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LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1978

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HEARING BEFORE THE COMMITTEE ON HUMAN RESOURCES UNITED STATES SENATE NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 2020

TO AMEND THE LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT TO CLARIFY THE ACT'S COVERAGE TO
EMPLOYEES ENGAGED IN THE MANUFACTURE, REPAIR, SERV-
ICING, OR SALE OF RECREATIONAL BOATS

SEPTEMBER 28, 1978

Printed for the use of the Committee on Human Resources

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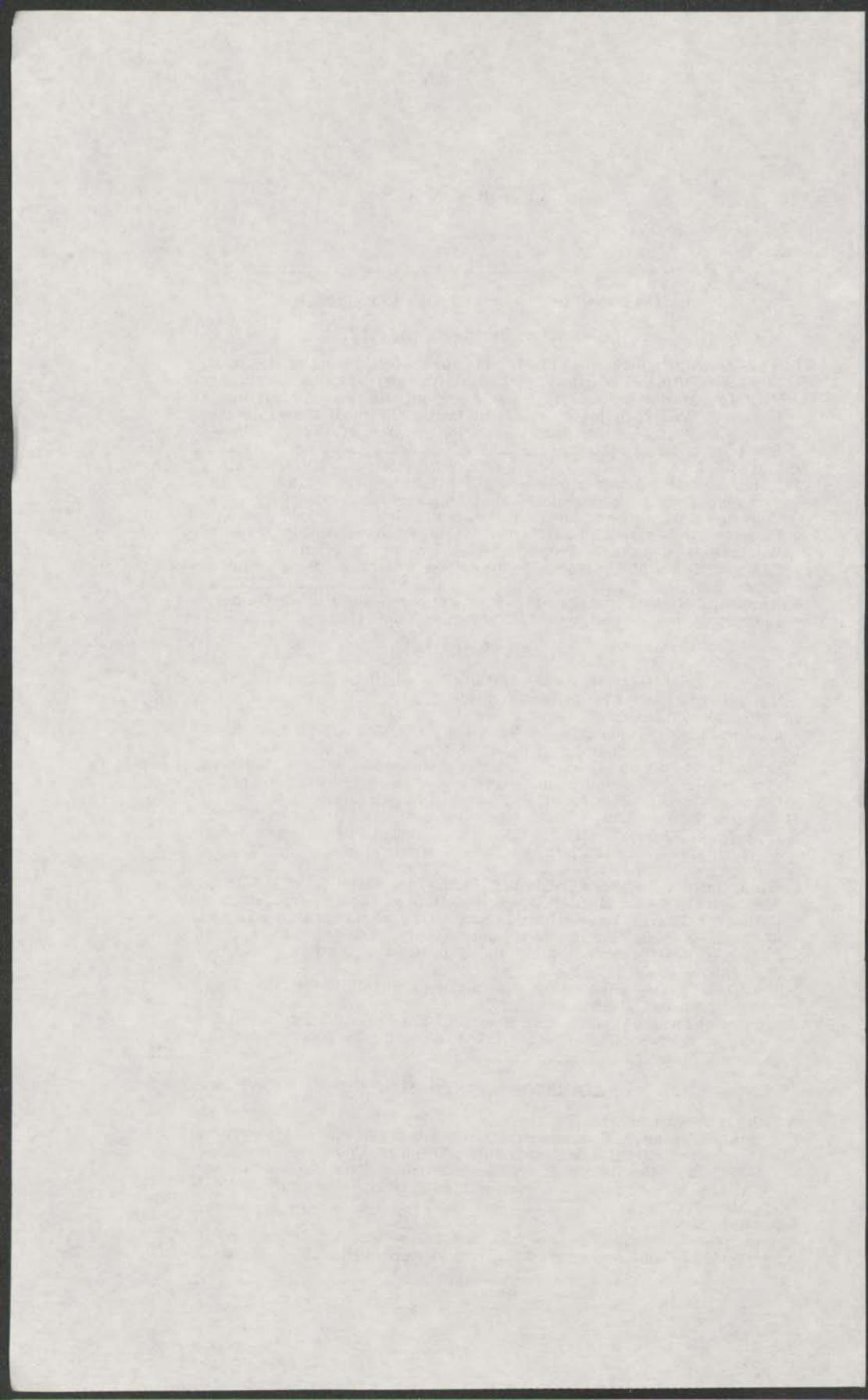
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LONGSHOREMEN'S AND HARBORWORKERS' COMPENSATION ACT AMENDMENTS OF 1978

THURSDAY, SEPTEMBER 28, 1978

U.S. SENATE,
COMMITTEE ON HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 4232, Dirksen Senate Office Building, Senator Alan Cranston, acting chairman, presiding pro tempore.

Present: Senators Cranston and Hayakawa.

OPENING STATEMENT OF SENATOR CRANSTON

Senator CRANSTON. We will please come to order.

This is a meeting of the full Human Resources Committee.

In 1972 the Congress enacted into law amendments to the Longshoremen's and Harborworkers' Compensation Act of 1927 designed to provide a uniform compensation system for those engaged in what had traditionally come to be known as maritime employment.

This 1972 amendment greatly improved benefits available to those workers in the industries who were injured on the job and to their beneficiaries. These industries include longshoremen and harbor workers engaged in loading and unloading, building, repairing, or dismantling large commercial ships.

One purpose of the 1972 amendments was to resolve the difficulties caused by the prior limits on coverage to only those who were injured on or over the navigable waters of the United States. Under the law in force prior to 1972, a longshoreman was covered by the Federal act while working on the deck of a ship, but not covered when he shifted his activities to the dock—a change of situation which might occur several times each day. In addition, with the new methods used in international shipping, involving container vessels and roll-on/roll-off unit cargoes, an increasing amount of longshore work is performed on docks and a lesser amount on ships.

The Congress agreed that compensation coverage for such workers should not depend on the fortuitous circumstance of whether the injury occurred on land or over water.

To eliminate this arbitrary distinction, Congress amended the definition of "navigable waters" under the act to include any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other area adjoining navigable waters customarily used by a maritime employer in loading, unloading, repairing, building, or dismantling a vessel.

A second purpose of the 1972 amendments was to clarify the defini-

tion of "employee" under the act, so that a determination of coverage could be made from that definition. Previously, the act defined an employee as "one engaged in maritime employment who is not an employer," a standard which was considered too vague to be useful. The old standard thus required the determination of coverage to be made on the basis of whether the injured worker was working for a covered employer.

In 1972, the Congress adopted what it believed to be simple, straightforward language to accomplish the two purposes that I have just enumerated. The record is ample that Congress desired to have the act apply uniformly to all workers engaged in the industries traditionally known as maritime employment. However, the record is barren of evidence that Congress intended to expand or otherwise alter the concept of what constitutes "maritime employment." In fact, there is considerable evidence to the contrary to be found in the committee reports and other pieces of legislative history leading to the 1972 amendments, as several courts have noted.

It is fundamentally clear and nearly universally conceded that Congress never intended to expand the coverage of the Federal Longshoremen's and Harborworkers' Compensation Act to employees of small boat marinas, shoreside restaurants, fuel and ice dealers, fish-processing plants, oyster shucking operations, scindiving schools, recreational boat manufacturing and repair shops, and other waterfront activities normally, completely, and appropriately covered by State workers' compensation laws—except to the extent that these occupations were already covered under Federal law prior to 1972. And that extent involves only those very few workers in such operations who actually work on or over the navigable waters of the United States who for that reason may be denied the coverage of State compensation laws. Previously, employers obtained Longshoremen's and Harborworkers' compensation coverage to protect these workers with a simple, relatively inexpensive rider to their State workers' compensation insurance policy.

In 1974, the Department of Labor, in its notice No. 21, with respect to the 1972 amendments to this act, reached the conclusion—with which I disagree—that in adopting the 1972 amendments to the act, Congress intended to expand the definition of "maritime employment" to include the entire pleasure boat industry, including small recreational boat builders and repairers, marinas, servicers of small commercial fishing boats, and other shoreside or nearby operations.

The effect of this decision was to impose a crippling financial burden on the numerous small businesses affected by it, who previously were covered by State workers' compensation laws. Testimony taken by the House Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor indicates that compensation insurance premiums among some small employers jumped by as much as 500 percent in less than 2 years, from, for example, \$6.05 per \$100 of payroll to more than \$30 per \$100 of payroll.

The tremendous increase in insurance costs for the recreational boat industry is not related to the risk of injury, but to other factors. The act was designed to cover shipbuilding and longshoring operations which are highly dangerous and involve as much as four times the risk of injury as ordinary manufacturing operations. Recreational

boatbuilding or repair, on the other hand, involves no more risk of industrial injury than that involved in comparable occupations like cabinetmaking or auto mechanics, which are covered by State compensation laws.

The high premiums faced by the employers newly brought under the act by the DOL decision apparently resulted from a combination of factors mostly unrelated to the actual claims experience of these employers.

These factors are:

First, the very small usual size of these operations, averaging around seven employees—meaning that the premium cost per employee must be much higher to cover the possibility of even a single serious accident. Large shipyards have, of course, many more employees, reducing the cost per payroll dollar. In addition, because the total premium for a shipyard is so substantial, there is some evidence that carriers are willing to rebate some premium costs in order to keep the business. Because the premiums have apparently been calculated industrywide, this may be responsible for even higher premiums imposed on the small employers, even though their risk of accident is substantially less.

Second, the combination of uncertainty as to cost/risk, given the new and in some instance, unlimited benefits available under the Federal act, combined with the fact that insurance premiums are based on the worst potential risk conceivable.

Third, the unwillingness of private carriers in many areas to write coverage under the Federal act, except for preferred customers. In California, coverage was virtually unavailable in 1975, until emergency State legislation temporarily opened the State compensation fund to employers seeking coverage under the L and H Act.

After permitting this legislation to expire in July, the California Legislature has recently enacted an indefinite extension of the State compensation fund's authority to provide this coverage. Among our witnesses today is Mr. J. Michael Kavanagh who is responsible for administering the L and H division of the State compensation fund.

With this extended authority, the situation in California was somewhat improved as to availability and cost of coverage, at least for the recreational boat industry. But other shoreside small businesses, including fish processing plants, remain subject to very high premiums.

While the most dramatic examples of hardship imposed on the recreational boat industry and other small businesses have surfaced in California—where a number of businesses have been forced to close—the negative impact of DOL's decision is becoming apparent in every State with a recreational boat industry on or near U.S. navigable waters where DOL's interpretation of the act's jurisdiction has been enforced.

And there is widespread evidence that in many places, either as a result of confusion or nonacceptance of DOL's interpretation, many employers have continued to operate with only State workers' compensation coverage.

Thus, those who have complied with the DOL interpretation have been put at an economic and competitive disadvantage, while those who have not are running the grave risk that they may eventually be found in noncompliance with the law.

This needless dilemma has been created by a DOL interpretation of the 1972 amendments to the act in a way that Congress never intended. Exhaustive attempts have been made to correct that decision administratively without success. The Department is apparently prepared to await the eventual outcome of judicial review of its decisions which may come years too late to correct the harm done various businesses.

I believe that the action of the Department of Labor and the reaction of the insurance industry are such that Congress must now clarify its own intent with respect to who is and who is not to be covered by the L and H Act.

This is the reason I introduced S. 2020, and am seeking its enactment.

[The text of S. 2020 follows:]

95TH CONGRESS
1st Session

S. 2020

IN THE SENATE OF THE UNITED STATES

AUGUST 5 (legislative day, JULY 19), 1977

Mr. CRANSTON introduced the following bill; which was read twice and referred to the Committee on Human Resources

A BILL

To amend the Longshoremen's and Harbor Workers' Compensation Act to clarify the Act's coverage to employees engaged in the manufacture, repair, servicing, or sale of recreational boats.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That section 2 (3) of the Longshoremen's and Harbor
4 Workers' Act (33 U.S.C. 902 (3)) is amended by striking
5 out the remainder of the sentence appearing after the word
6 "include" and inserting in lieu thereof the following:

7 “(A) a master or member of a crew of any
8 vessel;

9 “(B) any person engaged by the master to

1 load or unload or repair any small vessel under
2 eighteen tons net;

3 “(C) any person engaged in the manufacture,
4 repair, servicing, or sale of recreational boats, unless
5 actually engaged on, under, or over the navigable
6 waters of the United States (as defined prior to the
7 enactment of Public Law 92-576) and unless not
8 otherwise covered by State workers’ compensation
9 law; and

10 “(D) any person engaged in the manufacture,
11 repair, servicing, or sale of fishing boats and em-
12 ployed by an employer with twenty or fewer
13 employees, unless actually engaged on, under, or
14 over the navigable waters of the United States (as
15 defined prior to the enactment of Public Law
16 92-576) and unless not otherwise covered by State
17 workers’ compensation law.”.

18 SEC. 2. Section 2 of the Longshoremen’s and Harbor
19 Workers’ Compensation Act is amended by redesignating
20 paragraph (22) as paragraph (24) and by inserting after
21 paragraph (21) the following new paragraphs:

22 “(22) The term ‘recreational boat’ means any
23 vessel which is of a type or class designed, manufac-
24 tured, or used primarily for noncommercial purposes,

1 and not required to have a valid marine document as
2 a vessel of the United States.

3 “(23) The term ‘fishing boat’ means any vessel
4 which is seventy-two feet in length or less and is of a
5 type or class designed, manufactured, or used primarily
6 for commercial fishing purposes.”.

