The Longshore and Harbor Workers Compensation Act: A National Model

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Good morning. I am Stephen Embry, an attorney who has represented over 10,000 injured workers under the Longshore Act over the past 31 years. I am past chairman of the Workers' Compensation Section of the Association of Trial Lawyers of America, and past president of the Workplace Injury Law and Advocacy Group (WILG). I was intimately involved in the legislative process that amended the Longshore Act in 1984, and am a co-author of the Longshore Textbook (4th Ed.). If being an expert means knowing too much about too little, I may qualify as such a person on Longshore matters.

First of all the state of the workers compensation systems in our nation is a disgrace: benefits are low, many workers not covered, medical care corrupted and unavailable. Consequently workers who have done what we ask of them, work for a living, and suffered injury or death are often left high and dry. Their families suffer foreclosure, college drop out, and hunger. In the last decade a wave of reductions in benefits has brought workers and their families to the edge of financial collapse. Rather than talk about lowering Longshore Act benefits we should be trying to raise state benefits to a living level.

The Longshore and Harbor Workers Act is a national workers' compensation act providing uniform protection and health care for maritime employees who work upon the navigable waters of the United States or adjoining land areas customarily used for ship loading, ship construction and overhaul. Historically, the law was enacted following the U.S. Supreme Court's holding that the Admiralty provisions of the U.S. Constitution reserved to the federal government the right to regulate admiralty injuries, and that maritime workers were constitutionally entitled to a uniform remedy, and not subject to the growing hodgepodge of state workers' compensation acts. Southern Pacific Co. v. Jensen, 224 U.S. 205 Instead, the Constitution required that there be a uniform law that applied to such admiralty claims.

Over the next 50 years the Longshore Act provided uniform but low benefits, and engendered substantial litigation costs and delays as employers argued over whether the injury met the jurisdictional requirements of the Act. A worker would be covered if he fell into the water, but left high and dry if he landed on land. By 1972 the maximum benefit provided to a worker was $70.00 per week, and in order to obtain that benefit he regularly had to seek the support of the Federal Courts. Consequently, injured workers were usually forced to seek other remedies for catastrophic injuries. They frequently would sue the vessel owner for full damages for the negligence of the stevedoring company that had employed the longshoreman, and if that suit was successful the ship-owner would, in turn; seek indemnification from the stevedoring company.

The stevedores asked Congress for relief from these indemnification actions, and Congress agreed to provide such relief. But as part of the bargain, the benefit schedules of the Longshore Act were revised to provide fairer, but not munificent, benefits. In addition, due process under the Act was improved by the provision of hearings by Administrative Law Judges. Director, OWCP v. Perini North River 459 U.S. 297(1983)

The 1972 amendments to the Act coincided with the presentation to the Congress of the 1972 Report of the Commission on State Workers' Compensation Laws. That report documented the inadequacies of state workers' compensation laws that provided limited and inconsistent benefits to injured workers. The Commission reviewed the state laws and concluded that, indeed, the state acts were often unreasonably parsimonious and lacked basic coverage for many workers and widows. The Commission proposed a series of recommendations for national minimum standards for workers' compensation. For the Longshore Act, these included such common sense reforms as compensating workers for 66.66% of the wages lost as a result of the injury to to a maximum based on the national average weekly wage, eliminating caps on benefits and medical care, assuring that the benefits would continue as long as the disability did, and assuring that the maximum compensation rate would be adequate to compensate at least the average worker. In amending the Longshore Act, Congress also recognized that inflation frequently ate away at the purchasing power of the compensation benefits, and provided cost of living adjustments for workers who had suffered injuries causing permanent and total disability.

These modest reforms greatly improved the Act and saved many poor workers' families from destitution and foreclosure. In 1984 insurers argued that the unlimited cost of living adjustment provisions of the Act made it difficult to underwrite insurance, and Congress passed an amendment capping the COLAs at 5% annually. It also defined a modest benefit for workers suffering from long latent diseases such as asbestosis. Since that time the Longshore Act has provided a generally fair, reasonable, uniform and predictable workers' compensation remedy to the men and women who are engaged in the important but dangerous work of moving our cargo, and building and repairing our ships.

