

# Navigating LHWCA and State Workers' Compensation Claims

*Practice Pointers and Recent Developments*

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This program will address:

- (1) The differences in practice between handling Longshore and Harbor Workers' Compensation Act ("LHWCA") / Defense Base Act ("DBA") claims, and state workers' compensation claims; and
- (2) Recent developments in the law and significant case updates in LHWCA/DBA and state workers' compensation practice.

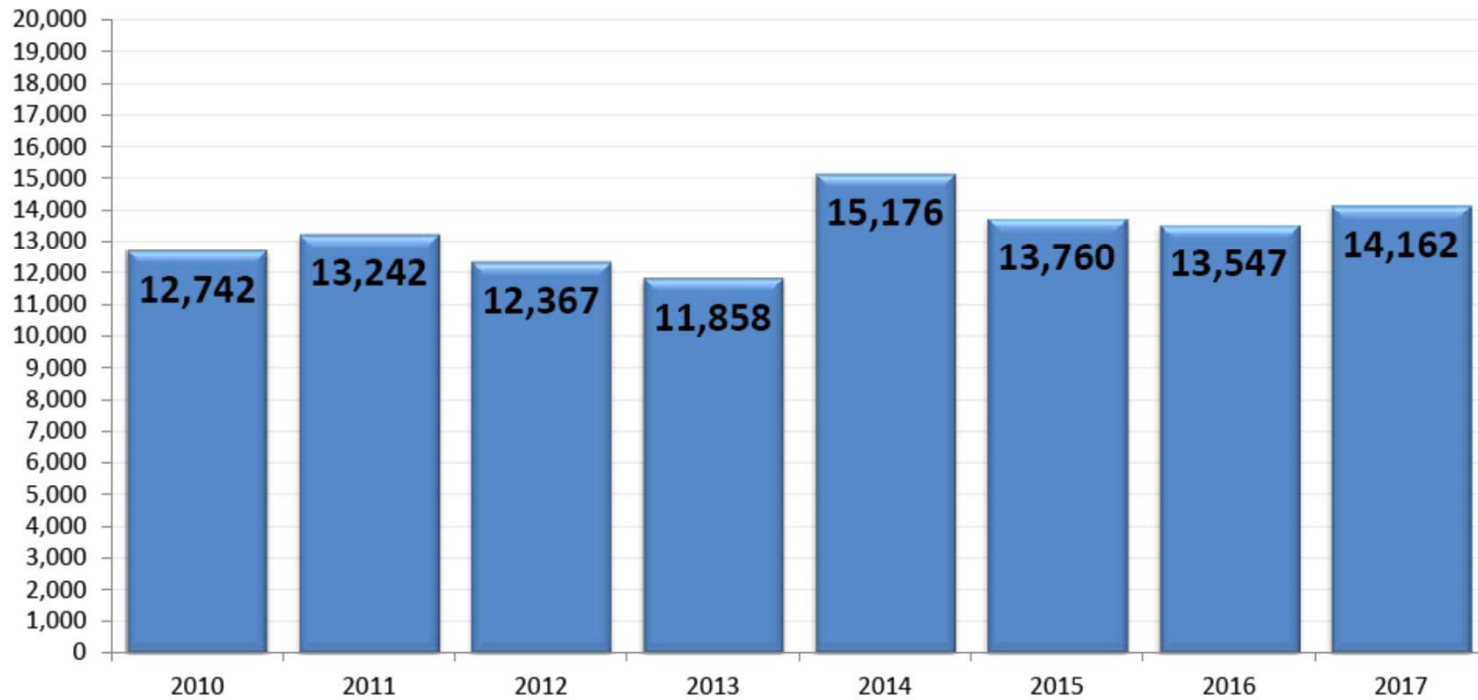


# Claims Trends

## New Claims Reported

FY 2010 – FY 2017

### Longshore Injuries Reported



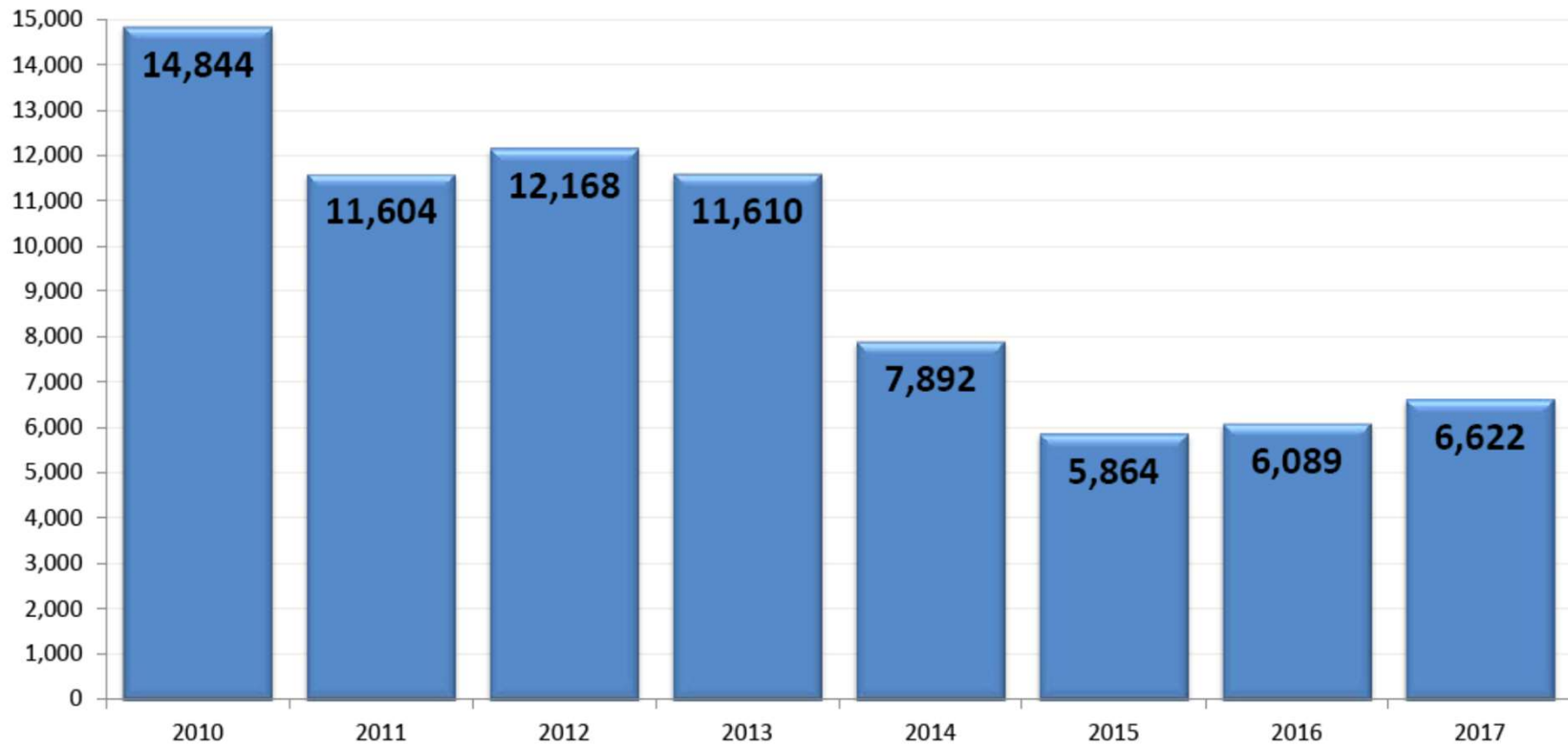


# Claims Trends

## New Claims Reported

FY 2010 – FY 2017

### DBA Injuries Reported



# What is the Longshore Act?

- Federal Workers Compensation Act
- Enacted 1927
- Initially covered marine workers injured on navigable waterways of U.S. that were excluded under state W.C.
- Amendments have extended Longshore Act landward for “adjacent” work sites. Created jurisdictional issues.
- Generous indemnity and medical benefits in favor of the Claimant

# Who Administers the LHWCA and DBA?

- U.S. Department of Labor oversees day-to day administration of the Act
- Although Federal Act, it is insured through private insurers, claims are handled by adjusters and third party administrators.