Senator CRANSTON. Today, we will hear from a panel of witnesses who can provide us with insight into how the DOL's interpretation of the 1972 amendments have affected various small businesses, we will hear from Assistant Secretary of Labor Don Elisburg, who has long familiarity with these issues, and we will hear from Mike Kavanaugh, who can provide us with the perspective of the insurance carrier now providing most of the coverage available in California to these small businesses.

As many of you are aware, Congressman George Miller has taken the lead on the House side in attempting to rectify this situation. Unfortunately, he is prevented by illness from attending this morning's hearing, but he has sent a statement which, without objection, I will include at this point in the record.

[The prepared statement of Congressman Miller follows:]

PREPARED STATEMENT OF HON. GEORGE MILLER, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF CALIFORNIA

Senator Cranston, members of the Committee, I regret that recent back surgery precludes me from delivering this testimony to the Committee in person. I do appreciate having the opportunity to submit this statement for the official record, and I would request that it be printed in the record.

Senators, you are well aware of the severe crisis which has developed in the recreational boating industry in the past few years. This crisis threatens not only the futures of these small businesses, but the millions of boat owners and users who depend upon them. In my own district of California, the cities of Richmond, Martinez and Pittsburg all have constructed new marinas for use by their citizens and others in Contra Costa County. I know, from the many letters I have received, and from the days of testimony on the Longshoremen's bill in the House Subcommittee, that this problem is nationwide in scope and severity.

We are not simply talking about imposing some new costs on these businesses. Imposition of the terms of Notice 21, which applied the Longshoremen and Harbor Workers' Act to recreational boating and marinas, will seriously jeopardize the entire future of this industry. Subsequent to the decision contained in Notice 21, insurance rates for small boatmen jumped by several hundred percent, forcing businesses either to pay the higher rates, and increase their prices to consumers, or close down. Only swift action by the California State Legislature has prevented the total impact of this bureaucratic disaster from being fully realized. But, as other witnesses will doubtless tell you, the coverage offered under the State Fund is not going to continue indefinitely, and when it expires, the small boating business in California will be imperiled.

Let me go right to the heart of some of the objections raised by those who have opposed the bill which I introduced in the House, H.R. 8878, and which Senator Cranston introduced in this body, S. 2020, on which this hearing this morning is being conducted. Last week, spokesmen for labor organizations told the Subcommittee on Compensation, Health and Safety that they believed that workers in an industry who do similar work should have similar coverage. I agree fully. I want to state as firmly as I possibly can, that I would not be in support of this legislation for a moment if I believed that it would, in any way, jeopardize necessary coverage for any worker. But the real question in regard to S. 2020 is whether or not comparable types of work are being done. I have visited small boatyards, and I must say that the work there bears little semblance to the shipbuilding yards at which the 1972 amendments were targeted. In fact, there is absolutely no evidence whatever to suggest, in the legislative history, that these small yards were intended to be covered by the Longshoremen's Act, except when workers are working over the navigable waters of the United States. My legislation, and Senator Cranston's, would continue their coverage under LHWA, and I do not believe that the small boating interests oppose that provision.

Let us look for a moment at the record of injuries. Obviously, if someone is killed or injured in a small yard, he is just as injured or dead as if he had been building an ocean liner. But what are the levels of injuries in small yards, and is it fair to impose unrealistically high rates on an entire segment of an industry if the actuarial tables clearly indicate that it is unjustified? Assistant Secretary

of Labor Don Elisberg, who served as a Senate staff person during the drafting of the 1972 amendments, recently testified on this matter before the House Subcommittee. Concerning small boat yards, Mr. Elisberg told the Subcommittee: "There have been relatively few injuries reported by this [segment of the] industry. During the three months July-September, 1977, when we conducted a survey, only 158 injuries were reported nationwide, of which only 62 involved lost time from work. In February, there were 24 lost time injuries reported; in March, 44; and in April, 28." Those figures are for the entire United States!

By contrast, I would like to note the magnitude of the overall injury rate in the shipbuilding and repair industry. In 1976, there were 171,300 injuries reported in occupations covered by the Longshoremen's Act. Given the infinitesimal percentage attributed to the recreational boating and marina phases of the industry, is it rational to require the imposition of the high LHWA rates, which were designed for hazardous occupations, on the small firms?

The U.S. District Court for the Northern District of California considered this situation last year. In the case, *Boating Industry Associations, et al v. Ray Marshall*, the Court found that there was no legislative justification for applying the 1972 amendments to recreational boat builders and marinas. The Court, as a result, ordered the Department of Labor to rescind Notice 21, and instructed the federal government to declare "that it is no longer the official position of the Labor Department that the LHWA applies to recreational boat builders and marinas." Together with 31 House and Senate colleagues, I wrote to the Secretary of Labor and requested that he abide by the ruling of the Court, and not appeal the decision. Unfortunately, the Labor Department has decided to pursue the appeal.

During a recent visit to California by Secretary of Labor Marshall, I was able to arrange for him to spend some time discussing this severe problem with a constituent of mine, Quentin Lewton of Richmond, California. Mr. Lewton has been one of the prime movers behind H.R. 8878, and he has outstandingly represented the views and the legitimate interests of his fellow marina and small boatyard operators. I understand that Mr. Lewton will be testifying before the Committee today, and I will defer to him on reporting the results of his discussions with Secretary Marshall. Suffice it to say that I have always been impressed with the Secretary's concern on this matter, and that I am most grateful that he took the time to hear the problems of the recreational boat industry earlier this month in California.

Mr. Chairman, it does not appear that the House Subcommittee is going to be able to act upon H.R. 8878 during the current session of Congress, and I regret this very much. We have had a great deal of testimony on behalf of the bill, and I think the record, taken together with the recent Court decision, establishes firm ground for its enactment. Over and over again, however, we have heard the complaint that there is not enough data.

To provide the Congress with more complete information on this issue, so as to assure swifter consideration in the next Congress, I will soon ask the General Accounting Office to begin an investigation of the fiscal impacts of Notice 21, of the legislative history of the 1972 amendments with regard to small boatmen, and of the impacts since the 1975 decision to impose LHWA rates on this segment of the industry. I also will ask GAO to investigate whether evidence exists to determine whether or not the rates being charged small industry by insurance companies are justified by injury or disability rates among workers in the yards.

I also am asking GAO to investigate the ripple effect of Notice 21 with respect to the closure of yards, increases in mooring, launching and storage fees, and other affected costs which are passed along to consumers. I am also anxious to see a fuller comparison of the injury rates in small yards with those of larger shipbuilding or repair facilities.

Mr. Chairman, in the event that this legislation is not enacted this year, the GAO study will provide a sound empirical basis upon which to push similar legislation in the 96th Congress. Until that time, a sword will hang needlessly over the heads of those in the recreational boating industry, workers and employers alike. I would like to commend you, Senator Cranston, and the members of the Committee, for recognizing the very great problems in this area, and for moving along with these hearings on behalf of this legislation. I would also like to invite any members of the Committee to submit to me questions which they would like addressed to GAO as part of the study which I have described this morning.

I appreciate having the opportunity to testify before this Committee, and I look forward to working cooperatively with you on this issue in the future.

Senator CRANSTON. I will now ask Mr. Quentin Lewton to introduce the first panel of witnesses to the committee.

Thank you very much for being present.

STATEMENT OF QUENTIN LEWTON, NORTHERN CALIFORNIA MARINE ASSOCIATION; JIM MCKINLEY, NORTHERN CALIFORNIA MARINE ASSOCIATION; WILLIAM KETTENBERG, SOUTHERN CALIFORNIA MARINE ASSOCIATION; DENNIS GRIESING, NATIONAL ASSOCIATION OF ENGINE & BOAT MANUFACTURERS; JOHN HARDY, NATIONAL ASSOCIATION OF ENGINE & BOAT MANUFACTURERS; AND JIM MCBANE, NATIONAL FISHERIES INSTITUTE, A PANEL

Mr. LEWTON. Good morning. My name is Quentin Lewton. I am from the Northern California Marine Association.

This morning, we have John Hardy from the firm of Patton, Boggs & Blow, representing the National Association of Engine & Boat Manufacturers.

This is Dennis Griesing, government affairs manager of the National Association of Engine & Boat Manufacturers.

Jim McBane represents the National Fisheries Institute.

Jim McKinley is from the Northern California Marine Association.

Also, we have William Kettenberg from the Southern California Marine Association.

I would like to ask John Hardy to lead off.

Senator CRANSTON. Fine.

Mr. HARDY. Mr. Chairman, my name is John Hardy, Jr., of the firm of Patton, Boggs & Blow. We are appearing today on behalf of the Boating Industry Associations, Chicago, Ill., and the National Association of Engine & Boat Manufacturers, New York, N.Y. The two associations are broadly representative of the recreational boating industry and their combined membership includes over 800 boat, engine, and accessory manufacturers, repair yards, and small marinas for recreational craft across the country.

We appreciate the opportunity given us this morning to testify with respect to S. 2020, which would help clarify the jurisdiction of the Longshoremen's and Harborworkers' Compensation Act by partially exempting the recreational marine industry from that act's coverage.

Mr. Chairman, I would like to summarize the rest of my written testimony, but would ask that it be placed in the record as if stated.

Senator CRANSTON. All these statements will go in as if read in full. We appreciate your summarizing since we are pressed for time.

Mr. HARDY. On June 6, 1975, the Department of Labor issued a ruling, designated "Notice No. 21," that recreational boatbuilders and marinas are "employers" within the meaning of the act and that employees of recreational boatbuilders and marinas are engaged in "maritime employment." Notice No. 21 is based upon an erroneous interpretation of the act. However despite that fact, it has had a devastating impact across the country, by compelling recreational boat businesses to obtain Longshoremen's Act coverage.

As a consequence of notice No. 21, the recreational marine industry has been beset by two major problems:

1. Insurance rates for Longshoremen's Act coverage have increased the total cost of workmen's compensation insurance several times over what it was prior to the time notice No. 21 was issued; and,

2. Private insurance carriers in various parts of the country (among others, California, Pennsylvania, Alabama, Oregon, Washington, and New York) are refusing to insure recreational boat businesses which have Longshoremen's Act exposure.

The escalating rate of Longshoremen's Act coverage is a severe problem for the recreational boating industry, composed primarily of very small companies having only limited financial resources.

The Department of Labor has stated time and again that it will not alter its position stated in notice No. 21 until the issue has been formally decided by the courts. There are two cases presently being litigated, in both of which BIA and NAEBM are parties. It is anticipated, however, that these proceedings will not be concluded for considerable time. It is the firm belief of this industry that the legal basis for our position that we should be exempt from the act, is sound.

The Longshoremen's Act was enacted in 1927 to provide a compensation remedy for workers involved in the loading, unloading, or repairing of large commercial ships who would not otherwise have been entitled to State workmen's compensation benefits if injured within the Federal maritime jurisdiction.

The legislative history establishes that the act was intended to cover only certain workers, those in the commercial shipping industry.

Subsequent to the passage of the Longshoremen's Act, this coverage was expanded by judicial interpretation.

The courts gradually enlarged the coverage of the act to include any employee, regardless of the nature of his employment, who was injured upon the navigable waters of the United States.

In 1972, Congress enacted substantial revisions to the coverage provisions of the act. The legislative history to the Longshoremen's and Harborworkers' Compensation Act Amendments of 1972 reaffirms Congress intent that the act cover only a specific and limited class of workers involved with large commercial ships.

A major provision in the 1972 amendment established a status requirement for coverage by mandating that the claimant be engaged in "maritime employment." Congress qualified that term by adding limiting language, "including any longshoremen or other person engaged in longshoring operations and any harborworker including a ship repairman, shipbuilder and shipbreaker." Thus, Congress intended to restrict those covered by the act to workers engaged in recognized historical maritime activities associated with commercial shipping. This language is clear and explicit; it cannot be read to include workers in the recreational boating industry.

The committee reports to the 1972 amendments state that only persons "directly involved" in the "loading, unloading, repairing or building of a vessel" are covered by the act. Workers in the recreational boating industry, who do not do any loading or unloading and who do not build or repair large commercial vessels, are not covered by the act.

S. 2020 is a major step towards the alleviation of the burden under which the recreational boat industry is presently operating. Thus, we, of course, urge its enactment. However, it may represent only a partial solution because it may eliminate the act's coverage for employees in this industry only when they are on land, and not when they are on or over the navigable waters.

Our testimony this morning indicates that Congress never intended to include the industry within the act's coverage. We urge this committee to consider a total exemption for the industry, in accordance with the intent of Congress, by expanding S. 2020 to cover employees in the industry not only when they are on land but in all of their activities.

Thank you.

Senator CRANSTON. Thank you.

[The joint prepared statement of the Boating Industry Associations and National Association of Engine and Boat manufacturers follows:]

TESTIMONY OF
BOATING INDUSTRY ASSOCIATIONS
AND
NATIONAL ASSOCIATION OF ENGINE AND BOAT MANUFACTURERS
BEFORE THE
SENATE HUMAN RESOURCES COMMITTEE

September 28, 1978

E. Bruce Butler
John V.E. Hardy, Jr.
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TESTIMONY OF
BOATING INDUSTRY ASSOCIATIONS
AND
NATIONAL ASSOCIATION OF ENGINE AND BOAT MANUFACTURERS
BEFORE THE
SENATE HUMAN RESOURCES COMMITTEE

Mr. Chairman and Members of the Committee, my name is John Hardy, Jr. of the firm of Patton, Boggs & Blow. We are appearing today on behalf of the Boating Industry Associations, Chicago, Illinois, and the National Association of Engine and Boat Manufacturers, New York, New York. The two Associations are broadly representative of the recreational boating industry and their combined membership includes over 800 boat, engine and accessory manufacturers, repair yards, and small marinas for recreational craft across the country.

