FILED
Apr 19, 2017 11:19 AM
Court of Appeals
Division II
State of Washington

Received via Portal

No. 49340-3-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

JEREMY GIBSON,

Appellant,

v.

AMERICAN CONSTRUCTION COMPANY, INC.,
a Washington corporation,

Respondent.

CORRECTED
REPLY BRIEF OF APPELLANT GIBSON

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A. INTRODUCTION

Respondent American Construction, Inc. ("American") fails to acknowledge what courts and commentators universally state – the law pertaining to the applicable compensation schemes for injured maritime workers is overlapping and not easily applied – it is a "zone of uncertainty"[1] for injured maritime workers. Instead, American posits a conception of that law that is black and white, cut and dried, to deprive injured maritime workers of remedial compensation law, liberally construed, to which they are entitled. American even goes so far as to imply that an injured seaman like Jeremy Gibson would receive double compensation when that assertion is patently false. This Court should not be taken in by American's heartless, and legally unsupported, arguments.

Gibson was seriously injured. His early receipt of Longshore and Harbor Workers' Compensation Act ("LHWCA") benefits without a formal adjudication of LHWCA jurisdiction over his injury does not preclude his later recovery of Jones Act relief under prevailing United States Supreme Court and Ninth Circuit precedent, precisely because his injury occurred in

[1] The Fifth Circuit actually described this body of law alternatively as "the never ceasing riddle of the ambiguous amphibious worker with its tri-cornered intramural controversy between state-federal compensation and the ubiquitous possibility of a pseudo-seaman's claim and the mutation in the vast body of the law…" *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 697 (5th Cir. 1963). *See also*, *Simms v. Valley Line Co.*, 709 F.2d 409, 411-12 (5th Cir. 1983).

the zone of uncertainty.

B. STATEMENT OF THE CASE

American's Statement of the Case is offensive for a number of reasons. First, and perhaps most significantly, American misstates what occurred here by deliberately and repeatedly describing the LHWCA settlement in Gibson's case as a "formal award" when the issue of LHWCA jurisdiction was *never actually litigated*. American's argument, if accepted, would defeat the opportunity to pursue federal maritime claims *in every instance* in which an injured maritime worker receives an 8i settlement, a result plainly contrary to *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405 (1991) and explicitly contradicting the Ninth Circuit's decision in *Figueroa v. Campbell Indus.*, 45 F.3d 311 (9th Cir. 1995).[2] Gibson's application for a settlement acknowledged the applicable law pertinent to the settlement – the LHWCA, CP 28, 32, and that he was seeking benefits "under the Act." CP 29. In articulating the reasons for the settlement, it is plain that it was designed to resolve *only* Gibson's "workers' compensation claim." CP 34 ("Employer (Carrier) will also resolve its liability under this claim."). It had *no effect* on Gibson's federal maritime

[2] In *Gizoni*, the injured worker formally applied for and received LHWCA benefits and simultaneously sued his employer for federal maritime relief. In *Figueroa*, the worker applied for and received state worker compensation and LHWCA, and settled both claims, before suing for federal maritime relief.

claims against American. *See* CP 34-35 (discharging liability "under the Act"), CP 37-38 (payments discharge liability "related to this Longshore & Harbor Workers' Compensation Act claim."). The OWCP district director merely signed off on the parties' settlement without *formally* addressing jurisdiction in any fashion – no ruling, no finding of fact, no conclusion of law. CP 41.

Second, American again misleads the Court by asserting that Gibson seeks "a second recovery for the same injury." *E.g.*, Resp't br. at 2, 8. That assertion is patently *false*, as American *knows*.[3] Gibson's LHWCA settlement will be an offset against any recovery a jury might award him against American under the Jones Act, once that jury has the opportunity to weigh the facts and make a determination as to Gibson's seaman status. *See*

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[3] American specifically acknowledged the offset rule in its brief at 14 noting that the rule

> allows the injured maritime worker to initially receive benefits under either scheme [the LHWCA or the Jones Act], medical and wage loss benefits under the LHWCA or a seaman's benefits in the form of maintenance and cure, with the requirement that once the worker elects his remedy the benefits received be offset so as to avoid double recovery, thus preserving mutual exclusivity.

