

## **COMMENTS OF LAWRENCE P. POSTOL**

I am a partner in the national law firm of Seyfarth Shaw LLP. I have represented employers under the Longshore Act since 1980. I have tried hundreds of cases, I have handled over 25 cases before the United States Courts of Appeals, and I have even won two cases before the United States Supreme Court. I have written two law review articles concerning the Longshore Act, as well as a chapter in an AMA text book entitled, "Disability Evaluations." I am not testifying on behalf of any of my clients, and indeed, no one is paying for my time in presenting these comments and my testimony. My comments and testimony reflect my views, and do not necessarily reflect the views of my clients.

My many years in this field have taught me a very simple reality – if you pay someone enough money NOT to work, they will not work. The Longshore Act is way beyond that point, being far more generous than any other workers' compensation statute known to man. The Longshore Act is so overly generous, it begs workers to abuse the system. Unfortunately, it is a temptation which many workers can not resist. There is a reason "entrapment" is a defense to a criminal act which the government encourages the person to engage in. The law recognizes that it is human nature to take something if we think we can get away with it. The Longshore system allows and even encourages abuse, so it is no wonder that workers take advantage of it.

One example will make this point clear. Assume I am a 60 years old longshoreman, and like the vast majority in that age group, I have some arthritis in my back. Indeed, MRI's are so sensitive, in persons 60 or older, over 50% of asymptomatic persons (having absolutely no back pain), the MRI will show abnormalities. In over 35% of such persons, the MRI will show a herniated disc. Yet, the person has no back pain. Now assume I have a minor back injury – it can be as simple as I bent over and felt pain. My choices are clear – if I recover, I might work

another 5 years to age 65.. If I complain of pain and say I hurt too much to work, I can recover 66% of my wages, tax free, for my lifetime – the next 20 plus years. Moreover, that is on top of my social security check and my retirement check. Indeed, if I am lucky, my car note and mortgage will have disability insurance, so I will be relieved of those payments. And if I owe child support, my longshore compensation check can not be attached to pay for child support.

You ask, how would I be able to get a physician to support such a claim? First, I go to a Plaintiff/Claimant's lawyer who refers me to a "liberal" doctor. The doctor can make a significant amount of money by ordering years of physical therapy at the facility he owns. Or I can get years of chiropractic care. The physicians understand that the lawyers and workers get to select who the treating doctor is, and thus they do not bite the hand that feeds them.

Lastly, you wonder, wouldn't the trial judge see through all this? Very rarely is the unfortunate answer. Deference is given to the medical opinion of the "treating physician," supposedly because he has seen the patient the most. However, since the patient and his lawyer selected him, he could hardly be more biased. Yet, the Judges are rarely willing to address that bias. Worse yet, every burden of proof possible is thrust onto the employer – there is a presumption the medical condition is work related; and if the worker can not return to his regular work, the burden is on the employer to show there are other jobs available.

This pattern of abuse is not limited, moreover, to older workers. Time and time again, I see workers claiming for 2 to 3 years that they are totally disabled and that they will never be able to work again, and medical providers gladly affirm the worker is "permanently and totally disabled." Yet, as soon as their case is settled for say \$250,000, the worker makes an amazing recovery, and goes back to his regular longshore work.

I am afraid I could give you hours of horror stories, but let me try a few examples. One of my first cases was a shipyard worker who had disc surgery to his back. While his working supervisor had had the same surgery and returned to work in 6 weeks, the worker had been out 6 months. When we took the doctor's deposition, the workers' counsel asked what percentage of the doctor's patients with this kind of surgery were able to return to work within 6 months. The doctor asked if we were talking about workers' compensation cases, or others. The other attorney and I were shocked (we were both novices) and asked why would it matter, the body is the same whether the injury occurred at work or at home. The doctor responded that was true, but his experience was that 90% of patients who are not workers' compensation cases return to work after disc surgery within 6 months, but in workers' compensation cases, it was only 50%. The doctor said he could not explain the difference, but that was in fact his experience, and he treated many longshoremen and shipyard workers.

