

**The ABC's of the LHWCA  
(Plus 20 Things You Need To Know)**

**By**

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## **The 20 Things You Need To Know**

- 1. To be covered under the LHWCA you need both “status” and “situs”, or an extension**
  - (a) Situs means on, or near navigable water, including the high seas; and**
  - (b) Status- means that the employee is either called upon to do work that is integral to traditional longshore work, is doing such work when injured, or is injured on navigable waters.**
- 2. The primary extension is OCSLA, which covers oilfield workers.**
- 3. The exclusions under the act may not apply if the employee actually does longshore work.**
- 4. The AWW is calculated based on 52 weeks of earnings.**
- 5. Medical never prescribes and is lifetime.**
- 6. There is no requirement that the employee point to an identifiable accident for his medical condition to be found work-related.**
- 7. Under 20(a) the law presumes (1) the injury is related to the conditions of work (2) Jurisdiction under the Act applies and (3) the employee was not injured by any intoxication.**
- 8. A back, neck or shoulder injury is a non-scheduled injury, and if permanent/disabling the employee is entitled to life-time wage loss benefits.**
- 9. A person with a scheduled injury only is limited to the schedule (although he may be able to extend his TTD payments another 104 weeks for Voc Rehab).**
- 10. A person with a scheduled injury, that prevents him from returning to his former employment is presumed to be permanent and total.**
- 11. If the employee commits fraud, there is no automatic forfeiture statute (he could be in jail collecting benefits).**

- 12. In order to invoke the intoxication defense the employer must show that intoxication was the sole cause of the injury.**
- 13. There is no suspensive appeal under the LHWCA, and an award/settlement not paid within 10 days is subject to a 20 % penalty.**
- 14. A claim for 8(f) ) (second injury fund relief) must be made whenever the issue of permanency is first raised at an informal conference.**
- 15. Death benefits, as well as permanent and total awards are subject to COLA increases.**
- 16. A claimant who settles his third party claim without the written approval of the employer/carrier may forfeit his right to further benefits.**
- 17. If 8(f) relief is granted it only pays after 104 weeks of permanency, it does not pay medical.**
- 18. 905(b) allows a longshoreman a cause of action, against the owner of a vessel, even if the owner is the employer, for the vessel owner's negligence.**
- 19. The failure to timely file forms with the DOL, is a cause for possible penalties ... You have a chance to avoid the penalty if a timely and good explanation is given.**
- 20. An informal conference must be requested and "litigation" does not begin until the DOL claims examiner issues an LS-18.**

## AWW

Under **33 USC 910** The AWW shall be computed as follows :

- (a) If the employee has worked in the employment in which he was injured, with either the same employer, or similar employer, during substantially the whole proceeding year his annual earnings shall consist of 300 times the average daily wage for a 6 day worker, and 260 times for a 5 day worker
- (b) If the injured employee did not work in same/similar employment, for substantially the whole of the year then use a similar class of employee
- (c) If either (a) or (b) can reasonably be applied use the employee's annualized earnings, or a similar employee's annualized earnings.

### How a 10 (a) calculation skews the AWW:

\$30,500/ 205 days actually worked = \$148.78 average daily wage

148.78 x 260 for a 5 day worker = \$38,682.80 average annual earnings

38,682.80/ 52 = an AWW of \$743.90

### What's included in the calculation:

1. Meals- Harris v Lambros, 56 F2d 48 (DC Cir 1932)
2. Overtime- Gray v General Dynamics Corp, 5 BRBS 279 (1976)
3. Payment in Kind (auto parts) rather than money- Carter v General Elevator Co., 14 BRBS 90 (1981)

### What's not included:

1. Post injury Bonus- Johnson v Newport News Shipbuilding and Dry Dock, 25 BRBS 340 (1992)
2. Fringe benefits- including contributions made to retirement, medical, disability, or other benefit plans. Morrison-Knudsen Construction Co. v Director, OWCP, 461 US 624 (1983)
3. Lost time due to illness, strikes etc. – In Duncan v Washington Metropolitan Area Transit Auth., 24 BRBS 133 (1990) The court in doing a 10(a) calculation used the 34.5 weeks the employee actually worked. The court omitted those weeks the employee was out due to a personal illness.