Thus, American's offensive assertion that Gibson seeks a "double recovery" *is belied by American's own brief.*

Moreover, Gibson's counsel specifically apprised American's counsel and the trial court that no double recovery would be sought by Gibson. RP (7/29/16):9-10. American's counsel should know better. *See* RPC 3.3(a)(1) (candor with the tribunal).

Br. of Appellant at 12, 17.[4] *Gizoni* specifically recognized that any LHWCA benefits received by an injured seaman were an offset against a federal maritime claim recovery. *Gizoni*, 502 U.S. at 91-92.

Third, American deliberately poses irrelevant issues in its brief. For example, American contends that Gibson had "pre-existing conditions," resp't br. at 4, purely for the purpose of attempting to diminish Gibson's injuries in the Court's eyes. The Court should not be distracted by such an argument that is for the jury. In any event, to the extent that American's egregiously negligent conduct "lit up" Gibson's pre-existing conditions, if indeed American can document they are "pre-existing," Gibson may still recover in any event. WPI 30.18; *Bennett v. Messick*, 76 Wn.2d 474, 478-79, 457 P.2d 609 (1969); *Dennis v. Dep't of Labor & Indus. of State of Wash.*, 109 Wn.2d 467, 745 P.2d 1295 (1987).

Further, American *admittedly* ("Although not in the record,...") seeks to interject extra-record factual material into the case. Resp't br. at 4. Such conduct is *patently improper*. RAP 9.1(a) describes the record on review. It is a cardinal principle of appellate practice that parties may not cite to factual material that is not part of that record. RAP 10.3(a)(5-6).

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[4] A jury determination of seaman status is Gibson's right. "A maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act." *Gizoni*, 502 U.S. at 89.

This Court should disregard such factual material and sanction American's counsel. RAP 18.9(a); *Hurlbert v. Gordon*, 64 Wn. App. 386, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992) (counsel sanctioned for failure to properly cite to the record and legal authority). *Accord*, *LithoColor, Inc. v. Pac. Emp'rs Ins. Co.*, 98 Wn. App. 286, 991 P.2d 638 (1999). *See also*, *In re Disciplinary Action Against Boucher*, 837 F.2d 869 (9th Cir. 1988) (9th Circuit suspends lawyer who misrepresented the record).

This Court should not countenance such abusive treatment of the facts in this case and it should disregard American's factual assertions.

Contrary to American's attempt to minimize Gibson's injuries resulting from its negligence, or to attribute them to pre-existing conditions, Gibson's injuries here were serious and the repercussions to him and his family were profound. What is *undisputed*, and must be taken as *true* in any event on review of a trial court CR 12(b)(6) decision[5] is that Gibson fell 10 feet through an open hatch cover landing on a steel beam; Gibson's injuries to his spine, neck, hip, and knee were extensive, necessitating

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[5] American *misrepresents* the standard for review of a trial court CR 12(b)(6) motion. Resp't br. at 11 n.4. This Court must treat the facts pleaded by Gibson, and any associated hypothetical facts, as *true*. Br. of Appellant at 7 n.8. For American to now assert that it really filed a summary judgment motion, resp't br. at 11 n.4, is *disingenuous*, at best. American, not Gibson, chose the form of the motion it filed below. CP 9, 12.

surgeries with more than $100,000 in medical bills, with more in the future. Br. of Appellant at 3. American's attempts to downplay Gibson's injuries are belied by these facts.

C. ARGUMENT[6]

(1) American Completely Disregards the "Zone of Uncertainty" Between the Remedial Systems for Injured Maritime Workers

In its brief, American displays not a particle of awareness concerning the murky, overlapping boundaries between state worker compensation, the LHWCA, and statutory/maritime common law relief for injured maritime workers that constitute the important backdrop for the United States Supreme Court decision in *Gizoni* and the Ninth Circuit's *Figueroa* decision. Br. of Appellant at 7-15. It seemingly *concedes* that characterization of the situation facing injured maritime workers by not addressing it.

