Jurisdictional Problems Between Washington's Workmen's Compensation Act and Federal Law

John D. Lawson

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Workers' Compensation Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol33/iss3/5

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
JURISDICTIONAL PROBLEMS BETWEEN
WASHINGTON'S WORKMEN'S COMPENSATION ACT
AND FEDERAL LAW

JOHN D. LAWSON

Serious and confusing jurisdictional problems confront the compensation lawyer in certain employment areas due to the supremacy of federal law over interstate commerce and maritime matters.¹ Federal legislation concerning compensation for work-sustained injuries has been enacted covering a variety of employments.² To the extent that the federal statute is applicable, state relief through its workmen's compensation act cannot be given, due to the pre-emption by federal law of the field. The perplexing problem for the practitioner is that of determining the extent of pre-emption by the federal act, and whether or not the injured workman was within the scope of the federal statute when he was injured. The penalty for bringing a claim under the wrong law will often be to have the claim barred by the statute of limitations when the remedy is later sought under the correct law. The expense of pursuing an improper remedy serves as an additional penalty for making a wrong choice.

In this comment, the principal concern will be with the conflict between the federal law and the state act in respect to the railway worker and the shoreline worker whose activity takes him upon navigable waters of the United States. It is in these areas that the confusion as to jurisdictional matters becomes the most difficult to resolve. The applicable federal statutes are the Federal Employers' Liability Act covering railroad employees, and the Longshoremen and Harbor Worker's Act covering shoreline employees. The discussion in this paper will be devoted to ascertaining the extent of federal pre-emption and the area left in which the Washington Compensation Act may be applied.³

The solution to the jurisdictional problems in these areas has not

---

¹ By virtue of Art. I, § 8, of the United States Constitution, Congress is given the power to "regulate commerce with foreign nations and among the several states..." Art. III, § 2, extends the judicial power "...to all cases of admiralty and maritime jurisdiction..." in the federal courts. Congress has the power to make "necessary and proper" laws to execute this grant.


³ In this regard emphasis will be placed upon the decisions of the final authority upon the applicability of federal law, the United States Supreme Court. Washington case law will be considered from the standpoint of predicting the probable treatment.
proven to be easy. The federal statutes involved do not give a clear
definition of the scope of the act, nor of the employment status cov-
ered. The court decisions interpreting the statutes have been equally
vague. Depending upon which relief, state or federal, is the more
favorable to the claimant at the time and place of the decision, the
courts have often strained to get the desired result. This distortive
process has lead to a complete lack of uniformity among the lower
federal and state court decisions. Decisions of the United States Su-
preme Court have not always adhered to employment characterizations
previously announced. As a result, there is no "rule of the thumb," no
"black letter law," nor any "majority rule" that can be followed.

The Washington legislature, appreciating the jurisdictional problems
posed by pre-emptive federal law in compensation areas, has attempted
to anticipate the conflict by declaring the state act inapplicable where
there is jurisdiction under a federal statute. To some extent the
Washington statute has made unnecessary the confusing distinctions
made in other jurisdictions in determining the status of the employ-
ment at the time of the injury in order to find jurisdiction. In other
respects, the attempt has only confused the situation further. The
effect of these provisions will be considered in the discussion to follow.

STATE JURISDICTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

A. The Extent Of The Federal Law. In 1908, after having an
earlier attempt declared unconstitutional for transcending the area of
intrastate commerce, Congress passed the Federal Employers' Liabil-
ity Act, hereafter referred to as FELA. The act prior to 1939 covered
only those employees who at the time of their injury or death were
employed in interstate commerce. Relating the employment of the
workman to interstate commerce was done to avoid the constitutional
objection of the earlier act which encompassed both intra- and inter-
state commerce.
In *Shanks v. Delaware, Lackawanna & Western Ry.*,\(^7\) the test of whether the injured employee was engaged in such commerce in the sense intended by the act was said to be: "Was the employee at the time of the injury engaged in *interstate transportation* or work so closely related to it as to be practically a part of it?" This led to a fertile area of litigation, pin-pointing the worker's employment status at the time of the injury.\(^8\) The employee had to be engaged in *interstate transportation* as distinguished from activities of the railroad not connected to the actual transportation part of its business in order to get relief under the federal act. He had to be so engaged at the time of his injury.\(^9\) Many fine distinctions were drawn in the myriad of appellate cases applying the test when making determinations of whether state or federal law should be applicable.\(^10\) A discussion of these cases would be fruitless in light of the 1939 amendment which redefined the coverage of the act. The *Shanks* case is mentioned in order to see the extent to which the old guides are now obsolete.

