

SOUNDINGS

NETWORK NEWSLETTER

Self Insurance Group Strength

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Welcome to **SOUNDINGS** *The Quarterly Newsletter of Signal Mutual Indemnity Association Ltd.*

Signal Mutual Indemnity Association Ltd. launches its quarterly newsletter with this issue in June 2010. As Signal Mutual celebrates its 25th Anniversary the logic for providing more varied types of communication surpasses the natural hesitancy on the part of Members and Managers to embark upon yet another publication. This tensile balancing act between the need to provide information and the need to do so in an absolutely proper manner led to the name of the newsletter. As the Association is navigating this new course, continually determining the depth of information required in useful communication efforts is very important, thus *Soundings* will be an ongoing effort in measuring not only depth but also breadth and length of issues brought forward via the newsletter.

Readers are welcome to comment, contribute, and query the editor at any time. Please realize that first and foremost *Soundings* is a newsletter to report to the Members about the Members and their industries, as well as about their Association. Many Members of Signal have outstanding newsletters of their own, and have graciously shared published information to report in *Soundings*. Please bring your company's newsletter, awards, contracts, and/or website to the attention of the editor. Contact information is on the final page.

25 Going on 50

The anniversary of a company is a moving target. Birthdays are more precise although smart people celebrate quietly for approximately a week. If you do not know exactly when your own wedding anniversary is, duck when you walk in the door on any evening on the calendar's general vicinity. But ask any company executive how it was decided the date from which to calculate their company anniversary and you may hear a winding tale. The second Annual General Meeting of Signal Mutual Indemnity Association Ltd. was held on October 14, 1985. It follows that the first Annual General Meeting of Signal Mutual Indemnity Association Ltd. was most likely held sometime during the year prior. The 25th Annual General Meeting of Signal Mutual Association Ltd was held on August 7, 2009. Nonetheless, it made sense to Joe Roach to determine that the Membership Year running from October 1, 2009 to September 30, 2010 would be our 25th Anniversary Year. Why? **2009 take away 1985 is actually 25!** And...celebrations such as this ought to last for a year, not one meeting. Details such as exactly when Signal celebrated its 20th Anniversary were conveniently ignored. And then we found all the neat 'markers' in the photo library just waiting to be used in the Annual Report. It was obviously meant to be: **Membership Year 2009/10 is the 25th Anniversary Year for Signal Mutual Indemnity Association Ltd.** The best part about it is that Signal is populated with 215 smart Members, supported by their brokers and the Managers so we will continue to celebrate – not so quietly -- for a long time.

As the premier Longshore mutual Signal looks forward to many more anniversaries. As in past years, each five year mark, each decade, will bring change; some of it anticipated, some of it out of the blue. One of the strengths of Signal is how resilient it has been due to its basic structure as it weathers changes through the years. Without complacency, the organization looks forward to celebrating many anniversaries in the future.

In the spirit of sharing the celebration Signal would like to hear from our Member companies and brokers about their company anniversaries of note. Whether it be 10, 15, 20, 25 or more years, please let the editor know you are celebrating, from when you date your company's beginnings, what made that date in history stand out for your company, and how you plan to celebrate. Please send your information to nancyann.flood@signal-ctc.com.

American Maritime Holdings Offers Free Health Care Plan for Employees

Two employee-owned Signal Members have launched a self-insurance health care program, and hired their own doctor, pharmacist and staff to run the operation. American Maritime Holdings, Inc. (AMH) owns Tecnico Corp. and MHI Ship Repair & Services, the two companies have opened a clinic that will serve at no cost nearly 1,000 employees. AMH principals Gary R. Brandt, chairman and CEO, and Michael Torrech, president and COO, hope that launching such a program will provide a measure of security for employees and the business concerning rising health care costs. Brandt and Torrech first saw a similar initiative in action at a shipyard client in Charleston, SC. Their operation is the second clinic in Virginia.

A 2,800-square foot space, with four exam rooms, doctor's offices, a waiting area and on-site pharmacy will serve the current population from a new location in Chesapeake, VA. Concerns of employees regarding privacy and possible ulterior motives of the company have been answered by success stories developed as the clinic has been operating from a temporary location since January 2010. The AMH HEALTH clinic operates under the same patient-confidentiality HIPAA guidelines as any other practice. Medical director Dr. Marc Gaines enjoys up to 30 minutes with each patient and is realizing a long time goal of working as "a proponent of preventative health care." Although approximately 250 employees have gone through wellness screenings, the screenings are not mandated. However, some employees have discovered asymptomatic medical issues that they can tackle with lifestyle changes. Dietary counseling, cooking classes and health walks are some services being developed through the clinic.

Future plans for AMH HEALTH include building expansions and the additional benefit of family coverage. "We have built our clinic so we could add on to it," Brandt said. Torrech said the main cost benefit of this program is embedded in one major principle: "Wellness is our No. 1 initiative."