# LHWCA and DBA: Pre-Trial Proceedings

- Office of Workers Compensation Programs (OWCP)
- Non-Judicial/Administrative Level of the U.S. Department of Labor
- District Director:
  - **May enter orders to Approve settlements**, no adjudicatory or discovery power
  - May issue fines for violations of notice requirements, form filing and non compliance with act
  - Refers file to Administrative Law Judge if case cannot be worked out and LS-18 is filed
- Claims Examiners:
  - Assist District Director to ensure claims are properly paid by Employers and carriers
  - Assist in informal dispute resolution, informal conference, issue correspondence
  - **Claims examiners cannot issue orders or approve settlements**

# LHWCA and DBA: Trial & Appellate Courts

## Judicial/Hearing/Appellate Levels

- **Supreme Court of the United States**
  - Highest Federal Appeals Court
- **Circuit Court of Appeals**
  - Primary Federal Appeals Court
- **Benefits Review Board**
  - Administrative Appeals Court, U.S. Department of Labor
- **Administrative Law Judge (Office of Admin. Law Judges (OALJ))**
  - Trial Level, U.S. Department of Labor → **Bench Trial - No Jury**
  - ALJ's may adjudicate claims, award benefits, approve settlements
  - **Trial to be held within 75 miles of where claimant lives - not in County where accident occurred.**



# Antiquated Defenses/Presumptions

- Claimant can raise presumption of injury causation under Section 20(a) of LHWCA, rebuttable by substantial evidence to contrary
- Presumption that accident not caused solely by claimant's intoxication
- Presumption that timely notice of injury given
- No absolute bar for fraud or misrepresentation
- Attorney's Fees awards of upwards of \$450.00/hour

## **Jurisdiction Under the LHWCA: SITUS/ & STATUS**

The concept of jurisdiction under the LHWCA:

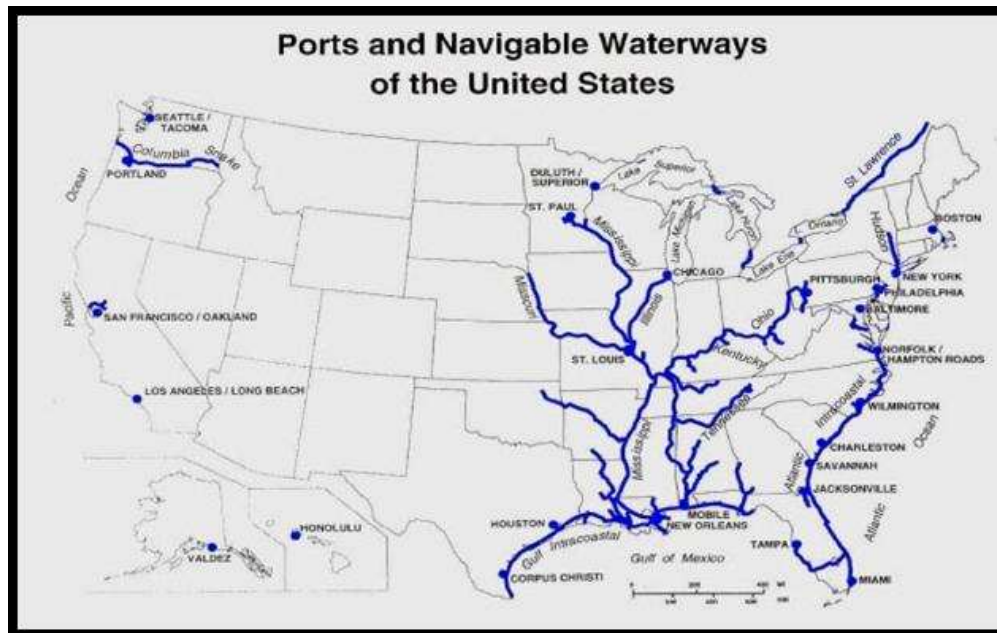
Courts Requires both “Situs” and “Status” to establish Longshore jurisdiction.

## **Jurisdiction Under the DBA: SITUS/ & STATUS**

The DBA provides workers' compensation protection to civilian employees working outside the U.S. on (1) U.S. military bases or (2) under a contract with the U.S. government for public works or for national defense.