The 1939 amendment added an important paragraph to the first section of the FELA. Employees under the act are now defined as:

> Any employee of a carrier, any part of whose duties as such employee shall be the *furtherance* of interstate or foreign commerce; or shall in any way *directly or closely and substantially affect such commerce* ... shall, for the purpose of this Chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Chapter. (Emphasis added)\(^11\)

This amendment, cast in language recently used by the Supreme Court in a case involving the expanded powers of federal commerce,\(^12\) has been interpreted as broadening the coverage of the FELA.\(^13\) The extent

---

\(^7\) 239 U.S. 556 (1916).

\(^8\) See, for example, the cases cited in Horovitz, *Federal Supremacy in Five Workman's Compensation Problems*, 24 Boston U. L. Rev. 109, 129-134 (1944).

\(^9\) These came to be known under various labels, such as the "pin-point" test, and the "transportation" test. See 2 Larson, *Workman's Compensation* 430 (1952).

\(^10\) The United States Supreme Court was the final arbitrator in 43 cases concerning the line to be drawn between between interstate and intrastate injuries out of 172 FELA cases in the first 25 years of litigation. 47 Harv. L. Rev. 394, 398 (1934).


\(^12\) NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). This case, involving labor relations, greatly broadened the interpretation given to the powers of Congress over interstate commerce to include activities which had a substantial effect upon that commerce. The ultimate in the expanded powers was reached in *Wickard v. Filburn*, 317 U.S. 111 (1942), where the growing of wheat for consumption on the farm producing it was said to "exert a substantial economic effect on interstate commerce" sufficient enough to be subjected to federal control.

\(^13\) Baird v. New York Central R. Co., 299 N.Y. 213, 86 N.E.2d 567 (1949). In the Senate Reports, 76th Cong., 1st Sess., Report No. 661, the following appears:

> This amendment is intended to broaden the scope of the Employers' Liability
to which its coverage now pre-empts state compensation acts is currently being carved out by the Supreme Court.

Until recent years, the United States Supreme Court has maintained a studied silence, evidently content to allow the lower courts to wrestle with the problem. But in two recent cases, *Southern Pacific Co. v. Gileo* and *Reed v. Pennsylvania Railroad Co.*, the Supreme Court has virtually rendered the old tests obsolete. By implication, conflicting decisions in the lower courts have been overruled by the new interpretation given to the amendment.

The *Gileo* case involved five California cases which were consolidated for review. At the time of the injury, the workmen concerned were each working on "new construction" for the railroad carrier. The court held that the provisions of FELA and not the state act were applicable:

... Congress enacted [the 1939 amendment] to cure the evils of hyper-technical distinctions which had developed in over thirty years of FELA litigation. Whatever justification there may have been before the amendment for holding that employees working on repairs of a railroad's instrumentalities were engaged in interstate commerce and therefore entitled to the benefits of the Act... while those who were working on construction of new railroad facilities were not engaged in interstate commerce and therefore were not covered by the Act... has been swept away by the 1939 amendment.

The court, in disposing of the cases, indicated that if any part of the duties of the employee is a "vital link in the chain of [the railroad's] function as an interstate rail carrier," his employment will be held to further interstate commerce and directly or closely and substantially affect such commerce. Instead of requiring that the employee be engaged in interstate commerce at the time of the injury as required by the *Shanks* case, the new test is whether any part of the duties of

---

14 This writer has been unable to find a Supreme Court case construing the amendment between 1939 and 1955.
17 The writs in two of the cases were dismissed for lack of finality of judgment in the highest court of the state.
18 *New construction" had been held not to be an employment in interstate commerce prior to the 1939 amendment. Raymond v. Chicago, Milwaukee & St. Paul R. Co., 243 U.S. 43 (1917); New York Central R. Co. v. White, 243 U.S. 188 (1917).
19 *Supra* note 15, 351 U.S. at 499.
20 Note 7, *supra.*
the employee are in furtherance of the interstate commerce activity of the railroad. The "pin-point" test formerly used now seems to be a completely dead issue. Uniformity of treatment is thus assured of workmen whose total activities "further" interstate commerce regardless of how they may be employed at the moment of injury.

The Reed case, a companion case to Gileo, discarded the other distinction previously used in distinguishing "transportation" employees from employees having no part of their employment connected with the transportation end of the carrier's business. The claimant in this case was a clerical employee. Her duties consisted of filing blueprint tracings and using them to fill orders for blueprints anywhere in the railroad's system. Her entire duties took place within the office building where she worked. She was held to be entitled to coverage under FELA. "The benefits of the Act are not limited to those who have cinders in their hair, soot on their faces, or callouses on their hands."