Pictured are Dr. Marc Gaines, Michael Torrech, Congressman J. Randy Forbes, Dr. Alan Krasnoff, Mayor of Chesapeake, VA, and Gary Brandt

What's The Buzz

06/12/2010

Good news in Southern California with both the Port of Long Beach and the Port of Los Angeles container stats for May showing strong growth over the dark days of May 2009. Long Beach showed May containerized imports up 26.8 percent over the same period last year, exports up 14.5 percent, and total volume up 25.1 percent. On the other side of San Pedro Bay, Los Angeles reported a 12.5 percent increase in imports, a 5.3 percent increase in exports, and a 19.9 percent increase in total container volume. The Port of Oakland, Port of Tacoma, and Port of Seattle have not released their May figures yet.

www.cunninghamreport.com

http://www.cunninghamreport.com/uploads/backup_docs/750-DetailedWestCoast.pdf

Staten Island Ferry

Colonna's Shipyard, a Signal Member, won a five-year contract with the New York City Department of Transportation to service six vessels of the Staten Island Ferry fleet earlier this year. The five-year contract, worth \$71.5 million, encompasses Coast Guard-mandated preventative check-ups that each ferry must undergo twice every five years.

Work on two vessels, the Andrew J. Barberi and the John J. Marchi were completed over the spring and summer. A third vessel, Guy V. Molinari, just recently dry-docked at the shipyard. Each vessel being worked on employs 200 people between shipyard workers and subcontractors from the Norfolk area. The ferries are dry-docked anywhere from 40 to 60 days.

Colonna's was the lowest of three bids, beating out two New York City shipyards for the contract. A portion of the funding for the contract is expected to come from the Federal Transit Administration, which allowed companies outside New York to bid on the project. It is the first time since 1905, when the ferry service operations were transferred to the City Department of Docks and Ferries, that the ferries were serviced outside New York.

Colonna's stated that the other three ferries, the Spirit of America, the Samuel I. Newhouse and the John F. Kennedy, will be docked at their facility in 2010. Colonna's plans to bid on work of the two smaller ferries next year.

Costs for transporting the ferries to and from New York were built into the contract and will be handled by Signal Member Moran Towing.

Colonna's Shipyard, founded in 1875, is the oldest family owned, full service private shipyard in the United States.

Article reprinted courtesy of Maritime Bulletin, VMA, Norfolk, VA



Andrew J. Barberi



John J. Marchi



Guy V. Molinari

Photographs courtesy of Colonna's Shipyard

Todd Shipyards' CEO Steve Welch Honored with Puget Sound Maritime Achievement Award for 2010

SEATTLE, May 12, 2010 (BUSINESS WIRE) -- Todd Shipyards Corporation announced today that business and community leaders have honored Steve Welch, Chairman and CEO of its wholly owned subsidiary, Todd Pacific Shipyards Corporation ("Todd"), with the Puget Sound Maritime Achievement Award for 2010.

Welch received the award on May 11 at the annual Seattle Maritime Festival Luncheon aboard Carnival Cruise Lines' Carnival Spirit at the Smith Cove Cruise Terminal at Pier 91. The luncheon is co-sponsored by the Greater Seattle Chamber of Commerce and Seattle Propeller Club.

"Todd is doing exceptionally well in a difficult economy, and for someone to show that leadership is particularly astounding," said Rich Berkowitz, who is Director of Pacific Coast Operations for the Transportation Institute and heads up the nomination process for the Seattle Propeller Club.

The Puget Sound Maritime Press Association began bestowing the honor to individuals in 1951 to recognize long and distinguished careers and specific achievements benefiting the local maritime community. Propeller Club Seattle has presented the award annually since 1984.

Welch became Todd Pacific Shipyard's leader in 1997 at a time when the future of the company was unclear and led a dramatic turnaround.

In nominating Welch for the Award, Rear Admiral John W. Lockwood, USCG ret. and Secretary of the Propeller Club Board of Directors, highlighted Welch's leadership in the industry -- he is past chair of the Shipbuilders Council of America -- and his resolve to make Todd the Best Shipyard on the West Coast of North America.

"Steve's foresight and leadership have brought together a close knit team" of more than 30 subcontractors to build at least three new Washington State ferries, the first new vessels for the system in more than a decade, Lockwood said. "The work ethic espoused by Steve sets an example for the entire industry, and nurtures and protects hundreds of family wage level jobs for Seattle-area marine industrial sector craftsmen and their families."

Lockwood also cited Welch's leadership in regard to Todd's eight environmental awards since 2004, and his strong commitment to apprenticeship programs to build a new generation of maritime industry workers.

Previous recipients of the Maritime Achievement Award include Todd's former General Manager, Carl Meurk in 1981, Leslie Hughes, Executive Director of the North Pacific Fishing Vessel Owners' Association, the first female recipient in 2006, C. Arthur Foss of Foss Tug and US Senator Warren G. Magnuson in the 1950s, Port of Seattle Director Richard Ford in the 1980s and Stan Barer of Totem Resources in the 1990s.

