

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

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INTRODUCTION

Longshore and harbor workers who are injured at work can pursue both a Longshore and Harbor Workers' Compensation Act (LHWCA) case and a state workers' compensation case. This is called *dual jurisdiction*. The two claims can be filed concurrently and pursued simultaneously, and the case can be transferred between venues as needed to maximize benefits to the injured worker. However, practitioners must carefully coordinate credit issues between the two cases.

The LHWCA and California state workers' compensation programs intersect at a number of points. Often, however, LHWCA benefits far exceed those under the California Workers' Compensation Act. It is important for any attorney whose practice is limited to workers' compensation at the WCAB to identify crossover cases and refer them to experienced counsel; failure to do so may be a disservice to your client, deprive them of significant benefits and raise potential legal malpractice issues.

The two systems differ from each other in several ways. For example, unlike the California workers' compensation system, the LHWCA provides no medical provider networks. Instead, claimants can select the physician of their choice. The LHWCA has no 104-week limitation on temporary disability, and its temporary disability rates are much higher than the state workers' compensation rates. Unlike at the WCAB, where all work injuries are rated using the Permanent Disability Rating Schedule, injuries under the LHWCA are compensated based on whether they are "scheduled" or "unscheduled" body

parts. In addition, permanent disability compensation often far exceeds the value of a state comp permanent disability recovery for a similar injury. In those cases where the LHWCA does not provide permanent disability compensation, a practitioner can transfer the case to the state Workers' Compensation Appeals Board to pursue permanent disability benefits.

LHWCA cases are litigated under the Federal Rules of Civil Procedure; discovery is a much more formal process than in state workers' compensation. Under the LHWCA, the attorneys prepare 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 LHWCA hearings, but in workers' compensation cases they always testify through their reports and/or depositions. Jurisdiction in an LHWCA case occurs only if the worker meets a "status" test and "situs" test, as described later in this article; in state workers' compensation, the injury must have arisen out of the employment and in the course of employment.



WHAT IS THE LWHCA?

The Longshore and Harbor Workers' Compensation Act is a federal workers' compensation program that 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 oversees the administration of benefits.

WHAT DOES THE LHWCA COVER?

Section 903 of the LHWCA 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 DOES THE LONGSHORE ACT COVER?

Status v. Situs

A maritime worker must have status and situs to qualify for benefits. Sections 2(3) and 3(a) of the LHWCA establish status and situs requirements. Section 2(3) defines *status*, or the types of tasks that qualify a maritime worker for coverage, while section 3(a) defines *situs*, or where the tasks are performed.

Status Test Under the status test, these are typical longshore occupations:

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

Situs Test When the LHWCA was enacted in 1927, it applied only to maritime employees who were injured while working on the navigable waters of the United States. This limited claims to longshoremen who were

aboard a vessel when injured. In turn, the limit forced injured workers who had been hurt on land to settle for smaller, state-issued workers' compensation payouts. Thus, Congress amended the Act to include non-seaman marine workers injured on the water and on any of the following:

- Piers
- Wharves
- Dry docks
- Terminals
- Building ways
- Marine railways
- Oil rigs, natural gas drilling platforms and other offshore oil drilling structures

The LHWCA also covers employees who are injured while working in any adjoining area normally used to load, unload, repair or build a vessel. This category 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 dry docks qualify for benefits because the structures fall under the definition of *adjoining area*, which employees customarily use to repair vessels.

What Are the Extensions of the LHWCA and Who Is Covered?

Congress expanded the LHWCA by passing extensions to it.

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.

Nonappropriated Fund Instrumentalities Act

Under the Nonappropriated Fund Instrumentalities Act, coverage extends to 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 Act would apply to an employee who works at a store on a military base, selling retail goods to military members and their families.

Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act is an extension of the LHWCA that 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 seabed of the outer Continental Shelf....

EXCLUDED EMPLOYEES

The LHWCA excludes crew members and masters of vessels. Other marine industry workers fail the status test if they fall into one of these categories:

- 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 do not 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 having 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 LHWCA benefits also qualifies for California workers' compensation benefits. The two claims have *dual/concurrent jurisdiction*, meaning the worker may file them concurrently and pursue them on parallel tracks until counsel determines which venue is more favorable to the injured worker. Counsel must then elect a remedy.

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 LHWCA case; this makes it a poor method for resolution of interim benefit issues. If the cases are filed concurrently, counsel can transfer the federal case to the state side, and using the expedited hearing or MSC and regular trial process can achieve a quicker resolution.

WHAT ARE THE DIFFERENCES BETWEEN STATE AND FEDERAL WORKERS' COMPENSATION CASES?

LHWCA benefits differ from California state worker's compensation benefits in a number of respects:

- There is no 104-week limit on temporary disability.
- The employee may select a doctor as described earlier in this article instead of being treated in an employer-controlled medical provider network.
- There is no Utilization Review or Independent Medical Review; the claims examiner approves or denies treatment.
- The doctor may use any logical and supportable rationale for determining permanent disability instead of being limited to the guidelines found in a particular edition of the AMA Guides. Attorney's fees are based on hourly billing, not contingency. The employee must pay the fees unless a benefit is denied (controverted). 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.