We appreciate the opportunity given us this morning to testify with respect to S. 2020, which would help clarify the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act by partially exempting the recreational marine industry from that Act's coverage.

The recreational boating industry firmly believes that it has never been the intention of Congress to include the recreational boating industry within the Act's coverage. The problem for this industry has arisen because of an erroneous interpretation of the Act by the Department of Labor. The two Associations which I represent are here today to stress that clarifying legislation is necessary to provide prompt relief for the industry.

I. Congress Has Never Intended for the Recreational Boating Industry to be Covered by the Longshoremen's Act.

A. The 1927 Act

The Longshoremen's and Harbor Workers' Compensation Act was enacted in 1927 to provide a compensation remedy for workers involved in the loading, unloading, or repairing of large commercial ships who would not otherwise have been entitled to State workmen's compensation benefits if injured within the Federal maritime jurisdiction.

The legislative history establishes that the Act was intended to cover only certain workers, those in the shipping industry:

1. Those who drafted the Act, Congressmen and the numerous witnesses appearing before the various Congressional Committees referred exclusively to shoreside workers who were involved with large commercial ships. Which industry and what size vessel Congress was contemplating when it passed the Act is indicated by the witnesses who were invited to testify before Congress on the proposed legislation. Testimony was heard from representatives of the International Longshoremen's Union, the American Association for Labor Legislation, the American Federation of Labor, the Central Trades and Labor Council of Greater New York, the Pacific Steamship Association, American Shipbuilders, Inc., the Council of American Shipbuilders, Inc., the New York and New Jersey Dry Dock Association, the American Steamship

Owners Association, the United States Shipping Board and the International Seamen's Union of America. All of these organizations were concerned exclusively with commercial shipping or the ship repair industries.

There is no reference in the legislative history to non-commercial vessels and not a single reference to recreational boats.

2. The legislative history indicates that Congress did not seek the inclusion of all those who worked on or near the water. The Act itself did not cover all forms of maritime employment. Masters and the crews of vessels were excluded as were other craft and their employers who were not engaged in the hazardous occupations of longshoremen and ship repairmen. The "eighteen ton net" exclusion was added to exempt the fishing industry, fishing vessels, and all other small vessels under that size.

It is clear then that Congress intended that the 1927 Act cover only workers in hazardous occupations, namely those involved with large commercial ships.

B. Judicial Interpretation of the 1927 Act

Subsequent to the passage of the Longshoremen's Act, its coverage was expanded by judicial interpretation.

The Courts gradually enlarged the coverage of the Act to include any employee, regardless of the nature of his employment, who was injured upon the navigable waters of the United States.

Thus a "freight brakeman" for a railroad (Pennsylvania R.R. Co. v. O'Rourke, 344 U.S. 334 (1953)), a janitor (Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941)), and a pilot (Nalco Chemical Corp. v. Shea, 419 F.2d 572 (5th Cir. 1969)) were all found to have been covered by the Act, even though none was involved with large commercial ships, because they were injured on or over the navigable water. Thus the courts, by interpretation, eliminated any status test and relied exclusively on a situs test to determine the Act's coverage.

C. The 1972 Amendments

In 1972, Congress enacted substantial revisions to the coverage provisions of the Act. The legislative history to the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 reaffirms Congress's intent that the Act cover only a specific and limited class of workers involved with large commercial ships.

A major provision in the 1972 Amendments established a precise and limiting definition of an "employee" for purposes of the Act's coverage. The new definition in Section 2 (3) mandates that the claimant be engaged in "maritime employment". Congress qualified that term by adding limiting language, "including any longshoremen or other person engaged in longshore operations and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." In defining the term "employee" for the first time, Congress intended to re-establish a status

test by restricting those covered by the Act to workers engaged in recognized historical maritime activities associated with commercial shipping.^{*/} This language is clear and explicit; it cannot be read to include workers in the recreational boating industry. These workers do not have the status of a longshoreman or harbor-worker.

The Committee reports to the 1972 Amendments made Congress's intention in this regard quite clear. The Reports state that only persons "directly involved" in the "loading, unloading, repairing or building of a vessel" are covered by the Act. Workers in the recreational boating industry, who do not do any loading or unloading and who do not build or repair large commercial vessels, are not covered by the Act.

The legislative histories of both the 1927 Act and the 1972 Amendments establish that the recreational boating industry was never intended by Congress to be included within the jurisdictional scope of the Longshoremen's and Harbor Workers' Compensation Act.

II. The Need for Federal Legislation

On June 6, 1975 the Department of Labor issued a ruling, designated "Notice No. 21", that recreational boat builders and

^{*/} The 1972 Amendments also enlarged the jurisdictional situs of the Act to eliminate the problem of workers moving in and out of the Act's situs coverage in the course of their work. However, this change has no bearing on whether or not the recreational marine industry was intended by Congress to be covered by the Longshoremen's Act.

marinas are "employers" within the meaning of the Act and that employees of recreational boat builders and marinas are engaged in "maritime employment". Notice No. 21 is based upon an erroneous interpretation of the Act. However, despite that fact, it has had a devastating impact across the country, by compelling recreational boat businesses to obtain Longshoremen's Act coverage.

As a consequence of Notice No. 21, the recreational marine industry has been beset by two major problems:

1. Insurance rates for Longshoremen's Act coverage have increased the total cost of workmen's compensation insurance several times over what it was prior to the time Notice No. 21 was issued; and,

2. Private insurance carriers in various parts of the country (among others, California, Pennsylvania, Alabama, Oregon, Washington and New York) are refusing to insure recreational boat businesses which have Longshoremen's Act exposure.

The escalating rate of Longshoremen's Act coverage is a severe problem for the recreational boating industry, composed primarily of very small companies having only limited financial resources. There are only a few companies in the industry which could be considered large. And even these cannot compare to any of the major companies in the country. Many businesses in this industry have ten or fewer employees. Consequently, the increase in premiums for Longshoremen's Act coverage to

which the industry is currently exposed is a terrible burden for the small businesses to carry.

The Department of Labor has stated time and again that it will not alter its position stated in Notice No. 21 until the issue has been formally decided by the Courts. There are two cases presently being litigated, in both of which BIA and NAEBM are parties.^{*/} Decisions in both of these cases at the present time support the legal position of the recreational marine industry set forth in this testimony. It is anticipated, however, that these proceedings will not be concluded for considerable time. Even then, they may have only a limited impact, either because of the scope of the appellate courts' decisions or because of the degree to which the precedential value of these courts' decisions is ignored by authorities like the Benefits Review Board and Administrative Law Judges who preside at contested-claims proceedings.

An example of why favorable Court decisions may not be adequate, and why Federal legislation is necessary is the decision of an Administrative Law Judge in a contested claims proceeding. In Nathan Henderson v. Henry Floyd Davis, d/b/a/ Davis Boat Repair, 8 BRBS 8 (ALJ) No. 78-LHCA-156, March 24, 1978, the

^{*/} Director, OWCP v. Donzi Marine, Inc. et.al., Fifth Circuit Case No. 77-1960, Awaiting Oral Argument; Boating Industry Associations, National Association of Engine and Boat Manufacturers et.al., v. Ray Marshall, et. al., Ninth Circuit, Case No. 78-1827, Awaiting Oral Argument.

Presiding Judge declined to follow the ruling of the U.S. District Court for the Northern District of California in Boating Industry Associations et. al. v. Marshall et. al. that recreational boat builders and repairers and those operating recreational boat marinas are not subject to the Longshoremen's Act.^{*/} In Henderson, the Presiding Judge declined to follow the District Court's Order and Ruling, stating:

In any event, the declaratory judgment of a Court outside the line of judicial review dictated by the Longshore Act, is not a valid reason for failure to follow the Benefit Review Board's clear precedent. 8 BRBS at 10 (ALJ)

It will be of no benefit to the recreational marine industry to obtain favorable Court rulings if the Benefits Review Board and the judges who preside at contested claims proceedings disregard the substance of those rulings. Only through a clarifying amendment to the Act can the erroneous interpretation of the Department of Labor be rectified promptly and small boat businesses be relieved of this intolerable financial burden.

Conclusion

S.2020 is a major step towards the alleviation of the burden under which the recreational boat industry is presently operating. Thus, we, of course, urge its enactment. However, it represents only a partial solution because it eliminates the

^{*/} On appeal to the Ninth Circuit.

Act's coverage for employees in this industry only when they are on land, and not when they are on or over the navigable waters.

Our testimony this morning indicates that Congress never intended to include the industry within the Act's coverage. We urge this Committee to consider a total exemption for the industry, in accordance with the intent of Congress, by expanding S. 2020 to cover employees in the industry not only when they are on land but in all of their activities.

Thank You.

Senator CRANSTON. Who is next?

Mr. LEWTON. Dennis Griesing.

Mr. GRIESING. Mr. Chairman and members of the committee, my name is Dennis Griesing, government affairs manager of the National Association of Engine and Boat Manufacturers.

NAEBM is a trade association of the recreational boating industry representing over 400 boat, engine, and marine accessory manufacturers as well as 30 regional marine trade associations across the country.

The recreational boating industry has suffered severely because of the burden placed upon it by its inclusion under the Longshoremen's and Harborworkers' Compensation Act. The promulgation of notice 21 by the Office of Workers' Compensation programs has resulted, most noticeably, in significant increased costs of workmen's compensation for employees in the recreational marine industry. In some cases, the increases have resulted in the closing of businesses, as in California.

Less noticeable, though equally onerous to the recreational boating industry, has been the establishment, through issuance of notice 21, of an unsettled and disrupted business milieu which has prevented the small recreational businessman, who forms the majority of the employers in our industry, from conducting his affairs in a secure business environment.

The ability to accrue capital for the expansion and improvement of facilities or for the upgrading of employee benefit plans, such as health and pension, is severely curtailed. Moreover, uncertainty concerning whether the Longshoremen's Act includes the recreational marine industry inhibits the ability of the marine businessman to plan carefully for growth over an extended period, a condition necessary for maintaining the viability of a small business under present economic conditions.

The recreational sector of the economy is enjoying substantial growth. The American public is increasing the recreational uses of its leisure time each year. Boating forms a significant part of the recreational sector and, as with any forward-looking industry, recreational boating looks forward to supplying the goods and services the public demands. Unfortunately, under present conditions, where Federal workmen's compensation rates are unduly high, the small marine businessman is finding it increasingly difficult either to improve or to expand his business. It is essential therefore that the Congress address itself to this problem and provide the basis for a secure and stable business foundation upon which the recreational marine industry can proceed to grow and prosper under normal conditions.

This end can be attained by clarifying the jurisdiction of the Longshoremen's and Harborworkers' Compensation Act by enacting legislation exempting this industry from the act. In our opinion, the ambient hazards and dangers which confront shipyard workers engaged in the construction of commercial tankers, freighters and ships of war are not comparable to the working environment of the recreational boatyard engaged in the construction, repair and maintenance of recreational powerboats, sailboats, outboard motors and auxiliary engines. In every respect, from the size of the vessels to the equipment and facilities needed to service them, the two situations are radically distinct.

In the shipyard there is extensive use of heavy equipment, multi-storied scaffolding, and heavy materials. By contrast in a marina, boats are moved by forklift and travelift. A single level of scaffolding, not generally over 5 feet from the ground, may be used during the painting or repairing of hulls. Moving materials require only the shifting of planking, timber, and cans of varnish and paint. The relative safety of such a work environment is emphasized every weekend prior to the beginning of the boating season when boatowners and their families crowd marines and boatyards to do much of their own repair work.

Despite the clear and distinct differences between the two work environments, the recreational marine industry finds itself lumped together with those industries which build submarines, guided missile cruisers or which unload cargo from ships at dockside. Only their geographical proximity to navigable waters is shared between the industries.

We request that the Senate Human Resources Committee address itself to the need for a clear jurisdictional demarcation which accounts for the categorical difference between the recreational boatyard and the commercial shipyard based on the principles outlined in S. 2020. We would propose further that the recreational boat industry be fully exempted from the coverage of the act.

Some have argued that the problem faced by the recreational boating industry is solely a California one. This opinion is categorically incorrect. While the most visible situation remains in California, rates have risen up to 300 percent in the State of New York. In States such as Florida, Pennsylvania, and New York, for example, it is either impossible, or near to impossible to obtain insurance from a private carrier. Thus businesses with excellent safety records are forced to seek refuge in State assigned risk pools, always at higher insurance rates. In each of these instances the employer is being unjustly penalized because he simply does not belong under the act's coverage.

Not only are recreational boat employers being penalized with higher premiums, but some are being compelled to break the law to remain in business. It has been my experience, based on a 3-month survey of the recreational boating industry, that in several major boating States there are numerous marine businesses who are "going bare," that is avoiding obtaining L and H coverage, because they simply cannot afford it.

In their view, to pay the required rates would be ruinous to their businesses. It is unfair to these employers that they should be placed in a situation, as they have by the Department of Labor's Notice 21, where they must either break the law or go out of business. Likewise, it is also unfair that employers in the industry should be penalized in their business efforts by complying with the law when, as a consequence of the cost of the insurance they cannot compete with those "going bare."

In summary, Mr. Chairman, the overall effect of the Longshoremen's Act upon the recreational boating industry has been to establish a milieu of uncertain business conditions; raise to unjustifiably high rates Federal compensation insurance for employees, which rates are totally without basis in the exposure history of the industry; and to

effectively inhibit the ability of a segment of the industry to meet demand.

This committee can take significant steps to alleviate these presently untenable conditions by its favorable consideration of S. 2020.