Todd Pacific performs a substantial amount of repair and maintenance work on commercial and federal government vessels engaged in various seagoing trade activities in the Pacific Northwest and provides new construction and industrial fabrication services for a wide variety of customers. Since 1916, Todd has proudly built and repaired ships on the Seattle waterfront and today has satellite operations in Bremerton and Everett, Washington. Its customers include the US Navy, the US Coast Guard, NOAA, the Washington State Ferry system, the Alaska Marine Highway System, and various other commercial and government customers.

SOURCE: Todd Shipyards Corporation • Shareholder Relations • Hilary Pickerel, 206-623-1635 Ext. 106
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The New Normal: The Effect of the Great Recession on Longshore Claims

F. Nash Bilisoly¹ & Megan B. Caramore²

The collapse of Lehman Brothers and the near demise of AIG on September 15, 2008 turned out to be only the first of a series of events which some prominent economists predict portend the beginning of a long recession similar to that which befell Japan for over a decade beginning in 1990. Inflation is no longer the fear - deflation was Japan's worst enemy and is a real possibility in the United States. The "bright side," such as it is, will be the distinct possibility that evidence of a sustained recession could result in a substantial shift in the law to reflect the new reality. Specifically, evidence of wage and hour regression could be used in partial disability claims to increase wage earning capacity calculations and defend against the costs of mass economic layoffs. This paper explores the state of the law as it has existed during a period of sustained growth and how a "new normal" might affect the foundations of that law.

Introduction

In late 2007, the American economy began to slow. By the fall of 2008 a complete meltdown of the financial sector appeared possible. Deemed the worst economic downturn since the Great Depression, the "Great Recession" has changed our outlook in many ways. As in so many sectors of society, this is true with respect to Longshore and Harbor Workers' Compensation Act ("LHWCA") benefits. Like many, if not most, areas of the economy, ports and the industries surrounding them are shedding jobs in unprecedented numbers. As a result, current compensation laws under the LHWCA sometimes create different results in today's economic climate than in previous times. The new normal, brought about by the recession, is anything but, and it raises a need for employers and their counsel to reexamine the effects of the Act in the current economic climate and plan accordingly.

The Great Recession

In 2007, the collapse of the housing bubble began a troubling series of events that led to a financial crisis of historic proportions. The diminished value of real estate and real

estate backed securities coupled with a liquidity shortfall in the banking system brought the American financial sector to the brink of collapse and triggered massive government bailouts, housing foreclosures, stock market downturns, unemployment and an overall decrease in economic activity. The current recession is more widespread than any economic downturn since the Great Depression. The winter of 2008-2009 saw 86% of industries cut production, the highest number in the 42 years that the Federal Reserve has kept track of the figures³. In December of 2008, for the first time in over 30 years, every state reported a rise in unemployment⁴. From its record high of 14,167 in October 2007, the Dow Jones Industrial Average plummeted to 6,547 by March 2009⁵. The depth and breadth of the recession has left few sectors of the economy unaffected.

Nationwide, U.S. Ports first began to see a negative trend in waterborne trade in 2007 when total waterborne trade levels fell by .9% from the previous year⁶. This trend continued and worsened as the recession deepened throughout 2008 and waterborne trade levels fell another 3.4% over the year⁷. The largest drop was still to come. The period from January to October 2009 saw U.S. waterborne exports drop 10.7%, imports fall 15.1% and total foreign trade plummet by 13.5% compared to already lower numbers in 2008⁸.

¹Partner, Vandevanter Black LLP. J.D., 1979, Tulane University Law School; B.A., 1976, College of William and Mary.

²Associate, Vandevanter Black LLP. J.D., 2009, University of Richmond; B.A., 2005, Washington & Lee University.

³Chris Isidore, *The Great Recession*, CNNMONEY.COM, March 25, 2009, http://money.cnn.com/2009/03/25/news/economy/depression_comparisons/index.htm

⁴Id.

⁵Tim Paradis, *The Statistics of the Great Recession*, THE HUFFINGTON POST, October 10, 2009, http://www.huffingtonpost.com/2009/10/10/the-statistics-of-the-gre_n_316548.html

⁶U.S. COASTAL AND GREAT LAKES PORTS - WATERBORNE TRADE 1970-2007, NAVIGATION DATA CENTER, U.S. ARMY CORPS OF ENGINEERS, available at <http://www.aapa-ports.org/Industry/content.cfm?ItemNumber=900&navItemNumber=551>

⁷U.S. COASTAL AND GREAT LAKES PORTS - WATERBORNE TRADE 1970-2008, NAVIGATION DATA CENTER, U.S. ARMY CORPS OF ENGINEERS, available at <http://www.aapa-ports.org/Industry/content.cfm?ItemNumber=900&navItemNumber=551>

