WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOSE FIGUEROA, *Applicant*

vs.

AMERICAN MARINE CORPORATION; ARCH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11433178
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Amended Findings, Award and Order of May 27, 2020, the Workers' Compensation Judge (WCJ) found that trial exhibits C, D, E, F, H, I, J, K, L, and M must be stricken due to defendant's failure to timely serve, disclose, and identify them with specificity at the Mandatory Settlement Conference (MSC); the WCJ also struck all testimony reviewing and/or commenting on the stricken exhibits. The WCJ also found that on May 6, 2016, applicant, while employed by American Marine Corporation at Terminal Island, California, sustained industrial injury to his left hand in the form of index finger laceration, and to his right upper extremity in the form of carpal tunnel syndrome, resulting in chronic regional pain syndrome. In addition, the WCJ found that defendant failed to establish that applicant was employed as a "seaman" under the Jones Act, and that defendant failed to establish that the California WCAB does not have subject matter jurisdiction over applicant's injury claim herein. Pursuant to these findings, the WCJ awarded applicant further medical treatment and temporary disability indemnity beginning May 10, 2016 and continuing, subject to the 104-week indemnity cap under Labor Code section 4656(c)(2), and less credit to defendant for any benefits paid, including maintenance benefits paid pursuant to the Federal Maritime or Jones Act.

Defendant filed a timely, unverified petition for reconsideration of the WCJ's decision. Defendant contends that the WCJ erred in excluding the employer's dive logs and other exhibits from evidence, that applicant's trial testimony is not credible, that the WCJ erred in disallowing

the testimony of Wade Bliss on behalf of the employer, and that the evidence justifies a finding that applicant was a "seaman" within the meaning of the Jones Act. By implication, defendant further contends that because the Jones Act is applicable, federal jurisdiction is exclusive in this matter.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

At the outset, we observe that if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include but are not limited to, injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or Court of Appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, we are called upon to review a hybrid decision because the WCJ's finding that the California WCAB has subject matter jurisdiction is a "final" decision on a threshold issue, whereas the WCJ's striking of various defense exhibits and related testimony is in the nature of an interlocutory ruling. For these reasons, although we treat defendant's petition as a petition for reconsideration to review the WCJ's finding of California jurisdiction, we also evaluate defendant's objections to the WCJ's evidentiary rulings under the removal standard, i.e., significant prejudice or irreparable harm.

In reference to the WCJ's evidentiary rulings and his finding of California subject matter jurisdiction, we have considered the allegations of defendant's Petition for Reconsideration, the contents of the WCJ's Report and Recommendation with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated below and in the WCJ's Report and Opinion, both of which we adopt and incorporate, we will affirm the Amended Findings, Award and Order of May 27, 2020. In affirming the WCJ's decision in its entirety, we have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.)

In reference to the WCJ's striking of exhibits C, D, E, F, H, I, J, K, L, and M due to defendant's failure to timely serve, disclose, and identify them with specificity at the MSC, and the WCJ's striking of all testimony reviewing and/or commenting on the stricken exhibits, we further note that any significant prejudice or irreparable harm visited upon defendant as a result of the WCJ's rulings is self-inflicted.

In reference to the WCJ's finding that defendant failed to establish that applicant was employed as a "seaman" under the Jones Act, as well as the WCJ's rejection of exclusive federal jurisdiction in this matter, we find no error in the WCJ's findings based on the evidence presented to him, as set forth in the WCJ's Opinion on Decision and Report and Recommendation.

In addition, we note that on the first day of trial on May 6, 2019, defendant asserted that "the WCAB does not have jurisdiction over applicant's claim due to exclusive jurisdiction under the Jones Act and Maritime law." (Minutes of Hearing, 3:10-12.) This assertion was sufficient to raise the question of whether there is concurrent federal and state jurisdiction, even if applicant was a "seaman" under the Jones Act. (See *Bontempo v. Workers' Comp. Appeals Bd.* (2009) 173 Cal.App.4th 689, 704 (74 Cal.Comp.Cases 419): [Raising the issues of permanent disability (Lab. Code, § 4660) and apportionment (Lab. Code, §§ 4663, 4664) was sufficient to raise the 15% increase in permanent disability under Labor Code section 4658(d).].)

On that question, we are persuaded that California has concurrent subject matter jurisdiction in this case. Although the federal Longshore and Harbor Workers' Compensation Act (LHWCA; 33 U.S.C. § 901 et seq.) is not involved here, the jurisprudence of concurrent

jurisdiction has often been addressed in that context, resulting in the development of the "twilight zone" doctrine.

As noted in the panel decision *Koch v. R.E. State Engineering, Inc.* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 80, the LHWCA establishes a federal system of workers' compensation benefits for stevedores and other dockside and maritime workers, and LHWCA jurisdiction over an industrial injury may be concurrent with the California Workers' Compensation Act. (Citing *Sun Ship, Inc. v. Pennsylvania* (1980) 447 U.S. 715 [45 Cal.Comp.Cases 1314].) In *Koch*, the panel also noted that the previous acceptance of benefits under the LHWCA does not constitute an election of remedies that precludes the injured worker from subsequently claiming benefits under California's workers' compensation laws. (Citing *Calbeck v. Travelers Insurance Co.* (1962) 370 U.S. 114 [27 Cal.Comp.Cases 204].) However, the injured worker may not receive a double recovery and credit must be allowed against an award for any payment to the extent that a double recovery would otherwise occur. (Citing *Sea-Land Serv. v. Workers Compensation Appeals Bd.* (*Lopez*) (1996) 14 Cal. 4th 76 [61 Cal.Comp.Cases 1360].) Although *Lopez* involved the issue of credit for benefits received under both LHWCA and California's Workers' Compensation Act, the Supreme Court noted that "the rule of concurrent jurisdiction was established to protect maritime workers against the harsh consequences of an exclusive jurisdiction system—under which a mistake in forum selection could result in no benefits at all." (61 Cal.Comp.Cases at 1370.)

Whether there is concurrent jurisdiction must be decided by reference to the particular circumstances, on a case by case basis. (*Sun Ship, Inc. v. Pennsylvania* (1980) 447 U.S. 715, 718 [100 S.Ct. 2432, 65 L.Ed 2d 458, 45 Cal. Comp. Cases 1314].)

In *CNA Ins. Co. v. Workers Compensation Appeals Bd.* (*Baker*) (1997) 58 Cal.App.4th 211 [62 Cal.Comp.Cases 1371], the Court of Appeal reviewed the history of case law involving concurrent federal maritime and state jurisdiction, and the Court found that there was concurrent jurisdiction under the circumstances presented there. We believe the principles discussed by the Court in *Baker* provide persuasive guidance in this case.

In *Baker*, injured employee Cella Baker was a Long Beach Water Concessions bartender who spent 80 percent or more of her time working on board the vessels to which she was assigned. While working, Baker was injured crossing the gangway of her assigned vessel; she fell onto the City of Avalon's floating dock when a surge of water destabilized the gangway leading to the dock. Baker claimed compensation under the federal Longshore and Harbor Workers' Compensation Act

(LHWCA; 33 U.S.C. § 901 et seq.); she also sued Long Beach Water Concessions, the City of Avalon, and Catalina Cruises (apparent owner of the vessel in question) in California Superior Court, citing both the federal Jones Act (46 U.S.C. Appen. § 688) and general maritime law; and she filed both an application for benefits under the Jones Act and an application for California workers' compensation benefits.

Navigators Insurance Company covered the employer for LHWCA and Jones Act compensation; CNA Insurance Company (CNA) provided state workers' compensation coverage. Baker settled with the City of Avalon and Navigators in the Superior Court action, and a short time later she settled her LHWCA claim. Baker also received (apparently minimal) workers' compensation benefits, which the Court described as "several small unpaid medical bills and money advanced by the California Employment Development Department." Navigators sought contribution from CNA in Baker's state workers' compensation case. The Board denied contribution but held CNA liable for certain liens (apparently the medical bills and the benefits paid by EDD). The Board rejected CNA's contention that since Baker claimed seaman status for purposes of the Jones Act, federal maritime law was her exclusive remedy. CNA sought review, but the Court of Appeal agreed with the Board. At 58 Cal. App. 4th 226-227, the Court reviewed federal and state case law addressing concurrent jurisdiction and concluded as follows:

> …The survey of these and numerous other cases teaches that the lines drawn are sometimes driven by the language of the state statutes, sometimes by the evidence, sometimes by actual findings of fact or the lack thereof, sometimes by philosophy.
>
> During the early development of the "maritime but local" doctrine, which recognized a state's interest in preventing injured citizens from becoming destitute and public charges, the *Massachusetts Supreme Judicial Court* summarized the problem of the diversity of opinions and *suggested an approach with which we agree* [italics added]:
>
> "[A]lthough apparently some heed must still be paid to the line between State and Federal authority as laid down in the cases following the *Jensen* case [*Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205 [37 S. Ct. 524, 61 L. Ed. 1086]], the most important question has now become the fixing of the boundaries of the new 'twilight zone,' and for this the case gives us no rule or test other than the indefinable and subjective test of doubt. . . . Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to regard the Davis case [*Davis v. Department of Labor* (1942) 317 U.S. 249 [63 S. Ct. 225, 87 L. Ed. 246]] as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as

> designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way [underscoring added], even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other." (*Moores' Case* (1948) 323 Mass. 162 [80 N.E.2d 478, 480-481], affd. *Bethlehem Steel Co. v. Moore* (1948) 335 U.S. 874 [69 S. Ct. 239, 93 L. Ed. 417].)
>
> Professor Larson has simply stated that "in those rare instances in which a 'successful' Jones Act proceeding might precede a compensation claim, the normal principle ought logically to be that the same rules apply as in the much more numerous cases in which the sequence is reversed." (9 Larson, The Law of Workmen's Compensation Law, *supra*, § 90.52, p. 16-547.)
>
> Here, Baker is a California resident, employed under a contract made within this state, and injured within territorial waters where the City of Avalon has control over the floating dock involved. All parties accept that the LHWCA and the state have concurrent jurisdiction where there is a showing of local interest. We conclude that Baker's contacts with California, coupled with the state's interest in the welfare of its citizens, conferred upon it concurrent jurisdiction with the Jones Act as well.

The Court's opinion in *Baker* indicates the following factors may be considered in determining whether concurrent jurisdiction exists: (1) where "a reasonable argument can be made either way," the Board should include "within a wide circle of doubt" all waterfront cases involving aspects pertaining both to the land and to the sea; (2) whether the injury occurred in "territorial waters" and whether the local California entity has control over the floating dock; and (3) the extent of the injured employee's contacts with California, coupled with the state's interest in the welfare of its citizens.

The facts of this case, considered in light of the three elements set forth above, support a finding of concurrent federal-state jurisdiction. As outlined in the WCJ's Amended Opinion on Decision (p. 3), on the date of injury applicant was assigned as a diver to perform underwater hull scraping on a barge, tied to another barge that in turn was tied up to the employer's dock. These circumstances bring this case within the 'wide circle of doubt' applicable to waterfront cases involving aspects pertaining both to the land and to the sea, in which 'reasonable arguments can be made either way.' It also appears that the injury occurred in territorial waters and that applicant's employer had control over the barge on which applicant was injured and the dock to which it was tied. Further, applicant was a California resident when he was hired by the employer, and he has remained a resident of California. All work performed for the employer was performed

in California, and applicant never spent a night on a vessel owned or operated by the employer. (Amended Opinion on Decision, p. 1.)

Thus, applicant's contacts with California were substantial, if not exclusive, and there is no serious argument that California's interest in the welfare of its citizens weighs against a finding of concurrent jurisdiction here. Accordingly, in addition to the WCJ's determination that applicant was not employed as a "seaman" within the meaning of the Jones Act, we conclude that application of the doctrine laid out in *Baker, supra*, further supports the WCJ's decision that defendant failed to establish that the California WCAB does not have subject matter jurisdiction over applicant's injury claim herein.

Finally, it should be noted that even if we had not affirmed the WCJ's decision on the merits, we would have dismissed defendant's petition for reconsideration for lack of verification. Labor Code section 5902 requires that a petition for reconsideration be verified. (Lab. Code, § 5902; see also Cal. Code Regs., tit. 8, former § 10450(e), now § 10510(d) (eff. Jan. 1, 2020).) In *Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (Significant Panel Decision), it was held that where a petition for reconsideration is not verified as required by section 5902, the petition may be dismissed if the petitioner has been given notice of the defect (either by the WCJ's report or by the respondent's answer) unless, within a reasonable time, the petitioner either: (1) cures the defect by filing a verification; or (2) files an explanation that establishes a compelling reason for the lack of verification and the record establishes that the respondents are not prejudiced by the lack of verification.

Here, defendant's Petition for Reconsideration was not verified and notice of this defect was specifically given by the WCJ in his Report and Recommendation. Moreover, a reasonable period of time has elapsed, but defendant never cured the defect by filing a verification and defendant never offered an explanation of why a verification was not filed.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that Amended Findings, Award and Order of May 27, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
AUGUST 3, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

JOSE FIGUEROA
SHELLEY & GRAFF
COX WOOTON LERNER GRIFFIN & HANSEN
LAUGHLIN FALBO LEY & MORESI

JTL/bea

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS

OPINION ON DECISION

BACKGROUND:

Applicant, Jose Figueroa, born 1/18/82, began his employment with American Marine Company (AMC), on 6/29/15. He was a resident of California at the time he was hired by AMC and has remained a resident of California through trial herein. All work performed for AMC was within California. He never spent the night on a vessel owned or operated by AMC. He brought his own lunches to work.

Applicant performed various job functions for AMC. Most of the work he performed was in the Port of Los Angeles (POLA) area where the local AMC office was located at Berths 261-262.

AMC has a long term contract with the POLA to perform specific types of work at various POLA facilities, docks, pilings, and ramps. The contract with the POLA related to the maintenance, construction, and repair of "below deck" structures and fixtures within the POLA, as well as shoreline related work involving measuring the slope angles from the beach into the water. Below deck work was defined as work done below the top of the pier, including all work done underwater.

AMC also performed work under contracts with other entities including the Los Angeles Department of Water and Power (DWP). In addition, AMC performed work for other entities which were located within the POLA area but which were not part of the POLA contract.

Some of the work applicant performed for AMC was work done on land, primarily at the company's office dock and warehouse. This type of land work involved maintenance and repair of company equipment, some fork lift work, and preparation work prior to working either on the water or at docks/piers/pilings within the POLA.

Other work performed by applicant for AMC involved water based work. Water based work was primarily performed within the POLA, although applicant also performed diving related work at inland reservoirs. On one occasion applicant was involved on a single day with a diving operation performed in the open ocean

about a half-mile off Pacific Palisades. This was the only time during his employment when he worked outside the breakwater of the port on the open ocean.

All of the water work at the POLA, and the single day job off Pacific Palisades, involved work in navigable waters, i.e. waters directly accessible to, or on, the open ocean. The inland reservoir work and land based work were not work performed on navigable waters.

As noted above, not all of AMC's work within the Port of Los Angeles, was directly for the Port or under the POLA contract. Above deck work done on POLA facilities are performed by POLA's own employees or other contractors, not by AMC. Any work performed by AMC as part of the POLA contract, however, required that AMC pay its employees on POLA contract jobs the same pay rate required under the POLA union employees' contract. This union contract is through the Pile Drivers Union. The union contract covers divers, standby divers, tender divers, and pile drivers. Each classification receives a different hourly wage with pile drivers earning the lowest pay. For salary purposes at AMC, when one of AMC's employees is performing any work associated with the POLA contract that isn't a strictly diving related job, they are classified and paid as pile drivers, even if the work is merely general labor type work. This is the lowest pay scale the union provides, so AMC uses the same classification in its payroll for any non-dive related work associated with the POLA contract.

Vessel related work could include actual diving operations. In this capacity applicant would work as one of a three member diving crew. A typical crew consisted of a lead diver (the one who does the actual underwater work), the backup diver (the one responsible in helping the diver in the event of an emergency), and the tender diver (responsible for maintaining air supply and support tools for the lead diver). Most of applicant's work as part of a diving team, while employed by AMC, was performed as a tender diver. In addition, vessel related work could also include non-diving duties, such as pile driver work which was described as above water work done on pilings or under deck pier work. Wrapping pilings with metal was a typical pile driver job function.

Applicant also performed work at the company's main office, which could involve inspection or repair of equipment, or dry dock work. In addition, the company's vessels could be brought to the main office dock, tied up, and have maintenance work performed on the vessel at that location.

AMC's watercraft included: the Lokalia, a fifty-two foot, steel hull, harbor tug with a diesel powered twin engine; the Nautilus, a thirty-eight foot fiberglass over wood hull with a gasoline outboard motor; and the Hoki Pau, a twenty-seven foot, fiberglass hull with an outboard diesel engine. The parties stipulated at trial that these three boats were considered "dive vessels". The dive vessels always had a three person crew assigned to them as required by OSHA, which included as previously delineated, the lead diver, a standby diver, and a tender diver. For daily work that utilized one of the vessels, either to get to a work location and/or to be used as a work platform, generally the standby diver and tender diver arrived early, checked the vessel for fuel and equipment needed for the days' work, and then transported the vessel to that days' work location. The lead diver would generally meet the vessel at the dive location.

In addition to the three larger vessels, the company also utilized two pontoon boats named the Tuna 1 and Tuna 2. Each was approximately ten feet by twenty-six feet in dimension. Each was equipped with an outboard motor, although at times the motor would be removed and the pontoon used as a work platform.

