

Workshop W5

Wednesday, October 11, 9 a.m.-noon

CONSTRUCTION MARITIME RISKS AND INSURANCE

“Insuring Maritime Risks”

Presented by



William H. Perkins
Instructor
Florida Association of Insurance Agents

While some contractors intentionally engage in maritime projects, many stumble into maritime exposures unknowingly. In some cases, the exposure is so obscure the contractor is not aware that it exists, and the contract documents rarely stipulate that coverage for these risks is required. Without an understanding of the various maritime statutes, contractors can easily overlook a statutorily required coverage and find themselves not only in violation of the law but also facing a potentially significant uninsured claim.

- Examines exposures and remedies under the Jones Act, general maritime law, and the Longshore and Harbor Workers Compensation Act.
- Outlines coverage for maritime exposures in traditional insurance policies.
- Describes maritime-specific coverages, including pricing and underwriting considerations.

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INSURING PROGRESS™

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Mr. Perkins is one of the presenters for Wednesday morning's Workshop W5, "Construction Maritime Risks and Insurance." He has been an instructor for the Tallahassee-based Florida Association of Insurance Agents (FAIA) since June 1993. His teaching responsibilities at the FAIA are concentrated on commercial insurance with interests in maritime compensation, employment practices liability, and fee-based income for insurance agents. Prior to joining the FAIA, Mr. Perkins was an agent for 12 years in his father's Orlando agency, during which he was an active member of the Independent Insurance Agents of Central Florida, serving as a board member and chairing its education committee. Workbooks in which he has been involved include *Advanced Maritime Insurance, Longshore and Harbor Workers Compensation Act and Jones Act, Employment Practices Liability*, and various works concentrated on business insurance topics. He graduated from Loyola University of the South in 1980 and holds the Accredited Advisor in Insurance designation.

Mr. Perkins was named IRMI's Words of Wisdom (WOW) speaker at the 21st IRMI Construction Risk Conference. This is Mr. Perkins's ninth year to speak at the Construction Risk Conference.

Notes

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INSURING MARITIME RISKS

William H. Perkins
Florida Association of Insurance Agents

I. Longshore and Harbor Workers Compensation Act

- A. Reasons for coverage
 - 1. Federal requirement
 - 2. State act limitations or exclusions
 - 3. Penalties
- B. How coverage is provided
 - 1. Monoline
 - 2. Endorsement
 - 3. Federal authorization requirement

II. Longshore and Harbor Workers Compensation Coverage

- A. Benefits
 - 1. Medical services
 - 2. Disability
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- B. Extensions of the Longshore and Harbor Workers Compensation Act
 - 1. Defense Base Act
 - 2. Nonappropriated Fund Instrumentalities Act
 - 3. Outer Continental Shelf Lands Act
- C. Practical concerns
 - 1. Risk assessment
 - 2. Markets
 - 3. Premium
 - a. Federal (F) rates
 - b. Non-F rates

III. Maritime Employers Liability

- A. Reasons for coverage
 - 1. General maritime law
 - 2. Merchant Marine Act
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- B. How coverage is provided
 - 1. Monoline policy
 - 2. Endorsement
 - a. Maritime Coverage endorsement (WC 00 02 01 A)
 - b. Voluntary Compensation Maritime Coverage endorsement (WC 00 02 03)
 - c. Limited Maritime Coverage endorsement (WC 00 02 04)
- C. Practical concerns
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IV. Protection and Indemnity

- A. Indemnify vs. "pay on behalf of"
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- C. Coverage
- D. Widely use forms
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- F. Practical concerns

MARITIME EXPOSURES: DO I HAVE ONE AND WHAT DO I DO ABOUT IT?

**William H. Perkins, AAI
Florida Association of Insurance Agents**

I. Introduction

The challenging world of insurance is redefined when clients have maritime exposures. For instance, in the area of occupational injury, it is a widely held belief of insureds and their insurance representatives that unless the client is working on the high seas or at the water's edge, there is no maritime exposure. To further perpetuate this misunderstanding, both parties wrongfully limit the meaning of the water's edge to a coastline such as an ocean or gulf and neglect the fact inland waters can often be a maritime exposure.

To further muddy the waters, the legal environment familiar to most clients and industry representatives is either not applicable (because maritime issues are a federal jurisdiction) or is subject to various concurrent jurisdictions intricately woven into the legal equivalent of a net.

Consequently, the client and agent need to work cooperatively to identify these unique exposures and adequately manage the maritime risk. What follows is an introduction on how to identify occupationally related maritime exposures, the beneficiaries and their respective remedies and how to insure this type of risk.

II. Shades of Gray

In the areas of general liability and workers compensation, the common experience of clients and agents is generally familiar territory. Standardized forms such as those of the Insurance Service Office (ISO) and the National Council on Compensation Insurance (NCCI) are widely used in many states to provide liability and workers compensa-

tion insurance. These forms can be customized by the use of preformatted endorsements developed by ISO and NCCI to either expand or further restrict coverage. There are however some exceptions. In some cases involving general liability not all insurers have adopted the complete ISO standard, while still others have company-specific changes patterned on ISO to provide their own unique protection features.

In workers compensation, many states have adopted the forms and data developed by NCCI to enable insureds to comply with the state's workers compensation law. The workers compensation policy conforms to specific state laws and can also be amended by the use of change endorsements normally designed by NCCI and approved for use by the insurance regulator of any given state.