# SITUS

- Is a *geographical* consideration - refers to where accident happens
- Act covers injuries that occur on or adjacent to navigable waterways of the United States or area customarily used by the employer for loading or unloading of vessels.
- May include navigable rivers/lakes, port facility, shipyards, drydocks, etc.



# SITUS

What is a navigable Waterway?

What is an adjacent area?

Pier, wharf, drydock

Does Longshore apply out of country?

How do we investigate Situs?

Google Earth, investigator, field adjuster



# STATUS

- Is an *occupational* requirement
- Refers to the type of job duties the employee is engaged in
- Examples: ship repair and manufacture, marine construction, stevedoring, dock building, fork lift operator in port, drivers in port



# 1984 AMENDMENTS: Exclusions

- (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); and
  - (iii) are not engaged in work normally performed by employees of that employer under the LHWCA

# 1984 AMENDMENTS: Exclusions

- (E) Aquaculture workers
- (F) Recreational vessel manufactured up to 65 feet in length or repair of recreational vessel any size as of February 17, 2009
- (G) A master or member of a crew of any vessel
- (H) Any person engaged by a master to load or unload or repair any small vessel under (18) eighteen tons net

*Individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law*

*Individuals described in clauses (G) and (H) are subject to coverage under the Jones Act*

# Jones Act Crewmembers Excluded

## LHWCA and Jones Act mutually exclusive

- LHWCA – longshoreman, harbor workers, not “master or member of a crew of any vessel” 33 U.S.C. § 902(g)
- Jones Act – “Seaman” 44 U.S.C § 30104
- Covers crewmembers on vessels
- At least 30% of time assigned to vessel or fleet of vessels of common ownership
- Provides Maintenance/Cure/Possible Damages
- Not workers’ compensation, but Employer Liability Act



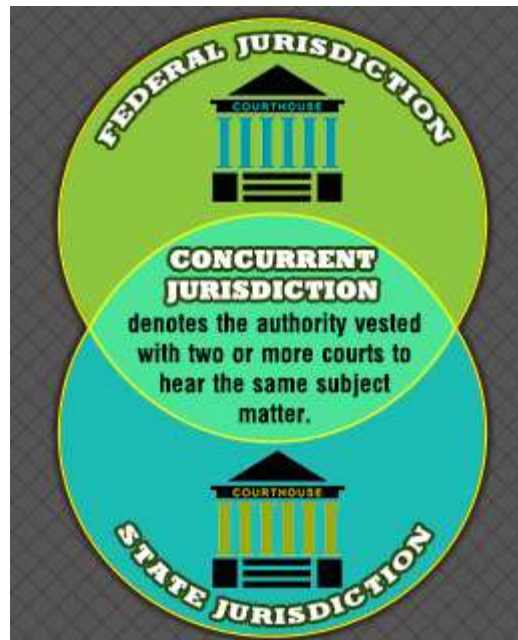


# The “Twilight Zone”

- **Concurrent jurisdiction** may exist between longshore and state compensation benefits
- If no concurrent jurisdiction, there may still be factual or legal issues that put correct jurisdiction at issue
- Claimant can make a non-fatal choice between jurisdictions: *Sun Ship v. Pennsylvania*, 447 U.S. 715 (1980)
- Most states allow a credit (e.g., Georgia allows for credit: O.C.G.A. 34-9-242)
- LHWCA has credit provision: 33 U.S.C. 903(e)

# Concurrent States

- ✓ Some accidents occur in areas that are maritime yet local, such as in a port facility or on a dock used for loading and unloading vessels.
- ✓ Some states decided to maintain concurrent state W/C with LHWCA jurisdiction in these situations, creating various legal challenges and additional exposure to litigation cost and expense.