Complementing the motorized craft, AMC also used punts and floats, which were basically work platforms that were manually moved by poles/oars/hands to position them. The floats were eight by eight feet or eight by twelve feet. The punts were three feet by thirteen feet, and were primarily used to maneuver and perform work activities under and between piers. The punts and floats were generally towed by one of the larger vessels to a work site.

On 5/6/16, applicant was assigned to perform underwater hull scraping work on a barge as a diver. The barge was tied up to another barge which was in turn tied up to the company's dock. Credible and unimpeached trial testimony from the applicant was that the hull scraping could have been more easily performed in dry dock, i.e. on land, but it would have been more expensive to have done so

because of applicable environmental laws relating to scraped off debris on land, which were not applicable if the scraping was done underwater and the debris was left there.

While performing the underwater scraping work on 5/6/16 a shell sliced through applicant's work glove and lacerated his left index finger. Applicant initially continued working but eventually surfaced and reported the injury. He applied a bandage to the wound and told the employer that he thought he could finish that day's work which was time sensitive. While doing so, he began using his uninjured right arm more. He eventually noticed that his right arm had become numb.

From the existing record, it appears that the employer was initially uncertain how to treat applicant's injury. Applicant was told to obtain evaluation on his own which he did at Kaiser. He was told at that facility that his left finger laceration was infected/contaminated by seawater and that they could not suture the wound at that time. An x-ray of his right wrist was also performed which was interpreted to evidence mild widening of the scapholunate joint with possible ligament injury (Applicant Exhibit 23-24).

At some point the employer informed the applicant that the employer was self-insured. When no benefits were immediately provided, applicant applied for State of California disability benefits (EDD), which the employer initially opposed claiming that applicant was receiving workers' compensation benefits. Applicant in fact was not receiving any workers compensation benefits at that time and as a result, EDD accepted applicant's claim and commenced providing disability indemnity payments (Applicant Exhibits 9-11).

Applicant was eventually informed by the employer that they were filing a Jones Act claim "on his behalf". Applicant testified that he had no understanding of any distinction between California workers' compensation rights/benefits versus Jones Act rights/benefits, or what the qualifications for each type of benefits were. At an unspecified date the employer began paying applicant $22.00 per day "maintenance", apparently under Federal Maritime Law rules. At some later date this amount was likely increased to $50.00 per day.

After his initial visit(s) to his personal doctors at Kaiser, applicant was informed by his supervisor that he was required to see an employer designated treating physician (Applicant Exhibit 12). Applicant complied and was evaluated by Dr. Allan Delman on 5/21/16 (Applicant Exhibit 20). The doctor's working diagnosis at that time was that applicant's right upper extremity symptoms were compatible with carpal tunnel syndrome. Electro-diagnostic testing and MRI imaging were requested and obtained in July 2016, with the right wrist MRI being interpreted to evidence two possible tears (Applicant Exhibit 25). Applicant was also seen on a neurological referral by Dr. Parag Mehta on 7/10/16. Dr. Mehta concluded that applicant had traumatic right carpal tunnel syndrome (Applicant Exhibit 18).

Dr. Delman requested authorization for right carpal tunnel surgery. His reporting also notes that applicant was feeling "overwhelmed" and that he was requesting a psyche referral (Applicant Exhibit 21, report dated 8/7/16).

Applicant underwent right carpal tunnel surgery on or about 11/14/16. Post-surgery follow up reporting from Dr. Delman noted "unusual post-surgery symptoms" including pain/shocks/throbbing/tingling of the right upper extremity, with symptoms extending into the left shoulder. By early January 2017 applicant was worse. Purportedly no physical therapy had been authorized. A triple phase bone scan was obtained (Applicant Exhibit 28) as well as a follow up evaluation/opinion with neurologist, Dr. Mehta, who concluded that applicant's injury had developed into chronic regional pain syndrome (CRPS). A single stellate block was authorized, with medical reporting from Dr. Mehta chronicling repeated requests for additional block authorization without success. By July 2017, Dr. Delman indicated that he was transferring applicant's care to Dr. Mehta for neurology and pain management (Applicant Exhibit 21, report dated 7/10/17).

As noted above, Dr. Mehta initially evaluated the applicant shortly after his injury in July 2016 on referral from Dr. Delman. He continued to follow the applicant as a secondary treater until becoming applicant's primary treating physician in July 2017. During the period he was treating the applicant, Dr. Mehta referred the applicant to Joshua Prager, M.D. for pain management treatment

(Applicant Exhibits 17-18).

At trial herein, the parties stipulated that applicant's current primary treating physician is Jason Groomer, M.D. Dr. Groomer's initial evaluation with the applicant was in October 2018 (Applicant Exhibit 14).

Applicant eventually filed a civil lawsuit against the employer in Los Angeles Superior Court seeking damages under the Jones Act, §46 30104, and general maritime law. On 5/23/18 applicant and the employer settled the civil claim(s) for $40,000.00 (from which applicant netted $12,700.00). The parties to that action executed a Release of All Rights, which released all claims relating to the injury including any entitlement to Jones Act benefits, Longshore and Harbor Workers' Compensation Act benefits, and all other potential Maritime or Admiralty related benefits, except for California workers'compensation benefits (emphasis added) (Applicant Exhibit 13).

The exclusion of potential California workers' compensation benefits from the settlement/release is made clear in the first sentence of the first paragraph of the release:

> "Notwithstanding any other provision of this release, nothing in this release shall be construed to bar Jose Figueroa in pursuit of any and all claims, benefits, or remedies, if any, under California Workers' Compensation law, nor shall this release constitute a waiver of or any impediment to Jose Figueroa's entitlement, if any, to receive any and all California Workers' compensation benefits, which administration of shall be governed by the California Labor Code, its enacting regulation, and case law."

On 8/16/18 applicant filed an application herein alleging he sustained a compensable injury under California workers' compensation laws. Defendant has denied compensability contending that the California WCAB has no jurisdiction over applicant's injury.

Of interest is that the employer, in the civil Jones Act claim, denied that applicant qualified as a Jones Act seaman, with applicant contending, at least through his legal representatives, that he was a Jones Act seaman. Reversing their position, in the present workers' compensation proceedings, it is defendant which is now contending that applicant is a Jones Act seaman, while applicant contends

that he does not qualify as such.

ADMISSIBILITY OF APPLICANT'S EXHIBITS:

Defendant objected to every applicant exhibit contending that they lacked foundation, authentication, and were hearsay. With respect to Applicant Exhibits 1-29 which were offered into evidence on the first day of trial, the undersigned finds that all of those exhibits were sufficiently delineated on the pre-trial conference statement (PTCS). In addition, all those exhibits are clearly admissible herein as they are either applicant's treatment records/reports, communications to and from the applicant and the employer, employer wage information, or a single photograph of applicant's finger cut injury taken shortly after the injury.

During trial, applicant also offered into evidence two photographs, undated, of docks containing work materials or equipment. The docks were identified by the employer as being within the POLA area, but neither the date the photos were taken, nor any information related to who, if anyone, was purportedly going to utilize the equipment or supplies depicted in the photos, was offered into evidence in support of the exhibits. The undersigned does not find the photos to be relevant, material, or having the ability to impeach prior employer testimony.

Based on the foregoing, Defendant's motion to strike Applicant Exhibits 1-29 is denied. Defendant's motion to strike Applicant Exhibits 30-31 is granted. Applicant Exhibits 30-31 are stricken and will be marked for identification only.

ADMISSIBILITY OF DEFENDANT'S EXHIBITS:

Applicant initially raised an objection to defendant trial exhibits at the Mandatory Settlement Conference on 2/26/19 at which time applicant objected to "unserved and unspecified evidence".

On the PTCS defendant listed the following proposed trial exhibits:

Claimant's dive logs – various
Claimant's payroll & other employment records – various
Hours summaries of claimant's work for AMC – various
Spreadsheet summarizing claimant's work – various

L.C. §5502(d)(3) states in relevant part that:

"Discovery shall close on the date of the mandatory settlement

> conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

At trial applicant objected to both the lack of specificity of defendant's proposed exhibits and defendant's failure to timely serve the records. Applicant contended that some of the records had only been handed to them on the morning of trial. Defendant offered no proof of service identifying if/when any records were served, but did acknowledge during trial that four additional pages were "found" and hand served on the day of trial.

The undersigned notes that the MSC judge wrote on the PTCS that "Defendant to send most dive logs to applicant's attorney asap and rest within 3 weeks but not less than 20 days before trial". There is no evidence that applicant agreed to this late service, or waived any objections they had detailed on the PTCS. Absent a stipulation by applicant, which arguably would have waived the admissibility issue, at least relating to the timeliness of service, any interpretation of the MSC judge's notation as an order allowing post MSC service is contrary to the express terms of L.C. §5502(d)(3) which mandates discovery closure at the MSC.

