Employees: More Maritime than you Think

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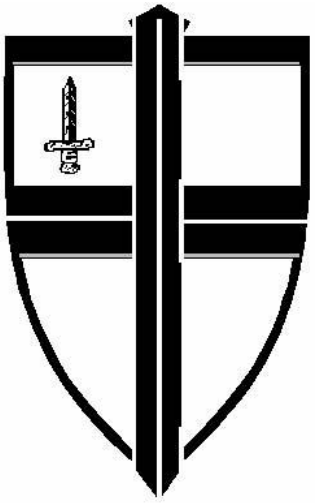

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Employees may be able to collect enhanced benefits for injuries under maritime and longshore laws. Many employers do not know this — and are not insured for these exposures. Caveat emptor.

Maritime Employees and Marine Workers Compensation

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Up until a few years ago, it was fairly easy to identify maritime workers by their job titles: longshoreman, ship repairer, captain, deckhand, etc. But with the growth of the cruise and general maritime business, plus the expansion by the courts as to whom maritime and longshore benefits are available, the term "maritime worker" has now incorporated many employees who have not traditionally been included.

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These employees now have the availability of enhanced benefits, more lucrative than those available under normal workers compensation. These benefits fall into two distinct categories:

1. the U.S. Longshore and Harbor Workers' Compensation Act; and
2. the various maritime remedies (including Jones Act, General Maritime Law, maintenance and cure, wrongful death, unseaworthiness, and the Death on the High Seas Act).

The Longshore Act

The U.S. Longshore and Harbor Workers' Compensation Act (or Longshore Act) is one of those mysteries of insurance known by many, yet understood by few. It is a compensation system (similar to workers compensation); that is, once coverage is decided, you can go to the Act to calculate exactly what has to be paid to the claimant.

However, that simple phrase, "once coverage is decided," is far more complicated than it seems at first glance. In order to be eligible for Longshore benefits,

the injured employee has to face a two-part test of *Status* (was the employee in a covered job?) and *Situs* (literally, where did the accident take place?). We will consider these two parts separately, but please remember that the employee must pass *both* tests to be successful: Fail one, and you need to go no further.

Status

Whilst the Longshore Act was originally written in the 1920s, specifically for stevedores, shipbuilders, and the like, it was drastically expanded in the 1970s and 1980s to include numerous occupations not originally considered "Longshore." To compare it to a property policy, it changed from a "named-perils" type of form (where the occupations to which it applied were listed) to an "all-risks" or "special-form" type of policy (where occupations are covered, unless excluded). Figure 1 shows the definition of a covered employee and, probably more importantly, its applicable exclusions. It is directly taken from the Longshore Act.

The penalties for not complying with the Longshore Act are extremely severe.

One must read these exclusions carefully! Case after case has shown that they are treated very strictly, and if the employee does not fall *exactly* under the exclusion, that employee *will* be covered by Longshore. In particular, exclusion D is one of the most frequently sought but most rarely successful, and the courts have shown that often the most obtuse connection to the maritime industry is sufficient. Take, for example, the employee whose sole job was to do maintenance on land on the brakes of a chassis that carried containers onboard vessels, or the pest control company that performed its function occasionally onboard vessels. Both companies tried to claim the employees were excluded from the Act by exclusion D, but both failed.

However, like an insurance policy, you only have to be excluded once. If, for example, you are a marina employee (see exclusion C) and not engaged in the construction, replacement, or expansion of the marina, then you are clearly excluded regardless of the size or nature of the vessel you work upon (exclusion F). In fact, this latter exclusion specifically states that it applies only to those employed to build, repair, or dismantle recreational vessels less than 65 feet in length.

Look out for some traditionally dry businesses, such as plumbers, carpet companies, and the like, that are suddenly seeing opportunities in the marine environment and moving into these exposures. These opportunities are often a result of the growth in the cruise-ship and the casino-boat industries.

In 1977, the U.S. Supreme Court supported these changes in *Northwest Marine Terminal Company v. Caputo*, 432 U.S. 249 (1977), extending "status" to employees not previously considered in the function of loading and unloading a vessel. In this case, Mr. Caputo was "stripping" (which means unloading the contents) a container on a dock away from where the vessel had been moored. In this 22-year-old decision, the courts, for the first time, recognized the container as "the modern equivalent of a ship's hold" and, as such, opened many employees involved in stripping, "stuffing" (loading), and repairing containers to Longshore exposure.

Situs

The Longshore Act, since the 1970s, has specified that it covered injuries occurring upon the "navigable waters of the United States and areas adjoining ....." Question: How far is adjoining?