Similarly, American does not deny anywhere in its brief that *each* of the systems for affording relief to injured maritime workers – state worker compensation, the LHWCA, or the Jones Act/federal maritime common law – is *remedial* in nature and must be *liberally construed* to

[6] American does not contest the point made in Gibson's opening brief at 7 n.8 that federal, not state law, controls on the substantive liability issues. But it fails to observe this critical point in its argument, as will be noted *infra*.

effectuate the purpose of fully compensating injured maritime workers. *Id.* By failing to address those critical interpretative principles, American *concedes* them. RAP 10.3(a)(6); RAP 10.3(b).

(2) American Misleads This Court on Whether Jurisdiction Was Formally Litigated in His LHWCA Settlement

As noted *supra*, American *repeatedly* misstates what transpired in this case with regard to jurisdiction. American repeatedly references Gibson's acknowledgment of LHWCA jurisdiction in his settlement application (resp't br. at 3, 6, 16, 17, 25, 27, 39) as if such an acknowledgement, necessary for an award of LHWCA benefits, constituted *actual litigation of LHWCA jurisdiction*, something that acknowledgement decidedly was *not*.

An "adjudication" connotes the actual, formal litigation of an issue – *a finding* by quasi-judicial officer or judge on such an issue. Br. of Appellant at 19-20.[7]

What is clear, however, on these facts is that:

[7] American has *no answer* on this point to *Roberts v. Director, Office of Workers' Compensation Programs*, 625 F.3d 1204, 1206 (9th Cir. 2010), *aff'd, sub nom. Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 132 S. Ct. 1350, 182 L. Ed. 2d 341 (2012). Indeed, there, the United States Supreme Court observed that an injured LHWCA claimant can receive an "award" by virtue of her/his entitlement to informal benefits under the Act. *Id.* at 101. Indeed, Gizoni received LHWCA benefits, an "award" in the parlance of *Roberts*, but not a *formal* award, an actually litigated decision, as the *Gizoni* court contemplated. A *formal* award obviously means something more than the functional equivalent of a stipulation and order of dismissal.

- American never raised the LHWCA jurisdiction as an issue before the OWCP;[8]

- There was no litigation of jurisdiction before the OWCP resulting in a specific ruling on that issue;

- There is no specific finding of fact on jurisdiction in the order approving the 8i settlement;

- American never sought a release from Gibson of his Jones Act claim as part of the LHWCA settlement.

As Gibson argued in his brief at 4 n.5, this was a so-called 8i settlement before the OWCP. Contrary to American's contention in its brief at 5-8 that such an 8i settlement was somehow a "formal award" by the deputy director, it was not. Such settlements are universally accepted without formality by OWCP "adjudicators." *O'Neill v. Bunge Corp.*, 365 F.3d 820, 823 (9th Cir. 2004). The parties merely stipulated to the basis for a settlement and the deputy director "signed off" on it. He did not hear witnesses, evaluate evidence, consider the law, or enter findings, particularly as to jurisdiction. This was decidedly not a "formal" award as contemplated by the *Gizoni* court where the Supreme Court specifically cited *Simms* and the Larson treatise, both supporting Gibson's contention

[8] The employer in the LHWCA claim setting has the burden of proving that it is not responsible for the maritime worker's injury. *Dillingham Ship Repair v. U.S. Dep't of Labor*, 320 Fed. Appx. 585, 587 (9th Cir. 2009).

that a formal award contemplated litigation. 502 U.S. at 91.[9]

Similarly, American's contention that any 8i settlement constitutes a "formal award" under the reasoning of *Gizoni* and *Figueroa*, resp't br. at 7-8, is flatly wrong. In effect, American's position would universally defeat the very type of settlement those cases recognized for dual status injured maritime workers in the "zone of uncertainty."