⁸U.S. WATERBORNE FOREIGN TRADE, AMERICAN ASSOCIATION OF PORT AUTHORITIES (2009), available at <http://www.aapa-ports.org/search/browse-Results.cfm?MetaDataID=93>

The drop in port traffic brought lower revenues, budget cuts and ultimately, fewer port related jobs. The Bureau of Labor Statistics database estimates that there were 45,800 employees in the marine cargo handling industry at the beginning of 2008. At the beginning of 2009, that number had dropped to 42,000. Preliminary estimates for January 2010 show employment levels at 41,900. In addition, the number of extended mass layoffs reported in the support activities for transportation sector is up substantially over previous years. In 2007 there were 11 extended mass layoffs, in 2008 there were 21 and in 2009 the preliminary estimates reported 59 extended mass layoffs. Unemployment numbers among transportation and material moving occupations was 12.5% in February 2009 and 15% in February of 2010⁹.

The port industry is well aware of the effects of the global downturn on its bottom line. When interviewed, Joe Dorto, president and CEO of Virginia International Terminals said, "You can basically track all the problems on Wall Street and in the home-building industry right here ... In 30 years I haven't seen it like this."¹⁰ Don Hamm president of the Port Newark Container Terminal near New York City echoed this sentiment, stating "I've been in the business 40 years and I have never seen anything like this ... [t]o have the whole world in a downward spiral is not something I think anybody of this generation has seen."¹¹

The loss of port jobs due to the recession is made even worse because there are few available job alternatives for unemployed workers. "There's been a very, very deep recession, and there have been heavy job losses in the relatively unskilled parts of the labor force," said Nigel Gault, chief U.S. economist for IHS Global Insight. "It's difficult for people who lose those types of jobs to find other jobs, especially if they require particular skills, which they don't have."¹² The widespread loss of employment caused by the recession has also had more subtle effects on the industry, including the heavier workers compensation burdens longshore employers experience which are explored here in detail.

Burden Shifting

While the maritime industry has weathered a number of moderate economic ups and downs under the Act, the magnitude of the current crisis is like nothing the modern industry has experienced to date. Before the beginning of the recession,

it appeared that workers' compensation under the Act struck an arguably appropriate balance between protecting longshore claimants and their employers. The depth of the current financial crisis, however, has turned many past assumptions on their head. The rigid shifting of legal burdens under current law, coupled with the courts' treatment of economic layoffs and job losses, puts employers in a difficult position with respect to meeting its burden to show suitable alternate employment. This, in turn, threatens to interfere with legitimate personnel decisions and transform the disability compensation under the Act into an unemployment benefits program.

LHWCA authorizes compensation to workers injured in the course of their employment. The Act provides compensation not for the injury itself, but for the economic harm suffered as a result of the decrease in wage earning capacity¹³. When an employee is injured on the job, and a claim is made for benefits, the Act imposes shifting burdens of proof upon the claimant and the employer. First, the employee must make a prima facie case of total disability by showing that due to his work-related injury he is unable to return to his prior employment¹⁴. Then, the burden switches to the employer to show suitable alternative employment for the claimant¹⁵.

⁹All employment numbers and lay off estimates can be found by searching the U.S. Department of Labor, Bureau of Labor Statistics Databases found at <http://www.bls.gov/data/>

¹⁰Bill Geroux, *Recession Pinches Port of Hampton Roads*, RICHMOND-TIMES DISPATCH, March 8, 2009, available at http://www2.timesdispatch.com/rtd/news/state_regional/article/PORT08_20090307-220216/224489/

¹¹Daniel Trotta and Michael Connor, *US Ports are a Gloomy Window on Global Recession*, REUTERS, July 13, 2009, available at <http://www.reuters.com/article/idUSN1319377420090713>

¹²Shahien Nasiripour, *Which Industries Lost/Gained Jobs in the Great Recession*, THE HUFFINGTON POST, April 5, 2010, available at http://www.huffingtonpost.com/2010/04/05/which-industries-lostgain_n_525504.html

¹³See *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 126 (1997).

¹⁴See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264 (4th Cir. 1997).

¹⁵See, e.g., *Newport News Shipbuilding & Dry Dock, Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

¹⁶*Bunge Corp., v. Carlisle*, 227 F.3d 934, 941 (7th Cir. 2000) (citing *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Bumble Bee Seafood v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327, 1329 (9th Cir. 1980)).

There is some disagreement among the circuits as to what information employers must provide to meet the burden of showing that suitable alternative employment is available to the claimant. On one hand, the Ninth Circuit requires the employer to identify a specific position for a specific employer which the claimant could likely perform and obtain¹⁶. The First, Fourth, Fifth and Seventh Circuits, on the other hand, utilize a more moderate test whereby employers must present evidence that a range of jobs exist that are reasonably available and that the disabled employee could realistically secure and perform¹⁷.