However, when a maritime exposure exists these standardized policies do not automatically provide coverage; thus, changes or perhaps the purchase of a separate policy designed to provide the needed protection will be necessary. For example, ISO's commercial general liability (CGL) policy excludes bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any watercraft owned, operated by, rented or loaned to any insured. While the policy automatically insures the vicarious liability caused by the negligence of an independent contractor, the CGL can provide for this uninsured exposure by using an endorsement (Boats, CG 24 12) which is designed to eliminate the exclusion.

In the case of workers compensation, Part One of NCCI's policy is designed to comply with the workers compensation statute of the state or states identified on the information page of the policy.

Careful examination of the applicable state law is necessary to ascertain whether or not it provides for the federal benefits mandated by the Longshore and Harbor Workers Compensation Act or those available through tort seeking benefits under General Maritime Law or the Merchant Marine Act. If these benefits are not granted by state act (which is usually the case) or are not made available via endorsement to the policy, the employer will be liable for these benefits without the help of insurance.

III. Seamen and Longshoremen: Who Are They?

The definition of seamen and longshoremen is an interesting tale of history and law. In the case of seamen, much of our present understanding is a result of centuries of maritime tradition which has been codified into law by various nations and recognized by international conventions designed to facilitate maritime commerce. For instance, in the United States a master (captain) of a vessel is required (46 U.S.C. 10302) to enter into an employment contract known as a shipping articles agreement or also referred to as “seaman letters”. This identifies for the seaman the nature and duration of the voyage, the number and description of the duties of each seaman; when work begins, the rate of pay and other provisions relating to the role of the seaman. But shipping articles vary depending upon whether the ship on which (s)he serves is engaged in foreign and intercoastal voyages, voyages to ports between non-adjointing states or fishing and fish processing voyages. In fact, these articles may not matter if the seaman in question is covered by a comprehensive collective bargaining agreement that serves the same function.

While having shipping articles may be a good measure to determine seaman status not all that qualify as seamen will need them. The most current description of a seaman recognized by the United States Supreme Court is one whose employment related connection to a vessel includes duties contributing to the function of a vessel or the accomplishment of its mission. The connec-

tion to the vessel must be substantial in both duration and nature.

Central to the discussion of who is a longshoreman is the term “employee.” This term was refined by the 1972 amendments to the Longshore and Harbor Workers Compensation Act (LHWCA) to show who was an eligible employee. The Act was later amended in 1984 to identify who is not an employee. The definition of employee means “any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship breaker”.

The following are not eligible for LHWCA because they do not meet the definition of employee found in Section 902 A-H of the Act and federal regulations 20 CFR Section 701.301:

- A. Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
- B. Individuals employed by a club (meaning a social or fraternal organization whether profit or non profit), camp, recreational operation (meaning any recreational activity, including but not limited to scuba diving, commercial rafting, canoeing or boating activities operated for pleasure of owners, members of a club or organization, or renting, leasing, or chartering equipment to another for the latter’s pleasure), 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) (*i.e. definition of employer*), and (iii) are not engaged in work normally performed by employees of that employer under this Act;

- E. Aquaculture workers, meaning those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species;
- F. Individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length. For purposes of this subparagraph “recreational vessel” means a vessel manufactured or operated primarily for pleasure, or rented, leased or chartered by another for the latter’s pleasure. A “length” means a straight line measurement of the overall length from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The measurement shall be from end to end over the deck, excluding sheer;
- G. A master or member of a crew of any vessel; or
- H. Any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

Exclusions from the definition of “employee” (§ 902 (3) and CFR § 701.301) and the employees of small vessel facilities otherwise covered which are exempted from coverage (§ 903 (d)(2) and (3) and CFR § 702.171) are dependent upon coverage under a state worker’s compensation program.

Unlike seamen who qualify for status by virtue of the type and duration of work they do, longshoremen must meet both an employment status and employment situs (site) criteria. The LHWCA extends benefits to employees whose disabilities or death “results from an injury 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”. It should be noted the status requirement

came about as a result of amendments to the Act in 1972. Prior to this time only the situs test was necessary to qualify as a longshoremen. However, there is an exception resulting from a 1983 U.S. Supreme Court decision. The Court ruled in *Director, OWCP v. Perini North River Associates* (459 US 297), if a claimant who would have received benefits within the pre-’72 coverage of the Act is covered today without regard to the post-’72 situs *and* status requirements.

IV. Federal Jurisdiction

The founders of the United States understood the vital role maritime commerce would play in the development and expansion of the young country’s economy. Contrary to the emphasis normally placed on state’s rights, the drafters of the Constitution retained federal authority (Article III, Section 2) over matters of admiralty and maritime jurisdiction.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public minister and consuls; to all cases of admiralty and maritime jurisdiction...

Further, the U.S. Supreme Court has interpreted this constitutional provision to contain three separate grants of power:

- 1) It empowered Congress to confer admiralty and maritime jurisdiction on the “tribunals inferior to the Supreme Court.”
- 2) It empowered the federal courts to draw on the substantive law “inherent in the admiralty and maritime jurisdiction” and to continue the development of this law within constitutional law.
- 3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.

A question later arose, does federal jurisdiction have priority over state jurisdiction? An answer to this question came about as a result of a 1980 U.S. Supreme Court decision (*Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715) when the Court ruled the Act supplements rather than supplants state compensation laws. Therefore, in states where the workers compensation law permits recovery, a worker may file under both schemes for compensation. When this occurs the amount recovered under a states' workers compensation law is credited against the amount due under the Longshore Act. Prudent risk management dictates a thorough review of how the insured's workers compensation law applies in such cases.