Well, first, let's draw a few lines as to what the navigable waters of the United States are. There is no formal definition of navigable waters in the Act, so we have again to draw from its interpretation. Simplistically, navigable waters extend three nautical miles (about three and one-half land miles) from the shoreline. They also extended inland, to include rivers, intercoastal waterways, lakes, canals, and virtually every other body of water on which one could put a vessel. In fact, it is easier to outline what is *not* navigable: a land-locked lake or a river upstream of a dam where there is no lock or other mechanism to bypass the dam.

So, we come back to: "How far is adjoining?" I believe that in common language, it means "next to," but the courts have taken it to become more a test of the function of the site, rather than its physical proximity. In particular, in *Gilliam v. Bath Iron Works*

Corporation, 20 Ben. Rev. Bd. Serv. (MB) 759 (1988), the case law further expanded the definition of an adjoining area from the Longshore Act to include premises four and one-half miles from the main point of maritime *situs*. In this case, Bath Iron Works had a shop whose sole function was to support the main shipyard, four and one-half miles inland from the main yard. *On the basis that the function of this shop was inexorably linked to the shipyard, the shop was held to be an "adjoining" area*. The problem here is that distance is not a bright-line test. This is a grey line, miles wide, and constantly being revisited by the courts.

Furthermore, in the past, the application of the Longshore Act has stopped at the U.S. territorial water's boundary. It used to appear that someone painted a bright line at three nautical miles, so when the employee crossed the boundary, he could stand on deck and wave goodbye to his Longshore coverage. However, *Cove Tankers Corporation v. United Ship Repair Inc.*, 528 F. Supp. 101 (S.D.N.Y. 1981), where an employee was injured 200 miles offshore, and *Kollias v. D&G Marine Maintenance*, 22 Ben. Rev. Bd. Serv. 367 (MB) (1989), supported Longshore Act claimants' cases where the claimants ventured far beyond that three nautical-mile line. In fact, a more recent case has even taken this coverage into foreign waters, by holding an employee covered whilst in Jamaican territorial waters — although we hope that this will be appealed.

The first two cases, *Cove Tankers* and *Kollias*, have one thing in common: The vessels were sailing directly between U.S. ports and, thus, did not involve claimants who were sailing to foreign ports, such as ports in the Bahamas or the Caribbean. However, the case involving Jamaican territorial waters may prove to be a precedent to remove even those restrictions. Further, one thing that you can almost guarantee is that someone who cannot be justified as a Longshore worker will find another venue for their claim. In *McDermott International v. Wilander*, 498 U.S. 337 (1991), the court, referring to the Jones Act, stated:

> we now recognize that The Longshore Act is one of a pair of mutually exclusive statutes that distinguishes between land based and sea based maritime employees ....

Subsequent court decisions have left some overlap, but few that escape any coverage.

Figure 1

Definition of Employee From the Longshore Act

(3) Any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, any harbor-worker including a shop repairman, shipbuilder, and shipbreaker, but such term does not include —

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4) [to which coverage applies], and (iii) are not engaged in work normally performed by employees of that employer under this act;

(E) aquacultural workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in Clauses (A) through (F) are subject to coverage under a State workers' compensation law.

Penalties

The penalties for not complying with the Longshore Act are extremely severe. Section 938 (a) states that:

> Any employer required to secure the payment of compensation under this Act who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severely liable for such fine or imprisonment as herein provided for the failure of such corporations to secure the payment of compensation; and *such president, secretary, and treasurer shall be severely personally liable*, jointly with such corporations, *for any compensation or other benefit* that may accrue under the said Act in respect to any injury which may occur to any employee of such corporations while it shall so fail to secure the payment of compensation as required by Section 32 of this Act. (Emphasis added.)

Most MEL cases settle for three to five times the amount of their workers compensation counterparts.

If you really want to guarantee the inclusion of this coverage in a workers compensation program, go to the president, secretary, or treasurer of the company, and explain that if the company does not buy this coverage, he or she will have the opportunity not only for personal liability for the claim, but also to be the houseguest of the federal government!

Remember, if there is a valid Longshore Act claim and the insurer has not endorsed the policy to provide longshore coverage, there is *no money* available to pay the claim. It is not just the difference between the Longshore Act and state act (which can be substantial in its own right), but the *whole* claim — and state courts have held that insurers do not need to pay even the first dollar of a Longshore Act claim if the insurer has not added the longshore endorsement.

The good news is there are new markets entering this field every day, and it is relatively straightforward to obtain Longshore Act coverage. However, few insurers are prepared to add it on an "if-any" basis, and virtually all insurers require detailed records to be kept, segregating the Longshore Act element of the insured's payroll.

Maritime Remedies

In addition to the compensation-based remedy of Longshore to qualifying employees, an employer has a tort-based liability to vessel-based employees. In the past, this has been more than adequately covered by the traditional protection and indemnity (P&I) policy carried by vessel owners. But the increase in activity on nonowned vessels, plus the frequent use of "occasional" or "incidental" crew who are land-based one day and vessel-based the next, has given rise to a whole new area of exposure.