I had a case where the Judge ruled that just because the Claimant cheated on reporting his wages, and that he committed perjury in his deposition, did not mean he is lying about his un-witnessed injury. I have had cases where workers have gone to chiropractic treatment for over 3 years, with absolutely no improvement. I had a case where the employer sent a compensation check to the address the worker had on file with the Department of Labor, and yet when it turned out the worker had failed to update his address with the Department of Labor, the employer was still assessed a 20% late penalty. I have had Claimant's counsel file attorney fee petitions for over \$50,000 in attorney fees they claim the employer should have to pay, when the Claimant recovered less than \$2,500 in benefits.

I had a worker exposed to pesticides who later developed a terrible nerve disorder. However, I had a full medical school professor, who had studied agent orange for Congress,

testify that while pesticides are well studied and cause some types of nerve disorders, pesticides had never been associated with the nerve disorder this worker had. The Administrative Law Judge nevertheless held the employer had not rebutted the presumption of compensability and awarded compensation. While the decision was eventually reversed on appeal, not until the employer paid over \$50,000 in compensation which it had no way to recover.

I should also note that thanks to concurrent jurisdiction, lawyers get to try cases twice, and earn twice the attorney fees. The worker can file claims under both the Longshore Act and the state workers' compensation act where the injury occurred. In addition, there can be inconsistent results. I had a recent case where one doctor was declared the treating physician under the state statute, and the United States Department of Labor refused to recognize the state ruling, and thus held that under the Longshore Act, another doctor was the treating physician. Yes, two different physicians in the same specialty treating the same injury at the same time. I have also had a worker declared employable under the Longshore Act and thus only entitled to partial disability benefits; whereas, the state commission held it could ignore the Longshore Judge's decision, and awarded total disability benefits. Moreover, some states such as South Carolina, refuse to always provide a credit for Longshore Act payments against the liability found under the state act. Even Virginia, a conservative state, at times only allows a partial credit.

We have a system that is great for lawyers, who can team up with physicians who profit from over treatment, and both make a lot of money, including getting to try cases twice thanks to dual jurisdiction. Workers quickly learn if they say they are in too much pain to work, and they go to the physician their lawyer directs them to, they will obtain tax free compensation benefits. The system rewards those who lie and cheat, while honesty must be its own reward,

because the Longshore Act does nothing to encourage nor reward the honest worker and honest physician.

Many states have reformed their workers' compensation system in recent years, and the Longshore Act is long overdue for reform. It is time to put limits on the amount of compensation injured workers receive, so they have some incentive to return to work and remain a productive member of the workforce. That is not only best for society, in the long run, it is also best for the workers as well. We need to take back control of the medical care, and limit the worker to a choice of a panel of physicians. The potential for medical malpractice lawsuits, and the natural relationship between a patient and doctor, will serve as an adequate check and balance on the fact the employer gets to select the panel of physicians. We need to assure the administration of the system is even handed, and does not tolerate fraud and abuse. Finally, we only need one legal system to adjudicate claims, and thus we need to eliminate the duplication of dual state and longshore jurisdiction. The only ones who will be hurt by these changes will be the lawyers, and those workers and physicians who have abused the system. For the honest workers and physicians, these changes will not adversely affect them in any material way. To the contrary, the changes will eliminate the temptation to abuse the system.

I realize for those who have never seen the Longshore Act system in action, my comments no doubt sound harsh and overstated. I assure you, however, that if you read the published decisions in the Benefits Review Board Service, you will see that the system is out of control. Not do my comments result from a personal unhappiness with the system. To the contrary, I very much enjoy litigating these cases, I make a very nice living litigating cases under the current system, and yes I win some of my cases. However, if I view the system as a

member of society, and not as a lawyer who profits from the system, it is all too clear the Longshore Act needs to be fixed.