V. Seamen and Their Remedies

In general, seamen who suffer an injury or dies in service to the ship has three actions against the employer. They are general maritime law, Merchant Marine Act (Jones Act) or Death On The High Seas Act.

A. General Maritime Law

General maritime law provides the seaman with three benefits. They are maintenance and cure, lost wages and unseaworthiness.

1. Maintenance and Cure. The origins of the shipowner's duty to care for injured or ill seamen dates back to the earliest of recorded history. The first time maintenance and cure was referred to in U.S. jurisprudence occurred in 1823. In his decision in *Harden v. Gordon*, U.S. Supreme Court Justice Joseph Story characterizes maintenance and cure as a right under both contract and general maritime law based on the long tradition of recognizing the special dangers inherent in maritime employment.

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labor. They are generally poor and friendless, and acquire habits of gross

indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behavior might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt.

* * *

On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seaman. The master will watch over -their health with vigilance and fidelity. He will take the best methods, as well, to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate, but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency.

To be eligible for benefits, the seaman must be in service to the ship at the time of illness or injury. In service to ones ship is understood to mean on duty and answerable to the call of duty including shore-based exposures to injury or illness if the seaman is on shore leave. The right to maintenance and cure is stipulated in the shipping articles agreement recognized by general maritime law and supported by the Shipowner's Liability Convention ratified by the U.S. in 1939.

Maintenance is the right of a seaman to food and lodging if ill or injured in the course of service to the ship. The amount payable for maintenance is based upon the actual expenditure of food and lodging until the injured seaman has reached maximum recovery. The amount payable must be rea-

sonable and cannot be waived by contract of employment.

Cure is the right to medical services. The right to cure affords the cost to provide reasonable medical expenses of a physician chosen by the seaman. Benefits are normally paid for through insurance or through union membership. The employer must pay all unpaid medical expenses. Until 1981, injured or sick seamen were cared for free of charge at U.S. Public Health Service Hospitals. The duty to provide maintenance and cure is without regard to fault.

In addition to the employer, the shipowner can be held liable for maintenance and cure benefits and the seaman can attach a “maritime lien of the highest priority.”

2. **Lost Wages.** In addition to maintenance and cure, the seaman has a right to receive unearned wages beginning with the onset of the injury or sickness until the conclusion of the voyage and receive these benefits until the seaman has reached maximum recovery.
3. **Unseaworthiness.** In order for a cause of action to be brought under the doctrine of unseaworthiness, the injured party must show the proximate cause of the injury was by a defective condition of the ship or its equipment. This extends to such things as the hull, cargo handling equipment, hand tools, ropes and tackle, provisions, the method of cargo storage, the lack of certain types of equipment, and the competency and size of the crew.

The test for an unseaworthy condition is whether the vessel or its equipment was reasonably fit for their intended use. The shipowner is not required to prove the vessel or its equipment were in perfect condition, nor is he required to provide an “accident free” ship with the latest and best equipment, merely, that it be reasonably suited for its intended use.

The duty for seaworthiness is absolute and independent of negligence. The warranty of seaworthi-

ness is owed to those claiming seaman status and not to others such as passengers or visitors aboard the vessel.

B. Merchant Marine Act (Jones Act)

Often referred as the Jones Act, taking the name of the legislator instrumental in its passage, the Merchant Marine Act permits a seaman to sue his employer for his illness or injury suffered while in the course of his employment due to the negligence of the employer. The duty of the employer is to provide the seaman with a reasonably safe place to work. The employer’s responsibility is absolute, nondelegable and includes the ship even if the employer is not the owner of the vessel. The employer is liable for the negligence of any of its officers, agents or employees (other than intentional acts by fellow employees) and contributory negligence and assumption of risk by the seaman does not bar his recovery.

The damages recoverable by a seaman under the doctrine of unseaworthiness and Merchant Marine Act are as follows:

1. **Loss of past wages.** Normally lost wages are recoverable with little disagreement as they are easily calculated and proven.
2. **Loss of earning capacity.** Future wages are not guaranteed therefore more difficult to prove when compared to loss of past wages. Despite this uncertainty, benefits are afforded in light of the seaman’s ability to be retrained for alternative employment, the degree of disability; i.e. total v. partial disability, and other variables such as inflation, guaranteed pay (e.g. overtime and vacation pay) loss and or reduction of pension and other work related benefits as well as the affect on work life expectancy.
3. **Past and future medical expenses.** To the extent these costs are not covered by an award for cure, medical expenses are recoverable as long as they are valid and medically necessary.

4. Pain, suffering, and loss of life's enjoyments. A seaman is entitled to recover damages for his physical injury including pain, suffering, mental anguish, physical discomfort, and inconvenience and for the mental and physical effects of the injury on his ability to engage in those activities which normally contribute to the enjoyment of life.
5. Interest. Prejudgment interest is available for cases involving unseaworthiness but is not available in cases involving the Jones Act.
6. Wrongful death. Recovery under the Jones Act for wrongful death caused by negligence is limited to pecuniary (monetary) damages payable to beneficiaries of deceased seamen. These beneficiaries are defined to include the "surviving widow or husband and children of such employee, and if none, then the next of kin dependent upon such employee." Monetary damages may include loss of support, loss of service (such as household services which now must be purchased and performed by someone else) and the monetary value of the loss of nurture, guidance, care and instruction, as well as funeral expenses. Pecuniary damages do not include the loss of society and consortium, pain and suffering, mental anguish and remedy for unseaworthiness.