# Some Concurrent States

Alabama	<b>Massachusetts</b>
Alaska*	Michigan
Arkansas	Minnesota
<b>California</b>	Nebraska
<b>Connecticut</b>	<b>New York</b>
<b>Delaware</b>	North Carolina
Georgia	<b>Pennsylvania</b>
Iowa	Rhode Island
Kentucky	South Carolina
Maine	Tennessee

\*- *EXAMPLE: Even though Alaska allows injured workers to bring both WC and maritime claims, they are not permitted a double recovery.*



# Exclusive States Beware

- 33 U.S.C. §916 provides:

No ... release ... of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid

- Jurisdictional analysis critical
- If settle under state W/C act, and jurisdiction is under LHWCA, settlement is not valid

# Some Exclusive States

<b>District of Columbia</b>	Missouri
<b>Florida</b>	<b>New Jersey</b>
Hawaii	Ohio
Kentucky	Oregon
Louisiana	Texas
<b>Maryland</b>	Virginia
Mississippi	Washington



# Special Considerations

- (1) Settlements
- (2) Pursuit of Benefits
- (3) Benefits/Defenses Available

Many states toll statute of limitations while LHWCA or Jones Act Case pending.



# Settlements

- In a concurrent jurisdiction state, does a settlement of one claim preclude the other? Answer: Most likely not.
- Settling both may require consideration and releases for both
- The Carrier may be entitled to a credit if there is a “double recovery”





# Benefits Under the LHWCA

- True WC System
- Limited to Medical and Indemnity
- Full tort immunity for employer
- No “pain and suffering” or “damages”
- Generous hourly attorneys fees



# LHWCA/DBA Indemnity Benefits

**2019 Maximum Weekly Compensation Rate\*** = \$1,510.76  
*(1 year of benefits equates to \$78,559.52)*

**TTD/TPD:** Maximum 500 weeks (9.62 years)

**PPD:** Paid on limited schedule or potentially for life based on LWEC

**PTD:** Paid for life with annual COLA increases

**DEATH:** Paid at 50% of AWW for life of widow, until she remarries, or with limits on other dependents.

\* - 10/01/2018 - 09/30/2019

# Permanent Partial Disability

- *After MMI, will either be limited to:*
- If Claimant sustained a “Scheduled Injury”, then benefits paid per §908 Schedule for particular body part;

***OR***

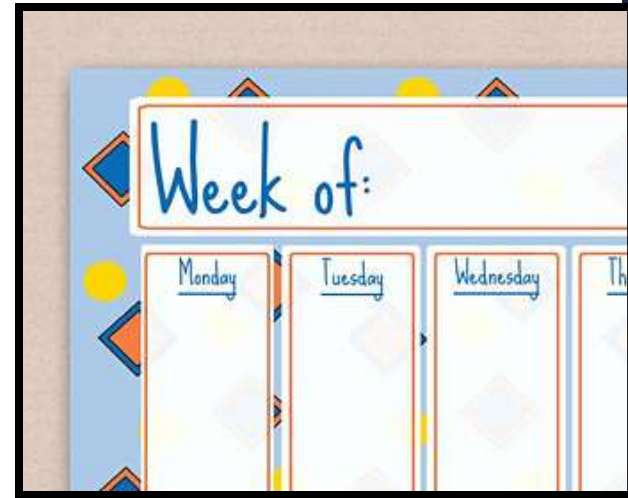
- If Claimant has unscheduled injury, he/she may be entitled to lifetime “Wage Loss” or unscheduled PPD
- “Wage Loss” is determined by subtracting wage earning capacity from AWW and multiplying by 66 2/3%

## Type of Disability Benefits

- Temporary Total Disability (TTD)
- Permanent Partial Disability (PPD)
- Permanent Total Disability (PTD)

## The “Scheduled Injuries” include:

1. Arm Loss - 312 weeks
2. Leg Loss - 288 weeks
3. Hand Loss - 244 weeks
4. Foot Loss - 205 weeks
5. Eye Loss - 160 weeks
6. Thumb Loss - 75 weeks
7. First Finger Loss - 46 weeks
8. Great Toe Loss - 38 weeks
9. Second Finger Loss - 30 weeks
10. Third Finger Loss - 25 weeks
11. Toe other than the great toe - 16 weeks
12. Fourth Finger Loss - 15 weeks
13. Loss of hearing: 52 weeks total loss in one ear - 200 weeks if total loss in both ears (determined by audiogram)
14. Disfigurement: \$7,500.00 - this includes scars, burns, etc., with no functional impairment



