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The Longshore and Harbor Worker's Compensation Act and Crossover Issues with California State Worker's Compensation

Longshore and Harbor Workers have both a Longshore and a state worker's compensation case. This is called "dual jurisdiction" and both claims can be filed concurrently. Both can be pursued simultaneously, and the case can be flipped from venue to venue as needed to maximize benefits to the injured worker. However, practitioners must be mindful of credit issues as between the two cases, which must be carefully coordinated.

There are many intersections between the Longshore and Harbor Worker's Compensation Act and California state worker's compensation programs. In many instances, however, Longshore benefits far exceed those under the state Act. It is important to spot crossover cases and refer them to experienced counsel, as failure to do so may do a disservice to your client and rob them of significant benefits, not to mention the potential legal malpractice issues which could arise.

Just to give you an idea of some of the differences, there are no MPNs in Longshore. Claimants get a Free Choice Doctor. There are no 104-week caps on TD, and the Longshore TD rates are much higher than the state rates. Injuries are compensated differently for permanent disability under the Longshore Act than the state Act and are based on whether they are "scheduled" or "unscheduled" body parts. Permanent disability compensation can often far exceed the value of a state comp PD recovery. In those cases where the Longshore Act does not provide PD compensation, the experienced practitioner can flip the case to the state side to settle PD. Longshore uses the Federal Rules of Civil Procedure, and discovery is a much more formal process utilizing Interrogatories, Requests for Production and Requests for Admission. Discovery does not formally open until a case is elevated for trial, and the judge must allow for the issuance of subpoenas. Doctors often testify live at trial in Longshore, whereas they always testify through their reports under the state Act. Jurisdiction in a Longshore case only occurs if the worker meets a "status" and "situs" test, whereas in state comp, the injury must only arise out of the employment and in the course of employment.

What is the Longshore Act?

The Longshore Act is a federal workers' compensation program which provides indemnity and medical treatment to maritime employees who do not perform the duties of seamen. The U.S. Department of Labor's Office of Workers' Compensation Plans (OWCP) oversees the administration of benefits.

What is covered by the Longshore Act?

§ 903 of the Act extends coverage for injuries “occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).”

Who is covered by the Longshore Act?

Status v. Situs:

A maritime worker must have status and situs to qualify for benefits. Status and situs requirements are established in Sections 2(3) and 3(a) of the Act. Section 2(3) defines what types of tasks qualify a maritime worker for coverage (status), while Section 3(a) defines where the tasks are performed (situs).

Status Test: (Typical Longshore occupations)

- Longshoremen
- Waterfront crane operators
- Longshore checkers
- Stevedores
- Terminal workers
- Shipyard employees
- Shipbuilders
- Marine construction workers
- Vessel repair workers
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Situs Test:

When the Longshore Act was enacted in 1927, it only applied to maritime employees who were injured while working upon the navigable waters of the United States. This limited claims to longshoremen who were aboard a vessel when injured. This forced injured workers to settle for smaller state-issued workers' compensation payouts if they had been hurt on land. Thus, Congress amended the Act to cover non-seaman marine workers injured on the water and any of the following:

- Piers
- Wharves
- Drydocks
- Terminals
- Building ways

- Marine railways
- Oil rigs, natural gas drilling platforms, and other offshore oil drilling structures

The Act also covers employees who are injured while working in any adjoining area normally used to load, unload, repair, or build a vessel. This includes repair facilities like floating dry docks, which travel on water but are normally moored on or close to land. Non-seaman employees assigned to floating drydocks qualify for benefits because the structures fall into the definition of “adjoining area” customarily used by employees to repair vessels.

What are the extensions of the Longshore Act and who is covered?

Defense Base Act:

The Defense Base Act covers civilian employees working outside the United States on U.S. military bases or under a contract with the U.S. government for public works or national defense.

Non-Appropriated Fund Instrumentalities Act:

This extension covers civilian employees of military exchanges, compensated from non-appropriated funds, performing services for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces. (For example, this is someone who works on a military base at a store selling retail goods to military members and their families.)

Outer Continental Shelf Lands Act:

This extension covers employees working on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline natural resources, or involving rights to the natural resources of the subsoil and embed of the outer Continental Shelf.

Excluded Employees:

Jones Act: The Longshore Act excludes crew members and masters of vessels.