C. Death on the High Seas

Enacted only two months before the Jones Act in 1920, Death on the High Seas Act (DOHSA), provides recovery for both seamen and non-seamen. DOHSA provides a recovery for death "caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any state." DOHSA is limited to monetary, not punitive, damages and provides for remedy of unseaworthiness for seaman killed beyond the territorial (three nautical miles) limit.

While scientific personnel aboard a vessel would likely meet the test for seaman status, federal legislation restricts their access to remedies found under the Jones Act and permits recovery under general maritime law, the doctrine of unseaworthiness and the Oceanographic Research Vessels Act (ORVA). This act was passed for the purpose of exempting scientific personnel from the burden of obtaining seamen's documents and reflects the fact that such seamen are well educated and generally in the employ of a university, research institute, or technology company and do not need the traditional protection offered to seamen. The limitation to a Jones Act remedy is only for those vessels that have been inspected and officially classified as a "oceanographic research vessel" by the U.S. Coast Guard.

VI. Longshoremen

A. History of the Longshore and Harbor Workers Compensation Act.

The Longshore and Harbor Workers' Compensation Act of 1927 (LHWCA) was enacted to provide compensation in lieu of tort damages for maritime workers who perform a variety of tasks for, on and around vessels. These workers are commonly referred to as "longshoremen."

In Article III, Section 2, of the U.S. Constitution the founding fathers conferred authority over ".all cases of admiralty and maritime jurisdiction" to the newly found federal government. These men understood that matters dealing with maritime and shipping were not to be the responsibility of the states but legislation and regulation of admiralty issues were federal jurisdictions. As the country expanded, commerce and the methods of shipping evolved to include the development of major port cities like New York and Baltimore to form along the shoreline of the Northeast. In these port cities, businesses settled near these ports and employed many persons to service

the needs of the growing maritime industry. During this same time, the states enacted their own workers compensation laws to provide for the injuries of their workforce population while avoiding the extending of benefits to those employees of a maritime character. These employees enjoyed the protection of general maritime law under federal jurisdiction and were precluded from benefits under the workers' compensation laws of the states. As a result, there formed a division of authority with the federal government responsible for maritime employees and the states responsible for non-maritime employees. But what about those land-based employees who work near the water's edge in service to the maritime industry? Prior to 1927, there was no right of recovery for those employees because they were without state act coverage due to their maritime employment characteristics and they were barred from suing their employers in admiralty because they were not seamen. All this changed as a result of the death of Christen Jensen in 1914, a longshoreman, who was killed unloading lumber from the steamship, *El Oriente*, as he operated a small electric freight truck. His widow sought and received death benefits under the New York Workers' Compensation Act but Jensen's employer, the Southern Pacific Company, appealed the award claiming that the state did not have jurisdiction in cases of admiralty. The U.S. Supreme Court upheld Southern Pacific and denied death benefits to Jensen's widow.

Pressure from powerful labor unions and the U.S. Supreme Court forced the Congress to resolve this issue. After two unsuccessful legislative attempts, the Longshore and Harbor Workers' Compensation Act was finally signed into law in 1927 creating a federal system of no-fault compensation for workers like Jensen. As a result, the term "Jensen line" has come to represent the point at which the water meets the shore. It was this situs (site) that was used in determining which jurisdiction, State versus Federal, was responsible for occupational injury benefits.

The original Act of 1927 exempted benefits to a master or member of a crew of any vessel (seaman) and to an officer or employee of the United States as these groups already had protection. It did however, provide compensation to injured employees "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." Because of this strict geographically based coverage provision and the different jurisdictions found on either side of the "Jensen line" coupled with the nature of longshoring work, employers and employees struggled with both state and federal acts. Injuries occurring on land were the state's jurisdiction whereas the provisions of the federal act regulated injuries on navigable waters. For years the question of jurisdiction arose when the worker literally walked in and out of coverage.

Finally, in 1972 Congress addressed the problem by including a second jurisdictional test. The Act would now provides benefits to injured workers landward of the "Jensen line" to include specific maritime facilities related to loading, unloading, repairing or building a vessel. It was also required that an eligible employee must be "engaged in maritime employment" thereby establishing both a situs (site) and status (employment) test for LHWCA benefits. Both the situs and status requirements must be met for there to be coverage under the Act. The last time the LHWCA was amended was in 1984 when Congress liberalized certain benefits and some groups of employees were eliminated from the status test.

In the original act, the situs was limited to the navigable waters of the United States including any dry dock. While the term navigable waters has undergone many court room challenges and will undoubtedly be tested more in the future, at the time the LHWCA was first

enacted the term navigable waters was understood to have to meet two criteria:

- (1) Do they have an interstate nexus and
- (2) Are they capable of being used for the customary modes of trade and travel?