With respect to the timeliness of service, CCR §10670(b) states:

> (b) The Workers' Compensation Appeals Board may decline to receive in evidence:
> (1) Any document not listed on the Pre-Trial Conference Statement.
> (2) Any document not served at or prior to the mandatory settlement conference, unless good cause is shown.
> (3) Any document not filed 20 days prior to trial, unless otherwise ordered by a workers' compensation judge or good cause is shown.
> (4) Any physician's report that does not comply with Labor Code section 4628 unless good cause has been shown for the failure to comply and, after notice of non-compliance, compliance takes place within a reasonable period of time or within a time prescribed by the workers' compensation judge.
> (5) Any report that does not comply with the verification requirements of Labor Code section 5703(a)(2)or 5703(j)(2).

The primary documents offered into evidence at trial by defendant were clearly in existence in 2015/2016 as they purportedly relate to chronicling

applicant's work during those years. In this case defendant has provided no evidence to support good cause why the proffered evidence was not served prior to, or at least at, the MSC on 2/26/19. No evidence was submitted, despite applicant's clear objections, as to when any post-MSC service was effectuated, or what specific documents were served, if any.

In addition to applicant's objection to the admissibility of defendant's exhibits based upon failure to timely serve those exhibits, applicant has also consistently contended that the exhibits should be excluded due to failure to clearly identify with specificity the evidence proffered.

The undersigned notes that none of the exhibits listed on the PTCS have any dates for the exhibits specified other than the word "various". The undersigned assumes, despite the omission, that defendant meant to refer to all dates during applicant's entire approximate one year of employment with AMC.

As noted above, defendant listed only four "exhibits' on the PTCS: (1) claimant's dive logs – various, (2) claimant's payroll & other employment records – various, (3) hours summaries of claimant's work for AMC – various, and (4) spreadsheet summarizing claimant's work – various.

The fourth item, the spreadsheet, is merely a consolidation by defendant of the information purportedly contained in the other three exhibits. This document was not prepared until after the MSC. The spreadsheet was identified on the first day of trial as Defendant Exhibit F, with a "clearer and more accurate version" offered at a later trial date as Defendant Exhibit M. If the underlying exhibits upon which the spreadsheets are based are determined to be inadmissible, then the spreadsheet data compilations would also be inadmissible.

Defendant Exhibit D was identified at trial as "Daily Work Logs". These voluminous records are clearly a compilation of a five different employer retained, or obtained, records from various sources. Some pages are untitled with little more than hand written notes on them. Some of the documents are titled "Weekly Safety Meeting", some are titled "Daily Work Logs", some are titled "Diver's Logs", and some are titled "Port of Los Angeles Construction and Maintenance Daily Diver's Reports". Of these various type of documents, only the Diver's Logs were clearly

identified on the PTCS. Defendant's listing of "other employment records – various" on the PTCS is excessively vague, ambiguous, and clearly lacks the specificity required.

Defendant Exhibit E was identified at trial as "Time Entry Reports", which defendant contended were payroll records. These documents, although difficult to decipher and in part illegible, do appear to relate to applicant's daily work and the rate of pay associated with different work activities. The undersigned finds that these records were sufficiently identified on the PTCS as "payroll" records, although the timeliness of the service (see above) is separate issue.

Based on the foregoing, the undersigned finds that due to failure to timely serve Defendant Exhibits D & E, and with respect to Exhibit D, the additional failure to identify everything within the exhibit other than "Diver's Logs", with specificity on the PTCS, Defendant Exhibits D & E are stricken, and will be marked for identification only.

In addition to the primary defendant exhibits detailed above, applicant has also objected to a number of other defendant exhibits.

With respect to Defendant Exhibit C, which is a copy of a pre-EAMS Findings of Fact and Opinion on Decision from 2002, relating to a prior California workers' compensation case involving a Jones Act/jurisdiction issue, this exhibit is not evidence. However, the undersigned will take judicial notice of the prior WCAB District Office decision. Based on the foregoing, Defendant Exhibit C is stricken and will be marked for identification only with the Court taking judicial notice of the prior judicial proceeding documents.

With respect to Defendant Exhibit H, which is a Jobs Transaction Costs Report, this document was not created until 3/29/19, which is after the mandatory settlement conference herein. Defendant provided no additional information, or an offer of proof, at trial why Exhibit H could not have been reasonably disclosed and served prior to the MSC. Based on the foregoing, Defendant Exhibit H, is stricken and will be marked for identification only.

With respect to Defendant Exhibits I-L, which were offered into evidence at the second day of trial (MOH/SOE 6/26/19), these exhibits are from applicant's

tangentially related Maritime/Jones Act civil litigation referenced above, and include portions of his civil deposition, civil interrogatory responses, civil request for production responses, and civil demand for production responses. All of these documents were clearly in existence prior to the MSC herein. In addition, the undersigned notes that defendant offered into evidence on the first day of trial, without applicant objection, applicant's summons and complaint (Defendant Exhibit A), and defendant's answer (Defendant Exhibit B), from the civil case. Defendant provided no reason why the additional civil litigation documents could not have been disclosed and offered into evidence at an earlier date. Based on the foregoing, Defendant Exhibit I-L are stricken and will be marked for identification only.

Finally, with respect to Defendant Exhibit N, which is a copy of a deposition of one of applicant's civil attorney's in the prior Maritime/Jones Act civil litigation, this deposition was not conducted until after trial herein had commenced. Defendant offered the deposition for impeachment/credibility purposes. Applicant was asked earlier in the trial proceedings herein whether he signed the responsive civil case discovery documents. At trial herein, applicant testified that he did not believe that he was the person who signed the civil discovery documents (he thought his attorneys may have signed on his behalf). The undersigned finds that defendant could not have reasonably expected that applicant would deny that it was (purportedly) his own signature on the discovery documents. As a result, applicant's motion to strike Defendant Exhibit N is denied, with the same admitted for impeachment/credibility purposes only.

STRIKING TRIAL TESTIMONY RELATING TO STRICKEN EVIDENCE:

All trial testimony relating to any witness's in Court review and testimony related to any of the stricken documents herein, is also stricken.

EQUITABLE ESTOPPEL:

Applicant contends that defendant's actions herein have resulted in defendant being equitably estopped from denying the compensability of applicant's workers' compensation claim, or that the California WCAB does not have jurisdiction over his claim. Defendant disputes that contention.

It appears to the undersigned that this argument would have been more appropriately raised against the defendants in the earlier civil claim. The employer told applicant they were filing a Jones Act claim on his behalf and apparently did so. They later denied that applicant qualified for benefits under Maritime/Jones Act laws.

In the instant worker's compensation claim, applicant has been able to timely file the claim and litigate the compensability/jurisdictional issues. The only possible detrimental reliance factor that the undersigned can appreciate is a possible delay in filing the instant claim.

Based on the foregoing, it is found that defendant is not equitably estopped from denying compensability and/or subject matter jurisdiction herein.

JURISDICTION:

As noted above, applicant was a resident of California at the time he entered into an employment contract with AMC in California. All of the work applicant performed for the employer was in California. He was injured in California. As a result, California workers' compensation laws would be applicable unless preempted/precluded by exclusive Federal jurisdiction.

Defendant contends that applicant's claim herein should be dismissed due to lack of jurisdiction. Defendant contends that applicant was a Jones Act seaman and that any claim for injury he may have is exclusively subject to Federal jurisdiction. Defendant contends that there is no "twilight", "maritime but local", or any other form of concurrent jurisdiction between Federal and State Law relating to applicant's injury if applicant qualifies as a Jones Act seaman.

Applicant contends that he does not qualify as a Jones Act seaman. In the alternative, applicant further contends that even if he does qualify as a Jones Act seaman, there is concurrent jurisdiction over his injury claim between Federal and California State workers' compensation laws, i.e. no Federal preemption. Applicant agrees, however, that the employer would be entitled to credit for benefits provided to applicant in the Federal civil claim(s).

After exclusion of the above referenced Defendant Exhibits (which were subject to contradiction and clarification by applicant in any case), and specific

testimony predicated on reviewing/commenting on those exhibits (see above), the undersigned is left essentially with the testimony of applicant versus the single supervisory employer witness, Michael Dunn.

It was conceded by the parties that applicant worked for the employer on either 113 or 114 days. He worked on a "call out" basis. When they had work he went into work. Applicant testified that he only performed Jones Act seaman work on 18 days during his employment (MOH/SOE, from 6/26/19, page 7, lines 8-12). Supporting this statement applicant further testified that he estimated that 50% of his work was performed on land (MOH/SOE, from 5/6/19, page 9, lines 20-22). In opposition, the employer witness testified that applicant performed seaman work between 55-58 days. A part of the discrepancy related to the type of work being performed. The employer considered any work during a day in which applicant utilized one of the company's vessels to get to a work location, as seaman work for the entire day. Applicant testified that on many occasions an employer vessel was used solely to transport the workers to a dock, pier, or beach where the entire days' work was done unrelated to the transport vessel.