Other marine industry workers fail the status test if they are:

- Clerical workers, receptionists, secretaries, security guards, data processors and other employees who perform general office-related tasks
- Maritime workers whose injuries occurred while they were intoxicated
- Maritime workers who intend to deliberately hurt themselves or others
- Officers and other employees of the U.S. government, as well as officers and employees of foreign governments

In addition, individuals who work in business establishments located near harbors, ports, shipyards, and other maritime facilities and are covered by their state's workers' compensation plan don't qualify for LHWCA benefits. These workers include:

- Employees of camps, restaurants, clubs, museums, retail stores, or recreational operations
- Marina employees who do not participate in constructing, replacing, or expanding such marina.
- Temporary workers in a maritime company
- Employees of transporters, suppliers, or vendors
- Aquaculture workers
- Workers hired to build, repair, or dismantle recreational vessels less than 65 feet in length or have displacements less than 18 tons net
- Workers on small vessels exempted by a certificate from the Secretary of Labor under certain circumstances

What is dual/concurrent jurisdiction and how does it work?

A worker who qualifies for federal Longshore benefits also qualifies for California state worker's compensation benefits. The two claims can be filed concurrently and pursued on parallel tracks until it is determined which venue is more favorable to the injured worker. An election of remedy must then be made.

The extensions of the Act do not have dual/concurrent jurisdiction. The benefits of filing concurrent claims include the expeditiousness of the state over the federal system in dispute resolution. For example, it can take years for a formal resolution after trial in a Longshore case, so it is a poor method for resolution of interim benefit issues. If the case is filed concurrently, it can be flipped to the state side, and the Expedited Hearing or MSC and regular trial process can be used to achieve a more timely decision.

What are the differences between state and federal worker's compensation cases?

Longshore benefits are superior to California state worker's compensation benefits in several respects.

First, there is no 104 week cap on temporary disability.

Second, the employee may select a Free Choice Doctor and does not have to treat in an employer controlled Medical Provider Network.

Third, there is no Utilization Review or Independent Medical Review. The claims examiner approves or denies treatment.

Fourth, the doctor may use any logical and supportable rationale for determining permanent disability and is not limited to a particular edition of the AMA Guides.

Fifth, attorney's fees are based on hourly billing, not contingency. The employee must pay the fees unless a benefit is controverted (denied). If a benefit is controverted and legal representation is needed to obtain the benefit, the employee can seek payment of attorney's fees by the insurance carrier.

Sixth, no special forms like the Physician's Report-2 (PR-2) or Request for Authorization (RFA) forms are required in a Longshore case.

Seventh, there are no Qualified Medical Examiner panels in Longshore. In Longshore, each side can obtain their own Independent Medical Examiner at their own expense to prove their case. However, it is usually best to select a Free Choice Treating Doctor who will be a good witness for the injured worker, because the treating doctor is typically given more weight than the Independent Medical Examiner, all things being equal.

Eighth, doctors typically testify live or through deposition testimony in Longshore cases, whereas in state cases, doctors' reports come into evidence in lieu of live or deposition testimony.

Permanent Disability for Scheduled v. Unscheduled body parts:

In Longshore, there are scheduled and unscheduled body parts. Scheduled body parts are arms and legs, excluding shoulders and hips. Unscheduled injuries cover everything else.

Scheduled injuries are paid pursuant to the Act regardless of whether there is permanent wage loss.

Unscheduled injuries receive no permanent disability compensation unless the employee proves permanent wage loss due to the injury. If permanent wage loss is found, it is payable for life at the temporary disability rate if the employee is permanently totally disabled, or at the amount of the actual wage loss if there is less than a complete loss of earning capacity, unless a modification order is later obtained.

The "Schedule" is located at Section 8(c) of the Act. If a body part is identified in the schedule, then permanent disability is based on the number of weeks listed in the schedule based on the employee's maximum temporary disability rate at the time of injury. The temporary disability rate is determined the same way it is on the state side, which is 2/3 of the Average Weekly Wage, subject to the rate cap for the date of injury.

Scheduled Injury Benefits:

(1) Arm lost, three hundred- and twelve-weeks' compensation.