The argument that commerce in the act means transportation and that the claimant was not engaged in transportation was rejected. The court said that if any part of the employee's duties furthers or substantially affects interstate commerce, it also furthers or substantially affects interstate transportation. The test for coverage under the amendment "is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers, or substantially affects transportation." The court found that the very purpose of the claimant's employment was to further the physical maintenance of an interstate railroad system and that her duties contributed to that purpose.

The Reed case should be interpreted as removing all distinction between the different employment classes of the railroad. Back shop workers, clerical help, restaurant people and other employees in the railroad's system would be covered if the test of the Reed case is met, i.e., do their duties in any way further or substantially affect the interstate business of transportation carried on by the railroad? The Reed opinion was quick to note that the word "furtherance" is a broad and elastic term and can only be marked out through case-by-case adjudication.

As now construed by the Gileo and Reed cases, the area left for the application of state compensation acts in the case of railroad employees is quite narrow. Under the Gileo test, any phase of work may be found

21 Note 17, supra.
to have a sufficient relationship to interstate commerce and be covered by FELA. Certainly the construction of railroad facilities are now covered where done by employees of the carrier, and it is enough if any part of their duties have the requisite effect. The Reed case removes distinctions previously made between the classes of employees. The provisions of FELA would now seem to be applicable to all employees on the payroll of the railroad who contribute in any way toward the “furtherance” of the railroad’s commerce activity.

Apparently the state act could still be validly applied to railroads engaged solely in intrastate activities. To find such a railroad today would be rare. Even though its lines are wholly within the state, such a railroad would probably connect with an interstate railroad or carry goods destined for shipment without the state. Under the expanded view of interstate commerce, it may be doubted if even a railroad engaged wholly in intrastate activities would be excluded from the provisions of FELA.

B. When Can The Washington Act Be Applied? Washington is one of several jurisdictions which have sought to avoid conflict with FELA by statutory provisions in its Workmen’s Compensation Act. The Washington provision places all railroad employees outside the state act, except those engaged in railroad construction work. Railway workers not engaged in interstate commerce (those in intrastate activities) are to be given the same right of recovery as may exist for included employees under FELA. Railroads engaged in traditional intrastate enterprises (street railways or power plants) are still subject to the state act.

Under this statutory language, the distinctions made in other jurisdictions and in Washington, would be determinative only of whether the claimant had a state cause of action based on the provisions of FELA or a federal FELA cause of action. The recovery would be the same. Uniformity of treatment among the railway workers would thus be achieved.

22 Or “transportation” if you prefer. The Gileo and Reed cases indicate that in the Supreme Court’s thinking, they now mean the same thing in the case of commerce by railroads.

23 RCW 51.12.080. Other jurisdictions include Idaho, Connecticut, Illinois, New York, Louisiana, Maryland, Nebraska, Tennessee, Utah, and West Virginia.

24 Presumably, this was intended to mean “new” construction work as distinguished from the repair of existing railroad facilities. Cf. Prink v. Longview, Portland & Northern R. Co., 153 Wash. 300, 279 Pac. 1115 (1929).

25 Under the Washington statute, every injured railway workman, not engaged in “new” construction, would receive the benefits of the FELA provisions regardless of how he was employed at the moment of injury.
Under the Gileo and Reed cases, the function played by the Washington statutory provision no longer will be needed. Uniformity of treatment is assured by pre-emption of state relief for all classes of railway workers. Even employees engaged in the construction of "new" railroad facilities are now covered by FELA. If any part of the duties of the injured employee contributes toward the interstate business of the railroad, the Washington act is inapplicable. Resort must be had to the federal cause of action embodied in FELA.

The Washington practitioner representing a railroad compensation claimant today would be well-advised to bring his cause of action under the provisions of FELA regardless of the class of employment or how the employee was engaged at the moment of injury. All that would be necessary is that the employee be engaged in some activity "furthering" the interstate commerce activity of the railroad.

STATE JURISDICTION UNDER THE FEDERAL LONGSHOREMEN'S ACT

A. The Extent Of The Federal Law. The jurisdictional problems under this heading involve shore-based workmen whose employments take them upon navigable waters of the United States. The principal concern in this relation will be with the longshoremen and harbor workers other than seamen, seamen being in a category all of their own.26 The jurisdictional problem there between state or federal relief involves the problem of characterization.27 If the workmen are found to be "seamen" according to some nebulous formula, the jurisdictional problem is solved.28 "Seamen" are the "wards of the admiralty," and are to be

26 "Seamen" have traditional remedies under admiralty law. The oldest is that of maintenance and cure. See Calmar S. S. Corp. v. Taylor, 303 U.S. 525 (1938). Another of the traditional remedies is that of indemnity for the unseaworthiness of the ship or a condition thereon. The Jones Act gives the seaman a statutory remedy in negligence based on the FELA provisions to complete the scope of seamen remedies. 41 STAT. 1007 (1920), 46 U.S.C.A. § 688. For a complete and excellent discussion of the rights of seamen modernly, see GILMORE AND BLACK, LAW OF ADMIRALTY, 249-333 (1957). See also The Tangled Siene: A Survey of Maritime Personal Injury Remedies, 57 YALE L. J. 243 (1947); Howe, Rights of Maritime Workers, 5 NACCA L. J. 146 and 6 NACCA L. J. 131 (1950).