Thank you.

Senator CRANSTON. Thank you.

Mr. LEWTON. Mr. William Kettenberg, Southern California Marine Association.

Mr. KETTENBERG. I am here on short notice, and I will not repeat many of the statements that have already been stated.

As I represent the second largest marine trade association in the United States, I have had hundreds of calls, indicating there are many companies with confusion, wondering what to do, where to go. In the past, I could not answer. There was no way to help them out.

A number of the small companies folded. One of the companies we have subcontracted work to, a boat cleaner and makeready company, Shipshape Marine, San Diego, with about seven employees, called. He said, "What do I do? I just got my insurance bill. I am out of business.

At that time, I did not have an answer. I can go on and on.

I get calls not only from SCMA members, but also from many small boatyards, people involved in the marine industry.

Many of the companies, so-called dockworker organizations, have one, five, six, seven employees, have cut back and are now single proprietorships.

There is lots of confusion in our territory still. The rates have come down, but still we are in trouble. Most of the companies I have surveyed in my immediate area have rates that are between \$13 and \$22.

I have noticed in reports that as far as injuries go, and I guess San Francisco is our reporting area, San Diego has had many more injuries in the month of February.

The State of California has helped out many of us in our area. As things got really bad, I called a number of meetings with our council and our board of directors' legislative committee to keep up on this.

I can state all the problems reported by other witnesses, the same thing has happened in my district. We need relief.

Thank you.

Senator CRANSTON. Thank you, very much.

Mr. LEWTON. Thank you, Mr. Chairman.

As you can see, we have a considerable amount of confusion still going on in California and throughout the rest of the country with people "running bare," not knowing what to do, not knowing where the situation lies.

Recently, for most members of NCMA, the insurance situation has improved somewhat. I am paying about \$22 per \$100 of payroll for the L and H exposure of Richmond Boat Works. I presently have an 81 percent experience modification factor for the good safety record of Richmond Boat Works. Some here today may tell you that the problem is solved, that I should be satisfied being able to obtain L and H insurance, and to obtain it at \$22 per \$100 of payroll. Those people, however, were not affected when L & H insurance was not available. They never had to close their own businesses for 90 days, to lay off workers, some of whom had been employed for 10 or more years at

Richmond Boat Works, because Longshoremen's Act insurance was unavailable or unaffordable.

Today, there are only two companies in California writing L and H insurance for recreational boat repair yards like mine. Only one of the two companies is a private carrier (the other is the State compensation fund). Six months ago, there was no private carrier in California writing L and H insurance. Six months from now, it is unclear that there will be any private carriers in California offering L & H insurance. No one can predict that L & H insurance will remain available, or at its present rate, if any of the following were to occur: (1) the favorable decision in the district court of the Northern District of California is overturned by the Ninth Circuit Court of Appeals pursuant to the appeal of the Department of Labor; (2) an employee has an injury of a major nature, causing the private carrier to decide the potential rewards don't justify the risks; (3) re-insurance becomes unavailable or unaffordable to the two present carriers.

NCMA has worked for State solutions. I would like to summarize those briefly.

In July 1976, NCMA asked the California Legislature to enact a bill that would provide a supply in California for L and H coverage. Legislation was passed, albeit reluctantly, providing for State fund to offer L and H coverage. Yet State fund was authorized to offer that coverage only for a 2-year period. Existing law required the Insurance Commissioner to set minimum premium rates of \$30 per \$100 of payroll, which the boating community strongly protested. After efforts were made by the legislature to request the Insurance Commissioner not to set minimum rates, the California Legislature enacted additional legislation to deprive the Insurance Commissioner of authority to establish minimum premium rates.

More recently, a third piece of legislation was enacted, to authorize the California State compensation fund to provide L and H insurance for an indefinite period of time. However, now there are reports that because of questions about reinsurance, it is unclear what the future cost for L and H insurance will be.

The California Legislature has also passed two joint resolutions requesting Congress to clarify that L and H Act. We concur in those requests.

The Northern California Marine Association has been told by the Department of Labor that legislative action must be taken by Congress for relief to be provided to employers in this industry. We concur that only the Congress can relieve us from having to purchase Longshoremen's Act insurance. We therefore urge your support for S. 2020 and, if possible, a complete exemption for this industry from the act.

Mr. Chairman, Mr. Jim McBane—

Senator CRANSTON. I would like to wait so Senator Hayakawa can make a statement. He has to go to another committee.

STATEMENT OF HON. S. I. HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator HAYAKAWA. Forgive me for interrupting, but I have to be somewhere else quickly. I have a prior commitment on the floor which I must attend to.

I want to welcome you and thank you for coming here. I hope my colleagues in the Senate will see the necessity for congressional action on S. 2020.

I am a cosponsor of this important legislation, and I hope Senator Cranston's staff and mine will work closely together to achieve action on this bill.

We all know the background of this situation. The 1972 amendment was proper, but the subsequent ruling of the Department of Labor to include recreational boating was not proper. The inclusion of low-risk recreational boating industry under the same formula as high-risk boating industry does not make sense.

Many small boating operations have been forced to close. With the imminent loss of State compensation funds, many more will follow suit.

This seems an example of agency rulemaking instituted without regard to the original legislative intent, an agency usurping the authority of the legislature. I do not support this type of action.

Let me emphasize my concerns, and I hope you will feel free to call on us for assistance. My staff will work with Senator Cranston's staff, and I hope we will get things accomplished on this.

Senator CRANSTON. Thank you, very much, Senator Hayakawa.

Senator HAYAKAWA. Thank you, Mr. Chairman.

Mr. MCBANE. Mr. Chairman, my name is Jim McBane. I am associate director of the National Fisheries Institute.

We represent commercial fishermen throughout the United States. We appreciated over the past year the opportunity to work with your staff and counsel on this legislation as it would impact on the fishing industry. My purpose in being here is to go over some operational problems the members of our institute are facing.

They do have a problem with required coverage by Longshoremen's and Harbor Workers' insurance. There are several instances in which this may apply.

For instance, the first case, which is very rare, occurs when a fishing boat will come in and the crew will unload the fish and it may go directly to the plant. In most cases, for the fishery, there is no Longshoremen's and Harbor Workers' coverage needed since none of the employees are involved in unloading the boat.

I say in most cases, because there is an exception.

For example, in Oregon at one of our plants, the main plant is a converted ship, permanently moored to the dock. It is somewhere in between a floating processing plant and a dock. They are required to have Longshoremen's and Harbor Workers' coverage for every employee, and yet these employees do not unload boats or move fish from the dock. They are just processors and scalers. They do have coverage for every one of their employees.

The second case, which is more normal, is, in many cases, the fishing boat crew unloads the fish onto the dock and the employees of the fishery then move the fish from the dock into the cannery or processing plant. In these cases, these employees must be covered by the Longshoremen's and Harbor Workers' insurance.

The third case may be where the employee actually unloads the fish from the boat into the plant itself. Although that may be analogous to longshoremen, it is our contention that particular activity was not intended to be covered.

We have had some methods of trying to alleviate the problem in the latter situation for the employees who have to actually unload the boat. It becomes a problem. Take, for instance, if it takes five men 40 hours to move these fish into the plant, or 1 day to alleviate the premiums, the fisheries have been trying to limit the amount of personnel doing the job. Where it would take five men 40 hours, it takes two men 4½ days. It reduces the amount of productivity in the plant. The plantworkers have to wait for two men to move the fish in.

As far as rates, for example, in California, they are paying for federal coverage \$25.21 for \$100 coverage versus \$7.50 for state compensation. The State fund premium that is \$13.50 per hundred does not cover fisheries.

Unfortunately, though, even when they do put a man on the dock to unload the boats, if he is out there for an hour, they have to pay the entire fee for the day.

For example, if he is out there for 1 hour moving fish from the dock into the plant, the employer must pay \$17.50 in Longshoremen's and Harbor Workers' premium.

I would like to cite some examples of insurance premiums that we have had around the country. A very small fishery in Maine, with insurance premiums formerly \$1,350, increased to \$4,200. In California, one fishery has premiums now of \$25,000 versus \$7,000 a year under regular workers' compensation.

In Florida, the Southern Fisheries Association, representing four States, had their own workmen's compensation plan that was in effect for 3 years, but it was ended on October 1, 1977, for two reasons.

One, they could not find an insurance carrier, and for those that could, the rates would have gone up from \$200,000 to \$500,000. Right now Florida fisheries are in the State plan, and for those fisheries that must have Longshoremen's and Harbor Workers' insurance coverage, they have an 8-percent surcharge.

In Florida itself, some insurance companies are requiring that if the fishes to be unloaded are moved to the packing house, cleaned, graded, and shipped, everybody, including the truck drivers must be covered.

It is our feeling that the problem is highly visible in California, yet it is cropping up in other States. I think the 1972 amendments have created the problem that is cropping up. The status test and the situs test, because they were not well or clearly designed created confusion among the States, and you see different problems and different solutions in various places. An example of one solution in California is that fisheries are deciding to move inland and not have the problem.

As of yesterday, I heard about a case in New York which decided that the truck drivers moving the fish would also have to be covered by Longshoremen's and Harbor Workers' coverage. These are problems that are coming up because of a lack of clear definition of what a maritime worker is. Nobody understands the present definition.

Are fisheries to be included or not? Are employees who move fish from boat to dock, or from dock to the fisheries, are they to be included?

I think the lack of definition is one of the main reasons for the problems. We appreciate working with your staff, and we have given to your staff a review we have done on the congressional passage of

the act in 1972 and recommendations we feel might solve the problem.

Senator CRANSTON. Thank you very much.

Does that complete the opening statements?

Mr. LEWTON. Yes, Mr. Chairman.

Senator CRANSTON. I would like to ask each of you one basic question. I would appreciate it if you would be brief in your response as we are pressed for time.

Given the recent improvement in availability of insurance in California—you have basically been talking about past problems—and also the recent improvement in premium costs, do you still believe that a clarification of who is covered under the act is necessary?

I would like to ask you whether exemption legislation is necessary in your view and why.

Mr. KETTENBERG. I am definitely for exempting the recreational boating field. Today the rates are at \$22 per \$100 of payroll, not \$13 or \$14. All you have to have is one or two major accidents and the rates will be back up there.

Senator CRANSTON. I will have to take a call. Hal Gross of my staff will continue the questioning. I'll be right back.

Mr. HARDY. I would concur with Mr. Kettenberg.

First of all, you have the uncertain future. One serious injury could either change the mind of the one private carrier presently providing L and H insurance to this industry in California, or it could force that carrier to substantially increase its rates.

Additionally, you have to recognize the fact that legislative histories of the act indicate, and the 1972 amendments indicate that Congress never intended to include the industry within the act's coverage.

Mr. LEWTON. I think also that redefining who is covered under the act is necessary versus the Department of Labor's opinion that everything must be adjudicated, and we have to go through the courts.

I agree in order to provide proper relief from current problems we have to go—the Congress has to redefine to provide that relief. The Department of Labor has said it appears that any action to provide relief to employers covered by this act would require legislative action by the Congress. And I have to agree with that.

Mr. MCKINLEY. I do not have much hope that in the future the insurance companies providing coverage now will continue. In the past we had one insurance carrier come in, wrote coverage for us for 2 months, then realized the problem they were facing. They realized the catastrophic problem they could have with one serious injury, and they left in 2 months.

I have very little faith that the two carriers we have right at the moment will stick around much longer. If they realize we have a problem or they have one big loss, coverage could be gone tomorrow.

Mr. GRIESING. I am in concurrence with all the previous statements. In addition, I would support congressional action on the basis that any exempting definition must be absolutely fundamental. This is necessary because of the politics of the insurance business wherein each State determines its own policy for administering its insurance programs. The boating industry is presently faced with a series of German principalities in terms of solving its problem. After dealing with a problem in one State, we find it cropping up in another.

Moreover, there is no homogeneity in the approaches of the various States. There will be different problems in each of the 50 individual cases.

Senator CRANSTON. Use the mike a little more. We cannot hear you very well.

Mr. MCBANE. Yes, definitely we think exemption legislation is necessary.

In California the problem has been alleviated to some degree. The State had to alleviate a problem that comes out of the national definition. Even though the \$13 rate we are now paying is a lot better than the \$26 we were paying, it is still almost double the regular State workmen's compensation rate. Right now, California is trying to alleviate the problem, but it still exists in other States. There are businesses that are adversely affected in Florida, Maine, as well as California.

Mr. GROSS. I would like to pin down a couple of facts.

Mr. KETTENBERG, you mentioned a number of layoffs occurring in the industry as well as a number of businesses that were forced to close as a result of the high premiums.

Can you give us any estimate of the total number of boat businesses and employees that may have lost their jobs as a result of this?

Mr. KETTENBERG. Mr. Gross, I cannot state the number. I just get inklings of it.

It is mainly the smaller companies or subcontracting firms where there are job losses. The larger ones, take for example "Driscoll Boats," their insurance program ran out just at the critical time. Jerry Driscoll called me and said, "What do I do?" The State of California came in just about that time and saved them.

If this had existed much longer—Driscoll is pretty substantial. The larger yards, maybe 10 to 50 employees, could weather this for a while. A number of them just "went bare." That is—operated without the required insurance. I do not know how many actually folded. It is the onesies, twosies, fours, that just gave up.

Mr. GROSS. You mentioned one in San Diego.

Mr. KETTENBERG. "Shipshape."

Mr. GROSS. Are there a minimum number you can give us of business that you know actually closed as a result of this problem?

Mr. KETTENBERG. It would be a guess.