Applicant testified that on occasion, with the tide out, no punt or floating platform was required to perform his pier repair or wrapping assignments. The employer witness acknowledged that that scenario was possible but that the employer wouldn't normally send a work vessel to a location when the tide was that far out. Applicant's testimony was found to be more persuasive and credible on this issue.

Applicant also testified credibly that there were occasions when he drove himself to a work location in the Port of Los Angeles, without utilizing a company vessel. This testimony was not credibly rebutted by the employer witness.

Applicant further testified that on some non-diving dock/pier work, he and his coworkers would work directly from the structure itself. The employer witness testified that work above deck was not authorized by AMC's contract with POLA, but he also acknowledged that he "rarely saw" applicant working in the field (MOH/SOE from 6/26/19, page 17, lines 15-17). The undersigned did not find it unreasonable that applicant would wrap piers just below the deck level (per the

POLA contract), using the deck itself as his work location. Although standing on the pier/dock might be performing an authorized work activity in an unauthorized manner, it would not make it non-industrial or make it vessel work when it was not.

As noted above, the Jones Act only applies to workers who meet the definition of "seaman". Originally, under general maritime law, a seaman was only entitled to "maintenance and cure" which in simplified terms is a limited temporary disability as well as treatment until the injured worker's injury heals. In addition, an injured seaman could receive damages for injuries as a consequence of the unseaworthiness of a vessel. No recovery was allowed for the negligence of the ship owner, master or crew member.

In 1920 Congress enacted the Jones Act (46 U.S.C. §30104 – formally 46 U.S.C. App. §688) to expand the rights of an injured seaman to allow actions caused by negligence. The Act itself did not define who qualified as a "seaman". The U.S. Supreme Court in Chandris, Inc. v. Latsis (1995) 515 U.S. 347, 368, set forth a two-part test for assessing whether a worker qualifies as a seaman for the purposes of the Jones Act. First, the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission. Second, the worker must have a connection to a vessel or group of vessels in navigation that is substantial in terms of its duration and its nature.

A "vessel" under the Act is "any watercraft that is practically capable of transportation…" Stewart v. Dutra Construction Co. (2005) 543 U.S. 481, 497. In a California workers' compensation case, the Appeals Board found that a worker who worked on a dredge barge that had no means of self- propulsion and no crew's quarters, and was designed primarily as a work platform, was not a vessel within the meaning of the Jones Act, Soli-Flo Corp. v. WCAB (Craft) (2002) Cal. Comp. Cases 981 (writ denied).

Although the Jones Act itself does not define what connection to a vessel was required to meet the "substantial in terms of its duration and its nature" prong of the overall definition of a seaman" under the Act, the Chandris Court stated that an appropriate rule of thumb would be a worker who spends thirty percent or more of their time in the service of a vessel in navigation. Absent meeting this "rule of

thumb", applicant would not be considered a "seaman" for purposes of the Jones Act.

Based upon applicant's trial testimony, which is found to be more credible and persuasive than the single employer witness who admitted to rarely seeing applicant actually perform his work duties in the field, it is found that applicant does not meet the definition or status of a seaman under the Jones Act. As a result, it is further found that this Court has subject matter jurisdiction over applicant's California work injury.

INJURY: PARTS OF THE BODY:

Defendants admit industrial injury to applicant's left hand in the form of a laceration. Applicant also alleges injury to his cervical spine, bilateral upper extremities, psyche, internal in the form of upper G.I., lower G.I. and liver injury, and in the form of complex regional pain syndrome (CRPS).

Based upon defendants' admission and upon applicant's testimony and the medical reporting of Allan Delman, M.D. (Applicant Exhibits 20-21), Parag Mehta, M.D. (Applicant Exhibits 15-16), Joshua Prager, M.D. (Applicant Exhibits 17-18), and Jason Groomer, D.O. (Applicant Exhibit 14), it is found that sustained injury to his left hand in the form of left index finger laceration, and to his right upper extremity in the form of complex regional pain syndrome (CPRS), arising out of and occurring in the course of employment.

With respect the other alleged body parts, although there are references in the treating reports to complaints/symptoms associated with psyche, internal, cervical spine, and additional components of the bilateral upper extremities, there is no competent medical opinion in the current record addressing injury and causation relating to those additional claimed body parts. Applicant was apparently referred for a psychological evaluation with Marilyn Jacobs, Ph.D. (Applicant Exhibit 22), the single page notes from that evaluation are not substantial on the issue of injury and causation.

Based on the foregoing, it is found that applicant sustained injury to his left hand in the form of a left index finger laceration, and to his right upper extremity in the form of complex regional pain syndrome (CPRS), arising out of and

occurring in the course of employment, and that the record requires further development on the issue of whether applicant sustained compensable injury to his cervical spine, bilateral upper extremities (other than left finger laceration and right CRPS), psyche, and internal in the form of upper G.I., lower G.I., and liver, arising out of and occurring in the course of employment.

OCCUPATION:

Applicant contends that he performed various job duties for the employer including work as a diver, loader, forklift driver and carpenter which entitles him to multiple occupational group variants depending on whichever job and its applicable occupational variant maximizes his impairment rating. Defendant contends that applicant's occupation should be limited to that of a "commercial diver".

A determination of applicant's occupational group number is not required at this time as it only impacts his permanent disability impairment rating, which is not in issue at the present time. As a result, the Court will retain jurisdiction over this issue pending further development of the record relating to impairment.

EARNINGS:

Based upon the parties' stipulations it is found that applicant's earnings were $825.00 per week, sufficient to produce a temporary disability rate of $550.00 per week and a permanent partial disability rate at the statutory rate.

TEMPORARY DISABILITY:

Applicant claims entitlement to temporary disability indemnity benefits commencing on 5/10/16 and continuing subject to the 104 week cap pursuant to L.C. §4656(c)(2).

The Employment Development Department (EDD) has filed a lien herein relating to benefits provided to the applicant during the period from 5/17/16 through 4/26/17 at the rate of $917.00 per week, in the total lien amount of $45,179.00.

Based upon applicant's testimony and the medical reporting of Allan Delman, M.D. (Applicant Exhibits 20-21), Parag Mehta, M.D. (Applicant Exhibits 15-16), Joshua Prager, M.D. (Applicant Exhibits 17-18), and Jason Groomer, D.O. (Applicant Exhibit 14), it is found that applicant is entitled to temporary disability

for the period beginning 5/10/16 and continuing, subject to the 104 indemnity cap pursuant to L.C. §4656(c)(2), less credit to defendant for any amounts paid heretofore on account thereof, including maintenance benefits paid under Federal Maritime or Jones Act benefit provisions, and less credit for amounts ordered reimbursed to the Employment Development Department (EDD) exclusive of any interest awarded and paid to EDD (see below).

FURTHER MEDICAL TREATMENT:

Based upon the medical reports of Allan Delman, M.D. (Applicant Exhibits 20-21), Parag Mehta, M.D. (Applicant Exhibits 15-16), Joshua Prager, M.D. (Applicant Exhibits 17-18), and Jason Groomer, D.O. (Applicant Exhibit 14), it is found that applicant is in need of further medical treatment to cure or relieve from the effects of the injuries herein relating to his left index finger laceration and right upper extremity CRPS.

The issue of whether applicant is entitled to further medical treatment relating to his cervical spine, bilateral upper extremities (other than left finger laceration and right CRPS), psyche, and internal in the form of upper G.I., lower G.I. and liver is deferred pending further development of record with the Court retaining jurisdiction.

SELF-PROCURED MEDICAL TREATMENT AND MEDICAL LEGAL COSTS:

Jurisdiction is reserved over any outstanding medical-legal and/or self-procured treatment lien claims with the parties to attempt informal resolution of the same, or to be determined in supplemental proceedings upon the filing of a Declaration of Readiness to Proceed.

LIEN OF EMPLOYMENT DEVELOPMENT DEPARTMENT:

EDD has paid benefits to the applicant during the period from 5/17/16 through 4/26/17 at the rate of $917.00 per week, in the total amount paid of $45,179.00.

Based on the finding on temporary disability (see above), the Employment Development Department is entitled to recover for sums paid from 5/17/16 through 4/26/17, at applicant's temporary disability indemnity rate of $550.00 per week.

All additional amounts claimed are disallowed.

Amounts ordered to be paid by defendant to EDD shall include statutory interest pursuant to Unemployment Insurance Code §2629.1(e). Defendant shall not be entitled to credit against applicant's awarded benefits herein for any interest due and payable by defendant to EDD.

ATTORNEY FEES:

No claim for attorney fees was made relating to applicant's award of temporary disability indemnity benefits herein. Efforts made to date by his attorney, Shelley & Graff, will be considered at the time the remainder of applicant's case is resolved.

DATED: 5-14-20

S. MICHAEL COLE
WORKERS' COMPENSATION JUDGE

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

The undersigned issued his Amended Opinion on Decision and Amended Findings of Fact & Award on 5/27/20. Defendant, American Marine Corporation, has filed a timely, unverified, Petition for Reconsideration on 6/8/2020.