# Permanent Total Disability

LHWCA: PTD benefits, paid for life of claimant at 66 2/3% of AWW, plus COLAS

LS: No SSDI or other offsets

If claimant dies on PTD may have to pay death benefits to widow(er)

**Total &  
Permanent  
Disability**



# LHWCA/DBA Scheduled Injury Example

- LS Claim: 40 Year-Old Male
- Right hand crush injury
- Out of work for 8 months, then MMI with 20% impairment rating to hand (*not body as a whole*)
- AWW is \$1,000.00, CR is \$666.66 ( $CR = 2/3$  of AWW)
- **TTD** for 8 months (32 weeks) = **\$21,333.12**
- **PPD** Schedule for hand is 244 weeks x .20 = 48.8 weeks
- 48.8 weeks at \$666.66 = PPD of **\$32,533.01**

**TOTAL INDEMNITY INCURRED = \$53,866.13**

# LHWCA Unscheduled Injury Example

- LS Claim: 40 Year-Old Male, low back bulging disc
  - AWW is \$1,000.00, CR is \$666.66 ( $CR = 2/3$  of AWW)
  - MMI with PIR of 3%
  - Labor Market Survey (“LMS”) demonstrates \$450.00/week earning capacity
- 
- TTD for 8 months (32 weeks) = \$21,333.12
  - Weekly LWEC is  $\$1,000.00 - \$450.00 = \$550.00 \times 2/3 = \$366.67$
  - Lifetime PPD is  $\$366.67 \times 52 = \$19,066.84 \times 42.2$  years = \$800,807.28 full value

**TOTAL INDEMNITY EXPOSURE = \$822,140.40**

# LHWCA/DBA vs. FL State Comp.

## Scheduled Injury

- LS Claim: 40 Year-Old Male
- Right hand crush injury
- Out of work for 8 months, then MMI with 20% impairment rating to hand (*not body as a whole*)
- AWW is \$1,000.00, CR is \$666.66 ( $CR = 2/3$  of AWW)
- **TTD** for 8 months (32 weeks) = **\$21,333.12**
- **PPD** Schedule is for 55 weeks of PPD benefits @ 75% of your weekly TTD benefit ( $\$666.66 * 75\% = \$499.99$ )
- 55 weeks at \$499.99 = PPD of **\$27,499.45**

**TOTAL STATE COMP. INDEMNITY = \$48,832.57**

Total LHWCA/DBA Indemnity incurred = \$53,866.13

**NET DIFFERENCE IS \$5,033.56**



# LHWCA/DBA vs. FL State Comp.

## Unscheduled Injury

- LS Claim: 40 Year-Old Male, low back bulging disc
- AWW is \$1,000.00, CR is \$666.66 ( $CR = 66 \frac{2}{3}\%$  of AWW)
- Labor Market Survey (“LMS”) demonstrates \$450.00/week earning capacity

- TTD for 8 months (32 weeks) = \$21,333.12
- Claimant paid Income Impairment Benefit of \$280.00

$$AWW \times 80\% = \$800.00$$

$$\$800.00 - \$450.00 = \$350.00$$

$$\$350.00 \times 80\% = \$280.00$$

- Maximum State TPD of 260 weeks at \$72,800.00

**MAX. STATE COMP. IMDEM. EXPOSURE= \$94,133.12**

Total LHWCA/DBA Indemnity Exposure = \$822,140.40

**NET DIFFERENCE IS \$728,007.28**

# LHWCA Death Benefits

- LS Death Claim: Deceased married Female with 35 year old widower, no children
- AWW is \$700.00, CR is 50% of AWW or \$350.00
- Funeral Expenses: \$3,000.00
- If Widower remarries, he receives 2 years lump sum or \$36,400.00
- If Widower does not remarry, he receives \$350.00 per week for life with annual COLA.
- Full value is \$858,400.00 (including funeral expenses) plus COLAS over 47 years life expectancy

# Medical Benefits

Free Choice Physician

No Managed Care

IME/Special Exams

May deny indemnity if claimant refuses reasonable medical care

No statute of limitations on medical care



## **Employers' Liability for Workplace Accidents (a/k/a State Workers' Comp.)**

- **Generally, it is the Exclusive Remedy:** Workers' compensation is the exclusive remedy for accidental injury or death arising out of work performed in the course and the scope of the employment.
- **Balancing Interests:** Under this no-fault system, the employee gives up the right to a common-law action for negligence against the employer in exchange for strict liability and the rapid recovery of benefits.

