JEFFREY S. MUTNICK, P.C.
jmutnick@mutnicklaw.com
Admitted in Oregon

MARITIME WORKER – JOB RELATED INJURY

As a maritime worker, your employer must provide compensation for job-related injuries. This entitlement arises under federal law, and is called the Longshore & Harbor Workers' Compensation Act. The Act requires compensation be provided in the form of time loss payments, medical and vocational expenses, and permanent disability compensation for injuries. Although the law was designed to be a simple, efficient, no-fault system of compensation for on-the-job injuries, it can be a nightmare if your employer or its insurer denies your right to benefits.

There are certain things you must do to protect your rights. First, you must notify your employer of your injury. The deadline for notification depends on whether you suffer from a traumatic injury or from an occupational disease. Generally, an "injury" refers to an injury arising out of a specific incident, however minor; for example, a low back injury occurring while lifting. An "occupational disease" generally refers to an injury or disease resulting from ongoing work activity or exposure; for example, bad knees resulting from years of climbing and walking or asthma resulting from toxic exposure.

The notification deadline for an injury is 30 days; however, it is a good idea to report the injury to your supervisor immediately. This is especially true, since it is not unusual for an employer to attempt to deny that an injury occurred. Notice to an employer should be in writing.

In the case of an occupational disease, notice to the employer is required within one year from the date that you know, or have reason to know, of the relationship between your condition and your employment.

Aside from notice to the employer, there is an additional reporting requirement. If you intend to preserve your rights under the law, a formal written claim (typically an LS-203 form) must be filed with the Office of Workers' Compensation programs of the U.S. Department of Labor. In the case of injuries, such a claim must be filed within one year from the date of injury; and in the case of occupational diseases, within two years from the date that you become aware, or should be aware, of the relationship between the occupational disease and your employment.

If you fail to file a timely LS-201 or LS-203 form, you may still be protected. That is because there are certain exceptions to the notification rules. For example, a claim for payment

of medical bills is never time-barred. Also, if the employer had actual knowledge of your accident or occupational disease, even if you did not file a formal written report, there may be no bar to your seeking benefits. Similarly, if the employer is not prejudiced by your failure to file a report, there may be no bar.

In the event that your injury causes you to miss work, you may be entitled to temporary disability ("time loss") payments. The employer's obligation is either to begin payment of time loss payments within two weeks or to controvert (that is, deny) your claim. Your entitlement to time loss benefits continues until you either return to work or are declared to be at a point of maximum medical improvement. Sometimes this is referred to as being "medically stationary."

Generally, your compensation rate is two-thirds of your average weekly wage. However, there are both minimum and maximum rates that can be paid. For example, for the years 1992-1993, the minimum rate to be paid by an employer was $180.29, and the maximum rate to be paid was $721.14. There are different methods of determining your "average weekly wage." The most common method uses your total earnings for the 52 weeks prior to injury and divides that figure by 52 (weeks). However, in some cases this produces an unfair result; for example, where you may not have worked for part of the year due to illness or other reasons. In such an event, other methods may apply.

One of your most important rights under the Longshore & Harbor Workers' Compensation Act is your right to medical treatment. You are entitled to medical care for your job-related injury or occupational disease for the remainder of your life. Medical care can, but does not always, include the following: (1) physical therapy, (2) a van with an automatic lift, (3) a wheelchair, (4) work shoes, (5) hospital beds, (6) biofeedback therapy, (7) attendant care, and (8) an air purifier. This list is not meant to be exhaustive and particular medical services are determined on a case-by-case basis.

A frequent area of concern is the right to choose your own doctor. Under the Act, you do have the right to make this decision, but only one time. The first physician you choose is your treating physician. Any decision to change physicians must then go through your employer. If your employer refuses to consent to the change, you can seek legal recourse, but there is no

guarantee you will prevail. It will be necessary for you to show good cause for the change. Examinations by a specialist at the request of your own doctor are permitted. Prior approval from the employer need not be obtained.