Employers can meet this burden in two ways. An employer may point to a suitable job that the claimant actually performed after his injury, or the employer may present evidence of other jobs that are available in the relevant geographic market for which the claimant is physically and educationally qualified (using a market survey in the First, Fourth, Fifth and Seventh Circuits or pointing to specific positions in the Ninth)¹⁸. Where layoffs are concerned, however, the employer often wishes to use the job that the claimant performed prior to the layoff as evidence of suitable alternative employment. The question is whether courts will accept the job that the claimant lost for purely economic reasons for purposes of suitable alternative employment, or whether the employer will have to start from scratch to meet this burden.

With markedly fewer jobs available for longshore workers, the burden to show suitable alternative employment may become increasingly difficult, if not impossible, to meet. The LHWCA and current case law do not appear to take a severe economic recession into account where the employer's burden to show suitable alternative employment is concerned. The result is that despite the fact that a claimant's inability to find work is due solely to economic conditions and is not the result of his injury, the employer may be stuck compensating the employee because the burden of showing suitable alternative employment remains with the employer.

Court Decisions

The number of layoffs caused by the recession necessitates an in-depth review of case law dealing with the effect of economic layoffs under the Act. All of the case law leaves the burden of showing suitable alternate employment on the employer in layoff situations, although the Fifth and Ninth Circuits leave open the possibility that post-injury positions held for lengthy periods before layoff may be offered to meet the employers suitable alternative employment burden. Little guidance is offered, however, with respect to how long the job must be held.

The Fourth Circuit makes no such concessions and has held that when an employer lays off an employee, that position may no longer be used as evidence of suitable alternative employment. The case law is described in greater detail below.

A. Fourth Circuit

The Fourth Circuit provided its take on the economic layoff issue in *Norfolk Shipbuilding & Drydock Co. v. Hord*¹⁹. In that case, the claimant was injured on the job and later returned to work in a light-duty position. More than two years later, the claimant was laid off for 7 weeks before being recalled to the same position. The claimant filed a claim for total disability compensation for the 7 weeks he was laid off. The ALJ had previously denied the claim on the grounds that the employer had not laid the claimant off due to his physical restrictions and the claimant actually working in the light-duty position prior to the layoff proved that employment was realistically and regularly available to him. The BRB reversed the ALJ and the Fourth Circuit affirmed, holding that an employer cannot satisfy its burden of showing suitable alternative employment by pointing to the post-injury internal employment subjected to the layoff.

As a result of *Hord*, it appears that when the employer makes the alternative position unavailable to the claimant by laying him off, that same position cannot then be used to satisfy the employer's burden of proof. The court did note, however, that the employer was not necessarily liable for LHWCA total disability compensation when it lays off a permanent partial disability claimant from a post-injury position made available by the employer. The employer can still rebut the employee's claim by demonstrating that there "exists a range of jobs which the worker is realistically capable of securing and performing and which are reasonably available in the open market."

¹⁷*Bunge Corp. v. Carlisle*, 227 F.3d 934, 941 (7th Cir. 2000) (citing *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984); *New Orleans (Gulf-wide) Stevedores v. Turner*, 661 F.2d 1031, 1042-42 (5th Cir. 1981); *Air America Inc., v. Director, Office of Workers' Compensation Programs*, 597 F.2d 773 (1st Cir. 1979).

¹⁸See *Norfolk Shipbuilding & Dry Dock Co., v. Hord*, 193 F.3d 797, 800 (4th Cir. 1999); See *v. Washington Metropolitan Area Transit Auth.*, 36 F.3d 375, 380-84 (4th Cir. 1994).

¹⁹193 F.3d 797 (4th Cir. 1999).

As in *Hord*, in *Cole v. Newport News Shipbuilding & Dry Dock Co.*, the court also held that regardless of the reason for the layoff, the employer was still required to satisfy its burden to show suitable alternative employment²⁰. In that case, the claimant sustained a work-related injury and later returned to work for her employer in a light-duty position. She was laid off after a year for economic reasons and filed a claim for benefits under the act. The Fourth Circuit upheld the ALJ's award of benefits under the Act.

Not all Fourth Circuit cases prior to *Hord*, took this point of view. For example, in *Forgich v. Norfolk Shipbuilding & Drydock Corp.*, the Fourth Circuit determined that the claimant was not entitled to compensation for the periods of time he was laid off because the layoffs were caused entirely by economic reasons and were in no way related to the employment injuries²¹. In that case, the claimant was injured and following treatment, returned to light-duty work with his employer. Claimant worked continuously except for two relatively short periods where he was laid off by his employer, along with a number of other employees of his seniority level, due to economic conditions. The employee filed a claim for workers' compensation benefits under the Act for the time he was laid off. The ALJ, BRBS and the Fourth Circuit all determined that the claimant was not entitled to compensation for those periods of time he was laid off because the layoffs were caused entirely by economic reasons and were in no way related to the employment injuries. Unfortunately, however, the *Hord* decision has overridden this more reasonable approach.