The Longshore Act also has been extended to cover those volunteer citizens who are working overseas at our defense bases in Iraq and Afghanistan to build and protect structures for our troops and move our military cargo. The Act thus covers a group of workers who are uniquely important to our nation. Longshore workers move billions of dollars of products, produce and materials through our ports daily. Shipyard workers produce and maintain our vessels used for commerce, war and recreation. They toil in dark, dirty and dangerous conditions to produce products vital to our national welfare and defense. Defense base workers are on the front lines of our national defense, volunteering for service that would otherwise require the reinstitution of the draft. All these workers typically toil in particularly harsh and dangerous environments, are subject to high rates of injuries, and their efforts contribute a high percent of the creation of our nation's wealth.

The combination of high risk of injury and wealth-producing functions means that these Longshore Act workers are compensated at rates which to a degree but not completely reflect the risks they take and benefits that they generate for the national economy. The Act attempts to compensate them commensurate with their work, and the losses they suffer. Like all compensation acts, it is not perfect. Workers who become disabled still must bear a share of the loss, and shoulder completely the costs for loss of heath insurance for them and their families, and their pension benefits. Often even with the meager longshore benefits their families can no long afford health insurance.

We have now had a generation's time to test the workability and fairness of the Act. It has performed well in providing a reasonable level of

wage replacement for maritime injuries. There are two major reasons for this success. The Act is a reasonable compromise, providing a fair measure of compensation for workers while protecting the employer from the full costs of the injury. No one gets rich by receiving Longshore benefits. The worker always gets less than the wages he is losing from the injury, bearing at least 1/3 of the cost, and often more for high wage earners. He is not compensated for the loss of health insurance, pension benefits or other fringe benefits. Consequently, in real dollar value, a Longshore worker and his family bears 50% or more of the cost of injury or disease. The employer is protected from paying for the full economic losses and is relieved entirely from compensating the worker for pain and suffering and loss of life's enjoyment.

Secondly, the Act provides a fair procedural framework for benefits. The simple extension of the Act in 1972 to adjoining land areas greatly reduced uncertainty and litigation and simplified insurance underwriting problems. The Act is a national model for reducing litigation and increasing fairness in workers' compensation by removing the insurer's incentives to ague about apportioning liability among causes and employers. Under this Act one need not be concerned that a worker may walk in and out of Longshore jurisdiction many times a day. One need not be concerned whether the vessel was on the New York or New Jersey side of the channel. Longshoremen may work for several stevedoring companies a day as they meet the stevedores' requests at the union hall.

The Longshore Act works reasonably well by any standard. Properly complied with it is a fair and rational law, easy to administer, and has low transactional costs. It would not be reasonable to return to broken experiments, such as we had in 1972, or to return to a fragmented, roulette wheel approach to caring for our injured workers by creating a maze of exceptions to jurisdiction that will only drive up litigation costs.

As has been stated, the present system is not perfect. For example, employers frequently unreasonably contest claims, sometimes in bad faith. The requirement of an informal conference before the District Director often delays the trial while the worker's claim languishes. Some employers use this to their advantage.

Employers can unilaterally terminate compensation for no justifiable reason, and without making a prima facie case of reasonableness to the

Department of Labor, or obtaining the Department's permission. Workers would like to have the right to a full remedy for such bad faith actions by the employer. Employers in cases where it is clear benefits are due should not be permitted to unilaterally terminate benefits without first making a prima facie case to the Department of Labor and obtaining permission to terminate benefits pending a prompt trial before an Administrative law judge,

The Pepco decision should be overturned. Pepco took away the Court's ability to award compensation for the actual wage loss suffered by employees who have suffered a scheduled injury such as an injury to the hand or arm. .

The Longshore Act should be brought into conformity with the 1972 Commission's recommendation and modern State workers' compensation law that widows' benefits be 2/3 of their husbands' wages

If Congress were to open the box for full review of the Act, a large number of other reforms would be advanced to improve it. On the other hand, the Act as currently written is a reasonably fair compromise -- generally fair, predictable,, easy to administer and is an effective and efficient delivery system. This is a sharp contrast to the situation that exists in the workers' compensation systems of the fifty states.