The Act further defines the term United States as including the several states and territories and the District of Columbia, including the territorial waters thereof. Territorial waters are those waters that form a boundary around a nation and, based on international law, are subject to certain limitations. At the time of the enactment of the LHWCA the custom was to recognize a three nautical mile limit (based on the theory that this was the effective range of a cannon of the period) from the low water mark as territorial waters. It was this range, from the “Jensen line” to the territorial water’s edge that the LHWCA benefits would extend. The second limitation, i.e. the dry dock, was extended in 1972 to “any adjoining pier, wharf, dry dock, terminal building way, marine railway, or other adjoining area customarily used in loading, unloading, repairing, dismantling, or building a vessel.” By extending the situs, Congress corrected a major problem found in the original Act. It resolved the issue of longshoremen “walking in and out” of coverage during the course of their work day and allowed for those adjoining areas to satisfy the situs test without extensive inquiry on how they were being used.

With the 1972 amendments, the status or maritime employment test was introduced for the first time. This test, in conjunction with the situs test, must be satisfied in order for an employee to claim benefits under LHWCA. Maritime employment is defined by the Act as including “any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker.”. Therefore, any worker whose employment involves any of the five types of maritime activity specifically mentioned in Section 903 (a) (i.e. loading, un-

loading, repairing, dismantling, or building a vessel) will satisfy the status test. This however, does not limit recovery to these specified occupations. In one of five major cases defining the status test, the Court ruled in *Chesapeake and Ohio Railway Co. v. Schwalb*:

Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is all that Section 902(3) requires. Coverage is not limited to employees who are denominated “longshoreman” or who physically handle the cargo. Nor are maintenance employees removed from coverage if they also have duties not integrally connected with the loading or unloading functions. Someone who repairs or maintains a piece of loading equipment is just as vital to and integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee’s contribution to the loading process is not continuous or that repair or maintenance is not always needed. Employees are surely covered when they are injured while performing a task integral to loading a ship.

Lastly, the 1972 amendments must be viewed in light of the original Act as establishing a test for maritime employment and not restricting the initial beneficiaries of the Act. In a 1983 Supreme Court decision of *Director, O.W.C.P., v. Perini North River Associates*, the court ruled that a construction worker injured on a barge while working on the foundation of a sewer outfall (an activity not normally associated with maritime employment) was eligible for LHWCA benefits because his injuries were received while in the course of his employment, while upon the navigable waters of the United States and would have been cov-

ered under the Act before the congressional amendments of 1972.

B. Liability for Compensation

The employer is immune from suit if (s)he provides LHWCA benefits. The Act requires payment of benefits regardless of fault for all compensable injuries (§ 904 (b)). In the case of an employer failing to provide LHWCA benefits, the injured employee, or in the case of death, his legal representative, may elect benefits under the Act, sue in civil court or seek protection under general maritime law. In addition, the employer is barred from using the three “common law” defenses i.e. negligence of fellow servant, assumed risk by employee and contributory negligence of employee.

An employer who fails to secure payment of compensation is guilty of a misdemeanor and is subject to a fine up to \$10,000, one year in prison or both. In cases where the employer is a corporation, the president, secretary and treasurer are severally and personally liable for any compensation or benefit an employee is entitled to under the Act.

Further, if an employer knowingly “transfers, sells, encumbers, assigns, or in any manner disposes of, conceals, secretes, or destroys any property belonging to such corporation” after it is known an employee is eligible for LHWCA benefits, with the “intent to avoid payment of compensation”, (s)he is subject to the same fine and imprisonment penalty cited above. In the case of a corporation, the president, secretary, and treasurer are severally liable for the imprisonment penalty and jointly liable with the corporation for the fine.

C. Benefits

1. Medical Services and Supplies. The act requires the “employer to furnish medical, surgical and other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus, for such period as

the nature of the injury or the process of recovery may require.” Additionally, federal regulations permit the recovery of reasonable and necessary costs associated with travel so long as such care is determined by a physician as medically necessary.

The employee is free to choose an attending physician from a list approved by the Secretary of Labor and within a reasonable distance from the injured employee’s home. The Act also permits the treatment of injury and disease by using prayer or spiritual means in accordance with the tenets and practices of a recognized (by the Social Security Administration for reimbursement under Medicare and Medicaid and the Internal Revenue Service as having tax exempt status) church or religious denomination.

The injured employee must notify the employer and the District Director of the U.S. Department of Labor, Office of Workers Compensation Programs, LHWCA in writing within 30 days of the date of injury, or within 30 days after becoming aware of the injury. For disease related claims, written notice must be within one year after the injured employee is made aware of an occupational disease.

Where state act medical fees are normally subject to scheduled charges, the LHWCA permits reimbursement similar to those prevailing in the community of the care giver but are subject to review to determine if costs are excessive.

2. Disability. The definition of disability is the “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modi-

fied from time to time by the Medical Association, in the case of an individual whose claim..." is due to an occupational disease after the individual has retired.

In determining the extent of disability, factors such as the injured's age, education, experience, physical condition, rehabilitative potential and availability of work must be considered. As found with most disability benefits, the LHWCA has a waiting period. The period is only three days after which benefits are paid and if the injured employee is disabled after fourteen days, benefits are paid retroactively.

Similar to state act disability, there are four types of disability classifications found in the LHWCA.