Mr. GROSS. Give us your best guess.

Mr. KETTENBERG. I would say 20 or 30 businesses in the San Diego waterfront area.

Mr. GROSS. Averaging how many employees?

Mr. KETTENBERG. One or two to six, something like that.

You do not hear about them. They are not the ones knowledgeable enough to survive.

And there are still a number of them "going bare."

There is a lack of information, lots of confusion. That makes it tougher to answer your question properly.

Mr. GROSS. Mr. Lewton, I would like to address the same question to you.

Mr. LEWTON. We have had one large company in San Francisco Bay, the largest boat works in the San Francisco Bay. One has been closed for a year and a half now. They laid off 15 employees.

We have other small operations that people—employees were laid off and they went out on their own, working off the dock.

San Francisco Bay has what we call the “dock people”—they work off the dock—it is cash in the pocket, money passes from hand to pocket. It never appears in the form of taxes or unemployment insurance or longshoremen benefits.

We have that problem.

Mr. GROSS. What is the minimum number of employees you are specifically aware of who have lost their jobs as a result of the increases in compensation costs?

Mr. LEWTON. Well, the numbers went down, but are now coming back up.

Perhaps 30 employees.

Mr. GROSS. I have one final question for Mr. Hardy. You are the lawyer on the panel.

You mentioned a preference for complete exemption, including the workers who work over the navigable waters of the United States. Is that something Congress can constitutionally do in light of case law in this area?

Mr. HARDY. Yes; do believe it is constitutionally permissible.

Our review of the case law has come to the conclusion that State compensation is restricted only in terms of its application to injuries occurring on or over the navigable waters, restricted only in the area of commercial shipping activity. Outside of those fundamental maritime activities, State compensation, the application of State compensation law would be constitutionally permissible. I would ask that our memorandum of April 4, 1978, on this subject be included at this point in the record.

[The material referred to follows:]

April 4, 1978

MEMORANDUM

State Workmen's Compensation Laws are Applicable
to Workers in the Recreational Boating Industry
Injured Upon the Navigable Waters of the United States

When an employee in the recreational boating industry is injured during the course of employment, and the injury occurs on or over the navigable waters of the United States, the question arises whether that employee is to recover workmen's compensation under state law or federal law. The Department of Labor presently interprets the federal Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §902 et seq., as being applicable to an injured employee in the recreational boating industry. Most recently a federal district court has declared just the opposite, finding that the recreational boating industry is not within the coverage of the LHWCA. */ While this case is presently under appeal to the Ninth Circuit Court of Appeals, legislation has been introduced in the House (H.R. 8878) and Senate (S. 2020) to clarify the fact that Congress did not intend to include the recreational boating industry within the coverage of the LHWCA. This proposed legislation necessarily requires resolution of the constitutional issue: does Congress

*/ Boating Industry Associations, et al. v. Ray Marshall, et al., No. C-76-2550 RHS (January 31, 1978).

have the constitutional power to allow state workmen's compensation laws to apply to workers injured upon the navigable waters of the United States.

A. The Scope of Admiralty Jurisdiction

Article III Section 2 of the Constitution extends the "judicial power of the United States" to "all cases of admiralty and maritime jurisdiction." Congress implemented the constitutional grant in section 9 of the Judiciary Act of 1789 */:

. . . the District Courts . . . shall also have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction . . .

The content of the federal admiralty and maritime jurisdiction has been the subject of considerable debate. Benedict **/ recognized that admiralty traditionally comprised matters pertaining to commercial ships and shipping:

Every maritime nation has certain rules or laws in relation to ships, shipping and maritime matters - rules peculiar to itself, such as its navigation Acts, [Etc.] . . . These were originally enforced by the admiral, exercising in port a high executive and administrative function, which was a portion of the royal prerogative and was, in substance, confined to the waters and vessels of his own nation. The admiralty court

*/ This jurisdiction has remained unchanged in substance to the present day. The present version of section 9 is 28 U.S.C. §1333.

**/ Benedict, Admiralty, (7 ed.) (ed. E. Jhirad and A. Sann) Vol. I (1974). (hereinafter Benedict).

was the forum through which and by the aid of whose process these local municipal and administrative rules were enforced. . . . These are properly the admiralty laws of any country. Cases arising under these laws are cases of traditional admiralty jurisdiction. Benedict, Vol. 1, §102 at 7-5 (emphasis added).

The term "maritime" in the Constitution means "relating to the sea." */

With the grant of admiralty and maritime jurisdiction the federal government took over the traditional body of rules, precepts and practices of the general maritime law, which focused upon matters pertaining to practices of commercial shipping, and developed as the means of dealing with problems "arising out of the conduct of the sea transport industry." **/

A leading case on the scope of the admiralty and maritime jurisdiction is De Lovio v. Boit, 7 Fed. Cas. 418, No. 3776 (C.C.D. Mass. 1815) in which Justice Story declared that admiralty jurisdiction:

comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bound by locality, the former extends over all contracts (where-soever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea . . ."
7 Fed. Cas. at 444 (emphasis added).

*/ Benedict, Vol. 1, §102 at 7-5.

**/ Gilmore & Black, The Law of Admiralty, §§1-5, p. 11 (2d ed. 1975).

In Waring, et al. v. Clarke, 46 U.S. (5 HOW.) 441 (1847) the Supreme Court stated that the grant of admiralty jurisdiction is to be interpreted by the courts in accordance with "the acknowledged principles of general admiralty law" pertaining to maritime commerce. In accord, Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870). In spite of the imprecision of the descriptions of admiralty jurisdiction it is readily apparent that matters relating to ships and commercial shipping form the central subject area of traditional admiralty and maritime jurisdiction.

Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914), supports the proposition that longshoremen and longshoring activities are central to maritime jurisdiction. In that case the Court emphasized that longshoring is "a specialized service devolving upon a class as clearly identified with maritime matters as are the mariners." 234 U.S. at 62. The Court in Imbrovek further emphasized:

If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters, was quite sufficient. 234 U.S. at 62.

B. Admiralty Tort Jurisdiction

The traditional test of admiralty tort jurisdiction was one of "locality", or situs of the injury. */ If the sub-

*/ Traditionally the jurisdictional situs of admiralty was the sea and extended so far as the ebb and flow of the tide, until in the Genesee Chief v. Fitzhugh, 53 U.S. (12 HOW.) 443 (1851), the Court extended admiralty jurisdiction to all navigable waters throughout the nation.

stance of the wrong and the injury complained of occurred upon navigable waters, federal admiralty jurisdiction was upheld.

The Plymouth, 3 Wall. 10, 18 L.Ed. 125 (1866).

Although the place or situs of the injury remains the primary criterion for determining admiralty jurisdiction, the Supreme Court added a second test to this traditional criterion in deciding Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972). In determining whether an injury would be covered by federal admiralty law, the Supreme Court held that not only must the traditional situs test be satisfied, but also that there must be

A maritime nexus - some relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters. 409 U.S. at 256. (emphasis added).

The addition of a status requirement to the pre-existing situs test thoroughly transformed the criteria for admiralty jurisdiction. The Court recognized the need for such a status test because the situs test alone could result in the application of admiralty jurisdiction to a set of facts for which admiralty was singularly inappropriate.

The question raised in Executive Jet was whether litigation arising from an airplane crash into Lake Erie was under federal admiralty jurisdiction merely because the accident and resulting injuries occurred on or over the navigable waters of the United States. Although the traditional "locality" or situs

test, strictly applied, would alone have established admiralty jurisdiction, the Court recognized that the application of federal admiralty law to such a factual context was totally inappropriate. It based this determination on the reasoning that such an accident bore no "significant relationship to traditional maritime activity." */

The Court described "traditional maritime activity" in the following manner:

The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules - rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of the maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage. 409 U.S. at 269-170 (emphasis added).

It is indisputable that the phrase "traditional maritime activity" encompasses all activities pertaining to commercial shipping.

It is also clear from the above quotation that there is nothing

*/ Executive Jet, supra., 409 U.S. at 268.

traditionally maritime about recreational boating. Yet there are lower court cases that have, on a case-by-case basis, focused on the personal injury rather than the lack of "traditional maritime activity" and determined that the improper operation of a recreational boat on navigable waters is within federal admiralty jurisdiction.

Although it is possible to distinguish the various lower court cases from the workmen's compensation type of case, it is not necessary to do so because the resolution of whether those cases are contrary to Executive Jet does not, in any way, affect Congress' power to legislate on admiralty and maritime matters.

C. Congress Has Broad Powers to Legislate
On Admiralty and Maritime Matters

Congress' power to legislate on admiralty and maritime matters derives from the Constitutional empowerment to the judiciary of "all cases of admiralty and maritime jurisdiction." Article III Section 2. Under the "necessary and proper" clause of the Constitution, Article I Section 8, Congress has the paramount power to determine the nature of the general maritime law enforceable in U.S. courts.

More specifically, the Constitution granted to the federal government, i.e., to the Judiciary and to the Congress, the authority to determine, alter and amend the maritime law under which the judiciary will adjudicate cases arising within

the admiralty and maritime jurisdiction. Congress, in enacting general maritime law as federal law, may modify or supplement the maritime law as it existed at the time the Constitution was adopted. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943).

There are few Constitutional standards by which Congress' legislative power in the admiralty and maritime area is limited. They can be summarized with the self-evident observation that Congress cannot legislate under this authority outside the bounds of admiralty and maritime matters. In Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924), the Supreme Court observed that there do exist some, however vague, limitations on Congress' power to legislate on maritime matters:

. . . there are limitations [to Congress' admiralty and maritime power] which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in these subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them, or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments - when not relating to matters whose existence of influence is confined to a more restricted field . . . - shall be coextensive with and operating uniformly in the whole of the United States. 264 U.S. at 386-87 (emphasis added). */

*/ The quotation in Panama R.R. Co. enumerates the reasons for which it can be argued that recreational boating is outside of Congress' admiralty power. Recreational boating is qualitatively different from maritime shipping and thus "a thing falling clearly without" the subject of maritime law. Moreover, it is an activity inherently local in nature for which national uniformity is not required. See, Stolz, Pleasure Boating and Admiralty: Erie at Sea, 51 Calif. L. Rev. 661 (1963).

Precisely where the limits of this power are cannot be stated more precisely.

The great breadth of Congress' power in admiralty is confirmed by the Supreme Court which has established that Congress can legislate with regard to changed notions of what comprise admiralty and maritime matters:

We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters. Detroit Trust Co. v. Steamer "Thomas Barbum" 293 U.S. 21 (1934) (emphasis added).

See also, O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 40-41 (1943). The 1972 Amendments to the Longshoremen's Act provide an excellent illustration of Congress' power to legislate with regard to new maritime concerns. In Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 522 (1975), the Fifth Circuit specifically relied upon that power of Congress in upholding the constitutionality of the 1972 Amendments.

Congress has only amorphous limits to its power to legislate on maritime matters, and so long as it can justify the legislation, as by a need for national uniformity, the Courts will be unlikely to challenge Congress' action on Constitutional grounds. Conversely, the relatively unrestricted nature of its power permits Congress to delegate certain of its powers to the states when shore-related concerns are more properly

the responsibility of the states, do not require national uniformity of treatment, and do not involve commercial shipping concerns.

D. Limits to Federal-State Power to Legislate on Maritime Matters

The power to determine the nature of and to enforce the general maritime law was allocated by the Constitution to the Federal government. As stated by Benedict:

In no manner could a uniform administration of that great branch of law of nations, known as the general maritime law, be secured except through the transfer of all cases of admiralty and maritime jurisdiction to the cognizance of the national judiciary and by committing to Congress the paramount authority to make all laws necessary and proper to carry into execution the power so vested . . . */

The principle that Congress has paramount power to legislate on admiralty and maritime matters to ensure national uniformity was enunciated in Southern Pacific Co. v. Jensen, 244 U.S. 207 (1917), in which the Supreme Court held unconstitutional the application of the New York State workmen's compensation law to an injury suffered by a stevedore while unloading a cargo ship. The Supreme Court invalidated application of the state law to an injury occurring over the navigable waters on the ground that the state workmen's compensation act conflicted

*/ Benedict at 7-12.

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with the general maritime law and would lead to the application of dissimilar laws in a field which required national uniformity.

Quoting the Lottawanna, 21 Wall. 558, the Court emphasized:

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states. 244 U.S. at 215.

The Court concluded that state legislation on maritime matters is invalid if it (1) contravenes the general maritime law, (2) contravenes the "essential purpose expressed by an Act of Congress," or (3) "interferes with the proper harmony and uniformity of [the general maritime] law in its international and interstate relations" 244 U.S. at 216.

Yet Jensen did not invalidate all state legislation pertaining to shore-related or maritime matters. States are not precluded from legislating in maritime matters to some extent:

. . . it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. 244 U.S. at 216.

The Court then concluded that the states can legislate in maritime matters so long as they neither (1) contravene an Act of Congress, (2) interfere with the proper uniformity of the maritime law, nor (3) conflict with the general maritime law.

In summary, Congress cannot delegate to the states but must itself exercise the admiralty power with regard to subjects requiring national uniformity and those dealing with commercial maritime concerns. But the states may enact legislation in regard to shore-related subjects not pre-empted by Federal law.