27 Determining who is a "seaman" in a given case is one of the disturbing problems of the admiralty bar. Many shore-based employees who would not seem to fit the concept of the term "seaman" have been afforded some, but not all, of the seamen remedies. This took place during the period of time when "seamen" remedies were more favorable than those provided harbormen. See International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926) (Longshoremen as "seamen" for purposes of Jones Act relief); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) ("seamen" in order to recover indemnity for unseaworthiness). See also, Ambler, Seamen are "Wards of The Admiralty" But Longshoremen Are Now More Privileged, 29 WASH. L. REV. 243 (1955).

28 The holding in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), makes clear
accorded federal relief. The state is incompetent to act in regards to these workmen due to the federal pre-emption by federal law.

The position of the harbor worker is much less certain. For a time, the states felt competent to apply their compensation acts to this class of workmen. Even though the contract was maritime and the injury occurred upon navigable waters, the interest of the states in these land-based employees was thought to be sufficient. Seemingly, there could be no "undue burden" upon admiralty law by regulating in regards to an injury in the absence of federal legislation. The burden would be incidental at best, and the interest of the state in the welfare of its citizens would be a legitimate reason for state action. Until Congress had legislated, there would seem to be no bar to state action in regard to these injuries.

Unfortunately the Supreme Court of the United States did not agree. The case of Southern Pacific Co. v. Jensen, established that uniformity must be preserved in the maritime law, and this included compensation for injuries. The court said that where the contract of employment is maritime and the locus of the injury is upon navigable waters, only those remedies under federal maritime law can be applied.

Following the Jensen decision, the courts and Congress were busy attempting to find ways to avoid the harshness of the uniformity rule. Congress twice attempted to overrule the Jensen result by expressly making state compensation acts applicable to these workmen. Both attempts were held unconstitutional. Then the courts gradually that injuries sustained upon navigable waters come within the exclusive province of the federal maritime law. Seamen are to be afforded the federal admiralty remedies whether injured on land or sea. See Gilmore and Black, op. cit. supra note 26.

As seen above, in the case of a railway worker the question of federal or state relief is determined by how the workman was occupied. In the case of "seaman," once the workman is classified in that favored class, the jurisdiction problem is solved without regard to what the workman was doing.

29 244 U.S. 205 (1917). The New York Compensation Act was found to work "material prejudice to the characteristic features of the general maritime law" and to interfere "with the proper harmony and uniformity of that law in its international and interstate relations." The Court used as its authority for the theory of uniformity The Lottawanna, 88 U.S. (21 Wall 558) 470 (1874), a case which held that state legislatures had the power to modify the maritime law by creating liens, enforceable in admiralty.

30 First in 1917, the "saving to suitors" clause was amended by adding a phrase: "... to claimants the rights and remedies under the workmen's compensation law of any state." Act of 1917, 40 Stat. 395. Then in 1922, this clause was again amended, this time expressly exempting seamen. Act of 1922, 42 Stat. 634.

carved out a "maritime but local" exception to the Jensen rule, in which cases the state act could be constitutionally applied.  

Finally Congress yielded, and in 1927 passed the Longshoremen's and Harbor Workers' Compensation Act. The reluctance of Congress to pre-empt the field is manifested by their making the Federal Act apply only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." The act contains certain limitations in its coverage which have produced litigation in addition to the provisions limiting the act's applicability to cases where state relief would be invalid. Only injuries occurring upon navigable waters (including dry docks) are covered by the act. Thus injuries occurring upon the land to harbor workers may be constitutionally covered by the state act. Also, the Longshoremen's Act does not apply to a "master or member of a crew of any vessel." Seamen are thus excluded from compensation-type relief and have their remedies provided only under the admiralty law.