In *Gizoni*, the Court interpreted the interrelationship of the LHWCA and the Jones Act, rejecting the black and white analysis American advances here:

> Southwest Marine suggests that an employee's receipt of benefits under the LHWCA should preclude subsequent litigation under the Jones Act. To the contrary, however, we have ruled that where the evidence is sufficient to send the threshold question of seaman status to the jury, it is reversible error to permit an employer to prove that the worker accepted LHWCA benefits while awaiting trial. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37, 84 S. Ct. 1, 3, 11 L. Ed. 2d 4 (1963). It is by now "universally accepted" that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act. G. Gilmore and C. Black, Law of Admiralty 435 (2d ed. 1975); see 4 A. Larson, Workmen's Compensation Law § 90.51, p. 16-507 (1989) (collecting cases); *Simms v. Valley Line Co.*, 709 F.2d 409, 412, and nn. 3 and 5 (CA5 1983). *This is so, quite*

[9] The required contents for a settlement application are set forth in 20 C.F.R. § 702.242. That rule executes the Congressional policy set forth in 33 U.S.C. § 908(i) regarding settlement of a "claim for compensation under this chapter." Merely by acknowledging the nature of the settlement in the stipulation, however, does not then constitute an "admission" or "adjudication" of jurisdiction conclusive of Gibson's federal maritime claim rights.

> *obviously, because the question of coverage has never actually been litigated.* Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA. 33 U.S.C. § 903(e). See Gilmore & Black, *supra*, at 435.

Id. at 493-94 (emphasis added).[10] The *Gizoni* court also *specifically rejected* as well the argument American advances in its brief at 29-30, 32, that other federal tort statutory schemes like FELA have any applicability here when it addressed the Federal Employees Compensation Act and the Federal Tort Claims Act. 502 U.S. at 90-91. The Court's emphasis on *actual litigation* on the question of LHWCA coverage and the absence of double recovery are key to this Court's resolution of the issues here.

Moreover, American gives short shrift to the Ninth Circuit's *Figueroa* decision. Resp't br. at 23-24, 27.[11] But there is little question that *Figueroa* is on point and supports Gibson's position. Figueroa actually sought state worker compensation and LHWCA benefits before filing a Jones Act claim. Both claims were settled and an 8i settlement order was

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[10] In *Simms*, 709 F.2d at 412, the court concluded that a "*formal adjudication of seaman's status*" is a necessary prerequisite for any preclusive effect to derive from a claimant's receipt of LHWCA benefits. *Id.* The *Simms* court stated that in order for *res judicata* or collateral estoppel to apply to a Jones Act case, there must be "a formal [Benefits Review Board] finding of non-seaman status." *Id.*

[11] American misrepresents the holding in *Figueroa*, claiming that if jurisdiction is simply mentioned at the administrative level, that is sufficient to constitute a formal award. Resp't br. at 26. That assertion is *plainly* contrary to *Figueroa*'s actual holding.

issued by the OWCP and a release approved by a judge of the California Workers' Compensation Appeals Board. The Ninth Circuit *rejected* the argument that a LHWCA settlement was a "formal award" as contemplated by *Gizoni*. 45 F.3d at 314-15. The court clearly contemplated that jurisdiction had to be *litigated*. In the absence of *a finding* in the OWCP compensation order on jurisdiction, the subsequent Jones Act claim did fall within the exclusivity provision of the LHWCA, 33 U.S.C. § 905(a). Critical to the Ninth Circuit was the absence of any ability by Figueroa to obtain a double recovery. 45 F.3d at 315.

The Ninth Circuit further addressed *Figueroa's* double recovery focus in *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 548, 117 S. Ct. 1535, 137 L. Ed. 2d 800 (1997). There, an administrative law judge at OWCP actually entered a finding that the injured maritime employee was a longshoreman; the longshoreman did not appeal it. The Ninth Circuit reversed a district court order dismissing Papai's Jones Act claim, concluding that the employee could relitigate his status in the Jones Act claim, citing *Gizoni* and *Figueroa*, because Papai would not doubly recover, and he was entitled to his day in court under the Jones Act. *Id.* at 207-08. Thus, in the Ninth Circuit, not even a formal adjudication of LHWCA jurisdiction by an ALJ precludes a

Jones Act claim.[12]

Instead of applying Ninth Circuit persuasive authority, American argues for the application of authority from other circuits that is entirely hostile to *Gizoni's* core teachings and the necessary liberal approach to Gibson's remedies. Resp't br. at 21-33. The Fifth Circuit approach to the issue espoused by American throughout its brief, for example, has been subjected to intense, and legitimate, academic criticism as being plainly contrary to *Gizoni* and betraying the remedial purpose of compensation schemes for injured workers generally.[13] Moreover, *Gizoni* itself resolved

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[12] This is consistent with the prediction in Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975) at 435 ("Gilmore & Black"):

> Even the payment of benefits pursuant to a formal award in contested proceeding is not necessarily fatal to the Jones Act action. The courts have shown themselves receptive to the argument that the compensation award may have been made without a proper adjudication of the claimant's status as a harbor worker of seaman.