## But, wait...

Many states recognize numerous statutory and common-law exceptions which allow the employee and others to circumvent the employer's workers' compensation immunity, including:

- Intentional Torts
- Indemnity Claims
- Unrelated Works
- Spoliation of Evidence
  - Criminal Acts
- Employer's Failure to Secure Benefits

**QUESTIONS**



# RECENT DEVELOPMENTS

- **Recent decisions related to jurisdiction under the Longshore Act: (Situs & Status)**
- **Recovering Attorney Fees under the Act**
- **OCSLA Extension**
- **905(b) Claims**
  - **Actions for benefits under both the LHWCA and Louisiana Workers' Compensation Act (LWCA)**
- **Awarding Medical Expenses actually “paid,” application of the Collateral Source Rule**

# Situs & Status

- *Ahmed v. W. Ports Transportation*, 731 Fed. Appx. 661 (9th Cir. 2018)(unpublished).
- *Archie Miller v. CH2MHILL Alaska, Inc.*, OALJ No. 2016-LHC-00252 (Jan. 5, 2018).
  - *See also* briefing on situs and status issues before Benefits Review Board. *Archie Miller v. CH2MHill Alaska, Inc.*, BRB 13-0069 (May 15, 2015).
- *Muhammad v. Norfolk S. Ry. Co.*, 2:18CV20, 2018 WL 2976983 (E.D. Va. June 13, 2018) *appeal filed* (6th Cir. June 21, 2018).



# Attorney Fees

- *Castro v. SSA Terminals, LLC*, 714 Fed. Appx. 746 (9th Cir. 2018)(unpublished).
- *McDonald v. Navy Exch. Serv. Command*, 691 Fed. Appx. 448 (9th Cir. 2017)(unpublished).

# OCSLA Extension of LHWCA

- The OCSLA extends coverage of the LHWCA to “injur[ies] occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources ... of the outer Continental Shelf.” 43 U.S.C. § 1333(3)(b).
- *Baker v. Dir., Office of Workers’ Comp. Programs*, 834 F.3d 542 (5th Cir. 2016).

# Overview of 905(b) claims

- Section 5(b) of the Longshore Act, 33 U.S.C. 905(b), allows an injured maritime worker to bring a third party tort lawsuit against a vessel owner for vessel negligence.
- The Section provides:
  - In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act ... If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide ship building, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly against the injured person's employer ... The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

# Overview of 905(b) claims

- In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), the U.S. Supreme Court articulated the limited duties owed by a vessel owner under section 5(b).
- Three duties:
  - Turnover duty
  - Active control duty
  - Duty to intervene

## 905(b), Recent developments

- *Price v. Atlantic Ro-Ro Carriers, Inc., et al* 262 F.Supp.3d 289 (D. Md. 2017).
- *Dalton v. Mar. Services Corp.*, 702 Fed. Appx. 592 (9th Cir. 2017)(unpublished).
- *Jones v. Sanko S.S. Co., Ltd*, 148 F. Supp. 3d 374 (D.N.J. 2015).
- *Weinlein v. Anapa Ship. Ltd.*, CIV.A. 12-4625 NLH, 2015 WL 760712 (D.N.J. Feb. 20, 2015).
- State claims, concurrent jurisdiction, 905(b)).

# Awarding Medical Expenses

- **Recent Fifth Circuit decision.**
- **Awarding Medical Expenses actually “paid” rather than “billed.”**
- **Application of the Collateral Source Rule**

# Longshore claim for benefits related to suicide attempt.

- *Leeward Marine, Inc. v. Dir., Off. of Workers' Compen. Program*, 694 Fed. Appx. 627 (9th Cir. 2017)(unpublished).

**QUESTIONS**