Defendant contends that:

1. The Appeals Board acted without or in excess of its power,
2. The evidence does not justify the Findings of Fact,
3. The Findings of Fact do not support the Order, Decision or Award.

The undersigned would recommended that defendant's petition to be denied summarily based upon the failure to provide the petition verification required by Cal. Reg. §10510(d) (previously §10450(e)).

With respect to the substance of defendant's arguments, the primary issue at trial was whether the California Workers' Compensation Appeals Board has subject matter jurisdiction over applicant's injury claim or whether exclusive jurisdiction over the injury claim is preempted under Federal Maritime Law and/or the Jones Act. Defendant contends that the evidence did not support the undersigned's finding that defendant had failed to meet its burden that Federal preemption was applicable. Related to that finding, defendant also contends that the undersigned committed err in excluding a number of defendant's trial exhibits for untimely service on applicant and failure to identify those records with specificity on the pretrial conference statement (PTCS) completed at the time of the mandatory settlement conference (MSC).

II
FACTS

Applicant, Jose Figueroa, (thirty-four years old at the time of injury herein), began his employment with American Marine Company (AMC), on 6/29/15. He was a resident of California at the time he was hired by AMC and has remained a resident of California through trial herein. All work performed for AMC was within

California. He never spent the night on a vessel owned or operated by AMC. He brought his own lunches to work.

Applicant performed various job functions for AMC. Most of the work he performed was in the Port of Los Angeles (POLA) area where the local AMC office was located at Berths 261-262.

AMC has a long term contract with the POLA to perform specific types of work at various POLA facilities, docks, pilings, and ramps. The contract with the POLA related to the maintenance, construction, and repair of "below deck" structures and fixtures within the POLA, as well as shoreline related work involving measuring the slope angles from the beach into the water. Below deck work was defined as work done below the top of the pier, including all work done underwater.

AMC also performed work under contracts with other entities including the Los Angeles Department of Water and Power (DWP). In addition, AMC performed work for other entities which were located within the POLA area but which were not part of the POLA contract.

Some of the work applicant performed for AMC was work done on land, primarily at the company's office dock and warehouse. This type of land work involved maintenance and repair of company equipment, some fork lift work, and preparation work prior to working either on the water or at docks/piers/pilings within the POLA.

Other work performed by applicant for AMC involved water based work. Water based work was primarily performed within the POLA, although applicant also performed diving related work at inland reservoirs. On one occasion applicant was involved on a single day with a diving operation performed in the open ocean about a half-mile off Pacific Palisades. This was the only time during his employment when he worked outside the breakwater of the port on the open ocean.

All of the water work at the POLA, and the single day job off Pacific Palisades, involved work in navigable waters, i.e. waters directly accessible to, or on, the open ocean. The inland reservoir work and land based work were not work performed on navigable waters.

As noted above, not all of AMC's work within the Port of Los Angeles, was directly for the Port or under the POLA contract. Above deck work done on POLA facilities are performed by POLA's own employees or other contractors, not by AMC. Any work performed by AMC as part of the POLA contract, however, required that AMC pay its employees on POLA contract jobs the same pay rate required under the POLA union employees' contract. This union contract is through the Pile Drivers Union. The union contract covers divers, standby divers, tender divers, and pile drivers. Each classification receives a different hourly wage with pile drivers earning the lowest pay. For salary purposes at AMC, when one of AMC's employees is performing any work associated with the POLA contract that isn't a strictly diving related job, they are classified and paid as pile drivers, even if the work is merely general labor type work. This is the lowest pay scale the union provides, so AMC uses the same classification in its payroll for any non-dive related work associated with the POLA contract.

Vessel related work could include actual diving operations. In this capacity applicant would work as one of a three member diving crew. A typical crew consisted of a lead diver (the one who does the actual underwater work), the backup diver (the one responsible in helping the diver in the event of an emergency), and the tender diver (responsible for maintaining air supply and support tools for the lead diver). Most of applicant's work as part of a diving team, while employed by AMC, was performed as a tender diver. In addition, vessel related work could also include non-diving duties, such as pile driver work which was described as above water work done on pilings or under deck pier work. Wrapping pilings with metal was a typical pile driver job function.

Applicant also performed work at the company's main office, which could involve inspection or repair of equipment, or dry dock work. In addition, the company's vessels could be brought to the main office dock, tied up, and have maintenance work performed on the vessel at that location.

AMC's watercraft included: the Lokalia, a fifty-two foot, steel hull, harbor tug with a diesel powered twin engine; the Nautilus, a thirty-eight foot fiberglass over wood hull with a gasoline outboard motor; and the Hoki Pau, a twenty-seven

foot, fiberglass hull with an outboard diesel engine. The parties stipulated at trial that these three boats were considered "dive vessels". The dive vessels always had a three person crew assigned to them as required by OSHA, which included as previously delineated, the lead diver, a standby diver, and a tender diver. For daily work that utilized one of the vessels, either to get to a work location and/or to be used as a work platform, generally the standby diver and tender diver arrived early, checked the vessel for fuel and equipment needed for the days' work, and then transported the vessel to that days' work location. The lead diver would generally meet the vessel at the dive location.

In addition to the three larger vessels, the company also utilized two pontoon boats named the Tuna 1 and Tuna 2. Each was approximately ten feet by twenty-six feet in dimension. Each was equipped with an outboard motor, although at times the motor would be removed and the pontoon used as a work platform.

Complementing the motorized craft, AMC also used punts and floats, which were basically work platforms that were manually moved by poles/oars/hands to position them. The floats were eight by eight feet or eight by twelve feet. The punts were three feet by thirteen feet, and were primarily used to maneuver and perform work activities under and between piers. The punts and floats were generally towed by one of the larger vessels to a work site.

On 5/6/16, applicant was assigned to perform underwater hull scraping work on a barge as a diver. The barge was tied up to another barge which was in turn tied up to the company's dock. Credible and unimpeached trial testimony from the applicant was that the hull scraping could have been more easily performed in dry dock, i.e. on land, but it would have been more expensive to have done so because of applicable environmental laws relating to scraped off debris on land, which were not applicable if the scraping was done underwater and the debris was left there.

While performing the underwater scraping work on 5/6/16 a shell sliced through applicant's work glove and lacerated his left index finger. Applicant initially continued working but eventually surfaced and reported the injury. He applied a bandage to the wound and told the employer that he thought he could

finish that day's work which was time sensitive. While doing so, he began using his uninjured right arm more. He eventually noticed that his right arm had become numb.

From the existing record, it appears that the employer was initially uncertain how to treat applicant's injury. Applicant was told to obtain evaluation on his own which he did at Kaiser. He was told at that facility that his left finger laceration was infected/contaminated by seawater and that they could not suture the wound at that time. An x-ray of his right wrist was also performed which was interpreted to evidence mild widening of the scapholunate joint with possible ligament injury (Applicant Exhibit 23-24).

At some point the employer informed the applicant that the employer was self-insured. When no benefits were immediately provided, applicant applied for State of California disability benefits (EDD), which the employer initially opposed claiming that applicant was receiving workers' compensation benefits. Applicant in fact was not receiving any workers compensation benefits at that time and as a result, EDD accepted applicant's claim and commenced providing disability indemnity payments (Applicant Exhibits 9-11).

Applicant was eventually informed by the employer that they were filing a Jones Act claim "on his behalf". Applicant testified that at that time he had no understanding of any distinction between California workers' compensation rights/benefits versus Jones Act rights/benefits, or what the qualifications for each type of benefits were. At an unspecified date the employer began paying applicant $22.00 per day "maintenance", apparently under Federal Maritime Law rules. At some later date this amount was likely increased to $50.00 per day.

After his initial visit(s) to his personal doctors at Kaiser, applicant was informed by his supervisor that he was required to see an employer designated treating physician (Applicant Exhibit 12). Applicant complied and was evaluated by Dr. Allan Delman on 5/21/16 (Applicant Exhibit 20). The doctor's working diagnosis at that time was that applicant's right upper extremity symptoms were compatible with carpal tunnel syndrome. Electro-diagnostic testing and MRI imaging were requested and obtained in July 2016, with the right wrist MRI being

interpreted to evidence two possible tears (Applicant Exhibit 25). Applicant was also seen on a neurological referral by Dr. Parag Mehta on 7/10/16. Dr. Mehta concluded that applicant had traumatic right carpal tunnel syndrome (Applicant Exhibit 18).

Dr. Delman requested authorization for right carpal tunnel surgery. His reporting also notes that applicant was feeling "overwhelmed" and that he was requesting a psyche referral (Applicant Exhibit 21, report dated 8/7/16).

