

### Healy Tibbitts Builders, Inc. v. Director, Office of Workers' Compensation Programs United States Court of Appeals for the 9th Circuit 444 F.3d 1095 (Decided April 14, 2006)

Robert O'Connor, Class of 2010

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captain were not so extraordinary as to be unforeseeable to the tanker. Thus, the Court concluded the district court did not clearly err in refusing to find the dredge captain's negligence to be a superseding cause of the collision.

With respect to the issue of equal apportionment of liability made by the district court, the Court referred to *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), in which the Supreme Court discarded the divided damages rule in favor of an allocation of responsibility based on comparative fault. The Supreme Court had held in that case that equal apportionment of responsibility was proper only where the parties were equally at fault or if it was not possible to fairly measure the comparative degree of the parties' fault. In this case, the Court stated that apportionment of fault was not a mechanical exercise and that although findings of equal fault were rare, the district court had properly identified a variety of negligent acts by both parties which supported a finding of equal fault.

Finally, on the issue of adjuster fees, the Court of Appeals found that a stipulation between the parties had merely stated the amount of fees owed and not liability for their payment. As the party moving for recovery, Plaintiff had the burden of showing it was entitled to the fees, and could not rest on the stipulation alone. Therefore, the district court was correct in denying recovery of the fees.

For the foregoing reasons the Court of Appeals affirmed the district court's judgment.

Andrew Lemonda  
Class of 2008

### **DECEDENT CONSTRUCTION WORKER RENOVATING SHIP BERTHS DEEMED A "HARBOR WORKER" UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT**

**The Court of Appeals held that an order of the Department of Labor Benefits Review Board, concluding that a decedent was a "harbor worker" covered by the Longshore and Harbor Workers' Compensation Act, was proper, even though decedent's specific job was not uniquely maritime in nature, because he was engaged in construction of a maritime facility.**

Healy Tibbitts Builders, Inc. v. Director, Office of Workers' Compensation Programs  
United States Court of Appeals for the 9<sup>th</sup> Circuit  
444 F.3d 1095  
(Decided April 14, 2006)

Petitioner Healy Tibbitts Builders, Inc. ("Healy"), entered into a contract with the United States Navy to renovate three submarine berthing wharves at Pearl Harbor, Hawaii. Subcontractor John Mannering ("Mannering") was retained by Healy to construct an underground concrete duct housing electrical and communication cables. In May 2001, Mannering employee Finefeuiaki Maumau ("Maumau") was killed when a steel trench shield fell on him. Respondents, survivors of the decedent, sought benefits under the Longshore and Harbor Workers' Compensation Act ("Act").

In 2002, an Administrative Law Judge ("ALJ") appointed by a director of the Office of Workers' Compensation Programs ("OWCP") granted the claim, awarding \$1,166.78 per week in benefits, based on the decedent's average weekly wage during the project. The ALJ relied on past decisions in which the Benefits Review Board had interpreted the Act to cover construction workers involved in the construction of a dock housing a submarine repair facility and other maritime facilities. The ALJ concluded that it was irrelevant that the decedent's job duties were not "inherently maritime" in nature.

The Department of Labor's Benefits Review Board ("the Board") affirmed the ALJ's decision. In holding that the decedent was a "harbor worker" within the meaning of the Act, the Board stated that

the relevant inquiry was whether the project on which Maumau was working was connected to the servicing of ships, not whether his specific job duties were of a uniquely maritime nature. Petitioner sought review.

The Court of Appeals noted that to qualify for benefits under the Act, an individual must be an “employee,” defined in the Act as “any person engaged in maritime employment, including ...any harbor worker...” The Court adopted the interpretation of “harbor worker” urged by the Director of OWCP, which would extend coverage to any worker directly engaged in the construction of a maritime facility, even if the worker’s specific job duties were not maritime in nature. The Court found the Director’s interpretation to be a reasonable, liberal construction consistent with the Act’s remedial purpose. The Court also observed that the text of the statute showed that Congress considered the construction of a maritime facility to be fully within the scope of the Act. Furthermore, the Director’s interpretation conformed with past Benefits Review Board decisions extending benefits to employees engaged in building a maritime facility, even though their duties were not maritime in nature.

The Court rejected Petitioner’s argument that the interpretation of “harbor worker” was foreclosed by Supreme Court precedent limiting coverage of the Act to individuals whose specific job duties had “a tangible connection to the ‘traditional’ maritime activities of ship repair and loading/unloading.” The Court recognized that although certain job duties of workers constructing a maritime facility could be so tangential as to exclude them from the Act’s coverage, “[i]f...the test were whether the subcontractor’s immediate work product had a maritime purpose in and of itself, few if any workers on a marine construction project would ever qualify for benefits.”

On the issue of the ALJ’s calculation of benefits, the Court held that substantial evidence supported the ALJ’s award of \$1,166.67 per week. Petitioners argued that the ALJ erred in estimating the decedent’s future earnings based solely on his wages from the berthing project. The Court held that Title 33 U.S.C. § 910 provided three bases for determining an employee’s average annual earnings, which serve as the basis for “average weekly wage:” 1) an employee’s earnings from the previous year, if the employee worked in the field in which he was injured for “substantially the whole of the year immediately preceding his injury;” 2) the average daily wage of a similarly situated employee in the year preceding the employee’s injury; or 3) a combination of factors, including the employee’s previous earning in the job at which he was injured, his other employment and previous earnings of similarly situated employees.

The Court found that the ALJ properly applied § 910(c) because there was substantial evidence to support his determination that the decedent’s wages from the berthing project reflected his future earning capacity. In addition, according to the Court, the claimant was well within her rights to make a tactical decision to skip § 910(b) and avail itself of § 910(c).

For the foregoing reasons the Court of Appeals denied Petitioners’ appeal for review.

Robert O’Connor  
Class of 2010

**CLAIMANT’S STIPULATIONS AS TO SHIPOWNER’S RIGHT TO LIMIT LIABILITY  
DEEMED ADEQUATE TO PROTECT SHIPOWNER’S LIMITATION OF LIABILITY CLAIM  
AND PERMIT CLAIMANT TO PROCEED WITH JONES ACT CLAIMS IN STATE COURT**

**After claimant seaman was injured aboard plaintiff’s tug, plaintiff commenced a suit in admiralty under the Limitation of Liability Act to limit its liability to the value of the vessel, and was further granted an injunction pursuant to Maritime Claims Rule F(3) enjoining all other actions against it arising from the accident. Claimant filed a claim exceeding the vessel’s value and was granted a motion dissolving the injunction and allowing him to pursue Jones Act claims in state court. The**