B. Fifth Circuit

The Fifth Circuit, when faced with the same question regarding the consequences of economic layoffs under the Act, affirmed an ALJ decision providing that the length of a claimant's post-injury employment prior to layoff was an important factor relevant to the determination of whether the job qualified as suitable alternative employment²². In *Necaise v. Halter Marine*, the claimant was laid off after returning to work for seven weeks in a light duty capacity following his injury. The layoff was the result of the employer's bankruptcy and subsequent closure and was completely unrelated to his work-related injury. While acknowledging that those with regular and continuous post-injury employment must take chances on unemployment like anyone else, the ALJ found and the Fifth Circuit confirmed that the seven week period was not sufficient to show that the position was regularly and realistically available to the claimant. Thus, the employer had not met its burden to show suitable alternative employment. The

opinion left open the question of how long a position must be held to show it was regularly and realistically available.

C. Ninth Circuit

The Ninth Circuit has also placed the renewed burden upon employers where economic layoffs result in a claimant's job loss²³. In *Edwards v. Director, OWCP*, the claimant suffered a job-related injury that prevented him from continuing his work for his employer. He was retrained and found work as a mechanical inspector but was laid off after 11 weeks because of a reduction in work force and was then unable to find other work. The ALJ awarded the claimant total disability benefits, finding that the employer had not proved suitable alternative employment. The BRB reversed the ruling on the ground that the 11 week job as a mechanical inspector satisfied the employer's burden of proving the availability of suitable alternate work. The Board reasoned that the employer was not a long-term guarantor of a claimant's employment. On appeal, the 9th Circuit reversed the Board's decision, reinstating the ALJ's award. The court determined that the employer had failed to meet the burden of showing suitable alternative employment because it failed to show that the work was realistically and regularly available to the claimant. As with the Fifth Circuit, the question of how long the position must be held to show that it was realistically and regularly available remains up in the air.

Problems & Possible Arguments

In the current economic climate where layoffs are frequent occurrences and jobs are increasingly difficult to find, the renewed burden to show suitable alternative employment for laid off claimant may prove difficult to meet. Additionally, where the employer is able to show suitable alternative employment, the severity of the recession may allow the employer to make an argument for adjusting the amount of wage loss based on the change in wages over time. In light of the increasing difficulty of showing suitable alternative employment, in conjunction with the inability in many cases to point to the layoff position as evidence of suitable alternative employment, it is time to reexamine the logic of the leading layoff cases and to look for new arguments that may provide some relief.

²⁰120 F.3d 262 (Table), No. 96-2535 (4th Cir. Aug. 12, 1997).

²¹153 F.3d 719 (Table), No. 96-2574 (4th Cir. Aug. 4, 1998).

²²*Necaise v. Halter Marine*, Case No. 2005-LHC-245, OWCP No. 07-160842 (May 10, 2005), *aff'd Halter Marine v. Necaise*, 235 Fed. Appx. 316 (Aug. 9, 2007).

²³*Edwards v. Director, OWCP*, 999 F.2d BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1539 (1994).

A. Inconsistent Treatment of Discharge and Layoff Cases

One of the most glaring problems with the current case law imposing a renewed burden to show suitable alternative employment in economic layoff cases is the glaringly different treatment such cases receive when compared to discharge for misconduct cases. While misconduct that results in discharge from post-injury employment may be factually distinguishable from layoff due to the relative "fault" of the discharged employee, it is quite analogous in that both rest upon the same legal rationale that the claimant's loss of wage earning capacity must be related to the injury claimed to be compensable under the Act²⁴. This reasoning frequently underlies the finding in misconduct cases that due to the actions of the claimant, the employer has no continuing responsibility to identify new suitable alternate employment²⁵.

In *Brooks v. Newport News Shipbuilding and Dry Dock Co.*, for instance, the Fourth Circuit affirmed the reasoning of the Benefits Review Board that wage earning capacity loss is not compensable under the Act inasmuch as it was not due to the claimant's disability from the work related accident²⁶. This makes sense because the act is meant to compensate an injured employee for wage loss that results from the injury. Where a claimant is discharged due to his own misconduct, the wage loss is not the result of the injury, but of the misconduct.

Likewise, where an employee is laid off from his post-injury employment for purely economic reasons, the employer's duty is to compensate for wage loss resulting from the employee's injury, not to compensate for wage loss that results from bankruptcies, economic setbacks or recessions. Where misconduct cases are concerned, the employer has no continuing responsibility to identify new suitable alternative employment because the employer is not a long-term guarantor of the claimant's employment²⁷. The same should hold true for economic layoff cases and employer's should not be required to re-establish suitable alternative employment where an employee has been laid off from his post-injury employment for economic reasons completely separate for his injury.