Applicant underwent right carpal tunnel surgery on or about 11/14/16. Post-surgery follow up reporting from Dr. Delman noted "unusual post-surgery symptoms" including pain/shocks/throbbing/ tingling of the right upper extremity, with symptoms extending into the left shoulder. By early January 2017 applicant was worse. Purportedly no physical therapy had been authorized. A triple phase bone scan was obtained (Applicant Exhibit 28) as well as a follow up evaluation/opinion with neurologist, Dr. Mehta, who concluded that applicant's injury had developed into chronic regional pain syndrome (CRPS). A single stellate block was authorized, with medical reporting from Dr. Mehta chronicling repeated requests for additional block authorization without success. By July 2017, Dr. Delman indicated that he was transferring applicant's care to Dr. Mehta for neurology and pain management (Applicant Exhibit 21, report dated 7/10/17).

As noted above, Dr. Mehta initially evaluated the applicant shortly after his injury in July 2016 on referral from Dr. Delman. He continued to follow the applicant as a secondary treater until becoming applicant's primary treating physician in July 2017. During the period he was treating the applicant, Dr. Mehta referred the applicant to Joshua Prager, M.D. for pain management treatment (Applicant Exhibits 17-18).

At trial herein, the parties stipulated that applicant's current primary treating physician is Jason Groomer, M.D. Dr. Groomer's initial evaluation with the applicant was in October 2018 (Applicant Exhibit 14).

Applicant eventually filed a civil lawsuit against the employer in Los Angeles Superior Court seeking damages under the Jones Act, §46 30104, and general maritime law. On 5/23/18 applicant and the employer settled the civil

claim(s) for $40,000.00 (from which applicant netted $12,700.00). The parties to that action executed a Release of All Rights, which released all claims relating to the injury including any entitlement to Jones Act benefits, Longshore and Harbor Workers' Compensation Act benefits, and all other potential Maritime or Admiralty related benefits, except for California workers' compensation benefits (emphasis added) (Applicant Exhibit 13).

The exclusion of potential California workers' compensation benefits from the settlement/release is made clear in the first sentence of the first paragraph of the release:

> "Notwithstanding any other provision of this release, nothing in this release shall be construed to bar Jose Figueroa in pursuit of any and all claims, benefits, or remedies, if any, under California Workers' Compensation law, nor shall this release constitute a waiver of or any impediment to Jose Figueroa's entitlement, if any, to receive any and all California Workers' compensation benefits, which administration of shall be governed by the California Labor Code, its enacting regulation, and case law."

On 8/16/18 applicant filed an application herein alleging he sustained a compensable injury under California workers' compensation laws. Defendant has denied compensability contending that the California WCAB has no jurisdiction over applicant's injury.

Of interest is that the employer, in the civil Jones Act claim, denied that applicant qualified as a Jones Act seaman, with applicant contending, at least through his legal representatives, that he was a Jones Act seaman. Reversing their position, in the present workers' compensation proceedings, it is defendant which is now contending that applicant is a Jones Act seaman, while applicant contends that he does not qualify as such.

III
DISCUSSION

As an initial note, defendant contends in its petition for reconsideration that the parties agreed that only the jurisdictional issue would be heard and other issues would be "reserved" if required (Pet Recon page 4, lines 14-16). The undersigned was unaware of this "agreement", as it is not noted on the PTCS, nor was it raised

at the time of trial. The framing of the stipulations and issues on the first day of trial clearly included body parts, temporary disability, further medical treatment, EDD's lien, and attorney fees associated with temporary disability (MOH/SOE, 5/6/19, pages 2-3). The undersigned addressed all those issues and does not believe that he committed err in having done so.

A. DID THE UNDERSIGNED COMMIT ERR IN STRIKING A SUBSTANTIAL PORTION OF DEFENDANT'S TRIAL EXHIBITS:

Applicant initially raised an objection to defendant trial exhibits at the Mandatory Settlement Conference on 2/26/19 at which time applicant objected to "unserved and unspecified evidence".

On the PTCS defendant listed the following proposed trial exhibits:

Claimant's dive logs – various
Claimant's payroll & other employment records – various
Hours summaries of claimant's work for AMC – various
Spreadsheet summarizing claimant's work – various

L.C. §5502(d)(3) states in relevant part that:

> "Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

At trial applicant objected to both the lack of specificity of defendant's proposed exhibits and defendant's failure to timely serve the records. Applicant contended that some of the records had only been handed to them on the morning of trial. Defendant offered no proof of service identifying if/when any records were served, but did acknowledge during trial that four additional pages were "found" and hand served on the day of trial.

The undersigned noted that the assigned MSC judge wrote on the PTCS that "Defendant to send most dive logs to applicant's attorney asap and rest within 3 weeks but not less than 20 days before trial". There is no evidence that applicant agreed to this late service, or waived any objections they had detailed on the PTCS. Absent a stipulation by applicant to post-MSC service, which would have waived the admissibility issue at least relating to the timeliness of service, any

interpretation of the MSC judge's notation as an order allowing post-MSC service is contrary to the express terms of L.C. §5502(d)(3) which mandates discovery closure at the MSC.

With respect to the timeliness of service, current CCR §10670(b) states:

> (b) The Workers' Compensation Appeals Board may decline to receive in evidence:
> (1) Any document not listed on the Pre-Trial Conference Statement.
> (2) Any document not served at or prior to the mandatory settlement conference, unless good cause is shown.
> (3) Any document not filed 20 days prior to trial, unless otherwise ordered by a workers' compensation judge or good cause is shown.
> (4) Any physician's report that does not comply with Labor Code section 4628 unless good cause has been shown for the failure to comply and, after notice of non-compliance, compliance takes place within a reasonable period of time or within a time prescribed by the workers' compensation judge.
> (5) Any report that does not comply with the verification requirements of Labor Code section 5703(a)(2)or 5703(j)(2).

The primary documents offered into evidence at trial by defendant were clearly in existence in 2015/2016 as they purportedly relate to chronicling applicant's work during those years. In this case defendant has provided no evidence to support good cause why the proffered evidence was not served prior to, or at least at, the MSC on 2/26/19. No evidence was submitted, despite applicant's clear objections, as to when any post-MSC service was effectuated, or what specific documents were served, if any. Further, there is no evidence in the record, including judicial notice of the electronic claims management system by the undersigned, to evidence the filing of any of the disputed exhibits prior to trial pursuant to CCR §10670(b)(3).

In addition to applicant's objection to the admissibility of defendant's exhibits based upon failure to timely serve those exhibits, applicant has also consistently contended that the exhibits should be excluded due to failure to clearly identify with specificity the evidence proffered.

The undersigned noted that none of the exhibits listed on the PTCS have any dates for the exhibits specified other than the word "various" attributed to each. Any argument that "various" equates to specificity is meritless.

As noted above, defendant listed only four "exhibits' on the PTCS: (1) claimant's dive logs – various, (2) claimant's payroll & other employment records – various, (3) hours summaries of claimant's work for AMC – various, and (4) spreadsheet summarizing claimant's work – various.

The fourth item, the spreadsheet, is merely a consolidation by defendant of the information purportedly contained in the other three exhibits. This document was not prepared until after the MSC. The spreadsheet was identified on the first day of trial as Defendant Exhibit F, with a "clearer and more accurate version" offered at a later trial date as Defendant Exhibit M. If the underlying exhibits upon which the spreadsheets are based are determined to be inadmissible, then the spreadsheet data compilations would also be inadmissible.

Defendant Exhibit D was identified at trial as "Daily Work Logs". These voluminous records are clearly a compilation of a five different employer retained, or obtained, records from various sources. Some pages are untitled with little more than hand written notes on them. Some of the documents are titled "Weekly Safety Meeting", some are titled "Daily Work Logs", some are titled "Diver's Logs", and some are titled "Port of Los Angeles Construction and Maintenance Daily Diver's Reports". Of these various type of documents, only the Diver's Logs were clearly identified on the PTCS. Defendant's listing of "other employment records – various" on the PTCS is excessively vague, ambiguous, and clearly lacks the specificity required.

Defendant Exhibit E was identified at trial as "Time Entry Reports", which defendant contended were payroll records. These documents, although difficult to decipher and in part illegible, do appear to relate to applicant's daily work and the rate of pay associated with different work activities. The undersigned finds that these records were sufficiently identified on the PTCS as "payroll" records, although the timeliness of the service (see above) is separate issue.

Based on the foregoing, the undersigned found that due to failure to timely serve Defendant Exhibits D & E, and with respect to Exhibit D, the additional failure to identify everything within the exhibit other than "Diver's Logs", with specificity on the PTCS, Defendant Exhibits D & E were stricken, and were marked

for identification only.

In addition to the primary defendant exhibits detailed above, applicant also objected to a number of other defendant exhibits. Defendant Exhibit H, identified as a Jobs Transaction Costs Report, is document that was not created until 3/29/19, which is after the mandatory settlement conference herein. Defendant provided no additional information, or an offer of proof, at trial why Exhibit H could not have been reasonably disclosed and served prior to the MSC. Based on the foregoing, the undersigned ordered that Defendant Exhibit H be stricken and marked for identification only.