[13] Professors David W. Robertson and Michael F. Sturley asserted:

> Simplifying slightly, one could say the Fifth Circuit's Sharp decision empowers the workers' compensation adjudicator to conclusively dispose of the seaman status issue by taking virtually any formal action that necessarily implicate the issue, whereas the Ninth Circuit view in Figueroa requires the issue to be explicitly litigated to a conclusion by the workers' comp tribunal. Choosing between those views entails the assessment of multiple values and principles, but it at least seems clear that in the present context the Ninth Circuit does a better job of protecting workers – which is supposed to be the main justification for workers' compensation statutes and the Jones Act – than the Fifth.

David W. Robertson, Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 39 Tulane Mar. L.J. 471, 495 (2015).

a Circuit split, and the Court there sided with the Ninth Circuit over the Fifth. 502 U.S. at 85 n.1.

Here, there was no *actual litigation* of the jurisdictional issue, no matter how much American attempts to argue to the contrary. The OWCP made *no finding* on jurisdiction in the 8i settlement approval. No *Gizoni* "formal award" on jurisdiction was present here. Moreover, as in *Figueroa/Papai*, there is no possibility of Gibson obtaining a double recovery in any event because his LHWCA benefits received will be an offset against any Jones Act recovery, as noted *supra*. American's position on Gibson's settlement here is not supported by the relevant United States Supreme Court and Ninth Circuit authority. The trial court erred.

(3) Gibson's Jones Act Claim Is Not Barred by Estoppel Principles or the Election of Remedies Doctrine

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Another commentator stated:

> [T]he Fifth Circuit's conclusion that ALJ ratification of a LHWCA settlement sufficed to bar a Jones Act suit, regardless of whether any express finding of nonseaman status was made, is unsupported by traditional common law preclusion principles and directly contradicts the Supreme Court's reasoning in Gizoni, which, at a minimum, required a finding of nonseaman status to trigger preclusion. An award is neither final nor formal for the purposes of estoppel unless the underlying issue has been actually adjudicated; justification for application of the doctrine lies in the avoidance of unnecessary duplicative proceedings, which is not implicated in the absence of prior litigation on a particular matter. In contrast to the fact-intensive, flexible approach endorsed by the Gizoni Court, the Fifth Circuit's imposition of a blanket bar on Jones Act claims upon approval of a settlement capriciously denies putative seamen with a colorable claim the ability to assert their status as a Jones Act seaman.

Victoria L. C. Holstein, *The Overlap Preclusion Trap Between the Jones Act and the Longshore and Harbor Workers' Compensation Act*, 76 Tul. L. Rev. 783, 815 (2002).

American ignores controlling state and federal authority on both estoppel and election of remedies. Resp't br. at 37-45. The trial court erred in concluding that such principles barred Gibson's Jones Act claim. RP (7/16/16):27 (election of remedies); RP (7/29/16):25, 27-35 (estoppel).

(a) Estoppel

Despite citing a paucity of *federal* authority for its estoppel argument, br. of appellant at 44-45,[14] American contends, based on state law, that Gibson was equitably estopped from seeking a Jones Act recovery by settling his LHWCA claim. In making that argument, American *concedes* that it is not making a *res judicata* or collateral estoppel argument (likely because it obviously cannot demonstrate a final adjudication on the merits of its jurisdictional argument for both doctrines, nor the absence of injustice, an element pertinent to collateral estoppel, as is required by Washington law).[15] It has *no answer* to the Ninth Circuit's determination

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[14] The only federal case American does cite is *Wickham Contracting v. Board of Education of City of New York*, 715 F.2d 21 (2d Cir. 1983), an NLRB case. The Second Circuit there applied collateral estoppel to NLRB unfair labor practice decisions that were *actually litigated* with applicable findings of fact. *Id.* at 22-23. The court noted that in order for an administrative decision to carry either *res judicata* or collateral estoppel effect, the quasi-judicial administrative agency must resolve disputed fact issues the parties actually had an adequate opportunity to litigate. *Id.* at 26 (quoting *U.S. v. Utah Constr. Co.*, 384 U.S. 394, 422, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966)). Mere dismissal of charges by the NLRB, like a LHWCA 8i settlement, carries no preclusive effect. *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1156 (9th Cir. 2013).