E. The Extent of Congress' Non-Delegable Legislative Power With Respect to Maritime Matters

In the aftermath of Jensen, Congress twice enacted legislation which would delegate to the states authority to apply state workmen's compensation laws to longshoremen and harbor workers associated with the shipping industry who were injured over the navigable waters. The efforts were struck down, first in Knickerbocker Ice Co. v. Stewart, 253 U.S. 155 (1919), and subsequently in Washington v. Dawson, 261 U.S. (1924), on the ground that Congress had exceeded its authority under the Constitution to delegate an "essential feature" of the jurisdiction to the states. In Knickerbocker, the Court held:

[Congress'] power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement arises from the Constitution, as above indicated. The

definite object of the grant was to commit direct control to the Federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable harmonious and uniform rules throughout every part of the Union . . . */

Thus, Congress' effort to delegate its legislative authority with respect to workmen's compensation for workers associated with commercial shipping who were injured over the navigable waters was held invalid because (1) the state laws conflicted with the general maritime law and therefore burdened maritime commerce, and (2) they impaired the necessary uniformity of the general maritime law. Yet neither Knickerbocker nor Dawson stand for the proposition that state laws on maritime matters which do not require national uniformity and which do not burden maritime commerce are constitutionally invalid.

While Knickerbocker and Dawson set forth the extent to which Congress' legislative power in maritime matters is non-delegable, Just v. Chambers, 312 U.S. 383 (1940), establishes that state legislation is precluded and national uniformity is required only when "the essential features of an exclusive federal jurisdiction" are involved.

In Just v. Chambers the Supreme Court held that state law is applicable to a maritime tort occurring on the navigable waters "to create rights and liabilities with respect to conduct

*/ Knickerbocker, 253 U.S. at 164.

within [its] borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." 312 U.S. at 391.

Further support for this proposition is found in Standard Dredging Co. v. Murphy, 319 U.S. 309 (1943). In that case the issue concerned whether the application of state unemployment insurance laws was precluded by the Jensen doctrine. The Supreme Court held that it was not precluded by Jensen, and, further, that "the Jensen Case has already been severely limited, */ and has no vitality beyond that which may continue as to state workmen's compensation laws." 319 U.S. at 309.

The Supreme Court has even interpreted the Longshoremen's Act to permit the application of state workmen's compensation laws to some injuries to workers occurring on or over the navigable waters. In a number of decisions limiting Jensen the Supreme Court enunciated a "local concern" doctrine which coexisted, though uneasily, with Jensen:

It is settled by our decisions that, where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations, and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general

*/ Citing Just v. Chambers, *supra*, and Davis v. Department of Labor and Industries, 317 U.S. 249 (1941).

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maritime law or interfere with its uniformity. Sultan Ry & Timber Co. v. Department of Labor and Industries, 277 U.S. 135, 137 (1928).

See also, Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922) and Alaska Packers Association v. Industrial Accident Commission, 276 U.S. 467 (1928).

While the precise status of the "local concern" doctrine remains uncertain it continues to have vitality. After Parker v. Motorboat Sales, Inc., 314 U.S. 244 (1941), which established that any injury occurring upon the navigable waters, regardless of the nature of the worker's employment, was compensable under the Longshoremen's Act, the Supreme Court decided Davis v. Department of Labor and Industries of the State of Washington, 317 U.S. 249 (1941), in accordance with the local concern doctrine. In that case the decedent-claimant drowned in navigable waters in the course of dismantling a drawbridge. By the Parker decision it is clear that the claimant could have recovered under the federal Act because the injury occurred over the navigable waters. Yet the Court held that the state compensation law could validly apply.

In Davis, after noting the confused state of the case law on the federal/state authority in maritime matters, the Court stated:

There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances

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are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act. 317 U.S. at 256.

The Court then held that since the claimant was not being processed under both state and federal law, but rather only state law, the Constitution does not invalidate the application of state workmen's compensation laws in this situation.

Under the local concern doctrine, in certain cases there exists a dual federal/state jurisdiction. If the claimant is in the class to which the doctrine is applicable, he can choose whether to receive state or federal compensation by applying for benefits under either one or the other of the laws. The Davis court provided evidence of the class of claimants to which the doctrine is applicable when it stated:

Harbor workers and longshoremen employed "in whole or in part upon the navigable waters" are clearly protected by this Federal Act; but, employees such as decedent here [bridge steelworker] occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. 317 U.S. at 253.

The Court distinguishes between, on the one hand, harbor workers and longshoremen and, on the other, other classes of employees whose occupations bear "only an incidental relation to navigation and commerce." Only to this latter category of employees is the "local concern" doctrine applicable.

Two conclusions may be drawn from the existence of the "local concern" doctrine. First, the existence of the doctrine establishes as a matter of constitutional law that certain injuries to workers occurring on or over the navigable waters are compensable under state law and that Jensen does not preclude state compensation laws from applying to any injury on the water. Secondly, Davis indicates that the doctrine is applicable to persons other than longshoremen and harbor workers who are employed on or over the navigable waters, including workers in the recreational boating industry. Federal workmen's compensation must be utilized for longshoremen and harbor workers because they are employed in an "essential feature" of admiralty, commercial shipping. Davis, then, establishes that the recreational boating industry does not constitute an "essential feature" of admiralty and maritime matters.

- F. The Longshoremen's Act and the 1972 Amendments, Their Legislative Histories, and the Case Law Interpreting the 1972 Amendments Establish that Congress did not Consider the Application of Workmen's Compensation Laws to the Recreational Boating Industry to be an "Essential Feature" of Admiralty and Maritime Jurisdiction.

The preceding section established that states can legislate in maritime matters so long as that state law does not (1) contravene an Act of Congress, (2) burden maritime commerce, or (3) interfere in maritime matters which require national uniformity, i.e., the essential features of an exclusive federal jurisdiction. The question which remains is whether the appli-

cation of state workmen's compensation laws to workers in the recreational boating industry falls within one of the above categories. If not, state compensation laws are applicable to injuries sustained by such a worker regardless of whether the injury occurs on or over the navigable waters; and Congress could specifically exclude the recreational boating industry from the LHWCA without fear that state compensation laws would be in conflict with any federal statute.

The application of state workmen's compensation laws, rather than LHWCA, to the recreational boating industry will not "burden maritime commerce." Maritime commerce, as that phrase is used by Congress and the courts, refers to commercial shipping, the commercial transport of passengers and cargo by water. It does not comprehend the sale of boats as merchandise, much less their use for recreation. Because the recreational boating industry is totally unrelated to "maritime commerce" the application of state workmen's compensation to injuries on the water would have no impact on maritime commerce, and thus cannot possibly burden or otherwise affect it.

The remaining constitutional ground by which state compensation laws might be precluded from applying to injuries to workers in the recreational boating industry occurring over the water is also inapplicable. National uniformity is not required because recreational boating is not an "essential feature of an exclusive federal jurisdiction." Congress, in

legislating in the area of workmen's compensation for maritime employees, established quite clearly that the commercial shipping industry is the "essential feature" of admiralty jurisdiction. Consequently, only matters which pertain to that industry, which according to the holding in Jensen, supra, includes compensation for workers injured in the course of employment affiliated with the commercial shipping industry, are required to have national uniformity of treatment. Correspondingly, it established that workers in other shore-side industries, such as the recreational boating industry, are not central to admiralty, do not require uniform national treatment, and may utilize state workmen's compensation laws.

The 1972 Amendments to the LHWCA, the legislative histories to both the 1927 Act and the 1972 Amendments, and case law interpreting the 1972 Amendments establish that Congress intended in both the original Act and the 1972 Amendments that federal workmen's compensation legislation should apply to employees engaged in occupations affiliated with ships and the commercial shipping industry.

If Congress viewed recreational boating as an "essential feature" of admiralty, it would have made quite clear that it intended workers in the industry to be covered by the Act. Yet, there is no support in the above materials for the proposition that the recreational boating industry was intended by Congress to be covered by the LHWCA. On the contrary, the language of

the Act and the 1972 Amendments, as well as the legislative histories to that legislation indicate that Congress never conceived that recreational boating might even be considered to be subject to the Act.

In the legislative history to the 1927 Act Congress was exclusively concerned with the shipping industry. It focused upon the highly dangerous occupations associated with ships - longshoring and ship repair. It referred specifically to two classes of workers, both related to commercial shipping - longshoremen and harbor workers. It never referred to "boats," except for tugboats which, while commercial vessels, are commonly called boats. No one for the recreational boating industry testified with respect to the Act, and there is no evidence in the legislative history that Congress conceived that recreational boats might be considered subject to the Act.

The legislative history does establish that Congress attempted to exclude small commercial vessels from the Act, through the "18 ton net" exclusion. Thus, it is quite apparent that it did not intend that recreational boats should be subject to the Act.

The 1972 Amendments substantiate this conclusion. While Congress expanded the jurisdictional situs of the Act to include longshoremen who were spending an increasing portion of their work in land-based activities, it redefined the class of workers covered by the Act by requiring that they be engaged

in maritime employment. Congress then provided examples of the sort of work encompassed by the term:

2(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, ship-builder, and ship-breaker. . . (emphasis added).

The statutory language uses the term "ship", and there is absolutely no evidence by which it can be argued Congress intended that the term "ship" includes a boat.

The legislative history to the 1972 Amendments establishes that Congress intended to narrow the class of workers covered by the Act to those engaged in the commercial shipping industry. Again no person testified on behalf of the recreational boating industry, nor was anyone from the industry asked to testify, even though numerous witnesses testified on behalf of many different groups involved in the commercial shipping industry.

The several Courts of Appeals which have considered the 1972 Amendments, and even *en banc*, the term "maritime employment," confirm this conclusion. Every Circuit which has considered the Amendments has observed that the 1972 Amendments establish a status test for coverage under the Act, which an employee must satisfy to obtain benefits. The employee must be engaged in "maritime employment" at the time of injury to be covered by the Act. Persons who before the 1972 Amendments were covered by the Act could be covered after the 1972 Amendments only if they were engaged in "maritime employment."

The Courts of Appeals which have considered the term "maritime employment" have uniformly rejected definitions of the term developed prior to the 1972 Amendments stating that Congress intended something different by the term as used in the LHWCA, as amended. The Courts then have gone on to hold that the term, as intended by Congress in the 1972 Amendments means traditional employment in admiralty and maritime matters, i.e., the commercial shipping industry.

In Weyerhaeuser v. Gilmore, 528 F.2d 957 (9th Cir. 1976) cert. denied, 429 U.S. 868 (1976) the Court held that the term meant having a "realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters." In Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir.) vacated sub nom. Director, OWCP v. Jacksonville Shipyards, Inc., ___ U.S. ___, 97 S. Ct. 2966 (June 27, 1977), the Fifth Circuit concluded that an injured worker was engaged in "maritime employment"

. . . if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work. 539 F.2d at 539-40.

Both Circuits have found that "maritime employment" as used in the LHWCA refers to occupations affiliated with ships and commercial shipping. They conclude from the Act, the 1972 Amendments, and the legislative histories that commercial shipping

was the essential feature of admiralty with which Congress was concerned.

Congress was not concerned with the recreational boating industry or with workers in that industry. It did not intend that the Federal Act cover them and did not consider them to be an exclusive feature of admiralty for which federal legislation should pre-empt state laws. Thus, state compensation laws may constitutionally apply to injuries of workers in the recreational boating industry regardless of whether the injury occurs on land or on or over the navigable waters of the United States.

JVEH



Mr. GROSS. Mr. Griesing, you are familiar with the operations of the recreational boating industry around the country.

Is it your experience or knowledge that actually State compensation coverage, not Federal L and H coverage, is covering a large segment of the industry in spite of the Department of Labor's interpretations in many States?

Mr. GRIESING. That is correct, sir. We find in several States that small retailers, dealers of boats and such can often find coverage under the same classifications as new car dealerships.

Mr. GROSS. That is all I have.

Senator CRANSTON. That completes our questions.

Mr. MCBANE. I wanted to respond to the question about going out of business.

We do know in the fishing industry a couple of businesses that indicated they would have to go out of business. For example, one of our companies just went through a recent contract negotiation with their workers, and these are over the past few years. They have found the awards under Longshoremen's and Harbor Workers' coverage have been similar to the awards they have had under workmen's compensation. Faced with the cost of insurance for Longshoremen's and Harbor Workers' compensation, the butchers union found they were limiting some of the demands for benefits. The companies could not afford them. They are in favor of exemption legislation, too.

Senator CRANSTON. Thank you very much. That completes our questions.

[Chorus of thank yous.]

Senator CRANSTON. We will do our best to be helpful.

We will now hear from Donald Elisburg, Assistant Secretary for Employment Standards, Department of Labor.

Don, glad to have you with us.

STATEMENT OF DONALD ELISBURG, ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS, DEPARTMENT OF LABOR; ACCOMPANIED BY GEORGE M. LILLY, COUNSEL FOR LONGSHOREMEN'S ACT, OFFICE OF SOLICITOR OF LABOR; JOHN E. STOCKER, ASSOCIATE DIRECTOR FOR LONGSHORE AND HARBOR WORKERS' COMPENSATION, OFFICE OF WORKERS' COMPENSATION PROGRAMS; AND EVERETT P. JENNINGS, DEPUTY DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR

Mr. ELISBURG. Mr. Chairman, if I may introduce my colleagues before I give you my statement. On my left is Everett Jennings, Deputy Director, Office of Workers' Compensation Programs—that is, he is to my far left. To my immediate left is John E. Stocker, Associate Director for Longshore and Harbor Workers' Compensation. To my right is George M. Lilly, who is the counsel for this program within the Office of the Solicitor.

I am very pleased to appear before you today to discuss the Longshoremen's and Harborworkers' Compensation Act and its application to recreational boat builders and related activities, and S. 2020, a bill which would affect the act's coverage of these establishments.

