

\textsuperscript{94} According to (1934) 24 AM. LABOR LEGIS. REV. 34, "The bill embodies agreements reached as a result of several conferences with maritime employers and unions to avoid hardship and injustice and to simplify administration following several court decisions since the original law was enacted in 1927. The amendments, like the original act, were introduced upon the joint request of the International Longshoremen's Association and the American Association for Labor Legislation."

\textsuperscript{95} If the existing flat-rate schedule is to be repaired by legislation it seems that an extensive statistical survey should first be made.

\textsuperscript{96} For provisions of state statutes, see JONES, DIGEST OF WORKMEN'S COMPENSATION LAWS (12th ed. 1931).

\textsuperscript{97} DICKINSON, \textit{ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW} (1927) 50, n. 38; Note (1927) 4 WIS. L. REV. 236.

\textsuperscript{98} 44 STAT. (1927) 1436, 33 U. S. C. SUPP. VII (1933) \S 921.
first five years of the act's existence, the lower federal courts in cases too numerous to cite accepted the statute as properly confining them solely to a review of questions of law. But when the matter was brought to the Supreme Court in the case of Crowell v. Benson, an almost-unheard of rule of judicial review was set up. In this case the district court had, from the outset, refused to restrict itself to the scope of review generally held proper and proceeded both to hear new evidence and to redetermine the issue of existence in fact of the requisite employer-employee relationship. The case was carried through the circuit court of appeals to the United States Supreme Court, and the action of the district court was there held proper.

The majority opinion, delivered by Mr. Chief Justice Hughes, holds first that the enactment of the Longshoremen's Act is constitutional. The opinion then states that although in general the provision for finality of administrative determinations of fact is proper, it could not apply to the issue there involved. The reason is explained by the Court as follows:

"A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions."  

In the above passage, and in other parts of the opinion, the Court makes clear that "constitutional rights" are the basis of the decision. If the Constitution (interpreted by existing decisions) gave any clue as to which issues of fact may be declared by Congress as finally determinable by the deputy commissioners, the decision would not make over-difficult the task of a practitioner under the act. But most exhaustive analyses of this problem reach no satisfactory solution, being at a loss to find even what part of the Constitution is involved.

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100 The cases are listed fully by Brandeis, J., dissenting in Crowell v. Benson, 285 U. S. at 68, n. 3.
104 285 U. S. at 54, 55.
105 See dissenting opinion of Brandeis, J., 285 U. S. at 65-95; (1933) 21 Calif. L. Rev. 266; (1933) 46 Harv. L. Rev. 478.
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The task of predicting future decisions on the *Crowell v. Benson* question is probably best accomplished by the judicious use of suggestive dicta in the case combined with the numerous indications of the trends of judicial attitude found in cases decided since the Supreme Court's decision. Using this method, litigation since the decision may be grouped into the following categories: (a) decisions holding that a redetermination of fact is necessary, (b) decisions holding that a redetermination is unnecessary as regards an issue not declared by dictum in *Crowell v. Benson* to be non-jurisdictional, (c) decisions holding that a redetermination is unnecessary as regards an issue which was declared by dictum in *Crowell v. Benson* to be non-jurisdictional, and (d) decisions which ignore or make only vague references to the case.

Cases falling in group (a), requiring a redetermination of fact, have been extremely rare. The issue of employment (which was held "jurisdictional" in *Crowell v. Benson* itself) has been redetermined in accordance with the decision in the one case in which the problem has again been raised. The issue of injury upon navigable waters (said to be "jurisdictional" in *Crowell v. Benson*) has been so declared in a case in which the issue was actually involved. No further rulings are found to date.

Cases in group (b), restricting the decision even further than the dicta contained therein, have been more common. The issue of scope of employment has been ruled non-jurisdictional by the Supreme Court and the fourth circuit court of appeals. The issue of causation of injury is well-established as non-jurisdictional. These cases, as will be shown in discussion later, probably indicate the most important trend.

The cases in group (c) are found meticulously to follow dicta of the *Crowell v. Benson* opinion. Scattered throughout the decision are statements that the issues of "the circumstances, nature, extent, and consequence of the employee's injuries and the amount of compensation that
should be awarded" are non-jurisdictional. These dicta seem only recently to have had an effect upon the decisions of the lower federal courts. Within the last year, three reported cases have appeared ruling on the point in accordance with the Supreme Court's suggestion.

Cases holding that the issue of existence of dependents is non-jurisdictional are probably best placed in this same category inasmuch as an award is given whether or not there are dependents, just as an award


110 285 U. S. at 47, 54, 65.