For several years after the passage of the Longshoremen's Act, the courts continued to draw distinctions based upon the "maritime but local" doctrine. Then in Motor Boat Sales v. Parker, the Supreme Court apparently tired of the game. In this case, a janitor-handymen for a marine store took it upon himself to go along on a trip to test an outboard motor. This was not one of his usual duties, which normally took place upon the land. The boat capsized upon maritime waters and the man was drowned. The Supreme Court held that relief under the Longshoremen's Act was proper and reversed the circuit court's finding

---

33 This exception was first developed in Western Fuel Co. v. Garcia, 257 U.S. 233 (1921), and then applied to the field of compensation by Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922). Under the exception, if a subject were local enough in character it would be held not to interfere with "the proper harmony and uniformity" of the maritime law to allow state relief, even though the subject were maritime. The development of this doctrine and its many applications has an interesting history. See Gilmore and Black, Law of Admiralty (1957).


36 33 U.S.C.A. § 903(a) The requirement of the injury occurring upon navigable water has led to narrow distinctions being made in pin-pointing the locus of the injury. Thus in T. Smith & Son, Inc., 276 U.S. 179 (1930), an injury was held to have occurred on land when a longshoreman standing on a dock was knocked into navigable water has led to narrow distinctions being made in pin-pointing the locus of the injury. In Minnie v. Port Huron Terminal, 295 U.S. 647 (1935), the impact causing the injury was held to have taken place upon navigable waters when a land operated crane knocked a workman standing upon the deck of a vessel onto the land. The state act was held to be inapplicable.

37 33 U.S.C.A. § 903(a) (1).

38 314 U.S. 244 (1941).
that the employment was a matter of local concern only. Compensation had been originally sought under the federal act and the deputy commissioner had granted relief. Possibly the Supreme Court had in mind administrative finality in the finding of federal jurisdiction.

One year later the Supreme Court announced its decision in the well-known case of *Davis v. Department of Labor and Industries.* In this case the maritime but local exception was not used, although possibly it could have been. Instead, the Supreme Court announced its now famous “twilight” doctrine:

There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements.

As an answer to the confusing jurisdictional problem previously existing, Justice Black made use of an old principle of law: that there is a presumption of constitutionality when the validity of a state statute is drawn into question. Justice Black said:

Under all the circumstances of this case, we will rely on the presumption of constitutionality in favor of the state enactment; for any contrary decision results in our holding the Washington Act unconstitutional as applied to petitioner. A conclusion of unconstitutionality of a state statute can not be rested on so hazardous a factual foundation.

Thus, under the twilight approach, the claimant in a borderline employment status will probably be successful if he applies for state relief. In such a situation, the jurisdiction of the state to apply its act would be accorded a “presumption of constitutionality.”

How does this “twilight zone” approach work where jurisdiction is first sought under the federal law? Quite possibly the answer may be found in the Longshoremen’s Act itself. Coverage under the federal act is exclusive once a determination has been made that it is applicable. The federal authorities are the determiners so far as questions involving the supremacy of federal law may be concerned. This would be true where the decision is made by the federal court, whether the issue is one of law or of fact. It would also be true where the decision is made by the federal administrative agency and the issue is one of
fact. Since the Longshoremen's Act provides that jurisdiction is to be "... presumed in the absence of substantial evidence to the contrary," it follows that the finding by the federal agency is to be accorded finality unless it is not supported by substantial evidence. Administrative finality in this regard would mean that a determination of jurisdiction by the deputy commissioner would be conclusive of federal jurisdiction. The Davis case itself bears out this thinking. There it is said that the court will give "... presumptive weight to the conclusions of the appropriate federal authorities . . ." Thus it would seem that a finding of jurisdiction by either the federal agency or a federal court would be given a presumption of validity by the United States Supreme Court. Similarly, a finding by these federal authorities that jurisdiction did not lie under the federal act would also be accorded a presumption of validity.

The Davis case leaves one vital question unanswered. Granted that a presumption of constitutionality of state statutes and of administrative finality is to be accorded in twilight cases, what types of employment are to be classed as sufficiently borderline to come within the twilight zone? Do past decisions, which have characterized a particular employment as coming within a state (or federal) law, take the case out of the doubtful area? The Davis case indicated that the unconstitutionality of a state statute cannot be made to rest upon a "hazardous factual foundation." This would seem to indicate that the twilight approach would not be used where precedents have already determined the factual situation as being within federal or state compensation and thus not a hazardous factual pattern.