For the traditional commercial vessel owner, the typical P&I policy covers the crew. But beware, whilst all the commercial P&I forms in common use today automatically include crew, endorsements are frequently inserted in the back of the policy, either removing crew altogether, or limiting it only to specific, named positions or persons.

For a nonowned vessel or those incidental "crew," the most appropriate coverage is provided by a maritime employers liability (MEL) policy. Many insureds only discover the importance of this coverage when a claim occurs, at which time it is often belatedly ascertained that this needed coverage is lacking.

Covered "Crew" Expanding

The type of work covered varies. The most obvious is the employee of a marine contractor standing on a barge away from the dock while painting or building a bridge ... or the shipyard or repair operation that sends its personnel on a vessel while it is under navigation ... or a diver inspecting the underwater structure of a bridge.

Less obvious is the carpenter, plumber, audio technician, actor, dancer, florist, chef, croupier, or any other person whose employment takes them aboard vessels (most commonly cruise ships or casino boats) while they are "in navigation."

Figure 2

Exposures for Marine Employers

State Act Workers Compensation

- Exclusively office clerical, security, data processing, and others excluded from Longshore.
- Compensation covered by standard workers compensation policy.

U.S. Longshore & Harbor Workers' Compensation Act

- Land-based workers on navigable waters or in areas adjoining navigable waters of the United States.
- Specific exclusions.
- Compensation covered by endorsement to a workers compensation policy.

Maritime Exposure

- "Jones Act" and other maritime liabilities.
- Employees onboard vessels worldwide.
- Liability covered by protection and indemnity policy or maritime employers liability policy.

Furthermore, while the Longshore Act contains some limitations as to the nature of employment and to the sizes and types of vessels to which it relates, the MEL exposures (Jones Act, Death on the High Seas Act, etc.) do not contain such limitations. Courts have ruled that even a simple work float may be determined a vessel, for purposes of this coverage.

A real case example: A marine contractor's employee jumped down from the dock he was building onto a work float and injured his back. Although the injury was fairly minor, his attorney claimed under the concept of maritime employers liability. The state act workers compensation insurer did not provide the MEL endorsement and, therefore, declined to pay or even defend. This case is now in litigation between the insured and his agent, who allegedly had failed to offer the MEL coverage.

Work with someone who understands both of these exposures.

Why would this case take the MEL route rather than workers compensation, under which there was collectable coverage? The motivation may have had something to do with the fact that most MEL cases settle for three to five times the amount of their workers compensation counterparts.

MEL Coverage Parameters

MEL can be added by certain insurers to their workers compensation and longshore policies; however, both dollar and geographical limitations must be carefully considered. Do not be fooled into thinking that the same employers liability limit as shown on the declarations page of the workers compensation policy will apply to maritime claims. The basic MEL limit is $25,000, and many insurers are unwilling or unable to increase this limit. If the insurer will provide increased limits, frequently the filed factor costs are prohibitively expensive. Insofar as geographical limits are concerned, most workers compensation maritime endorsements exclude coverage outside the territorial limits of the United States and Canada, clearly inadequate for many clients working on cruise ships. Thus, it behooves any prudent agent involved in these areas to seek out one of the few monoline MEL markets in order to offer the coverage, even if the only benefit is the agent's own protection against any errors and omissions claim. Unlike its dry counterpart, employers liability, maritime employers liability is a working policy and provides valid and essential protection to those insureds who may venture on the water (even on an "if-any" basis).

In seeking markets, look for minimum premiums starting around $5,000. It will also be necessary to determine whether your market will write MEL as primary coverage or only as excess over the $25,000 provided by some workers compensation insurer. If primary, you should expect a deductible or self-insured retention (SIR) of $5,000, $10,000, or even $25,000.

Conclusion

Every marine employer (even if the exposure is one employee for one hour a year) must carry:

1. state workers compensation act coverage, even if the only purpose is to protect those Longshore Act exclusions;
2. Longshore Act coverage, unless the employer has one of the few specifically excluded maritime occupations (see Figure 1 — but even then, make sure it fits *exactly* into the exclusions); and
3. maritime employers liability (MEL) coverage or protection and indemnity (P&I) coverage, including crew if the employees *ever* venture onto vessels "in navigation," regardless of who owns them.

And probably the most important factor of all: Work with someone who understands *both* of these exposures. It is not uncommon to find people who understand the Longshore Act, or for that matter Maritime Laws, but the combination of knowledge of both is rare. It is that simple lack of understanding, when working with an insurer or agent who may have even less understanding, that keeps those of us who do expert-witness work so busy.

These lines of coverage present some of the most difficult to master in the insurance industry, but at the same time, they therefore present some of the best opportunities to properly structure coverage with the right partner.

May your world be full of opportunities.