10 (c ) is used if the claimants work is seasonal, intermittent, discontinuous or the calculation under 10(a) or (b) cannot be fairly applied

If for example the employee works a schedule other than a 5 day work week or a 6 day work week, it is acceptable to take the annual earnings and divide by 52. Guthrie v Homes and Narver, Inc. 30 BRBS 48 (1996).

In *Bonner v National Steel and Shipbuilding* 600 F2d 1288 (9<sup>th</sup> Cir 1979) The ALJ only used the 10 weeks of earning from the employer of injury and threw out the earnings and weeks claimant worked as a bartender, babysitter, housekeeper.

However it is possible to bring in earnings over several years to establish an intermittent work history. *Anderson v Todd Shipyards*, 13 BRBS 593 (1981). See also *Hall v CESI*, 139 F3d 1025 (5<sup>th</sup> Cir 1998).

## INDEMNITY BENEFITS

*Disability is defined under the LHWCA as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury... including permanent impairment..."* 33 USC 902(10) In fact a finding of disability may be found based solely of the employee's credible complaints of pain, see e.g. *Eller and Co v. Golden*, 620 F2d 71 (5<sup>th</sup> Cir 1980). An employee may be entitled to compensation even when incarcerated *Allen v Metropolitan Stevedore Co.*, 8 BRBS 366 (1978), including confinement in an asylum *Bay Ridge Operating Co., Inc v Lowe*, 14 Fsupp 280 (SDNY 1936).

### ***Temp. Total and Perm Total disability***

33 USC 908 Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent, 2/3 % of the AWW shall be paid to the employee during the continuance of such total disability.

(b) Temporary total disability: In case of disability total in character but temporary in quality, 2/3 % of the AWW shall be paid to the employee during the continuance thereof.

1. An employee who has lost both hands, arms, feet, legs, or eyes, or any two of each is presumed to be permanent and totally disabled.
2. The same standard applies regardless of whether the claim is for temporary total or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).
3. A claimant may receive continuing total disability compensation where the employer has established the availability of suitable alternate employment at a minimum- wage level, but the claimant is precluded from working because he is undergoing vocational rehabilitation. *Abbott v. Louisiana Ins. Guaranty Assoc.*, 27 BRBS 192 (1993); aff'd, 40 F.3d 122 (5th Cir. 1995).
4. An award of total disability concurrent with continued employment has been limited to two situations. The first is the "beneficent employer" or "sheltered employment" situation, where claimant's post-injury employment is due solely to the beneficence of employer. *Walker v. Pacific Architects & Eng'rs*, 1 BRBS 145, 147-48 (1974); *Proffitt v. E.J. Bartells Co.*, 10 BRBS 435 (1979). Sheltered employment has been held to be insufficient to establish suitable alternate employment. The Board has defined it as a job for which the employee is paid even if he cannot do the work, and which is unnecessary. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

### ***TPD (Temp partial)***

Temporary partial is a partial reduction in wage earning capacity entitling the employee to 2/3 of the difference between his pre-injury earning and his present earnings for a period not to exceed 5 years. 33 USC 908 (e)

### ***PPD***

#### Sec 8 (c )

- (1) Arm- 312 weeks
- (2) Leg- 288 weeks
- (3) Hand- 244 weeks
- (4) Foot- 205 weeks
- (5) Eye- 160 weeks
- (6) Thumb- 75 weeks
- (7) 1<sup>st</sup> Finger- 46 weeks
- (8) Great Toe- 38 weeks
- (9) 2<sup>nd</sup> Finger- 30 weeks
- (10) 3<sup>rd</sup> finger- 25 weeks
- (11) Toe, not great- 16 weeks
- (12) 4<sup>th</sup> finger- 15 weeks
- (13) Hearing loss
  - (a) one ear – 52 weeks
  - (b) both ears- 200 weeks
  - (c) audiogram shall be presumptive evidence of loss...if.(1) done by licensed audiologist (2) the employee was provided with a copy at the time of the audiogram and (3) no other audiogram is introduced.
  - (d) ...a claim for hearing loss shall not begin to run ..until the employee has received the audiogram report
- (14) Phalanges- more than one phalange lost is considered loss of entire digit. Loss of 1<sup>st</sup> phalange is considered a half-loss
- (15) Amputation- if amputated above elbow or knee is as if entire arm/leg was amputated ..if below then it's as if hand/foot was amputated
- (16) Binocular Vision- 80% percent loss is considered a whole loss
- (17) 2 or more digits may be proportioned to the loss of a hand/foot
- (18) Loss of use is the same as loss of the member
- (19) Partial loss of use may be proportionate
- (20) Disfigurement- not to exceed \$7,500 to the face hand , neck or other likely exposed areas likely to handicap employees in securing employment
- (21) Other cases (a.k.a. non-scheduled loss e.g. spine, neck, back, shoulder, memory loss, vertigo, hernia,) compensation shall be 66 2/3 of the AWW at the time of injury and the employee's earning capacity thereafter (i.e lifetime)
- (22) Other than as mentioned in (17) awards for loss to multiple parts shall run consecutively
- (23) (d)(1) if the employee receiving such PPD in (1)-(20) dies from causes unrelated to his injury, the total remaining award is payable to his survivors. As mentioned in (a) though (d)