- a. Permanent total disability means the injured is without earning capacity for life. The loss of both hands, both arms, both feet, both legs, both eyes or any two is presumed (absent conclusive proof to the contrary) to be permanent total disability. Payments are paid at 66 2/3% of the employee's average weekly wage.
- b. Temporary total disability means the inability to earn any wages for a temporary period of time. Payments are paid at 66 2/3% of the employee's average weekly wage
- c. Permanent partial disability means partial in character but permanent in quality. There are three methods used by the LHWCA in determining lost wages of the permanently partially disabled. First, if the injury is identified in the schedule found in the Act in Section 908 (c), the employee is entitled to receive 66 2/3% of his average weekly wage at the time of injury for a specified period of time. Second, if the injury is nonscheduled, i.e. not specified in Section 908 (c), payment is made at a rate of 66 2/3% of the dif-

ference between the employees average weekly wage and the employee's wage earning capacity after his return to work in the same employment or otherwise. Third, compensation for disability to retired workers whose disability manifests itself after retirement is entitled to 66 2/3% of the average weekly wage multiplied by the percentage of permanent impairment as determined by the statute.

- d. Temporary partial disability means a partial reduction in wage earning capacity for a temporary period of time entitling the employee to 66 2/3% of the difference between his pre-injury earnings and his present earnings for a period not to exceed five years.
3. Death Benefits Survivors benefits are limited to 66 2/3% of the decedent's average weekly wage subject to a maximum of 200% of the national average weekly wage. The LHWCA specifies in detail the percentages allowable for eligible dependents. Dependency is, according to the Act, determined as of the time of the injury. The Act also states that the maximum allowable for reasonable funeral expenses is \$3,000.

VII. Methods of Insuring

Seamen. NCCI's standard workers compensation policy may be used to provide maritime employers liability insurance for the liability under one or more state workers' compensation laws and for liability under admiralty law. There are two programs available to extend maritime employers liability under the rules of the National Council on Compensation Insurance. Program I provides statutory limits for Part One-Workers Compensation corresponding to the state listed in item 3.A. on the Information Page. Using the Maritime Coverage Endorsement (WC 00 02 01 A), the employers liability section of the policy (Part Two) is amended to provide tort liability protection for the em-

ployer due to bodily injury, disease or death arising out of and in the course of employment of a master or member of a crew of a vessel. Program II provides the same coverage as Program I, however the insurance carrier settles claims based on the statutory benefits of the state shown in the schedule found on the Voluntary Compensation Maritime Coverage Endorsement (WC 00 02 03) in lieu of the laws of negligence. Liability limits range from a minimum of \$25,000 up to \$500,000.

Coverage is payable for only those injuries that occur in the territorial limits of the continental United States, Alaska, Hawaii or Canada and those operations involving a vessel sailing directly between ports within these territories. Coverage includes maintenance and cure, lost wages, and transportation expenses if endorsed. Coverage provided by a Protection and Indemnity (P & I) policy is excluded.

In contrast to the territorial limits of NCCI, foreign markets such as Lloyds of London or the Institute of London Underwriters provide worldwide maritime employers liability coverage either on a primary or excess basis.

Another option is Protection and Indemnity (P & I) Insurance. Typical P&I policies provide for loss due to injury, illness and loss of life (normally defined broadly enough to provide damages required under maintenance and cure, Jones Act, general maritime law and DOHSA) to which the insured is legally obligated to pay. P&I also extends benefits for hospital and medical expenses incurred by the insured beyond those (s)he is legally obligated to pay as well as, repatriation and other medically necessary transportation expenses; damage to other vessels caused by collision or by other non-collision losses such as the dropping of cargo on the deck of the vessel or forcing another

vessel aground; damage to property other than vessels; wreckage removal; damage to cargo; fines and penalties; expenses related to the prosecution of mutiny or misconduct; quarantine expenses and defense costs.

Longshoremen. The National Council on Compensation Insurance sets forth in Rule 3A.4. of its manual the procedure to properly classify and rate the workers compensation policy to comply with the LHWCA and its extensions. There are specific classifications that are subject to the LHWCA and are defined as federal classifications because of their scope of operations. These classifications use the letter “F” after the four-digit workers compensation classification number to indicate that federal benefits apply. To extend federal benefits to non-federal classifications that are required to provide LHWCA benefits because their normal operations have expanded to include a maritime exposure, apply the LHWCA coverage percentage surcharge to the manual rates and minimum premiums of such classifications. The policy is amended by the use of an endorsement (WC 00 01 06A) adding the LHWCA to the meaning of workers compensation law found in the policy

VIII. Conclusion

The concentration of this paper has been on introducing the reader to the occupational injuries, benefits and insuring methods of maritime exposures. This unusual area of employee welfare is seasoned with the strong influences of history and alternating winds of jurisprudence. Sensible risk management, attention to state and federal laws and the frequent Supreme Court decisions related to maritime issues will prove to be the right course to a safe harbor in an otherwise turbulent sea.

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

Construction Maritime Risks and Insurance

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Instructor

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Florida

1

Longshore and Harbor Workers Act



- **Reasons for coverage**
 - **Required by federal law**
 - **State act limitations, exclusions**
 - **Penalties**

2

Longshore and Harbor Workers Act



- **Federal requirement**
 - **Every employer shall be liable...**
 - **Shall secure...compensation payable under section:**
 - **907 Medical services and supplies**
 - **908 Disability**
 - **909 Death**

3

Longshore and Harbor Workers Act



- **State act limitations, exclusions**
 - **Concurrent jurisdiction**
 - **Permits state act schemes to apply to land-based longshore sites**
 - **State workers compensation laws exclude LHWCA benefits**