[15] American actually asserts in its brief at 44 that "there is no authority for this proposition," that is, that there must be a final adjudication on the merits in the first

in *Figueroa* that the LHWCA settlement has no preclusive effect. 45 F.3d at 315-16; Br. of Appellant at 28-29.

More troubling, however, is American's utter disregard of the Supreme Court's *rejection* in *Gizoni* of the very equitable argument it now raises, as Gibson noted previously. Br. of Appellant at 28. The *Gizoni* court stated:

> For this same reason, equitable estoppel arguments suggested by *amicus* Shipbuilders Council of America must fail. Where full compensation credit removes the threat of double recovery, *the critical element of detrimental reliance does not appear*. See *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59, 104 S. Ct. 2218, 2223, 81 L. Ed. 2d 42 (1984); *Lyng v. Payne*, 476 U.S. 926, 935, 106 S. Ct. 2333, 2339, 90 L. Ed. 2d 921 (1986).

502 U.S. at 92 n.5 (emphasis added). The *Gizoni* court also noted equitable estoppel was barred where double recovery by the injured maritime worker

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proceeding for such a decision to have preclusive effect. American apparently did not read the authorities in Gibson's opening brief. Br. of Appellant at 28-30. Washington law cited there *unambiguously* demands that for a decision to carry preclusive effect it must be *actually litigated*. *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983) (*res judicata* requires a final judgment; collateral estoppel requires that an issue actually be litigated).

Federal law is no different on this point. Collateral estoppel applies "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated by the same parties in any subsequent lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 465 (1970); *see also, Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 n.5, 118 S. Ct. 657, 139 L. Ed. 580 (1998) (citations omitted) (noting *res judicata* is the term traditionally used to describe claim preclusion and issue preclusion). The Ninth Circuit requires an examination of the prior case record to decide whether the issue was fully litigated and decided in the first case. *U.S. v. Ford*, 371 F.3d 550, 555 (9th Cir. 2004). Similarly, that Circuit requires a final judgment to have been entered in the first action in order for claim preclusion – *res judicata* – to apply. *Russell v. C. I. R.*, 678 F.2d 782, 785 (9th Cir. 1982).

would not occur. *Gizoni* is controlling here, precluding American's equitable estoppel argument.

However, even if Washington equitable estoppel authority were somehow applicable on this plainly federal issue, the trial court erred and American's analysis is simply wrong.

Under Washington law, equitable estoppel seeks to prevent "a party from taking a position inconsistent with a previous one where inequitable consequences would result to a party who has justifiably and in good faith relied." *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 868, 154 P.3d 891 (2007). The elements of equitable estoppel are: "(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Lybbert v. Grant Cty., State of Wash.*, 141 Wn.2d 29, 1 P.3d 1124 (2000) (quoting *Bd. of Regents v. City of Seattle*, 108 Wn.2d 545, 741 P.2d 11 (1987)). Each element must be proved by *clear, cogent, and convincing evidence*. *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 734, 853 P.2d 910 (1993). The doctrine is *disfavored* in Washington. *Id.*

American cannot document any inconsistency in Gibson's position, given the fact that the approach he took to first receiving available LHWCA

benefits and then filing suit for any pertinent federal maritime law relief is so well understood and employed in federal maritime personal injuries actions after *Gizoni*. As double recovery is specifically avoided, American's claim of "injury" also rings hollow.

The trial court erred in applying estoppel principles to bar Gibson's Jones Act claim.