Finally, defendant contends in its Petition for Reconsideration that Defendant Exhibit G, supports its claim that applicant qualified as a seaman. The undersigned disagrees. Exhibit G was not listed on the PTCS. It was admitted for demonstrative purposes only at trial, without objection, as a map showing the layout of the Port of Los Angeles area. All of the overlaid information contained on the map (primarily dates) was generated by defendant after the MSC, and is based on the work records that were specifically excluded herein (discussed above). Absent correlation to the stricken work record evidence, and stricken testimony related to those records, the dates have no clear evidentiary value in any case. Exhibit G was not intended by the undersigned, or any of the parties at trial, for any purpose other than to show a map of the general POLA area as it correlated to admissible testimony.

B. DID THE UNDERSIGNED COMMIT ERR IN STRIKING TRIAL TESTIMONYRELATING TO STRICKEN DOCUMENTARY EVIDENCE?

All trial testimony relating to any witness's in Court review and testimony related to any of the stricken documents herein, was also stricken. Defendant contends in its petition that if the undersigned had ruled on the evidentiary issues prior to the commencement of testimony, it might have presented a different case and that they were essentially denied due process by the undersigned making his evidentiary findings after completion of trial. The undersigned disagrees.

First, both parties were aware that the disputed exhibits were subject to exclusion. Both parties had an opportunity to present their case with the evidentiary

dispute in mind. That defendant chose to rely almost exclusively on the disputed documents in presenting its case was apparently dictated for the most part by its only witness's acknowledgement that he "rarely saw" applicant working in the field (MOH/SOE, from 6/26/19, page 17, lines 15-17).

If the undersigned did not commit err in excluding defendant's trial exhibits, then the undersigned does not believe that exclusion of the all testimony based upon review of those records at trial was in error.

C. DID THE UNDERSIGNED COMMIT ERR IN DENYING TESTIMONY FROM WADE BLISS?

Defendant contends that the undersigned committed err in denying testimony from a proposed employer witness named Wade Bliss. Mr. Bliss was purportedly going to testify about the nature of applicant's work, as he was applicant's daily direct supervisor during much of his employment with AMC. His testimony was intended to go the primary jurisdictional issue raised by defendant. This issue was clearly known by defendant well before the MSC and completion of the PTCS. Despite this knowledge, defendant chose not to list Mr. Bliss as a potential witness on the PTCS.

The undersigned does not believe that he committed err in excluding the trial testimony from a clearly previously known, yet undisclosed, witness.

D. DID THE UNDERSIGED COMMIT ERR IN FINDING THAT DEFENDANT FAILED TO PROVE THAT CALIFORNIA WORKERS' COMPENSATION LAWS WERE PREEMPTED BY FEDERAL MARITIME/JONES ACT LAW?

As noted above, applicant was a resident of California at the time he entered into an employment contract with AMC in California. All of the work applicant performed for the employer was in California. He was injured in California. As a result, California workers' compensation laws would be applicable unless preempted/precluded by exclusive Federal jurisdiction.

At trial, defendant contended that applicant's claim should be dismissed due to lack of jurisdiction. Defendant contended that applicant was a Jones Act seaman and that any claim for injury he may have is exclusively subject to Federal jurisdiction. Defendant contended that there is no "twilight", "maritime but local", or any other form of concurrent jurisdiction between Federal and State Law relating

to applicant's injury if applicant qualifies as a Jones Act seaman.

Applicant contended that he does not qualify as a Jones Act seaman. In the alternative, applicant further contended that even if he does qualify as a Jones Act seaman, there is concurrent jurisdiction over his injury claim between Federal and California State workers' compensation laws, i.e. no Federal preemption. Applicant agreed, however, that the employer would be entitled to credit for benefits provided to applicant in the Federal civil claim(s).

After exclusion of the above referenced Defendant Exhibits (which were subject to contradiction and clarification by applicant in any case), and exclusion of specific testimony predicated on reviewing/commenting on those exhibits (see above), the undersigned is left essentially with the non- record review testimony of applicant versus the single supervisory employer witness, Michael Dunn.

It was conceded by the parties that applicant worked for the employer on either 113 or 114 days. He worked on a "call out" basis. When they had work he went into work. Applicant testified that he only performed Jones Act seaman work on 18 days during his employment (MOH/SOE, from 6/26/19, page 7, lines 8-12). Supporting this statement applicant further testified that he estimated that 50% of his work was performed on land (MOH/SOE, from 5/6/19, page 9, lines 20-22). In opposition, the employer witness testified that applicant performed seaman work between 55-58 days. A part of the discrepancy related to the type of work being performed. The employer considered any work during a day in which applicant utilized one of the company's vessels to get to a work location, as seaman work for the entire day. Applicant testified that on many occasions an employer vessel was used solely to transport the workers to a dock, pier, or beach where the entire days' work was done unrelated to the transport vessel.

Applicant testified that on occasion, with the tide out, no punt or floating platform was required to perform his pier repair or wrapping assignments. The employer witness acknowledged that that scenario was possible but that the employer wouldn't normally send a work vessel to a location when the tide was that far out. Applicant's testimony was found to be more persuasive and credible on this issue.

Applicant also testified credibly that there were occasions when he drove himself to a work location in the Port of Los Angeles, without utilizing a company vessel (MOH/SOE, 6/26/19, page 10, line 15 to page 11, line 8). This testimony was not credibly rebutted by the employer witness. Despite applicant's credible testimony on the issue, defendant incorrectly states in its petition that "Applicant did not identify a single specific instance when he drove to work…" (Pet Rcon. Page 11, line 23 to page 12, line 1).

Applicant further testified that on some non-diving dock/pier work, he and his coworkers would work directly from the structure itself. The employer witness testified that work above deck was not authorized by AMC's contract with POLA, but he also. The undersigned did not find it unreasonable that applicant would wrap piers just below the deck level (per the POLA contract), using the deck itself as his work location. Although standing on the pier/dock might be performing an authorized work activity in an unauthorized manner, it would not make it non-industrial or make it vessel work when it was not.

As noted above, the Jones Act only applies to workers who meet the definition of "seaman". Originally, under general maritime law, a seaman was only entitled to "maintenance and cure" which in simplified terms is a limited temporary disability as well as treatment until the injured worker's injury heals. In addition, an injured seaman could receive damages for injuries as a consequence of the unseaworthiness of a vessel. No recovery was allowed for the negligence of the ship owner, master or crew member.

In 1920 Congress enacted the Jones Act (46 U.S.C. §30104 – formally 46 U.S.C. App. §688) to expand the rights of an injured seaman to allow actions caused by negligence. The Act itself did not define who qualified as a "seaman". The U.S. Supreme Court in Chandris, Inc. v. Latsis (1995) 515 U.S. 347, 368, set forth a two-part test for assessing whether a worker qualifies as a seaman for the purposes of the Jones Act. First, the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission. Second, the worker must have a connection to a vessel or group of vessels in navigation that is substantial in terms of its duration and its nature.

A "vessel" under the Act is "any watercraft that is practically capable of transportation…" Stewart v. Dutra Construction Co. (2005) 543 U.S. 481, 497. In a California workers' compensation case, the Appeals Board found that a worker who worked on a dredge barge that had no means of self-propulsion and no crew's quarters, and was designed primarily as a work platform, was not a vessel within the meaning of the Jones Act, Soli-Flo Corp. v. WCAB (Craft) (2002) Cal. Comp. Cases 981 (writ denied).

Although the Jones Act itself does not define what connection to a vessel was required to meet the "substantial in terms of its duration and its nature" prong of the overall definition of a seaman" under the Act, the Chandris Court stated that an appropriate rule of thumb would be a worker who spends thirty percent or more of their time in the service of a vessel in navigation. Absent meeting this "rule of thumb", applicant would not be considered a "seaman" for purposes of the Jones Act.

As noted above, applicant testified to non-seaman work at inland reservoirs, work on land, driving to land/dock based locations, and at times utilizing a company vessel to get to a land based location for work. This testimony was found credible and established insufficient seaman/vessel work to meet the Chandris court definition of a seaman. Defendant's arguments to the contrary relay substantially upon inadmissible documents and testimony associated with those documents, with defendant repeatedly referring to its excluded records and documents in its petition for reconsideration (Pet. Recon. Page 10, line 21 to page 11, line 8).

Based upon the admissible evidence herein, and upon applicant's trial testimony, which was found to be more credible and persuasive than the single employer witness who admitted to rarely seeing applicant actually perform his work duties in the field, the undersigned found that defendant failed to prove that applicant met the definition or status of a seaman under the Jones Act. As a result, it was further found that this Court had subject matter jurisdiction over applicant's California work injury. The undersigned does not believe that he committed err in making that finding.

IV
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied.

DATED: June 25, 2020

S. MICHAEL COLE
Workers' Compensation Judge