4

Longshore and Harbor Workers Act



- **Penalties**
 - **Fine of not more than \$10,000 or**
 - **Not more than one year imprisonment or**
 - **Both**
 - **In cases involving a corporation:**
 - **President, secretary and treasurer severally liable for fine or imprisonment and**
 - **Personally liable for compensation under the Act**

5

Longshore and Harbor Workers Act



- **How coverage is provided**
 - **Insurer must be federally authorized**
 - **Monoline**
 - **Endorsed to workers compensation policy**
 - **Self-insured**

6

Longshore and Harbor Workers Act



- **Amends Part One and Part Two of policy**
- **Must indicate state where longshore work is being performed**
- **Does not extend to:**
 - **Defense Base Act**
 - **OCSLA**
 - **Nonappropriated Funds Act**

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Defense Base Act



- **Extends LHWCA benefits to:**
 - **Any employee working on a military base outside the United States, including US territories, possessions**
 - **Any employee engaged in federally funded public works business outside the United States**
 - **Any employee engaged in public works or military contracts with a foreign government deemed necessary to the United States national security**
 - **Work for American employers providing welfare or similar services outside the United States for the benefit of the Armed Services, e.g., the United Service Organizations (USO)**

8

Outer Continental Shelf Lands Act



- **Extends LHWCA benefits to injured employees exploring for natural resources on the Outer Continental Shelf of the United States.**
- **Coverage does not extend to a master or member of the crew of any vessel**

9

Nonappropriated Fund Instrumentalities Act



- **Extends LHWCA benefits to civilian employees compensated from nonappropriated funds in service to military posts or service clubs**
- **Coverage extends to employees within and outside the continental limits of the United States**

10

Practical Concerns



- Risk assessment
- Markets
 - Availability
 - “If any”
- Premium
 - Special F codes
 - Non F codes
 - Multiplier applied to rate

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Practice Concerns



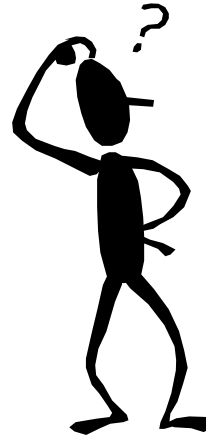
- Useful websites:
 - Division of Longshore and Harbor Workers’ Compensation
 - www.dol.gov/esa
 - Office of Administrative Law Judges
 - www.oalj.dol.gov

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Quiz



- True or False:
 - Longshore is optional
 - State act benefits are primary
 - State regulators authorize carriers to write longshore coverage
 - A separate workers' compensation policy is required to provide longshore benefits
 - Only special F code classes are eligible for longshore coverage



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Quiz



- True or False:
 - Longshore is optional **False**
 - State act benefits are primary **False**
 - State regulators authorize carriers to write longshore coverage **False**
 - A separate workers' compensation policy is required to provide longshore benefits **False**
 - Only special F code classes are eligible for longshore coverage **False**

14

You Be The Judge



The claimant worked on a major construction project known as the Harbor Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and an outfall tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang" and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island. The claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself.

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Morrissey v. Kiewit-Atkinson-Kenny **36 BRBS 5 (2002)**



- **OCSLA: erroneously disregarded the statutory requirement that the claimant's injury must result from explorative and extractive operations involving natural resources.**
- **DBA: does not extend coverage for work on projects that must meet federal specifications, guidelines and statutes, but rather requires that the United States or an agency thereof be a party to the contract**
- **LHWCA: The bedrock was at all times dry ground, and there is no assertion that the tunnel itself was used in interstate commerce as a waterway.**

16

Maritime Liability Exposures



17

Reasons For Coverage

- **General Maritime Law**
- **Merchant Marine Act**
- **Death on the High Seas Act**



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How Coverage Is Provided

- **Protection and Indemnity policy**
 - **Protection against liability for bodily injury, illness and death,**
 - **Third -party property damage and**
 - **Other vessel-related expenses due to operation of a vessel**
- **Maritime Employers Liability Coverage**
 - **Employers liability under admiralty law**
 - **Endorsements to Workers Compensation policy**

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Protection and Indemnity

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Protection and Indemnity

- **Originated in early 1800's**
 - **Underwriters accepted 3/4 of loss**
 - **Shipowner pays remainder**
- **Shipowners associations formed**
 - **Mutually insure shipowner's obligation**
 - **Now known as P&I clubs**

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Protection and Indemnity

- **P&I clubs today**
 - **Approximately 20 clubs worldwide**
 - **International Group of P&I Associations**
 - **Represent 95% of all P&I insurance**

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Protection and Indemnity

- **Conventional insurers**
 - **Larger domestic carriers**
 - **Non assessment mutuals**
 - **Policies issued subject to limits of liability**
 - **Not subject to February 20 renewal date**

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Protection and Indemnity Forms

- **The American Club**
 - **SP-23**
 - **Greater range of coverage when compared to SP-38**
 - **SP-38**
 - **Does not extend coverage to cargo, SP-23 does**
- **American Institute of Marine Underwriters**

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P& I Coverage

- **Typically used for owned/operated vessels**
- **Insuring agreement**
 - **Policy indemnifies the assured; not pay on behalf of the assured**
 - **Indemnifies the assured in the capacity of vessel owner**

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P&I Coverage

- **Non-ownership**
 - **“Bare boat charterer,” i.e., charterer without crew**
 - **Owner *pro hac vice*, i.e., for the time being**