(b) Election of Remedies

Just like its argument on estoppel, American's argument on election of remedies here is governed by federal law, and the United States Supreme Court in *Gizoni rejected* it: "[The] [a]rgument by *amicus* would force injured maritime workers to an election of remedies we do not believe Congress to have intended." 502 U.S. at 91 n.5. The Court specifically noted there that the argument now American makes, made by the Shipbuilders Council of America, was unavailing as it was "universally accepted" that an injured worker could first receive LHWCA benefits and then pursue federal maritime remedies without waiving the right to obtain Jones Act relief *and* Congress contemplated such an approach by enacting 33 U.S.C. § 903(e). *Id.* at 91-92. American now contends Gibson had to make an election between the LHWCA and the Jones Act, an argument the *Gizoni* court manifestly found to be untenable. American cannot cite a *single case* post-dating *Gizoni* applying the election of remedies concept to

an injured maritime worker who received LHWCA benefits and then brought federal maritime law claims against a shipowner. Indeed, a recent Oregon district court decision simply stated, citing *Gizoni*, that "Congress did not intend to force injured maritime workers to elect between LHWCA and Jones Act remedies." *Meng v. Dutra Group*, 2012 WL 1866840 (D. Or. 2012) at *3.

American has the audacity to argue Washington law on the election of remedies, resp't br. at 37, 40-41, knowing full well federal law controls on such a substantive issue. But even if Washington law is considered, it does not preclude Gibson's maritime personal injuries claims here. American notes that the touchstone for the doctrine in Washington law is the avoidance of "double redress." *Birchler v. Costello Land Co.*, 133 Wn.2d 106, 112, 942 P.2d 968 (1997). But because of 33 U.S.C. § 903(e), any such double recovery cannot occur here, as the *Gizoni* court specifically noted.

Ultimately, as has been indicated in treatises on this issue, the concept of election of remedies is inapplicable here both technically, and because of the very nature of the claim Gibson is presenting:

> As to election between the Jones Act and the Longshore Act, the defense has been rejected on the technical ground that the doctrine of election applies only when the two remedies are coexistent. Since these two remedies are not coexistent but mutually exclusive, and since plaintiff's remedy legally

must be only under one or the other act, plaintiff cannot be deemed to have made a valid election.

A more fundamental answer to the election defense, and one that applies as well to state compensation acts, is the argument, advanced in other connections where the doctrine has made its appearance, that the doctrine of election simply has no place in modern social insurance law. Whatever may have been its justification in the process of setting up ground rules for private adversary legal contest it makes no sense when applied to public protective systems created to serve public as well as private purposes. The community has decided that injured workers and their families shall have as a minimum the security that goes with nonfault compensation. It is not for the individual, once he or she is part of that system, to elect whether its protection is a good idea or not. If the individual accepts or claims its benefits, this is not an election but merely the setting in motion of a protective process ordained by the state. This being so, it would undermine and prejudice the operation of this protective public program if the claimant were put in the position of risking the loss of other valuable rights, such as those under the Jones Act, by the mere fact of accepting or invoking this basic system of compensation protection. It is of the nature of compensation, as distinguished from damage actions, that it is intended to be both prompt and reliable, in order to perform its function of caring for the immediate economic and medical needs of an injured worker and his or her family. If, then, he or she accepts or claims compensation as his or her first move, perhaps fully intending to follow this with a Jones Act action, this should not be thought to be sinister, deceitful, or avaricious on his or her part. The worker is setting out to ensure that the worker gets the minimal social insurance protection that the worker may be entitled. If it turns out later that the worker is entitled to a more generous award under a different system, since the compensation award will be credited on the larger award, there has been no serious harm done.

Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 146.05 (2011) at 146-56–146-58 ("Larson").

The trial court erred to the extent it relied upon the doctrine of election of remedies to dismiss Gibson's claim.

(4) Washington Public Policy Supports Gibson's Position

As noted *supra*, American *ignores* the remedial purpose of *all* of the statutory schemes potentially at issue here – the IIA, the LHWCA, and federal maritime claims – that *require* their *liberal construction* to ameliorate the risk and harm experienced by Gibson as a maritime worker. *See* Br. of Appellant at 7-15, 25-28. Instead, it claims that Washington public policy supports its position. Resp't br. at 40-41.[16] It is wrong.