The Supreme Court, however, has ruled that this is not the case. In Moore's Case, the Massachusetts court found repair work upon a completed vessel would come within the provisions of its compensation act. The state judge recognized the futility of attempting to reason logically about "illogic." The Davis case was held to include doubtful cases involving aspects pertaining both to land and navigable water

---

Footnotes:

44 See in this regard, the discussion in Rodes, Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone, 68 Harv. L. Rev. 637, 644 (1955).
45 See Avondale Marine Ways, Inc. v. Henderson, 201 F.2d 437 (5th Cir. 1953), aff'd per curiam, 246 U.S. 366 (1953).
and precedents were not to be controlling. The federal Supreme Court affirmed in a per curiam decision.\textsuperscript{47}

In \textit{Baskin v. Industrial Accident Commission},\textsuperscript{48} the California court reached an opposite result. This time the Supreme Court reversed in another per curiam decision, citing \textit{Moore's Case}.\textsuperscript{49} Thus it would seem that the "twilight" doctrine covers a wide range of cases, and earlier cases will not operate to take a case out of the doubtful or "twilight" area. Under the \textit{Davis} case, then, the claimant's award of compensation under either federal or state law would be accorded a presumption of validity.

It may be argued that this means that the state and federal powers now enjoy concurrent jurisdiction in this field. This conclusion would seem to follow whenever relief has been granted, since the presumption of constitutionality of the state statute or the presumption of administrative finality under the federal law would go to validate the award. In the case of a denial by the state authorities of state compensation, a different result might be reached. Such a finding would not necessarily be conclusive in denying state jurisdiction. The federal authorities, determining the extent of federal pre-emption might decide otherwise.\textsuperscript{50} However, a denial by the federal authorities of a claim would seem to be conclusive so far as the constitutional power of a state to entertain a claim is concerned. Thus federal jurisdiction is concurrent with state jurisdiction, if the federal authorities so decide,\textsuperscript{51} but state jurisdiction is not necessarily concurrent with federal.

If we have a type of concurrent jurisdiction, may successive awards be made? The United States Supreme Court has not yet answered this question. Arguably, an award made under a state act would not be conclusive as to a possible second award under the Longshoremen's Act. The federal authorities would not be bound by the findings of the state authorities concerning a question of the extent of federal pre-emption. The federal authorities could make a determination that the claim

\textsuperscript{47} Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).
\textsuperscript{48} 89 Cal. App.2d 632, 201 P.2d 549 (1949).
\textsuperscript{49} Baskin v. Industrial Accident Comm., 338 U.S. 854 (1949).
\textsuperscript{50} Conceivably, this could happen two ways. The denial by the state authorities could be appealed to the federal courts who might then reverse the state's finding against the presumption of constitutionality. Or, the claimant might seek relief under the federal act and be told by the federal agency that the state should have applied its act.
\textsuperscript{51} In state vs. state compensation conflicts apparently there is now full concurrent jurisdiction between the states to apply their acts. Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622 (1947). There equal powers exist. "Less than concurrent" jurisdiction between state and federal powers must necessarily exist because of the supremacy of the latter power.
came under federal law and that the state act could not be constitutionally applied due to federal pre-emption. Of course, the state award would be credited on the federal award.

Such a result was reached in *Western Boat Building Co. v. O'Leary*, a ninth circuit case. Here the injured workman had been repairing a tugboat on a marine railway. The state commissioner allowed an award under the Washington act and monthly payments were made. The claimant then filed a claim under the Longshoremen's Act. The deputy commissioner allowed the claim and made the award. The district court affirmed. The marine railway was held to be a "dry dock," bringing the injury under the federal act. The federal agency has jurisdiction even though the state agency has adjudicated the question. This means that awards may be made by both agencies and the federal court will decide the conflict.

A federal award followed by a state claim would probably be denied. Here a finding of jurisdiction by the federal authorities would be conclusive as to the jurisdiction of state relief.

**B. When Can The Washington Act Be Applied?** RCW 51.12.100 provides:

The provisions of this title shall apply to all employers and workmen except a master or member of a crew of any vessel, engaged in maritime occupation for whom no right or obligation exists under the maritime laws for personal injuries of such workmen. (Emphasis added)

This was enacted after the Longshoremen's Act's provision that the federal act will only apply where a state act may not be validly applied. The Washington provision makes the state act applicable, unless the federal act will be applied. Therefore the controlling question is whether the federal act is applicable to a particular set of facts, and thus pre-emptive of state relief.

The answer to this question lies in the decisions of the Supreme Court discussed above. The Washington practitioner will probably find that the federal act will be pre-emptive only in those cases where jurisdiction is sought first under federal law and the federal authorities decide the jurisdictional question. An award granted by the state au-

---

62 198 F.2d 409 (9th Cir. 1952).
63 See also Maryland Casualty Co. v. Lawson, 101 F.2d 732 (5th Cir. 1939).
64 See Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F.2d 968, 971 (4th Cir. 1951).
COMPENSATION ACT JURISDICTION

authorities, will probably be upheld due to the presumption of the state statute under which the award was made being constitutional.