A scheduled injury is limited to the schedule. *Potomac Electric Power Co V Director OWCP*, 449 US 268 ( 1980)

Yet If an employee suffers a scheduled loss sec (1) through (20), and that loss prevents him from returning to his former employment, he is entitled to a presumption of Permanent and total disability *New Orleans (Gulfwide) Stevedores v Turner*, 661 F2d 1031 (5<sup>th</sup> Cir 1981).

Moreover, a person with a scheduled injury, may be entitled to an additional period of TTD if enrolled in “approved” Vocational Schooling / program. *Brown v National Shipbuilding*, 2001 WL 94756 (BRBS 2001).

### ***Scheduled and Non-scheduled awards:***

If an employee incurs a scheduled injury and a non-scheduled injury from the same incident, he is entitled to both so long as the claim for wage loss is attributable to the non-scheduled part. *Turney v Bethlehem Steel Corp*, 17 BRBS 232 (1985) & *Green V ITO Corp of Baltimore*, 32 BRBS 67 (1998). The payment of the awards would be consecutive, not concurrent.

If an employee incurs a non-scheduled injury (shoulder) that eventually leads to an impairment in the scheduled member (CTS in the arm) the employee is not entitled to a scheduled award in addition to his general injury recovery. *Ward v Cascade General, Inc* 31 BRBS (1996)

Yet, conversely if the scheduled member leads to harm of a non-scheduled body part, the employee may receive a separate award, under 8(c ) (21) for the consequential injury. *Bass v Broadway Maintenance*, 28 BRBS 11 (1994)

### ***Death benefits***

#### Ranking

Widow only- 50% 33 USC 909(b)

Widow & Child- 66 2/3 33 USC 909(b)

Widow and children- 66 2/3 33 USC 909(b)

One Child- 50% 33 USC 909(c)

2 or more children- 66 2/3 33 USC 909(c)

Grandchildren/ Brothers/sisters- 20% 33 USC 909(d)

Parents/ Grandparents- 25% 33 USC 909(d)

Aliens/nonresidents- dependency limited to wife/children..or if none then mother /father 33 USC 909(g)

If no dependents- the employer shall pay \$5,000 to the special fund 33 USC 944©(1), CFR 702.146

Funeral benefits- not to exceed \$3,000 33 USC 909(a)



### ***General Rules***

1. The right to death benefits does not arise until the death occurs. i.e. cannot settle future death benefits during the life of the employee. **Cortner v Chevron International Oil Co. Inc** 22 BRBS 18 (1989). 20 CFR 702.241(g)
2. The laws of the state will be used to determine what constitutes a dependent, acknowledgement of a child and a marriage. **Marcus v Director, OWCP**, 548 F2d 307 (DC Cir 1976)
3. Questions of dependency are determined at the time of the employee's injury. Yet, in **Griffin v Bath Iron Works**, 25 BRBS 26 the ALJ denied the widow's claim as she didn't marry the employee until 4 months after his injury. However that decision was reversed by the BRB as they decided that what was required was dependency at the time of death and here there was no dispute in that regard.
4. Children are eligible, past majority, until 23<sup>rd</sup> birthday if a full time student in an accredited school, or if unaccredited credits would be accepted at an accredited school. 33 USC 902 (14)
5. Brother/sister only eligible if dependent, and under 18, unless incapable of self-support. 33 USC 902 (14)
6. If the widow remarries they are entitled to a 2-year lump sum dowry. But benefits to the dependent children would continue. **Daville etal v Movable Offshore**, 16 BRBS 215 (1984)
7. The death benefit to survivors will be increased every October by the COLA as calculated under 33 USC 910(f)
8. In the case of the death, unrelated to the injury, of an employee receiving a scheduled disability award the balance of the award is paid in accordance with the ranking of possible dependents mentioned in 33 USC 908(d)(1)(A)(B) (c ), or (D)

## MEDICAL

Under the LHWCA, Medical benefits never prescribe. *Dean v Marine Terminals Corp*, 7 BRBS 234 (1977).