- (2) Leg lost, two hundred- and eighty-eight-weeks' compensation.
- (3) Hand lost, two hundred- and forty-four-weeks' compensation.
- (4) Foot lost, two hundred- and five-weeks' compensation.
- (5) Eye lost, one hundred- and sixty-weeks' compensation.
- (6) Thumb lost, seventy-five weeks' compensation.
- (7) First finger lost, forty-six weeks' compensation.
- (8) Great toe lost, thirty-eight weeks' compensation.
- (9) Second finger lost, thirty weeks' compensation.
- (10) Third finger lost, twenty-five weeks' compensation.
- (11) Toe other than great toe lost, sixteen weeks' compensation.
- (12) Fourth finger lost, fifteen weeks' compensation.
- (13) Loss of hearing:
 - (A) Compensation for loss of hearing in one ear, fifty-two weeks.
 - (B) Compensation for loss of hearing in both ears, two-hundred weeks.
 - (C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.
 - (D) The time for filing a notice of injury, under [section 912](#) of this title, or a claim for compensation, under [section 913](#) of this title, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.
 - (E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.
- (14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.
- (15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.
- (16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.
- (17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.
- (18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.
- (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.
- (20) Disfigurement: Proper and equitable compensation not to exceed \$7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment

Lopez Credits:

Sea-Land Service Inc. v. WCAB (Lopez), 14 Cal.4th 76; 58 Cal.Rptr.2d 190, 925 P.2d 1309 (1996) stands for the proposition that California state worker's compensation carriers have a right to credit for ALL Longshore benefits paid.

This can create sticky situations if the attorney has flipped the case between jurisdictions to expeditiously obtain benefits. Taking a case to trial on the federal side can take years but utilizing a state side Expedited Hearing can start the flow of benefits to an employee within months, so it is often useful to utilize both forums. However, the practitioner must be careful to recognize credit issues that may come home to roost later.

Sometimes Longshore carriers will waive some Lopez credits when settling on the state side to get the deal done, but the practitioner cannot count on this. One common situation where this arises is when TD is paid for over 104 weeks on the federal side for an unscheduled injury where the employee returns to work without wage loss and there is no permanent disability entitlement on the federal case. The practitioner then flips the case to the state side to settle the permanent disability based on the QME, only to find that there is a huge overpayment of temporary disability beyond the 104 weeks which would have been due on the state case, for which the state carrier is entitled to a credit against the permanent disability settlement.

Forms:

Of course, the forms differ on both the state and federal side. However, a full discussion of all the different types of Longshore forms is beyond the scope of this article.

How does federal discovery differ from state discovery?

The attorney in a California state worker's compensation case can begin discovery immediately. However, in a Longshore case, formal discovery cannot commence until the case is "elevated". This means that there is a dispute which has typically gone before a district director (claims examiner) at the Office of Workers Compensation Programs at the Department of Labor for an Informal conference and non-binding recommendations have issued. If either side disputes the recommendations, the matter is then "elevated" for hearing before a federal administrative law judge.

Once elevated, a discovery schedule is set forth which then allows the parties to take depositions of witnesses and experts, propound Interrogatories, Requests for Admissions or Requests for Production, etc. Each side pays their own experts and discovery costs, as opposed to the state carrier bearing the burden of discovery costs. The Federal Rules of Civil Procedure apply in Longshore, whereas the rules are much looser in state worker's comp and based generally on the California Code of Civil Procedure.

How do I spot crossover issues with personal injury law, the Jones Act, etc?

Third party cases are common in worker's compensation injury cases. In state worker's compensation, the employee cannot sue the employer for negligence for causing a work injury but can sue a negligent third party. The same is true in Longshore cases. The Jones Act comes into play when the employee is actually a seaman. It is important to inquire into the duties of the

employee to see if they can be considered part of the crew of a vessel. If so, there may be no Longshore or state worker's compensation jurisdiction and the claim should be referred to a personal injury attorney who handles Jones Act cases, although it is not uncommon to see state or federal work comp benefits being paid to a Jones Act Seaman due to failure to spot the issue. The recovery is often much larger under the Jones Act than it would have been under state or federal worker's compensation law, with jury verdicts in the millions of dollars.

A case recently handled in our office involved a safety officer who sustained a work-related injury. He filed a state worker's compensation claim and benefits were administered by the state carrier. However, when we got the case, we inquired further and learned that he was a police boat captain. This new fact should set off alarm bells when you hear it, because now you've identified a Jones Act case. We immediately reached out to our sister firm with whom we collaborate on PI cases and they filed the Jones Act claim, obtaining a multi-million dollar recovery for the injured worker. Although our state comp case was wiped out, the referral fee on the Jones Act case was quite substantial!

Conclusion:

So, the moral of the story is to always be on the lookout for crossover cases and make appropriate referrals to maximize benefits to your client, avoid malpractice, and obtain a referral fee to boot!