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[16] American cites *Garrisey v. Westshore Marina Associates*, 2 Wn. App. 718, 469 P.2d 590 (1970), an old Washington case singled out for criticism by Professor Arthur Larson in his seminal treatise on worker compensation:

> It is a little difficult to know what to make of its opinion. There was not only a claim but an award and acceptance of state compensation benefits, followed by a Jones Act action. The court appears to have concluded that, as a matter of law, the plaintiff was not a seaman under the Jones Act. If this is so, its further statement that the plaintiff was barred by his election of state compensation may seem to be superfluous and in the nature of dictum. Moreover, the court makes the curious statement that, under *Davis* and the twilight-zone rule, a claimant electing state compensation is thereafter barred from receiving not only Jones Act but Longshore benefits – apparently overlooking the substantial line of cases, beginning with *Calbeck* itself, in which Longshore benefits have followed state benefits (*see generally* Ch. 145 § 145.05[3], above), with the election argument being expressly rejected. The court seems to be confusing the initial process of election by which in some states employees theoretically come under the compensation act in the first place, and the ad hoc election of a particular remedy in a particular case by an employee once he or she is generally under the act. Treatise cited.

Larson at 146-57 n.4.

For the reasons articulated in Gibson's opening brief at 25-27, public policy favors a liberal opportunity for an injured maritime worker to initially secure worker compensation-like benefits, that are more rapidly available, but less generous than federal maritime relief, and then subsequently pursue a tortfeasor, whether the vessel owner or a third party, so long as a double recovery is averted. American misses the public policy implications of RCW 51.12.100/.102 and *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 212, 118 P.3d 311 (2005) and similar cases. Br. of Appellant at 26-27.

Ultimately, Professors Gilmore and Black were pointed in their criticism of the precise logic advanced by American here. After specifically noting that the "substantial majority" of cases hold that Jones Act claim is not barred by the receipt of LHWCA benefits where no "formal award" has been made, they stated:

> On the grounds of policy the argument can be plausibly advanced that the injured worker should be entitled to try for his Jones Act recovery no matter how properly his status as a non-seaman may have been adjudicated in a contested compensation proceeding. No problem of double recovery is involved: the compensation payments will be routinely deducted from the damage recovery if the Jones Act action is successful. How is an injured worker, who is arguably a Jones Act seaman, supposed to live and support his family during the months or years which will elapse before his damage recovery, if his Jones Act action is successful, becomes collectible? The provision of compensation during this period would serve the function of

> the traditional maritime remedy of maintenance and cure (which has always been thought of as supplemental to the damage recovery). It is only because of a series of accidents in our legal history that the payment of medical expenses and a living allowance to an injured worker is thought to be entirely consistent with his damage recovery if the payment is called maintenance and cure but inconsistent with the damage recovery if it is called compensation.

Gilmore & Black at 435.

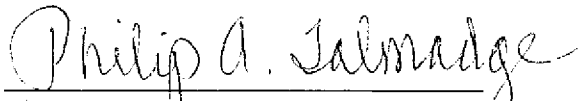
D. CONCLUSION

Nothing in American's brief should dissuade this Court from reversing the trial court's erroneous decision. In light of the remedial purpose of the LHWCA and the Jones Act, and given the absence of any formal litigation of jurisdiction in his LHWCA case, Gibson was entitled to pursue his Jones Act claim under *Gizoni*. He neither had to elect his remedies between the LHWCA and the Jones Act, nor was he estopped to pursue his federal maritime law remedy.

This Court should reverse the trial court's dismissal of Gibson's Jones Act claim and allow him to pursue that claim on its merits. Costs on appeal should be awarded to Gibson.

DATED this 19th day of April, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Corrected Reply Brief of Appellant Gibson*** in Court of Appeals, Division II Cause No. 49340-3-II to the following parties:

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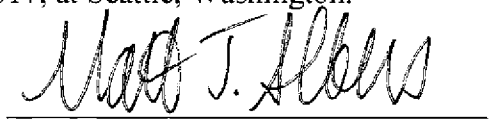
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 19, 2017, at Seattle, Washington.



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Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49340-3
Appellate Court Case Title:	Jeremy Gibson, Appellant v. American Construction Company, Inc., Respondent
Superior Court Case Number:	16-2-05915-1

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