### *Causality is presumed*

Under 20(a) the employee is provided with a presumption that his injury is causally related to his employment if the employee establishes a harm and that working conditions existed; or an accident occurred which could have caused, aggravated or accelerated the harm. Where a work injury combines with a non-work related condition the entire resultant infirmity is compensable. To rebut the presumption the employer must put forth substantial contrary evidence.

### *Subsequent injuries*

In *Mississippi Coast Marine v Bosarge*, 637 F2d 994 (5<sup>th</sup> Cir 1981) the court found a second heart attack suffered 22 months after the 1<sup>st</sup> to be causally connected and compensable as “A subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause.” At 1000.

As to what is “independent cause” we see what the court said in *Weaver v General Dynamics*, 28 BRBS 334 (1993) “ Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent or non-industrial cause. Moreover the subsequent disability is compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances” at 347.

### *Last injurious exposure v natural progression*

The general rule is that as to an injury, the last longshore employer to expose the employee to the injurious stimuli is responsible. *Todd Shipyards v Black*, 717 F2d 1280 (9<sup>th</sup> Cir 1983). Moreover apportionment is not permitted. *Epps v Newport News*, 19 BRBS 1 (1986)

Similarly, if the second injury aggravates, accelerates or combines with the employee’s first injury to cause a greater disability, then the second injury is compensable and the last employer is responsible for the entire disability. *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979). However, if the court finds that the disability is simply the natural progression of the first injury, then the first employer is responsible. *JV Vozzolo, Inc v. Britton*, 377 F2d 144 (DC Cir 1967)

### ***Choice of Doctor***

1. He must request permission from the employer to be treated by his choice. Failure to request such treatment may absolve the employer from responsibility for such treatment. **Ranks v Bath Iron Works, 22 BRBS 301 (1989)**
2. The choice should be within 25 miles from his house. **Welch v Pennzoil Co., 23 BRBS 395 (1990); 20 CFR 702.403**
3. Failure to make the request in an emergency situation is excused. 33 USC 907(d) & 20 CFR 702.418 et al
4. A change of physician must be requested for, and the failure to make such a request may absolve the employer from responsibility for this medical care. **Slattery Associates, Inc v Lloyd, 725 F2d 780 (DC Cir 1984).**
5. The employee need not request the employer's consent when there is a refusal to continue to treat the employee, including the treating doctor misdiagnosing the injury. **Atlantic & Gulf Stevedores, Inc v Newman, 440 F2d 908 (5<sup>th</sup> Cir 1971) & Washington v Cooper Stevedoring, 556 F2d 268 (5<sup>th</sup> Cir 1977)**
6. The employee's refusal to attend a medical examination by the employer, or DOL, will be grounds for suspension of compensation payments and medical treatment. **Maryland Shipbuilding & Drydock v Jenkins, 594 F2d 404 (4<sup>th</sup> Cir 1979).**
7. Moreover under certain circumstances the refusal to undergo a surgical procedure may result in a suspension of benefits. **Dodd v Newport News Shipbuilding and Dry Dock, 22 BRBS 245 (1989)**
8. If the employer refuses the request for medical care and the employee obtains same without authorization the employee only needs to show that such treatment was required in order to recover. 33 USC 907(d)

### ***Chiro care is limited***

Chiropractor's care is limited under 20 CFR 702.404 to manual manipulations of the spine, by the chiropractor, to correct a subluxation. i.e. not carpal tunnel syndrome and no reimbursement for example of hot pack/cold packs.

## REHABILITATION

### *Turnerizing*

The employer is not required to act as an employment agency for the claimant. It must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981),

All longshore and harbor workers can obtain vocational rehabilitation free to the insurance company if the injured worker requests or agrees to such services. All longshore workers are entitled to this benefit.