While it is tempting to try and distinguish misconduct cases from layoff cases based on an allocation of fault to the employee, this fact should be wholly irrelevant to the

legal analysis. By stepping back and examining the bigger picture, one observes that the Longshore and Harbor Workers' Compensation Act provides a system of compensation which is not based on negligence or relative fault. It is a system designed to compensate injured workers for losses in their wage earning capacity stemming from work-related injuries. There is no aspect of punishment included in this scheme that should create a different result for discharge cases as opposed to layoff case. There is no satisfactory explanation for treating the two types of cases differently where the renewed burden upon employers is concerned. If there is no renewed burden to show suitable alternative employment in a misconduct situation, then the same should hold true in a layoff situation.

B. The Apple to Apples Argument: Redefining Wage Earning Capacity

The depth and breadth of the current recession make it increasingly difficult for employers to meet their burden to show suitable alternative employment whether by survey or by pointing to specific positions available to the claimant. In light of this difficulty, employers may remain liable to compensate claimants laid off for purely economic reasons, putting those workers in a better position than if they had never been injured. Where employers are able to show suitable alternative employment, the severity of the recession may also

provide new arguments that employers can use to dispute the true wage earning capacity of claimant's in today's market. This, in turn, could help to reduce the burden on employers. One such argument is that the claimant's wage earning capacity upon which benefits are based should be modified to reflect that the claimant's actual wage earning capacity in today's economy may be lower than at the time of injury. This argument stems from the apples-to-apples comparisons made to take changes in compensation over time into account when awarding benefits under the Act.

²⁴See *Armfield v. Shell Offshore, Inc.*, 25 B.R.B.S. 303, 307 (1992).

²⁵*Brooks v. Newport News Shipbuilding and Dry Dock Co.*, 2 F.3d 64, 27 B.R.B.S. 100 (CRT) (4th Cir. 1993).

²⁶*Brooks*, 2 F.3d at 65.

²⁷*Brooks*, 2 F.3d at 65.

In general, an award for permanent partial disability in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity²⁸. If the claimant is unable to return to his usual employment due to injury but secures other employment, the wages which the new job would have paid at the time of injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury. Subsections 8(c)(21) and 8(h) of the Act allow for wages earned post-injury to be adjusted to the wage levels which that job paid at time of injury²⁹.

This look back type of approach ensures that the comparison between the wages is done on an apples-to-apples basis. As the Second Circuit noted, "[a] disabled worker's post-injury earnings can only fairly and reasonably represent his wage-earning capacity ... if they have been converted to their equivalent at the time of injury."³⁰ An apples-to-apples comparison of post-injury and pre-injury wages helps to ensure that wage-earning capacity calculations are not "distorted by inflation or depression."³¹ In the past, this apples-to-apples comparison has generally benefitted the claimant because wages have generally risen over time. As a result, the wage levels of the post-injury employment were adjusted down to the amount that same job earned at the time of injury, which created a greater disparity between the pre-injury and post-injury wage levels and resulted in a larger benefits award for the claimant.

While this approach has typically been used to adjust the post-injury wages down to what they would have been at the time of injury, it could arguably work in the reverse as well in order to make an apples-to-apples comparison which takes the current economic climate into account. Where, in an economic downturn, wages have decreased within an industry, it could be argued that the claimant's post-injury employment wages should actually be adjusted upwards to be compared with wages at the time of injury on an apples-to-apples basis. The argument is that had the employee had worked in his current, post-injury position at the time he was injured, his wages would have been substantially greater than what he is earning at the same job in the recession. Therefore, the current wages earned by the claimant should be adjusted upwards to reflect what that position would have been making at the time of the injury.

In such a case, the employer will benefit from a smaller difference between the pre-injury and post-injury wages and the resulting benefits award will be smaller.

Conclusion

The effects of the recession have created a new state of normal throughout our economy leaving few industries untouched by change. This is certainly the case in the longshore industry where container traffic has dropped and as a result job losses and wage decreases among workers are common. Where the Longshore and Harbor Workers' Compensation Act is concerned, the recession may create changes in the effect of the compensation scheme. In previous times, the employer's suitable alternative employment burden worked well for determining whether the claimant had a compensable disability under the Act. In the current economic climate of widespread economic distress, however, the same burden may produce unintended results. An employer may find it difficult to show suitable alternative employment as a result of purely economic conditions which have no connection to the claimant's injury or subsequent disability. Where the employer is unable to show suitable alternative employment due to layoffs within its own workforce and the greater industry as a whole, it may be forced to take on a role as an unemployment insurance provider rather than a worker's compensation provider. Where an employer is able to show suitable alternative employment, however, the drop in wages that has accompanied the recession may allow the employer to reduce its overall compensation liability by arguing for an upward adjustment in post-injury wages to reflect what the position would have earned at the time of injury.

²⁸33 U.S.C. §908(c)(21), (h). *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988).