111 Anderson v. Hoage (App. D. C. 1934) 70 F. (2d) 773 (existence of occupational disease); Whitfield v. Hoage (1934) 63 App. D. C. 237, 71 F. (2d) 690 (amount of wages); Texas Employers' Ins. Ass'n v. Sheppeard (S. D. Tex.) 1934 Am. Mar. Cas. 494 (receipt of medical aid). The dicta were followed in the earlier case of Los Angeles Ship. Corp. v. Pillsbury (S. D. Calif., Aug. 6, 1932, No. X-157), an unreported case involving a disputed issue of fact on the extent of injury. The employee injured his foot while engaged in repairing a ship in dry dock. According to the deputy commissioner's findings the foot was still disabled. The employer asked for injunction in the district court claiming that the finding that the disability continued was erroneous. In affirming the award the court reviewed the transcript of testimony at the hearing and said, "it must be concluded that the findings of the deputy commissioner are not without support in the evidence presented to him." The court mentioned that in such a case, "No question as to any want of jurisdiction in the deputy commissioner is raised." The same conclusion is reached in Smith v. Marshall (W. D. Wash., Oct. 2, 1934, No. 518), a recent unreported case, in which the deputy commissioner found that the claimant was no longer disabled. Upon review brought by the claimant, the district court affirmed the ruling, stating "there appears to have been substantial evidence supporting the findings of the Deputy Commissioner, and, no constitutional ground of objection being made touching the jurisdiction of the Deputy Commissioner . . . it follows that the complaint should be dismissed and it will be so ordered."

112 Texas Employer's Ins. Ass'n v. Sheppeard (C. C. A. 5th, 1932) 62 F. (2d) 122, 1933 Am. Mar. Cas. 518; Harris v. Hoage (1933) 62 App. D. C. 275, 66 F. (2d) 801. The case of L'Hote v. Crowell (1932) 286 U. S. 528, 1932 Am. Mar. Cas. 1450, is probably a ruling in accord with the above cases. It was so cited in (1933) 46 Harv. L. Rev. 488, n. 66, and digested as such by 1932 Am. Mar. Cas. 1450. As a matter of actual fact, one of the briefs filed in the Supreme Court (Memorandum for Lotus N. Crowell, p. 3) shows that no new evidence was heard by the district court and from the wording of the district court's decision (Transcript of Record, p. 63) it seems probable that the court was not revaluing the evidence, but rather applying its own somewhat questionable legal definition of dependency. In granting certiorari the Supreme Court limited its hearing "to the question raised by the review of the Deputy Commissioner's finding as to the dependency of Zeb Payne," (1932) 285 U. S. 533. The citation of Crowell v. Benson in the memorandum opinion of the Supreme Court suggests that the court regarded the case as involving a problem of judicial review rather than the definition of dependency.

113 The act provides ($44) that if there are no dependents, an award of $1000 is made to a special fund for vocational rehabilitation and other purposes.
is given whether the injury is great or small. The dictum declaring
non-jurisdictional the issues of "whether the injury was occasioned
solely by the intoxication of the employee or by the willful intention
of the employee to injure or kill himself or another," has not yet
found application in actual decision.

A surprisingly large number of cases are found in group (d) in which
the court simply ignores the rule of Crowell v. Benson and in restricting
itself to questions of law has not discussed whether the issues of fact
were jurisdictional. Although the language of the decision seems to
lay down a rule applicable to the review of findings of all federal ad-
ministrative bodies, only the vaguest of references to the case (and
no actual application) have been made in reviewing findings of agencies
other than the deputies of the United States Employees' Compensation
Commission.

In the above decisions two trends may be noticed which (although
most confusing from a constitutional aspect) are of great assistance to
a practitioner under the act. First, it seems that only the issues of em-
ployment and injury on navigable water receive a trial de novo.

Second, it seems that Crowell v. Benson is to be applied only under the

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114 285 U. S. at 47.

115 Bethlehem Ship Corp. v. Monahan (C. C. A. 1st, 1932) 62 F. (2d) 399,
60 F. (2d) 35; Ayres v. Hoage (1933) 61 App. D. C. 388, 63 F. (2d) 364; New
Amsterdam Cas. Co. v. Hoage (1932) 61 App. D. C. 338, 62 F. (2d) 468; Lumber-
men's Mut. Cas. Co. v. Hoage (1932) 61 App. D. C. 171, 58 F. (2d) 1072; Lumber-
case; Russell v. Norton (E. D. Pa., Jan. 10, 1933, No. 7425), an unreported case;
Although all these cases refused redetermination of some fact, they could not be
used as precedents delimiting Crowell v. Benson.