Positive side of this: Vocational rehabilitation is offered and paid for by the Department of Labor. The Department of Labor has specified vocational rehabilitation counselors who are assigned and paid by the Department of Labor to work on specific cases. The injured workers are provided with services with the goal of returning to the workforce. The DOL does not get credit for the person unless they are returned to the workforce, so a very strong push is made to do this. The injured worker is provided with any service needed to assist him/her return to the work force. The adjuster is entitled to a copy of the report that is given to DOL monthly. Also, if DOL offers this service and the injured worker refuses, you have your first refusal for vocational rehabilitation services, putting into question the motivation of the injured worker to return to work. Therefore, if you assign the case at a later date to another vocational rehabilitation counselor and the injured worker does not participate, you will have another example of non-cooperation further demonstrating the injured workers lack of motivation to return to the work force.

Negative aspects of this: It can be a lengthy process. Sometimes the DOL decides to retrain the individual and this can take years to do. Also, the adjuster has limited control over the process. Lastly, the DOL can wait several months to offer services, oftentimes not until MMI is reached. If you believe in an early intervention model this does not work.

If you decide to go the regular route of assigning a vocational rehabilitation counselor the first step is to let the counselor perform a job analysis with the employer of injury. Let the counselor find out what the injured worker did and inquire about transitional work. It is sometimes the case, because of a higher level of compensation, longshore workers, may lack a certain return to work ethic. Thus, a stronger push to get them back with the employer of injury should be made. Oftentimes this is not possible due to working offshore, or traveling to get to work, but you never know what the employer has and unless a contact is made this can't be explored. Also, it looks much better in court if the counselor has made some attempt to return the injured worker to their job of injury or a modified job. Going straight to a Labor Market Survey can look like the vocational counselor is just interested in having the injured worker "cut off of benefits".

Be sure to have the vocational counselor conduct an initial interview. She has to meet the injured worker fact to face. This is very important. I encourage vocational counselor to get a medical release signed at this time.

The vocational rehabilitation counselor should be allowed to conduct 3 labor market surveys three months in a row, identifying appropriate jobs for the injured worker. These jobs should be sent to the injured worker within 24 hours of location via regular and certified mail. The jobs should also be sent to the doctor for his approval.

The vocational counselor should be meeting with the injured worker on a bi-monthly during this time to provide job search techniques and strategies. The ALJ will have less of a problem agreeing that everything had been done to assist the injured worker to return to work.

One thing to remember is to get a list of DOL approved counselors in your area from your DOL contact. Use a DOL counselor on your case and this counselor will know if the person is a candidate for DOL services. If this happens, then you will have your counselor on the case and DOL will take over payment of the training and in some cases the payment of the counselor!

## PENALTIES & ATTORNEY FEES

### *Attorney Fees:*

All attorney fees must be approved. CFR 702.132 and 33 USC 928 ©. Any person who receives fees without approval is subject to criminal prosecution CFR 702.133

The LHWCA provides for an award of attorney fees in 4 circumstances:

- (1) If there has been a successful prosecution (including settlement) 33 USC 928(a)
- (2) Fees are allowed if the employer declines to pay any compensation,
- (3) If after, informal conference, the employer rejects the recommendation of the board or commissioner.
- (4) The employer tenders the amount recommended, the employee rejects the amount, hires an attorney and receives a larger award. **FMC Corporation v Perez**, 128 F3d 908 (5<sup>th</sup> Cir 1997)

If the employer has refused to pay for “required” medical care, the provider is allowed to prosecute the claim and recover the payment of the bill as well as attorney fees and interest. 20 CFR 702.422 (b), **Ion v Duluth, Missabe & Iron Range Ry** 31 BRBS (1997)

### *Penalties*

10% penalty for non-controverted payments. Under CFR 702.233 if any installment of compensation payable is not paid to the person owed, within 14 days, after it becomes due an amount of 10% shall be added unless the employer files a notice of controversion under 702.261 (i.e filing a LS207)

\$110 for failure to report a termination of payments- Under CFR 702.236- The employer is liable for a \$110 civil penalty if they fail to file a LS 208 within 16 days after the final payment of compensation has been made. Even when the case is settled the LS 208 is to be filed.

