Incidental Maritime Employers Liability

What is "contingent" or "incidental" Maritime Employers Liability coverage and do I need it?

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We previously wrote about the scope of the U.S. Longshore and Harbor Workers Compensation Act (the Act) and provided an aid to employers to determine when they and their subcontractors need USL&H coverage. In that paper, we mentioned that special consideration needs to be taken by operators of marine facilities (e.g., terminals, warehouses, ports and shipyards) who also own or operate vessels as they risk claims by their USL&H employees alleging that they are actually Jones Act seamen.

We have prepared this document to assist those employers in understanding when and how they can recognize and address the risk of their USL&H workers alleging they are Jones Act seamen.

Please note this is a very high-level summary and is not a substitute for a detailed review of any issue as needed by legal counsel.

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The U.S. Longshore & Harbor Workers Compensation Act

A high-level summary of the Act

The U.S. Longshore & Harbor Workers Compensation Act (the Act) is a federal law that provides a statutory scheme for the payment of compensation, medical care and vocational rehabilitation services to non-seaman maritime workers suffering on-the-job injuries. It requires a claimant to meet both a "status" and "situs" test to recover benefits:

- **Status** – 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, exempting some specific jobs.
- **Situs** – Injury occurring upon any navigable waters of the U.S. including any adjoining pier, wharf, drydock, terminal, building way, marine railway or other adjoining area customarily used in loading, unloading, repairing or building a vessel.

Courts have taken an expansive interpretation of the wording "any harbor worker" and have also defined the concept of activities that are "integral to shipbuilding" to expand coverage under the Act to many workers that undertake any activity at a marine facility.

Recovery under the Act is an exclusive, no-fault remedy for workers that fall within its scope with employers being protected against tort liability to employees.

Interaction of the Act and the Jones Act

The Act expressly excludes "seamen" (masters or members of a crew of any vessel) on the basis that they have a right to sue their employers under the Merchant Marine Act of 1920 (the Jones Act) and related laws. In theory, claims will be made either under the Act or the Jones Act, not both.

Unfortunately, the existence of mutually exclusive remedies does not mean that an injured employee will elect just one theory of recovery and pursue it alone. To the contrary, suits are usually brought against the employer "in the alternative" seeking recovery under the Jones Act or, assuming seaman status is not established, under the Act.

When does a shoreside employer face the risk of a Jones Act claim?

A Jones Act seaman is generally anyone who (i) has a connection to a vessel in navigation or to an identifiable group of such vessels that is substantial in terms of both duration and nature (e.g., 30% or so of their time) and (ii) whose job duties contribute to the function of the vessel or to the accomplishment of its mission.

Determining Jones Act seaman status is a mixed question of law and fact and is frequently litigated.

Example Decision

A company that operated vessels employed a shoreside maintenance and repairman to work in their fabrication shop and inspect, clean and repair vessels. This was mostly done with vessels at the dock but occasionally the repairman would go on "test runs" or work on vessels while they were being repositioned in a canal near his employer's yard.

The employee was injured while operating a land-based crane but sued his employer seeking damages as a Jones Act seaman.

The employer argued that plaintiff was a land-based repairman who was clearly a "ship repairmen" within the scope of the Act.

The court rejected this argument and instead concluded the employee was a Jones Act seaman as he (i) contributed to the function of a vessel (cleaned, maintained and repaired vessels) and (ii) had a substantial relationship in duration and nature (over 30% of his time) to vessels in navigation owned or operated by his employer.

As the injured worker had Jones Act seaman status, the fact that the injury occurred on land was not relevant.

The issue

Many operators of marine facilities also own and/or operate vessels. Sometimes this is to support shoreside operations (e.g., terminal assist tugs) while other times it is a related business. In either case, the employer's use of vessels raises the issue of an employee meeting the test to be a Jones Act seaman.

This is a problem as recovery for Jones Act seamen is in tort with damages as proven at trial. This often leads to large awards by plaintiff's counsel who were retained on a contingency fee basis versus the limited, statutory recovery under the Act. Thus, employees are incentivized to claim they are Jones Act seamen and excluded from the scope of the Act and its limited recovery.

This distinction is made more problematic by the fact that liability under the Act is normally financed by USL&H coverage while liability under the Jones Act is usually financed via either Maritime Employer's Liability Insurance (MEL) or Protection & Indemnity (P&I) coverage.

As a result, your insurance program needs to anticipate and efficiently address claims alleging liability under the Jones Act or, assuming seaman status is not established, under the Act.

Insurance considerations

Given the ability of USL&H employees to potentially qualify as Jones Act seamen, USL&H employers that use vessels should secure "incidental" Maritime Employer's Liability coverage. This coverage obligates your insurer to defend and indemnify you in the event an employee covered by the Act sustains bodily injury under circumstances that demonstrate he or she was a Jones Act seaman. It does not pay for liabilities to "normal" vessel crew, but rather those covered dock or yard workers who unintentionally obtain seaman status.

Adding "incidental" Maritime Employer's Liability coverage to respond to claims by USL&H workers alleging seamen status will allow you to tender a complaint with combined allegations to your USL&H insurer who will oversee the resolution of the claim. This is significant to avoid separate insurers from fighting for their respective interest to the overall detriment of the insured (i.e., USL&H carrier trying to prove the claimant is a Jones Act seaman versus MEL or P&I insurer trying to prove the client is covered by the Act).

Incidental MEL coverage is provided by the two largest USL&H Mutual Clubs with a $1 million limit but there are some requirements to confirm the coverage. You can also obtain it via the commercial market.

Operators of shoreside marine facilitates that utilize vessels in their operations need to make sure that they have incidental Maritime Employer's Liability coverage in place and that they have considered how that coverage interacts with the balance of their insurance program.

As important as having incidental MEL coverage is determining how it interacts with the balance of your insurance program. This will require special attention and, perhaps, wording in your coverages with a customized approach with your insurers.

Operational considerations

While not always practical, steps can sometimes be taken to prevent USL&H workers from obtaining Jones Act status including monitoring (and documenting) their on-vessel activity and making sure it is substantially less than 30% of their time (the threshold generally required to obtain Jones Act status). Operators can also hire third party vessels and subcontractors to perform work at their facility instead of owning and operating vessels themselves.

Summary

Operators of marine facilities (e.g., terminals, warehouses, ports and shipyards) that also operate vessels potentially face claims by their USL&H employees alleging that they are actually Jones Act seaman and their insurance program needs to be structured to efficiently fund the defense and resolution of these claims.

Please feel free to contact us if you have any questions or concerns.

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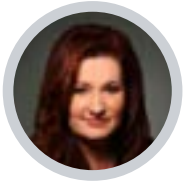

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