One particular restriction to note concerning your right to medical care concerns chiropractic care. You are entitled to the services of a chiropractor, but only insofar as the chiropractor does "manual manipulation of the spine to correct a subluxation shown by X-rays or clinical findings." In many cases, a chiropractor does more than manipulation—for example, he or she may prescribe and direct a physical rehabilitation program. In such cases, the employer is not required to pay for the additional services.

In the event that your injury prevents your return to work, you may be entitled to rehabilitation. Under the law, your doctor may request assignment of a vocational counselor designated by the Office of Workers' Compensation Programs. Your employer may also be interested in hiring a vocational counselor, though you have no obligation to participate in the employer-selected program. You should be entitled to payment of some compensation while you participate in your vocational program.

Perhaps the right of most interest is the right to a permanent disability award in cases where you do not have a complete recovery. Undoubtedly, you have co-workers or friends who have received permanent disability awards under the Longshore & Harbor Workers' Compensation Act.

Permanent disabilities are broken down into two categories: partial and total. Partial disabilities are broken into two further categories: scheduled and unscheduled. Each of these categories has its own rules for determining a partial disability award.

Permanent total disability occurs where the claimant is unable to return to his or her regular work, and the employer is unable to identify other suitable and available work. In such a case, you are entitled to two-thirds of your average weekly wage for the remainder of your life.

Partial disabilities are a bit more complicated. Initially, it is important to determine whether the injury is "scheduled" or "unscheduled." "Scheduled" and "unscheduled" injuries have their own rules.

A scheduled injury is an injury that is listed on a schedule set forth in the statute. The following list constitutes the few scheduled injuries: (1) arm injuries, (2) leg injuries, (3) hand injuries, (4) foot injuries, (5) eye injuries, (6) finger injuries, and (7) hearing loss. Virtually all other injuries are unscheduled since they are not listed on the schedule of injuries.

Determination of a worker's permanent disability award for scheduled injury is based on a formula. Essentially, the worker is entitled to two-thirds of his average weekly wage for a period of time specified in the Act. The period varies depending on the particular body part injured and the severity of the injury. Although the formula is rather straightforward, there are frequent disputes about its application. For example, it is not uncommon to argue about the severity of the injury. A worker may well contend that he has a 50% disability to his leg; the employer claims it is only 10% or 20%. Disputes such as this either require a compromise or hearing.

Significantly, with scheduled injuries, unless you are totally disabled, it is irrelevant that your injury causes you to lose money. The determination of disability is primarily a medical question. The severity of your injury is based on medical considerations, such as weakness, pain, restriction of motion, loss of sensation, and instability. They do not take into consideration what impact your injury will have on your ability to earn money.

Unlike scheduled injuries, unscheduled injuries are related to your ability to earn money. Unscheduled disability awards are determined by comparing your average weekly wage prior to injury with your earnings after you are medically stationary. In the event that there are no current earnings, you may be entitled to a total disability award. In the event that there are current earnings that are less than your pre-injury average weekly wages, you are entitled to two-thirds of the difference between the two. For example, a worker who previously earned $900 per week and now only earns $600 per week, due to his injury, is entitled to a $200 per week award. ([$900 - $600] x [2/3]=$200).

One final right to discuss is your right to representation by counsel. This may well be your most important right, since employers frequently deny some or all of the above benefits. An employer may well deny that your injury is work-related; may refuse to pay a doctor bill, or

consent to a switch of physicians; may refuse to pay time loss; may dispute your entitlement to a fair and adequate permanent disability award. In all such cases, an attorney can help you.

Of course, one frequent concern is who pays for the attorney. Ultimately, this is determined either by the Office of Workers' Compensation Programs or by an Administrative Law Judge. In most cases, where the employer has denied a benefit, the employer is ordered to pay the attorney fee. If there are costs in the case, for example, expenses related to testimony from your doctor, the employer may be made to pay these as well.

While this article does summarize your rights and entitlements under the Longshore Act, it is not intended to be comprehensive. As with all legal rules, there are many exceptions. The law is always undergoing change. Should you have questions, or should you confront a situation that is not discussed by this article, you are encouraged to consult an attorney.