116 With the exception of cases "which arise between the Government and per-
sons subject to its authority in connection with the performance of the constitutional
functions of the executive and legislative departments." Hughes, C. J., in Crowell

266; Butte A. & P. Ry. v. United States (C. C. A. 9th, 1932) 61 F. (2d) 587; Flynn
Tillinghast (C. C. A. 1st, 1932) 62 F. (2d) 308; Denver Union Stock Yard Co. v.
United States (D. Colo. 1932) 57 F. (2d) 735; The Olympia (D. Conn. 1932) 58
F. (2d) 638, 1932 Am. Mar. Cas. 1161; St. Joseph Stockyards Co. v. United States
(W. D. Mo. 1932) 58 F. (2d) 290; Wichita Gas. Co. v. Public Service Comm. (D.
Kan. 1932) 2 F. Supp. 792. None of these cases actually applies the rule of Crowell
v. Benson. For the possibility of the extension of the rule to decisions by state
directors of the National Emergency Council and to decisions by the local com-
mittees of the Agricultural Adjustment Administration, see Judicial Review of
A similar conclusion is expressed in The Federal Longshoremen's and Harbor Work-
ners' Compensation Act (1934) 43 Yale L. J. 640.

118 See notes 106-109, supra.
District of Columbia Workmen's Compensation Act\textsuperscript{110} and the Longshoremen's Act.\textsuperscript{120}

Besides the possibility that all issues of fact would be declared jurisdictional, another danger lay in \textit{Crowell v. Benson}.\textsuperscript{121} The issues of existence of employment and place of injury are involved in every award that is made under the act. Consequently it was possible, in theory, that no award would be finally decided without a redetermination in the district court. But the ruling of the case has now been in operation long enough so that we are able to draw accurate statistical conclusions on this matter. A comparison of the figures gathered annually by the United States Employees' Compensation Commission\textsuperscript{122} proves that the percentage of reviews by the courts has shown no startling change in recent years and none that could be correlated with \textit{Crowell v. Benson}.\textsuperscript{123}


It is interesting to note that the Railroad Retirement Act, 48 Stat. (1934) 1283, 1288, 45 U. S. C. A. (Supp. 1934) §210(b), makes special provision for the rule of \textit{Crowell v. Benson} by giving the district courts jurisdiction "to make a decision necessary for the enforcement of a legal right of the applicant, when the applicant shall establish his right to a judicial review upon the jurisdictional ground that, unless he is granted a judicial review of the action or decision, or failure of the [Railroad Retirement] Board to act or to decide, of which he complains, he will be deprived of a constitutional right to obtain a judicial determination of his alleged right." The bill, when introduced in 1933 (S. 1529, 73d Cong. 1st. Sess. (1933), contained the same provision.

\textsuperscript{120} See notes 106 and 117, supra.

\textsuperscript{121} See Brandeis, J., dissenting in \textit{Crowell v. Benson}, 285 U. S. at 94.

\textsuperscript{122} United States Employees' Compensation Commission, Twelfth Annual Report (1928) to Seventeenth Annual Report (1933). A recent letter from the chief counsel of the commission to the author gave the 1934 statistics.

\textsuperscript{123} \textit{Crowell v. Benson} was decided February 23, 1932, at the close of the fiscal year July, 1931, to June, 1932. Any increase in the number of reviews by the courts due to the decision should appear in the years ending June, 1933 and 1934. The number of new cases under the Longshoremen's Act filed in the district courts expressed as a percentage of the number of hearings held by deputy commissioners during that year is given below. In view of the conclusion expressed in note 106, supra, the statistics for the District of Columbia Act are also given.

<table>
<thead>
<tr>
<th>Fiscal year ending June</th>
<th>Reviews under the Longshoremen's Act</th>
<th>Reviews under the Dist. of Col. Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>1928</td>
<td>4.44</td>
<td>0.00</td>
</tr>
<tr>
<td>1929</td>
<td>7.31</td>
<td>10.87</td>
</tr>
<tr>
<td>1930</td>
<td>5.41</td>
<td>4.07</td>
</tr>
<tr>
<td>1931</td>
<td>8.30</td>
<td>13.50</td>
</tr>
<tr>
<td>1932</td>
<td>7.16</td>
<td>9.35</td>
</tr>
<tr>
<td>1933</td>
<td>7.05</td>
<td>9.83</td>
</tr>
<tr>
<td>1934</td>
<td>4.18</td>
<td>11.87</td>
</tr>
</tbody>
</table>
Consequently, the fact finding capacity of deputy commissioners under the act remains unhampered except in unusual circumstances.

IV. GENERAL SIGNIFICANCE OF THE DECISIONS

The discussion above has presented the four fields in which litigation under the Longshoremen's Act has taken definite shape. The decisions are of immediate importance in assisting the administration of the act. They are of further importance in marking the success of the pioneer step in federal social insurance. Dual jurisdiction for compensation purposes is apparently not too unworkable. Decisions under the Longshoremen's Act would be particularly well suited for use under the proposed Interstate Workmen's Compensation Act.

Leigh Athearn.

SAN FRANCISCO, CALIFORNIA.

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125 See note 44, supra.