As previously indicated, the 1972 Commission examined state workers' compensation laws and found them to be inadequate and capricious. It recommended a series of minimum national standards that would provide a basic floor to protect workers and insure the economic stability of their families and of communities ravaged by work related injuries and death. Unfortunately, not only have we failed to meet those standards, but across the nation we have seen a wholesale degradation of workers' compensation systems resulting in increased poverty, foreclosure and family destruction.

To give you just a few examples, in New York the maximum rate for total disability is $400.00 per week -- not enough to cover rent let alone keep a family in food and clothing.

In California, Florida and Texas total benefits are terminated after 104 weeks even though the worker remains totally disabled.

In Kansas the maximum for permanent total disability in 2005 was $449.00 per week. Worse yet these benefits were capped at $125,000.00. At the $449 the $125,000 cap is reached in just over five years.

Florida caps widow's benefits even though death last forever.

Texas and Florida have set medical reimbursements so low that many doctors will not treat work related injuries. In New Jersey workers struggle to obtain authorized medical care through a litigious system that precipitates huge delays impeding the appropriate and timely delivery of effective medical treatment.

Rhode Island apportions occupational diseases between the occupation and non-occupational causes. These and other apportionment schemes which seek to shift the burden of work related injuries back onto the worker's families are not fair or workable; the worker never receives full compensation for his injury under a compensation act. The reduced rates and loss of remedies for pain and suffering already force the worker to bear much of the burden. Further such apportionment schemes are unworkable and based on junk science. They force delays and increase litigation.

Iowa reduces awards for prior benefits paid on an old injury. If you are injured and return to work and latter suffer a second injury the employer gets credit for prior injury. Employers should not be rewarded for injuring their employees multiple times.

Connecticut apportions compensation among all employers, driving up costs and delaying benefits for years while the employers argue over percentages, even where everyone agrees that the benefits are due and the worker's family has no income.

Nevada requires that the work related injury be the predominant cause of the disability, denying benefits to workers who were working with preexisting conditions and thereby establishing a barrier to hiring of the handicapped.

The driving force behind these reductions and erosions of benefits in the states has been the astute use of the reverse auction threat. Businesses suggest that unless New York reduces its benefits, they will move to New

Jersey. New York reduces its benefits and the next year New Jersey faces the same threat. The bids for business continue to fall. This drive to the bottom is an economic failure for many reasons and works to the detriment of the entire national economy. As a matter of principle, benefit levels for injured workers should not be subject to crass commercial arguments. The worker who becomes disabled suffers real losses and should not be asked to subsidize the employer's negligence by taking reduced benefits. Employers urge to place the concept of "fault" back into the workers' compensation process thereby eroding the fundamental principals upon which it was established.

Such economic policies are always self-defeating. The actual effect of reducing benefits for workers is exactly the same as losing a job. If workers' compensation benefits are reduced by $9,000,000 that is exactly the same as losing 300 jobs paying $30,000 a year. The people of the state are poorer by that amount; businesses are hurt since the workers cannot spend that amount on cars and food. Children suffer since their parents cannot afford that much for education.

In general, policies designed to make people poorer are not successful in making them richer. Poverty is not the way to wealth. The other result of this reverse auction concept is that the cost is shifted to workers' families and to the public and taxpayers at large, foreclosures increase, children are not fed. Families are forced to turn to welfare, food stamps, social security and Medicare to replace the losses created by workers' compensation reform. The Rand Corporation has looked at how effectively workers' compensation systems in a number of states replace lost wages, and it found that before the recent reforms, the workers' compensation systems did poorly, and that after the reforms they are doing worse.

It was just such fear of the economic fracturing and pitting worker against worker that led the founding fathers to reserve the regulation of Admiralty claims to the Federal Government. It was the original intent, and continuing common sense of the framers of the Constitution, that workers on the high seas, New York Harbor, the Port of Los Angeles and the Mississippi river should be treated the equally and fairly. A uniform compensation act such as the Longshore Act prevents forum shopping in which the employers threaten to and occasionally do search for the weakest and meanest workers compensation law to move their activities.

Oil should be applied where the squeaking occurs. The Longshore Act is relatively silent. The squeaks from the fifty state acts are significant. That is where our attention should be directed. We should revisit the concept of the 1972 Commission which felt that workers were valuable and entitled to a minimum compensation rate regardless of where the injury occurred. Perhaps it is time to force the states to restore fairness and justice to our system.