If I may, I would like to begin by briefly reviewing some of the history of the Longshore Act, to set a proper framework for looking at S. 2020. The longshore program was first enacted on March 4, 1927, to provide coverage to certain classes of maritime employees while working over navigable waters. Coverage had been denied to these workers under State workers' compensation laws by a 1917 decision of the U.S. Supreme Court.

Over the years there have been amendments to that law, but related primarily to raising the coverage and, in addition, that basic law has been extended to other than Federal workers related to other kinds of private employers, such as the District of Columbia, the defense base activities, on the Outer Continental Shelf, and wherever the Federal Government offers employment to non-Federal employees on military bases.

The most sweeping and most recent amendments to the act were enacted on October 27, 1972. In general, the 1972 amendments attempted to incorporate most of the major recommendations of the report of the National Commission on State Workmen's Compensation Laws, which had been issued a few months before, in July 1972. The act's benefits structure was greatly improved.

In addition, the amendments expanded coverage of the act back from the water's edge to cover workers involved in maritime employment in adjoining shoreside areas. The basic purpose of this expansion of coverage was to assure that benefits for workers engaged in maritime employment did not depend upon the fortuitousness of being over navigable waters when an accident occurred.

Senator CRANSTON. I have to run upstairs to the Banking Committee for a few minutes. Counsel will carry on.

Mr. ELISBURG. All right, sir.

Prior to the 1972 amendments, it is clear that longshore coverage extended to recreational boating for work performed upon the navigable waters of the United States just as it did to the activities of other industries. In June 1975, industry notice No. 21 was issued by the Office of Workers' Compensation Programs (OWCP) in response to repeated requests received by the Department of Labor from the recreational boating industry for clarification of their members' status under the act, as amended. The notice, OWCP's best opinion as to longshore coverage of recreational boat builders and marinas, stated that the Department considers builders and repairers of small boats and marina operators, when meeting the "situs" requirement set forth in the act, to be subject to the act's jurisdiction onshore as well as offshore.

Issuance of notice No. 21 was followed by cancellations of previous workers' compensation policies in some instances, or increases in premiums, by as much as 500 percent in others.

I stress this was not an activity of the Department of Labor, but was related to insurance premiums, and insurance company activities.

Representatives of the recreational boat industry have indicated that many small companies in maritime-related activities have been unable to obtain insurance coverage, or that it was only available at exorbitant rates. The OWCP soon began to receive correspondence concerning the problems they were having, and requesting the Department to rescind the notice. As notice No. 21 pointed out, however, the

final resolution of issues about coverage extensions made by the 1972 amendments must be by the courts, not the Department of Labor.

Another document which is frequently mentioned in connection with notice No. 21 is program memorandum No. 58, issued by OWCP on August 10, 1977. The memorandum was an internal document issued in response to a recommendation made by a task force formed to study the workers' compensation programs of the Employment Standards Administration.

The task force suggested that OWCP issue general guidelines on issues of coverage to the district offices for the sake of consistency of administration of the Longshore Act program. Basically, program memorandum No. 58 represents a synthesis of all longshore coverage decisions, including the decisions of the U.S. Supreme Court in the *Caputo* case, and its progeny, as well as decisions of the U.S. Courts of Appeals and the Department's Benefits Review Board.

The *Caputo* case is a milestone since it is the only longshore jurisdiction case to be decided by the Supreme Court following the 1972 amendments. But let me emphasize that the memorandum's purpose was not to extend jurisdiction, but to serve as a field guide for uniform nationwide administration of the act in light of the most recent judicial interpretations of our jurisdiction.

In November 1976, the Boating Industry Associations and others representing all facets of the recreational boating industry filed an action against the Secretary of Labor and other Department of Labor officials in the U.S. District Court for the Northern District of California, requesting the court to declare the plaintiffs not subject to the act, to direct the Department to rescind industry notice 21, and to direct the Department to state that the notice no longer represented the Department's position on the matter.

In January 1978, the Court ruled in favor of the plaintiffs, and the Department has appealed to the Court of Appeals for the Ninth Circuit, where it is pending on an expedited basis. There is also pending before the Court of Appeals for the Fifth Circuit the case of *Director OWCP v. Donzi Marine* concerning the direct question of the act's coverage of a recreational boat builder, in which the Boating Industry Association has intervened.

That case is scheduled for argument in the Court of Appeals for the Fifth Circuit on October 10 of this year.

S. 2020 would provide that Longshore Act coverage for recreational boating and for fishing boats up to 72 feet in length be limited to operations on the water—generally the extent of Longshore Act jurisdiction prior to the 1972 amendments. It would specifically exempt employees engaged in the manufacture, repair, servicing or sale of recreational boats or small fishing boats from the Longshore Act unless they are actually engaged in work on, under, or over navigable waters of the United States, or unless they are not otherwise covered by State workers' compensation law.

I believe that any coverage retrenchment should be carefully weighed in terms of the effect it would have on injured workers. Congress set benefit levels for injured workers in the Longshore Act which it determined would provide equitable relief for work-related maritime injuries.

I hesitate to endorse any action which would deny to one group of eligible workers benefits which the Congress has determined to be equitable. Such action may encourage the advocacy of still further erosion of Longshore Act coverage by other groups of maritime employers.

Further, S. 2020 would not necessarily aid the insurance cost and availability problem that has developed during the past few years, most dramatically in California which has many recreational boat activities. This is because even under S. 2020, activities over the water would remain covered by the Longshore Act.

I would also note that there have been relatively few lost-time injuries reported in the recreational boating industry nationwide. Only 62 injuries involving lost time from work were reported nationwide for recreational boating during the 3 months of July, August, and September 1977, according to a survey conducted by OWCP.

I believe those are injuries that are reported to the Department of Labor. In February 1978 there were 24 lost-time injuries reported; in March, 44; and in April, the last month the survey was made, 28.

Since the incidence of injury appears to be low for the industry, the problem of high insurance rates should be eased as carriers reduce premiums to reflect the low injury experience for recreational boating. Certainly, recreational boating should be separated from the broad class of stevedoring when determining workers' compensation rates. In addition, some insurance carriers and State funds have only recently underwritten Longshore Act coverage for recreational boating firms, and this increased availability should contribute to lower costs.

For example, as was stated today, you know the insurance problem has been particularly critical in California, which has many recreational boating establishments. However, over time, the California rate situation has improved. In 1976, the California Legislature reacted to the availability problem by permitting the California State fund to write coverage under the Longshore Act until July 1, 1978. This authority has been renewed. Initially, the fund's premium rates were set at over \$30 per \$100 of payroll for recreational boating. Effective March 1, 1978, the State fund reduced its rates pertaining to the recreational boat industry to a range from \$13 to \$24. We understand in most instances, approximately 90 percent of the recreational boating firms can obtain coverage at the lower end of the rate range.

In view of the general problems with Longshore insurance rates, the Employment Standards Administration has initiated a study of insurance problems under the act. We have selected a private research firm, Cooper & Co. of Stamford, Conn., to conduct an in-depth study of insurance rates and availability under the act. The study will include an extensive survey of employers and insurance companies writing Longshore Act coverage, including coverage for recreational boatyards. It is expected to be completed next month, and should help us ascertain the facts about the true extent of the Longshore Act insurance problem. The results of the study may be the basis for recommending corrective actions which employers, insurance carriers, or possibly the OWCP might take.

I would respectfully urge that the committee defer any action on S. 2020 until its impact on insurance problems and on benefits avail-

able to injured workers can be thoroughly studied by the administration.

That concludes my prepared remarks. We will be glad to answer any questions you may have.

Mr. GROSS. I apologize for the temporary absence of the Senator. I hope you will tolerate any questions from me instead.

Mr. ELISBURG. Mr. Gross, I am delighted.

Mr. GROSS. In the Senator's statement, and in your statement, a great deal is said about the improvement of benefits resulting from the 1972 amendments.

Would you agree with me, however, that as far as benefits to workers, benefits in providing compensation insurance are really only potential benefits to workers?

That is to say, a worker only receives such benefits if in fact he suffers a covered injury while working in a covered employment?

Mr. ELISBURG. Yes.

Mr. GROSS. You just went through the statistics for the recreational boating field, and mentioned the lost-time injuries, at least those reported to the Department of Labor during the period when the survey was taken, covering, I take it, 6 separate months.

Those are nationwide statistics. I take it that those workers who actually benefited from the improvement of benefits within the recreational boating industry are represented by these statistics. At least, this is the maximum number for these months, assuming the reporting is accurate, of workers receiving benefits under the act, since anyone who does not suffer a lost-time injury gets no comparative benefit under longshore coverage he would not receive under State insurance.

Mr. ELISBURG. I think that is correct. I guess there may be some situations where the employee who may be injured may receive the compensation benefits and, for one reason or another, the carrier or the employer, if it is self-insured, does not report it to the Labor Department. But they may still be paying at the longshoreman rate, or they may not.

But the numbers we have are those where the injuries have been reported to the Department. There is a requirement that all lost-time injuries be reported, but I cannot vouch for the accuracy or whether all of the lost time injuries that are being compensated are, indeed, being reported.

Mr. GROSS. At any rate, these are the best statistics available to us at the moment.

Mr. ELISBURG. Yes, sir.

Mr. GROSS. Now, I take it that a worker would only benefit in the way that we are using the term from Longshoremen's and harbor workers' coverage if the benefits he receives are in fact greater than he would have received under State compensation coverage for the same injury.

Mr. ELISBURG. Sure.

Mr. GROSS. Is there any way of breaking down these statistics, lost-time injuries? Can we say all these workers received some possible benefit by coverage by Longshoremen and Harbor Workers' Compensation, rather than State compensation?

Mr. ELISBURG. My judgment is yes, but we would be pleased to try to provide a breakdown for the record, and submit it.

[The information referred to follows:]

The attached table is provided in response to Counsel Gross' request for a breakdown of statistics showing amounts received by injured workers under the Longshoremen's and Harbor Workers' Compensation Act and the amounts that would have been received by them under the State of California Worker's Compensation Act. The attached shows a sample of lost time injuries reported to the San Francisco OWCP District Office between July 1977 and April 1978.

Sample of California recreational boating industry lost time injuries reported to Department of Labor under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).

Date of injury	Type of injury	Average weekly wage	Period of total temporary disability	Total paid under LHWCA	Payable under State compensation ¹
Nov. 1, 1977	First finger	\$298.00	Nov. 5 to 6, 1977	\$56.76	0
Oct. 14, 1977	Back strain	242.20	Oct. 18 to 20, 1977	69.27	0
Sept. 30, 1977	First finger	240.10	Oct. 3 to 6, 1977	91.47	0
July 6, 1977	Foot	288.00	July 10, 1977 only	27.43	0
Apr. 25, 1978	Leg	267.34	Apr. 26 to May 23, 1978	704.00	\$616.00
Nov. 1, 1977	Bladder protrusion	141.19	Nov. 2 to Dec. 12, 1977	551.33	551.33
Sept. 6, 1977	Low back strain	130.00	Sept. 7 to Nov. 14, 1977	929.81	929.81

¹ 1st 7 days under California State compensation law are waiting days in a "no-pay" status unless the injury extends beyond 21 calendar days.

Source: Office of Workers' Compensation Programs, U.S. Department of Labor.

Mr. GROSS. That judgment is based on the assumption that the time lost provisions, providing compensation to a worker for losing time for a covered injury, are greater under Longshoremen's coverage than State coverage.

Mr. ELISBURG. It probably goes mostly to the level of benefit that you could get. The Longshoremen's Act provides for two-thirds of the injured workers' wage payments, up to a maximum of 200 percent of the national average weekly wage. For most workers in this category, that translates to just two-thirds of what their pay is.

There are still many States where the maximum level of payment would be less than what that two-thirds would allow, that is, where the workers get two-thirds up to a weekly maximum that, in fact, is less than two-thirds would allow.

I think that would be where most of the differential would be.

Mr. GROSS. How would the two-thirds benefit compare, for example, with the State of California? We have a witness from the State coming in. If that number is not available, we can get it later.

Mr. ELISBURG. Well, the maximum weekly payment in California would be \$154 a week. The maximum weekly payment under the Longshoremen's Act would be as high as \$367 a week.

Of course, that is all subject to a two-thirds cutoff, so you really have to look at the injuries by State, and what the salaries were.

Obviously, to the extent that two-thirds of that particular worker's salary does not exceed \$154, to that extent there is a wash for that particular benefit.

There are other benefits under the law.

Mr. GROSS. Right. Is there any way of knowing how many of these injuries, 62 over a 3-month period, and then 24 and 44 and 28 over single months following that, occurred in California?

Mr. ELISBURG. In California, 28 injuries were reported for the months of February, March, and April of 1978.

Mr. GROSS. Total of 28?

Mr. ELISBURG. That is a 3-month period we can give you for this year. And in 1977, July, August, and September, there were 24.

Mr. GROSS. We just heard testimony from the panel which preceded you that in southern California alone, if my notes are correct, between 10 and 50 employees lost their jobs as a result of the introduction of Longshoremen and Harbor Workers' coverage to the recreational boat industry. And in northern California, a minimum of 15 to 30 employees also lost their jobs as a result of this.

And again, these were simply minimums based on personal knowledge of the witnesses who were on the panel. Those numbers added to other testimony that indicates a number of employers are "running bare" because of the cost of Longshoremen's coverage, and hence not providing any of these benefits, except a potential lawsuit to the employee, would seem to indicate there are more employees losing employment or losing potential compensation benefits than there are gaining them as a result of the act.

Would you agree with that, within the recreational boating industry?