\$15,000 for willful failure to file an LS 202 - 33 USC 930(e)

20% penalty if benefits terminated after a formal award has been issued, **Shoemaker v. Schiavone and Sons, Inc**, 11 BRBS 33 (1979)

20% penalty is assessed for failure to pay an award by order or settlement within 10 days after it is filed by the District Director. 33USC 914(f) and it’s mandatory **Twine v. Locke**, 68 F2d 712 (2<sup>nd</sup> Cir 1934)

Interest is assessed on all monies due, (except attorney fees and penalties) but not paid, regardless of the filing of a controversion. **Barry v. Sea Land Services**, 27 BRBS 260

(1993) includes funeral expenses *Adams v. Newport New Shipbuilding & Dry Dock*, 22 BRBS 78 (1989)

\$10,000/ 5 years prison- if an employer/insurance carrier representative willfully makes a false statement for purposes of reducing/terminating benefits to an employee 33 USC 931 (4)(c).

## ***905(b), as well as 33(g) and 8(f) a.k.a. subro and SIF***

905(b) allows a longshoreman a cause of action, against the owner of a vessel, even if the owner is the employer, for the vessel's owner's negligence

### ***Subro***

Section 33(g) of the LHWCA has been described as 'the Tail that Wags the Dog'. *Roberts...1993 Southeastern Admiralty Law Institute*. Why? Because the employer/carrier can refuse to pay LHWCA benefits to a claimant and at the same time refuse to approve a third party settlement.

There is no requirement that the employer justify a refusal to approve a third party settlement or that the employer act in good faith. *Gibson v. ITO Corp.*, 18 BRBS 162 (1986), *Johnson v. American Mutual liability Ins.* 559 F2d 382 (5<sup>th</sup> Cir 1977).

There is no requirement to make a formal request to intervene to recover from the employee's third party recovery. *Miller v Rowan Companies*, 815 F2d 1021 (5<sup>th</sup> Cir 1987)

If the employee settles his third party claim for *less* than the total amount of compensation owed by the employer, the employee must obtain written approval of *both* the employer and carrier before the settlement is executed. *Estate of Cowart v. Nicklos Drilling Co.*, 505 US 469 (1992). If he settles without such approval all rights to compensation are terminated.

The employee is required to give notice, but is not required to obtain written approval in 2 situations:

- (1) When the employee obtains a judgement, rather than a settlement; and
- (2) When the employee settles for an amount that is greater than or equal to the employer's total liability.

If a consent judgment is entered based on a settlement, and there is no written approval, compensation rights are forfeited *Gibson v. ITO Corp.*, 18 BRBS 162 (1986). However if there is a dismissal, but no payment, the employee may still be entitled to LHWCA. *Rosario v MI Stevedores*, 17 BRBS 150) (1985)

The banning of future compensation benefits of 33(g) does not apply if the person making the present claim for LHWCA benefits was not a person entitled to compensation at the time the settlement was entered. *Ingalls Shipbuilding, Inc. v. Director OWCP*, 519 US 248 (1997). There, Mr. Yates a USLH employee, settled his third party claim against an asbestosis manufacturer as well as his employer. The wife agreed with and signed the settlement against the manufacturer. After his demise his wife filed a claim for death benefits. The US Supremes stated that because she was not a person entitled to



compensation (i.e. she could not claim death benefits at the time of the settlement) she was not required to obtain the employer's written approval. FYI under CFR 702.241(g) it is impermissible to settle a survivor's benefits contemporaneous with an 8(I) application.

Even when there is a waiver to subrogation 33(g) rights still apply. *Jackson v. Land & Offshore Services, Inc.*, 855 F2d 244 (5<sup>th</sup> Cir 1988)

The lien is satisfied from the 'net' recovery, which is the amount of recovery less deductions for attorney fees and costs. 33(f) and *Bloomer v. Liberty Mutual Ins. Co.*, 445 US 74 (1980). The money is distributed as follows:

1. Worker retains his litigation expense and a reasonable attorney fee;
2. The employer receives a credit for any compensation liability not yet satisfied and reimbursement for compensation already paid;
3. The worker keeps what is left *Peters v. North River Ins. Co.*, 764 F2d 306 (5<sup>th</sup> Cir 1985).

If there is a consent to settle the employer/carrier must resume payment of compensation after the credit for remaining amounts is absorbed i.e. Payments resume when the total amount of compensation payments that would have been paid but for the tort recovery exceeds the amount of the tort recovery. The employee can offset this amount by having the medical paid by his health insurance included. *Texports Stevedores v. Director, OWCP*, 931 F2d 331 (5<sup>th</sup> Cir 1991)

33(a) of the Act permits a "person entitled to compensation" to receive compensation under the Act and also recover damages from a third party. Under 33(b) if a "formal award" of compensation has been awarded and accepted and the "employee"

### ***8(f) Second Injury***

The case of *Ceres Marine Terminal v Director OWCP*, 118 F3d 387 (5<sup>th</sup> Cir 1997) addresses the issues relating to an award of 8(F) relief when an employee is found P&T. There the employee had work injuries to his neck and shoulder as well as pre-existing conditions of hypertension and diabetes. The court wrote that in a P&T case 3 things must be present:

1. Pre-existing permanent partial disability;
2. Which was manifest to the employer prior to current injury; and
3. Current disability not due *solely* to the employment injury.