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P&I Coverage

- **Loss of life, injury and illness**
 - **Legal liability for injury or death to:**
 - **Crew**
 - **Guests**
 - **Persons aboard other vessels**
 - **Extends to:**
 - **Maintenance and cure**
 - **Jones Act**
 - **General maritime law**
 - **Death on the High Seas Act**

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P&I Coverage

- **Hospital, medical, other expenses**
 - **Applies to expenses assumed by assured**
 - **Rather than those assured is liable for**

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P&I Coverage

Repatriation expenses

- **Obligation of assured to return crew to original port**
- **Not limited to injury or death of crew**
- **Also pays crew's wages due to**
 - **Wreck or**
 - **Loss of vessel**

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P&I Coverage

- **Collision damage to other vessels**
 - **Covers the assured's liability to other vessels**
 - **Includes property or freight**

30

P&I Coverage

- **Damage to property other than vessels**
 - **Such as**
 - **Dock**
 - **Pier**
 - **Harbor**
 - **Bridge**
 - **Buoy, etc.**

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P&I Coverage

- **Wreck removal**
 - **Owner liable for sunken vessel**
 - **Pays costs to remove the insured vessel if compulsory by law**
 - **Value of salvage may be deducted**

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P&I Coverage

- **Damage to cargo**
 - **Covers cargo or other property (except mail) that is:**
 - **To be carried**
 - **Being carried or**
 - **Has been carried**
 - **Cargo coverage not found in all P&I policies**
 - **Not available with SP-38 form, optional with AIUM form**

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P&I Coverage

- **Fines and penalties**
 - **Applies to laws and regulations of**
 - **Federal**
 - **State or**
 - **Foreign country**

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P&I Coverage

- **Mutiny or misconduct**
 - **Expenses incurred in prosecuting:**
 - **Crew or**
 - **Other person employed by vessel**
 - **Not available with SP-38 form**

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P&I Coverage

- **Quarantine expenses**
 - **Costs associated with vessel in isolation due to contagious disease**
 - **Includes cost to disinfect vessel, person on board**
 - **Not found with SP-38 form**

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P&I Coverage

- **Putting-in expenses**
 - **Due to injury or illness of crew or passenger**
 - **Vessel must deviate from course for medical attention**
- **Not found with SP-38 form**

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P&I Coverage

- **Cargo's proportion of general average**
 - **General average**
 - **The apportioned cost borne by all due to the loss incurred by some for the common safety of the venture and preservation of property**
 - **Pays if owners of cargo aren't required to contribute their portion of general average**
- **Not found with SP-38 form, optional with AIMU form**

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P&I Coverage

- **Defense costs**
 - **Covers reasonable costs in addition to liability**

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P&I Coverage

- Risk assessment
- Markets
 - Domestic
 - Foreign
- Premiums
- Deductibles

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Maritime Employers Liability

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Maritime Employers Liability

- **Typically used when vessel is not owned by the insured**
- **Provides coverage subject to Jones Act**
 - **Bodily injury**
 - **Illness**
 - **Death**
- **Monoline policy**
 - **Primary policy or**
 - **Excess**

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Maritime Employers Liability

- **Specialty Domestic Insurers**
- **Foreign markets**
 - **Lloyd's of London**
 - **British Company Market**

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Endorsements

- **Maritime Coverage Endorsement**
- **Voluntary Compensation Maritime Coverage Endorsement**
- **Limited Maritime Coverage Endorsement**
- **All:**
 - **Amend Employers Liability (Part Two) Insurance**
 - **Provides tort protection for bodily injury, disease, death**

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Maritime Coverage Endorsement

- **Deletes Employers Liability exclusion**
- **Applies to bodily injury to a master or member of a crew of any vessel**
- **Employment subject to scheduled work**

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Maritime Coverage Endorsement

- **Subject to territorial limitation**
 - **Continental United States**
 - **Alaska, Hawaii**
 - **Canada**
- **Exclusions**
 - **Protection and Indemnity (P&I)**
 - **Transportation, wages, maintenance and cure**
 - **Unless additional premium charged**

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Maritime Coverage Endorsement

- **Defense coverage**
 - **in personam**
 - **Insurer defends insured**
 - **in rem**
 - **Suit against vessel is suit against insured**
 - **Vessel must be owned or chartered by insured**

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Maritime Coverage Endorsement

- **Accident limit**
 - **Applies to all bodily injury arising out of an accident**
 - **Minimum limit is \$100,000 per accident**
 - **Standard increased limits to \$500,000 per accident**

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Maritime Coverage Endorsement

- **Disease limit**
 - **Applies as an aggregate to all bodily injury by disease**
 - **Minimum limits**
 - **\$100,000 each employee**
 - **\$500,000 policy limit**
 - **Subject to increased limits**

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Voluntary Compensation Maritime Coverage Endorsement

- **Same coverage as Maritime Coverage Endorsement**
- **Differences**
 - **Benefits payable to crew members of *scheduled* vessels**
 - **Settlement offer subject to State Act benefits**
 - **If rejected, Employers Liability limits apply**

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Limited Maritime Coverage Endorsement

- **Advisory form**
 - **Designed for incidental maritime exposures**
- **Same coverage as Maritime Coverage Endorsement**
- **Difference**
 - **Benefits payable to scheduled classifications**

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Practical Concerns

- **Risk assessment**
- **Markets**
- **Rates**

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**Construction Maritime
Risks and Insurance**

Any Questions?

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