- No special forms, such as the state workers' compensation system's Physician's Report-2 and Request for Authorization, are required in an LHWCA case.
- There are no Qualified Medical Examiner panels in the LHWCA. Instead, each side can obtain, at its own expense, an Independent Medical Examiner to prove their case. However, it is usually best to select a treating doctor who will be a good witness for the injured worker; remember that the treating doctor's opinion typically has more weight than that of the Independent Medical Examiner.
- Doctors typically testify live or through deposition testimony in LHWCA cases; in state cases, doctors' written reports come into evidence in lieu of live testimony.

PERMANENT DISABILITY FOR SCHEDULED AND UNSCHEDULED BODY PARTS

The LHWCA includes claims for scheduled and unscheduled body parts. *Scheduled body parts* are arms and legs, excluding shoulders and hips. *Unscheduled body parts* are everything else.

Injuries to scheduled body parts are paid pursuant to the LHWCA, regardless of whether permanent wage loss results. Injuries to unscheduled body parts 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.



Section 8(c) of the LHWCA outlines the "Schedule." If the schedule identifies a body part, then permanent disability is calculated based on the number of weeks listed in the schedule and the employee's maximum temporary disability rate at the time of injury. The temporary disability rate is determined the same way as in the state workers' compensation: two-thirds of the Average Weekly Wage, subject to the rate cap, for the date of injury.

Scheduled Injury Benefits

Under section 908(c) of the LHWCA, these are the 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

The California Supreme Court holding in *Sea-Land Service Inc. v. WCAB (Lopez)* (1996) 14 Cal.4th 76 stands for the proposition that California state workers' compensation carriers have a right to credit for *all* LHWCA benefits paid. This can create sticky situations if the attorney has transferred the case between jurisdictions to obtain benefits expeditiously. Taking a case to trial in the federal system can take years, but using a state board expedited hearing can start the provision of benefits to an employee within months, so it is often helpful to use both forums. However, the practitioner must be careful to recognize credit issues that may arise later.

When settling the state workers' compensation case, LHWCA carriers sometimes waive some of the credits they are entitled to under *Lopez* in order to get the settlement completed, but the practitioner cannot rely on this as a certainty. This issue commonly arises when temporary disability is paid for over 104 weeks in the federal claim for an unscheduled injury where the employee returns to work without wage loss and there is no permanent disability entitlement in the federal case. The practitioner then transfers the case to the state workers' compensation board to settle the permanent disability based on the QME, only to discover there is a huge overpayment of temporary disability, beyond the 104 weeks that would have been due in the state case, and the state insurance carrier is entitled to a credit against the permanent disability benefits otherwise owed.

Note: Of course, the forms insurance carriers and injured workers complete on the state side differ from the federal forms. However, a full discussion of the different types of LHWCA forms is beyond the scope of this article.

HOW DOES FEDERAL DISCOVERY DIFFER FROM STATE DISCOVERY?

The attorney in a California state workers' compensation case can begin discovery immediately after filing the Application for Adjudication with the Workers' Compensation Appeals Board. However, in an LHWCA case, formal discovery cannot commence until the case is *elevated*. This usually means that a dispute has gone before a district director (claims examiner) at the Office of Workers' Compensation Programs at the Department of Labor for an informal conference and nonbinding recommendations have issued. If either side disputes the recommendations, the matter is elevated for hearing before a federal administrative law judge.

Once the matter is elevated, a discovery schedule is set forth that allows the parties to take depositions of witnesses and experts and propound Interrogatories, requests for admissions, requests for production, and so on. Each side pays its 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 the LHWCA; discovery rules are much more relaxed in state workers' compensation and based generally on the California Code of Civil Procedure.

HOW TO SPOT CROSSOVER ISSUES WITH PERSONAL INJURY LAW, THE JONES ACT, ETC.

Third party cases are common in workers' compensation injury cases. In state workers' compensation, the employee cannot sue the employer for negligence for causing a work injury but can sue a negligent third party. This is also true in LHWCA cases. The Jones Act comes into play when the employee is a seaman. It is important to inquire into the duties of the employee to see whether they can be

considered part of the crew of a vessel. If so, there may be no LHWCA or workers' 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 workers' compensation benefits being paid to a Jones Act seaman due to failure by the insurance carrier to identify the issue).

A case this author's office handled recently involved a safety officer who sustained a work-related injury. He filed a state workers' compensation claim, and the state carrier administered benefits. However, when the case came into the office, inquiries revealed that he was a police boat captain. This employment designation was crucial; we were then able to determine that his claim would fall under the Jones Act. We immediately reached out to our sister firm, with whom we collaborate on personal injury cases. They filed the Jones Act claim, obtaining a multi-million-dollar recovery for the injured worker. Although the client's state workers' compensation case was eliminated, the worker received a substantial recovery in his Jones Act case.

CONCLUSION

The moral of the story is to always be on the lookout for cases with potential LHWCA or Jones Act jurisdiction and make appropriate referrals to maximize benefits for your client and avoid legal malpractice.



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