The court first stated that if the employment injury is sufficient by itself to render the employee P&T then 8(f) would not apply. This is true as the aggravation requirement of 8(f) could not be satisfied if the employer is liable to the same extent if an able bodied employee suffered the same injury. However if the employer can show that it is a

combination of the injuries (pre and employment) that creates the condition of permanently disabled then the employer is entitled to 8(f) relief.

The court distinguished between 2 different principles. First, evidence that the current disability is greater because of a pre-existing disability (a combination of the pre and employment injury) does not necessarily prove the current 'permanent' disability is not due solely to the employment injury. The example would be where an employment injury renders a claimant totally disabled, but the pre-existing condition makes it more painful.

The second principle is that the current disability is greater because of the pre-existing disability. In other words it is the existence of multiple injuries that combine to increase the claimant's disability. The contribution requirement is satisfied when the pre-existing conditions are necessary to push the claimant over the hump from partial to total disability.

However in a partial disability situation the employer must show that the current permanent partial disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone" ***Louis Dreyfus Corp v Director, OWCP***, 125 F3d 884 (5<sup>th</sup> Cir. 1997). In denying 8(f) relief there the court held that, the employer incurred no additional liability by hiring and retaining a partially disabled employee.

## CREDITS/ DEFENSES

### a. Credits

NO

1. Social security- *Ladner v Secretary of HEW*, 304 Fsupp 474 (SD Miss 1969)
2. Retirement benefits- *Brandt v Avondale Shipyards, Inc.*, 8 BRBS 698(1978)
3. Disability pension Plans- *Adkins v. Safeway Store* 6 BRBS 513 (1977)
4. Disability paid by VA- *Todd shipyards Corp v. Director, OWCP*, 848 F2d 125 (9<sup>th</sup> Cir 1988)
5. Formal salary Continuance- (unless the employer can show the payments were intended to be advance payments of compensation) *Van Dyke v. Newport New Shipbuilding and Dry Dock*, 8 BRBS 388 (1978), *Breen v. Olympic Steamship Co.*, 10 BRBS 334 (1979)
6. Unemployment Insurance- *Marvin v. Marinette Marine Corp*, 19 BRBS 60 (1986)
7. Child support or other liens- 33 USC 916 – the payment of LHWCA benefit is un-assignable from all claims of creditors and is free from attachment and is not waivable. *Thibodeaux v. Thibodeaux*, 454 So2d 813 (La 1984)

Yes- to a degree

1. The act mandates a 3-day waiting period commencing on the 1<sup>st</sup> day of disability. It is paid to the employee after the 14<sup>th</sup> day. 33 USC 906(a)
2. Any amounts paid to the claimant for the same injury under any other workers' compensation law, including Jones Act- 33 USC 903(e)
3. If the employee received scheduled benefits under the LHWCA for a prior disability, then the subsequent employer is entitled to a credit for the percentage when the subsequent injury is to the same scheduled member. *Lopez v. Atlantic Container Lines, LTD*, 2 BRBS 265 (1975), *ITO Corporation v. Director, OWCP*, 883 F2d 1422 (5<sup>th</sup> Cir 1989)
4. Any employee who fails to submit the report on earnings, under CFR 702.286 or who knowingly underreports, shall upon determination by the District Director forfeit all right to compensation for any period for which the employee was required to file such report CFR 702.286. Compensation already paid shall be recovered by a deduction.
5. Any claimant who willfully makes a false statement for the purposes of obtaining benefits.... Shall be fined up to \$10,000/5 years in prison 33 USC 931 (a)(1)

6. Benefits may be suspended upon an order from the director if the employee fails to attend a required medical examination 33 USC 907(d)

### ***Defenses***

*Begin with the idea that they are few and far between. In fact under USC 920(b), (c ) and (d) there are presumptions that arises that sufficient notice of the claim was given, that the injury was not caused solely by the employee's intoxication and the injury was not caused by the employee's willful intention.*

### ***Willful intent to injure:***

In ***Konno v. Young Brothers, LTD,*** 28 BRBS 57 (1994) the Board held that death benefits were properly awarded to a widow whose husband committed suicide. The employee was being investigated by a grand jury for thefts related to work. The board held that at least some of the conditions at work contributed to the worker's death as the grand jury investigation itself arose out of the course of employment. The court further found that the suicide was a work related "irresistible suicide impulse" and not a "willful intent" to commit suicide.