Washington has made clear that one qualification will be applied in the case of shore-based employees before they will be held to come within the provisions of the federal maritime law. The employee must be engaged in a maritime service when he suffers injury upon navigable waters to come within the provisions of federal law. This may be another way of applying the local concern rule. It will serve, however, to include those employees within the state act, who are not engaged in a maritime venture at the time of the injury.

Those employees engaged in work of a maritime nature would come within the concurrent jurisdiction situation discussed above. The claimant could file under either the Washington act or under the federal act, and would probably be upheld in his choice of jurisdiction.

ADDITIONAL CONSIDERATIONS

Mention should be made of interstate commerce activities other than railroads and the jurisdictional state-federal problems concerning injuries in those areas. Some preliminary observations pertaining to the relative powers of state and federal governments in the field of interstate commerce will point out the respective role each plays.

Constitutionally, a state may validly provide compensation for the injuries or death of an employee engaged in interstate commerce in the absence of federal legislation on the subject. Although congressional power over interstate commerce is admittedly broad, the state's interest in the welfare of its residents is sufficient to justify the exercise of its police power over these injuries. Lacking federal legislation over

---

67 Examples of non-maritime service: Sulton Railway & Timber Co. v. Dept. of Labor & Industries, 141 Wash. 172, 251 Pac. 130 (1926), aff'd 277 U.S. 135 (1926) (booming of logs into rafts preparing them for towing—logs have not yet entered into interstate commerce); Eclipse Mill Co. v. Dept. of Labor & Industries, 141 Wash. 172, 251 Pac. 130 (1926) (breaking up of log rafts—logs have left interstate navigation). In the Puget Sound Dredging case, supra note 56, the court said that dredging is maritime service only if its purpose is to aid navigation.
69 Note 12, supra.
these employment relations, then, a state may validly apply its workmen's compensation act in the field of interstate commerce.  

Appreciating the difficulties caused by FELA upon the application of a state compensation act, the Washington legislature attempted to anticipate the possibility of federal legislation in other commerce areas as to injuries. The purpose was to alleviate any possible conflict which might result. This thinking into the future has produced some present day problems. The statute provides that the provisions of Washington's Workmen's Compensation Act:

... shall apply to employers and workmen (other than in railways and their workmen) engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation now exists under or may hereafter be established by the congress of the United States, only to the extent that the payroll of such workmen may and shall be clearly separable and distinguishable from the payroll of workmen engaged in interstate or foreign commerce: Provided, That as to workmen whose payrolls are not so clearly separable and distinguishable the employer shall in all cases be liable in damages for injuries to the same extent and under the same circumstances as is specified in the case of railroads in the first proviso of RCW 51.12.080. (Emphasis added)

The statute is ambiguous in several respects. For example, suppose the Congress amends the Motor Carrier's Act to provide compensation for injuries in that field of commerce. Suppose also that the payrolls of the workmen are not clearly separable. Does the statute mean that the employees could then collect damages for injuries upon the same grounds as are contained in FELA? A literal reading of the statute would indicate this result. Yet this would destroy the uniformity of treatment to workers in this field. Some would receive a compensation type relief, while others would receive a liability type recovery. In order to assure uniformity of treatment, the statute would have to be interpreted to mean that relief would be given upon the same grounds as is specified in the newly-enacted federal statute, as is now done in the case of railroads. In other words, if the future federal statute were a compensation type, employees not included therein would receive state relief to the same extent as provided by the federal compensa-

---

61 It might be noted that interstate commerce is not restricted to interstate transportation. Paying premiums into a state's industrial insurance fund constitutes just as much a burden on interstate activities other than transportation, e.g. a factory selling products without the state, as it does upon interstate transportation. Admittedly, the burden is incidental and not direct.

62 RCW 51.12.090.
tion statute. This interpretation, while doing violence to the incorpora-
tion method employed by the draftsman, is to be preferred. Uniformity
would be assured to all workmen within the same general employment
group.

Another ambiguity has already been discovered and construed by
the Washington Supreme Court. In State ex rel. Washington Motor
Coach Co. v. Kelly,63 employers engaged in motor transportation sought
to compel the Director of Labor and Industries to accept premiums
into the state Industrial Insurance Fund on the accounts of certain of
their employees. The director contended that no payroll segregation
could be made of the intrastate and interstate activities of the em-
ployees. He also contended that the Motor Carriers Act,64 enacted by
Congress, pre-empted the field of interstate transportation. The Wash-
ington court found that in the absence of federal legislation upon the
subject of injuries, a state could validly cover employers in interstate
commerce by enactment of a state compensation act. The Motor Car-
riers Act did not purport to cover liability for injuries and thus was
held not to pre-empt state power in this regard. The state act did pur-
port to cover motor carriers within the extrahazardous employments
covered by workmen’s compensation.65 Therefore, the court concluded,
unless the provision contained in RCW 51.12.090 excluded this em-
ployment, it was covered by the Washington act. The court said that:

... the interstate employees excluded from the operation of the sec-
tion were those only ... for whom a rule of liability or method of
compensation has been or may be established by the Congress of the
United States... (Italics by the court)

Since no "rule of liability or method of compensation" had been estab-
lished by the Congress in regard to these employees, RCW 51.12.090
could not be applicable in this case. The court concluded that the
employees engaged in motor transportation, whether intrastate or inter-
state commerce, were covered by the Washington act. The court made
no holding as to whether segregation of payrolls could be made in this
case or not, since its finding meant that all employees were covered.

Seventeen years later, the court again construed the statute under
consideration in the case of McClung v. Pratt.66 Here an Oregon truck
driver, employed by an Oregon resident, negligently collided with an

63 192 Wash. 394, 74 P.2d 16 (1937).
65 LAWS 1937, c. 211, § 1.
industrial inter-plant bus in Seattle. The occupants of the bus were injured and brought a common law action against the truck driver and the owner of the truck. At the time of the accident the truck was engaged solely in interstate commerce. The defendants contended that under RCW 51.24.010, they were immune from a common law action.\footnote{RCW 51.24.010 provides that employees covered by workmen’s compensation, when injured by a third party, may elect whether to take under the Act or seek a common law remedy against the third party “... Provided, however, That no action may be brought against any employer or workman under this Act as a third person if at the time of the accident such employer or such workman was in the course of any extra-hazardous employment under this Act.” (Emphasis added.)} Truck driving is covered as an enumerated extrahazardous employment under the act.\footnote{RCW 51.12.010.} The court rejected this contention and held that these defendants were not subject to the provisions of the act and could be subjected to a common law suit.

The Washington Motor Coach case was distinguished as holding that employments concerning both intrastate and interstate commerce were covered, not employments concerning only interstate commerce. “The language used must be confined to the facts before the court in that case.” The court in the Pratt case emphasized the conjunctive form of the words used in RCW 51.12.090. “By its plain terms, the statute makes our workmen’s compensation act apply only to employers and workmen . . . engaged in intrastate and also in interstate or foreign commerce.” Since the defendants were engaged only in interstate commerce, the court held that the statute does not purport to cover them. The court also said that the separability limitation contained in the statute bore out its holding. Employees engaged wholly in intrastate commerce were said to be excluded but were covered by another part of the act. Is this reasoning sound? Employees engaged wholly in interstate commerce may be excluded by this section, but it would seem that they too are included by another section of the act.\footnote{Ibid.} The court noted that it did not intend to hold that the legislature did not have the power to include interstate employers but that the statute did not purport to include them. The court does not seem to give effect to the part of the section italicized above, limiting its application only to cases where federal legislation has established a method of liability or compensation. If such a federal statute has not been enacted, it would seem that RCW 51.12.090 is inapplicable, and the other provisions of Washington’s Workmen’s Compensation Act should apply. It is submitted that the court’s reasoning is erroneous. Had the truck carried
only one item in intrastate commerce, the defendants would have been covered by the statute. Surely this was not the legislative intent.

**Conclusions**

Jurisdictional problems between state and federal law in the injury area do not as yet have a suitable solution. Only further clarification by the United States Supreme Court will enable the practitioner to know, with any degree of accuracy, under which law he should file his claim. The present thinking of the Supreme Court seems to be that of upholding the jurisdiction first invoked by the injured claimant, or that of further clarifying the extent of pre-emption by the federal statute.

In the case of railway workmen, this means FELA relief almost exclusively. The Reed and Gileo cases include virtually all the workmen of an interstate railway under the provisions of the federal act. Only a wholly intrastate railway enterprise could be covered by the state act due to federal pre-emption of any activity which in any way furthers or substantially or materially affects interstate commerce.

Shore-based workmen who work upon navigable waters, other than “seamen,” will probably be upheld in their choice of jurisdiction under either federal or state statutes. If their choice is state relief, the presumption of constitutionality to be afforded a state statute will serve to uphold the claim. If the choice is federal relief, the administrative finality to be afforded questions of fact will serve here to uphold the federal award. The “twilight” jurisdiction of state and federal law concerning these workmen seems to be moving toward a limited type of concurrent jurisdiction. Federal law can probably be applied and a successive award following a state award may be granted if the federal authorities decide that the state was without jurisdiction due to federal pre-emption. The reverse (federal award followed by a state award) will not probably be granted.