²⁹*Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980); see also *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (D.C. Cir. 1986).

³⁰*La Faille v. Benefits Review Bd.*, 884 F.2d 54, 61, 22 BRBS 108, 120 (CRT) (2nd Cir. 1989). See also *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70 (CRT) (1st Cir. 1987); *Sproull v. Stevedoring Serv. of America*, 86 F.3d 895, 899 (9th Cir. 1996).

³¹*Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297, 298 (1984).

Signal/NAWE Maritime Conference Chicago, Illinois – June 3-4, 2010

Nearly 200 people gathered in Chicago on June 3-4, 2010, to attend the Signal/NAWE Maritime Conference. Providing an annual continuing education conference, Signal Mutual creates this opportunity for its Members and adjusters to network and learn with attorneys and employers nationwide.

Signal was delighted to have a new collaborator for the 2010 conference, the National Association of Waterfront Employers (NAWE). The General Counsel of NAWE, Win Froelich, spoke about the History of the Longshore Act and Implications for Today's Claims at lunch on Thursday. Although over 14 hours are spent in the main room attending sessions, there is also ample time provided for attendees to meet, share their stories, and learn informally from others.

A goal of the conference is to provide practical, timely continuing education topics and to encourage the audience to be interactive with the faculty. In a room with attendance that fluctuates between a high on the first morning of 175 persons to a low of 42 persons by late on the last afternoon, interaction between the attendees and the faculty is not easily obtained. If the topic is controversial, questions develop more easily; if the session topic seems more mundane, then it is up to the moderator to engage the audience. Signal prides itself on providing a lively conference, with timely topics so that either the faculty themselves or the attendees will find it easy to be interactive. Those



Doug Matthews, New Orleans, and Larry Craig, Miami, took a turn at the simulated command exhibit Thursday evening. A Museum employee observes their progress.

who attend leave behind evaluations that speak to the success of this goal. The challenge is to do it year after year.



The Thursday night networking event was held at the Museum of Science and Industry with a U505 as a centerpiece and tour opportunity for attendees.

Among the most engaging sessions this year was a live demonstration of an Independent Medical Examination with a foot/ankle medical specialist examining a purported claimant who arrived for his appointment limping on crutches. Between explanations provided by Dr. Simon Lee and the legal framework offered by Larry Postol this session held the attendees' attention with no problem and generated questions until the 'bell rang.' Another session that received high marks on evaluation forms was that provided by a lunchtime speaker from The Northern Trust, economist Paul Kasriel. Mr. Kasriel provided hand-outs of his speech, "Economic Recovery – Is It Really Here?"

Member companies send representatives to this meeting at the same rate the Association experiences for a summer Board meeting. It may be that statistic is enhanced because the conference registration fee is waived for Members' employees. In Chicago, 27 Member companies were represented by 39 individuals. These people were joined by 11 individuals representing employers in similar industries outside the Signal network, who are of course paying customers. The Association hosted 25 adjusters who were joined by 70 attorneys (again, paying customers); both groups provided a select group of speakers for various sessions. The Department of Labor (DOL) kindly provided five speakers from various agencies within the DOL. Attendance at the conference was completed by 14 vendors, three brokers who do business with Signal, a doctor who was a speaker, and a number of Signal employees, five of whom filled numerous speaking roles.

Rick Knapp Receives Distinguished Service Award

The Virginia Maritime Association honored Richard N. Knapp with the "Distinguished Service" award at the Annual Banquet. Knapp, Signal Mutual's Chairman of the Board, retired as COO of Virginia International Terminals in October, 2009.

Mr. Knapp has been an industry and community leader in the Port since he answered a Virginia International Terminals, a Signal member, help-wanted ad for a marine engineer in 1971. His innovative improvements in crane design have greatly increased the efficiency and safety of handling containerized cargo. Through Knapp's leadership role, he was able to guide Virginia International Terminals to success in a period of rapid change and position the Port of Hampton Roads to become the preeminent port on the U.S. East Coast.

It is with this resolve, that the VMA expresses its sincere appreciation for "Distinguished Service." This honorary award is symbolized with a brass ship's bell, properly mounted, and suitably engraved, including the title "Mr. Hampton Roads."



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Signal Administration, Inc.
64 Danbury Road, Suite 400
Wilton, CT 06897
Phone: 203-761-6060

Editor

Nancyann Griesemer Flood
Chief Learning Officer

Contributors

Larry Toepper, VP Safety
Anthony Filiato, General Counsel
Mike Horray, VP Claims
Michael Crucefix, Asst. VP Safety
James Sammons, Sr. Safety Manager
Erik Lassow, Asst. VP Claims

"Self Insurance Group Strength"

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If you would like to receive this quarterly newsletter, please e-mail Nancyann Griesemer Flood at nancyann.flood@signal-ctc.com Please include your full name, Company name, e-mail address and telephone number.