### ***Intoxication***

No compensation shall be payable if the injury was occasioned **solely** by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. 33 USC 903(c)

In ***Sheridon v. Petro-Drive , Incorporated,*** 18 BRBS 57 (1986), the Board reversed the denial of benefits, pursuant to Section 3(c), holding, "In light of the express statutory requirement that the injury must be 'solely' due to intoxication and the presumption against such (in Section 20(c)), it is clear that employer has the heavy burden of virtually ruling out all other possible causes of injury before the intoxication defense is proven. As stated, intoxication will defeat a claim only when all the evidence and reasonable inferences flowing therefrom allow no other rational conclusion than that the intoxication was the sole cause." Here no one was sure exactly how the employee fell.

## LEGAL PROCEEDINGS AND SETTLEMNTS

### *The informal conference*

The informal conference is not automatic. It must be requested and may be requested by either party including the DOL Claims Examiner. Generally 10 days notice is required. 20 CFR 702.313. No stenographic record is made. Following the conference the examiner shall set forth the agreement of the issues. If the employer has agreed to pay, reinstate or increase benefits it shall do so immediately without awaiting receipt of the memorandum. 20 CFR 702.315

An 8(f) application must be raised whenever there is an issue of permanency at the informal conference. 20 CFR 702.331 Under 702.321(2)(b)(ii) when the issue of permanency could not have been reasonably anticipated the District Director shall adjourn the conference and establish a date by which the fully documented application must be submitted.

### *The trial*

A case is transferred to the ALJ level if the parties' request, and/or the scheduling of further conferences would not likely resolve the issues. The case is transferred when the District Director furnishes each of the parties with a copy of the pre-hearing statement. If a party fails to return the form within 21 days the District Director may still transmit the case without the parties form.

A decision by an ALJ is appealed to the Benefit Review Board CFR 702.391 and from there it is appealed to the Federal District Court.

Be aware there is no suspensive appeal mechanism under the LHWCA. An order awarding benefits must be paid with 10 days, or is subject to penalty. This is true even when the decision is appealed. CFR 702.350

## Helpful WEB Sites, DOL offices, and Max/Min Rates

<http://www.oalj.dol.gov/liblhc.htm>

www.workerscompensation.com

### **Longshore District 6**

**(N Carolina, S Carolina, Alabama, Florida, Georgia, Tenn., Kentucky)**

214 North Hogan, Ste 1040  
Jacksonville, FL 32202-4226  
(904) 357-4788

### **Longshore District 7**

**(Louisiana, Arkansas, Miss.)**

701 Loyola, AVE. Rm. 13032  
New Orleans, LA 70113  
Phone: (504) 589-2671

### **Longshore District 8**

**(Texas, Oklahoma, New Mexico)**

8866 Gulf Freeway, Ste. 140  
Houston, TX 77017  
Phone: (713) 943-1605

### **Mileage**

As of 1/21/2- the mileage rate is 36.5 cents a mile

### **Compensation min/max**

Dates	Max comp	Min Comp rate
10/01/91 - 09/30/92	\$ 699.96	\$ 174.99
10/01/92 - 09/30/93	\$ 721.14	\$ 180.29
10/01/93 - 09/30/94	\$ 738.30	\$ 184.58
10/01/94 - 09/30/95	\$ 760.92	\$ 190.23
10/01/95 - 09/30/96	\$ 782.44	\$ 195.61
10/01/96 - 09/30/97	\$ 801.06	\$ 200.27
10/01/97 - 09/30/98	\$ 835.74	\$ 208.94
10/01/98 - 09/30/99	\$ 871.76	\$ 217.94
10/01/99 - 09/30/00	\$ 901.28	\$ 225.32
10/01/00 - 09/30/01	\$ 933.82	\$ 233.46
10/01/01 - 09/30/02	\$ 966.08	\$ 241.52