Mr. ELISBURG. I do not believe I would want to engage in a comparative numbers dialog with you, without knowing more about the actual basis for these firms shutting down, and to what extent the employment loss was temporary or not.

I think the issue one needs to look at is, in certain respects, what kind of protection do whatever number of workers that are injured have. In some areas, the cost to the injured workers between the State coverage or longshoremen's coverage could be quite substantial in the protection.

I appreciate the difficulty when you look at one small segment of a covered industry of trying to look at a national statute, and dealing with what appear to be a few hundred injuries.

This act and its extensions cover more than 800,000 workers. There may well be many—this is true of many workers' compensation statutes—many employers are paying insurance, and never have an injury. That is certainly to be hoped.

But it still is the protection that is necessary for those workers who, in fact, do arrive, regrettably, at the point where they have to receive these benefits.

Mr. GROSS. I think that we are focusing today, of course, on the question of exemption for the particular industry we are discussing here, and hence the benefits to the workers within other industries would seem to be immaterial.

Do you agree with that? I mean, obviously no one—or at least Senator Cranston is not challenging the very positive benefits accruing to longshoremen and workers of other major maritime industries under this act.

The question is, how do these benefits affect this particular small industry and, really, is the cost-benefit ratio attractive enough to maintain coverage over the industry?

Mr. ELISBURG. I think that any time you are dealing with workers' compensation, and the potential harm to that injured worker, complaining to them that the cost-benefit ratio was such that they should receive lower payments is a very difficult one to make. This is true of many of the labor standards we have in this society, trying to maintain a minimum protection for all workers.

The Longshoremen's Act's passage was not necessarily based on covering purely an industry just because it was hazardous. The basic coverage was, in our view, extended to recreational boating people over the water before 1972. That was the only way any coverage could be provided.

Mr. GROSS. As long as they worked over water—

Mr. ELISBURG. The question then of whether it was a serious injury or not, or whether it was an industry that had lots of serious injuries or not, never was the principal factor. The problem for even an industry that does not have a lot of serious injuries, the consequences even to this industry, to the individual worker—if they do suffer a serious injury, of whether they happen to be on the boat, floating in the water when the boom falls on them, or standing on the dockside, is quite severe.

So it logically is the same.

Mr. GROSS. You have made two comments. One, that you would not want to deprive any worker of benefits now provided to him. But I take it at issue here is the question of whether or not the 1972 amendments extended to shoreside activities within the recreational boating industry.

Mr. ELISBURG. I think, yes, that is certainly an issue. And I think the Department's view is that the legislative history took the offshore coverage where it was and moved it shoreside. That is, if recreational boat-builders were not specifically brought in in 1972, they were already there in some fashion, and the line just moved inland, on to the land with them.

Obviously the issue with respect to that kind of an entitlement to a benefit is something that ultimately, unless Congress itself specifically redefines it, is something that the courts are going to have to interpret as to how far, if at all, the line went.

I would think the case in the fifth circuit is probably the best one at this point to argue that issue. The case in the ninth district involves more, I think, of the Department's authority to promulgate its own instructions to its employees, or what the effect is of the Department on a document, and whether it has authorities and procedures, rather than the coverage issue per se.

Mr. GROSS. I take it it is hazardous to predict the outcome of appellate decisions, and therefore we cannot know how either case will come out.

Mr. ELISBURG. That is correct.

Mr. GROSS. They may go out on procedural grounds, rather than dealing substantively with the jurisdictional lines Congress intended to draw under the act.

Mr. ELISBURG. I would defer to my counsel here, but I believe in the fifth circuit there is not a procedural issue. The issue is this issue.

Mr. GROSS. Does the issue in the Fifth Circuit case deal with all the problems within—the potential problems of coverage within the recreational boating industry, or just the fact situation in the case before the Court?

Mr. LILLY. Just the fact situation before the Court.

At the appellate level, there may come down guidelines to cover

other instances. I do not think we will have to go on a case-by-case basis.

Mr. GROSS. The Court may or may not provide those guidelines, I take it.

Mr. LILLY. Very true.

Mr. GROSS. We may wait until October, or next year, or the following year, when the Supreme Court finally pronounces on the Fifth Circuit case. And then we may still have nothing. We may have to wait until the next fact situation comes up.

I take it that is the Department of Labor's position, that the intent of Congress should be determined by the courts?

Mr. ELISBURG. I think that is correct. This kind of statute providing entitlement for benefits to workers is one particularly where the courts would have to draw the lines.

Obviously the administrative agency tries to sort out what is meant by the legislative history, and what is meant by the court guidelines. I think you have to do that in administering the program.

But I think the issue of shoreside coverage over and apart from the recreational boat industry was a pretty big hassle for the first 5 years after the enactment of the 1972 amendments. With the multiplicity of cases moving along, finally the Supreme Court did decide the appeal case.

We think it provided fairly reasonable guidelines, which took a lot of the dialogue out of the system.

Mr. GROSS. Would it not be more efficient and more reliable guidance to the intent of Congress to have Congress decide what its intent was, than have the courts decide what Congress' intent is?

Mr. ELISBURG. I am not sure how to properly answer that, counsel.

Obviously Congress always has the last word on what Congress says, I guess, until the courts act.

Mr. GROSS. Because the thing I find peculiar, not only in this hearing today, but also in the hearings conducted—and I see Paul Dwyer here from the Compensation, Health and Safety Subcommittee of the House Education and Labor Committee—both the Congressmen on that committee and Senator Cranston, who served on the Labor Committee in this body that adopted this law, both have challenged your interpretation of what the Congress intended when the law was enacted.

Mr. ELISBURG. Counsel, I think that—I would like to make a statement about that.

Mr. GROSS. You would what?

Mr. ELISBURG. Like to make a statement about that.

I have testified on the House side, I believe, that to the extent I have any recollection as a staff person working up here, the issue, per se, of the recreational boating industry, or small boatbuilders, was not something that had any discussion as far as I know in the deliberations, hearings, or so forth, that it was never raised.

I cannot speculate about what Congress might or might not have done, specifically had it been raised.

The point I come back to is that in the judgment of the Department and its attorneys, which has been very consistent, is that employees in the recreational boating industry, to some extent, always came under this law.

Now, in the administration of whether or not their insurance companies have longshore coverage or not, whether or not cases were processed through longshoremen's or State acts, how that process worked for 40, 50 years, I cannot say.

But the 1972 enactment, as far as I understand, was as I said earlier today, to take the industries, whatever they were, that had over the water coverage, and extend the protection shoreside to those workers. That is as far as I can speak on the background of the matter.

Mr. GROSS. Let me—

Mr. ELISBURG. What I am getting at is that if there were a judgment that the recreational boating industry never, under any circumstances, be covered under this law, that is, even over the water, one might have a different set of facts from which the Department might proceed. But I think that is just a different set of facts.

Mr. GROSS. I take it that every industry who had workers over the navigable waters of the United States was covered prior to 1972 under the Longshore Act. People who painted bridges were engaged in marine employment, if they fell in the water.

Mr. LILLY. If they fell in the water, yes. [Laughter.]

Mr. GROSS. The test was, are you over the water.

If I understand your interpretation of what Congress did, which seems to ignore the whole question of status, the so-called status test of whether or not a worker is engaged in maritime employment, they simply moved the definition of navigable water inland to cover docks, marinas, various others.

Mr. ELISBURG. I guess maritime employment is another one of these potentially ephemeral or amorphous definitions. We talk boatbuilding, shipbuilding, and ship repair as maritime employment.

What happens in these small boatyards, the ones I have visited, small boatbuilding, and boat repair? Whether the term "maritime employment" was supposed to be read "commercial" or "big boats," or something like that, seems to me part of the dialogue going on here.

I think our view is that it is not to be separated that way. Again, I think that is something that is only going to be tested in the courts, or if Congress specifically acts. I do not think administratively we can draw that line.

Mr. GROSS. I agree with you entirely. I ask you, would it not be more efficient to have Congress draw that line, than to wait for the uncertain outcome of future court decisions?

Mr. ELISBURG. I would have to defer to your judgment on that.

Mr. GROSS. You have a statement on page 6 of your written statement that—

Since the incidence of injury appears to be low for the industry, the problem of high insurance rates should be eased as carriers reduce premiums to deflect the low injury experience for recreational boating.

We have examined that question, and I wonder whether you have, with respect to how insurance carriers calculate their rates—one of the factors that makes the recreational boating industry apparently different from the large shipping industry, or the longshoring industry, is the size of the work force. And it appears that there is a bottom line as to how low the premiums can go, since if you predict any accidents at all under the coverage, you are going to need enough total

premium dollars to pay for the losses, and hence the premiums for small employers are significantly higher, regardless of their loss ratio, than for large employers in the same field.

Can you comment on that?

Mr. ELISBURG. With all due deference to the insurance industry, and the people who have been very cooperative with the Department, if you have been able to figure out the ratemaking process, I commend you. It is a very difficult process and, depending on what State you are in, particularly in California, separated from the other States, it seems to work different.

What we do know is that the rate now of \$13 by the State fund is substantially different from the \$30 that seemed to be pulled out of the air originally. It was a guesstimate, I guess, by the actuarial people.

The fund will have to speak for that. We know that the State averages, we have comparable figures, \$10.71—

Senator CRANSTON. Can you all hear in the back?

[Chorus of noes.]

Senator CRANSTON. Speak out.

Mr. ELISBURG. \$13.40, and that can go up to \$24.

The \$13.40 compares with \$10.71 for nonlongshore—

Senator CRANSTON. Would you speak a little louder?

Mr. ELISBURG. The problem of how you group people—60,000 workers in the industry, approximately, that we know of and—

Mr. GROSS. Recreational boating industry?

Mr. ELISBURG. Right.

The question of pooling, or how you determine these premiums, is one that is peculiar to how the insurance system functions. There may be other ways to do it.

They may be able to pool salaries. They may be able to pool other kinds of classifications. There are lots of groups of small employers who may have potential high injuries who somehow do not have these high premiums.

I wanted to stress our concern all along, and it led me personally at the Secretary's direction, to consult with the people in the insurance industry, this year and last. With respect to the problems of writing insurance and underwriting and all of those things, we felt would be unfortunate if the ability of Congress to suggest that there was a level of benefit for workers under workers' compensation should be thwarted by the process of providing insurance to the private sector.

It was very difficult to say the law is a problem because it is difficult to write—the insurance industry has trouble adjusting to it.

Mr. GROSS. I would certainly agree with that comment, the insurance industry should not be permitted to thwart the will of Congress.

Of course, we have left open the question of what is the will of Congress in this instance.

Would you agree with me that it might be possible to structure a set of benefits for workers which required, no matter how they were calculated, premiums which were so high as to be impractical within, particularly, small businesses?

Mr. ELISBURG. I suppose yes; you could do so.

Mr. GROSS. You have already indicated, in your testimony, that Congress, for sure, made no attempt to examine the implications of the 1972 amendments on the small businesses we are talking about here.

The focus was entirely on the larger industries that are, by everybody's definition, subject to the Longshoremen's Act.

Mr. ELISBURG. With a difference, I would say that certainly with respect to the District of Columbia private sector, there are many, many kinds of businesses that are subject to these benefits that are very similar. I suspect, to the recreational boat industry, both with industry exposure and types and scope of injury, and all of that, right here in town.

Mr. GROSS. If I recall the testimony from the House subcommittee hearing, there were many of the same complaints about the premiums being so high they could not compete with businesses in Maryland or Virginia, furnishing the same services as a result of being subjected to the longshoremen's rates.

That is irrelevant, really, to this hearing; but you can respond if you want to.

[No response.]

Mr. GROSS. One final question with respect to coverage.

We have agreed, I take it, that prior to 1972 workers in the recreational boating industry and, for that matter, in any other industry, who worked over navigable waters of the United States, were apparently subject to the Federal law.

Can you tell me whether the—certainly nothing in the 1972 act amendments was designed to diminish the coverage over the navigable waters of the United States with respect to any workers; is that not correct?

Mr. ELISBURG. That is correct.

Mr. GROSS. Can you tell me whether there are whole States in which workers over the navigable waters of the United States, in spite of the Supreme Court decision, and in spite of your and my agreement on what the Federal law apparently is, are being served by State compensation while working over the navigable waters of the United States?

I am thinking about Maryland, and various other jurisdictions.

Mr. ELISBURG. We obviously do not have the resources in the Department to go and examine every employer's injury data, and every State agency's payments. The purpose of notice 21, when all is said and done, was to let employers and the insurance industry, and State agencies know what we thought the Longshoremen's Act covered.

I would not be surprised if there are many situations where injured employees are paid under State laws, where they are injured over the waters where State agencies and insurance carriers and self-insurers process those cases, and where the injured employees are either satisfied, or do not know of their rights, and accept those payments.

It could conceivably happen. We would have no way of knowing that, except by some rather extensive enforcement, or examining efforts and, frankly, I think it is, with the limited resources we have, we are trying to put it into processing the claims that are presented to us.

Mr. GROSS. But if the Longshoremen's Act provides workers with substantial benefits, which you have said, and Senator Cranston has said, and if in fact Congress intended, as the Department of Labor

has contended, that the Federal law applied, does not the situation in which large jurisdictions apparently are either willfully or innocently using a different system call out for further clarification of the intent of Congress?

Mr. ELISBURG. I do not know the extent of noncompliance here. I really do not know that. Therefore, I do not think I can comment, really, on the way you put the question.

Mr. GROSS. OK.

I think I have no further questions, Senator Cranston.

Senator CRANSTON. Thank you very much, Don. We appreciate your being here, and each of you, thank you greatly.

Mr. ELISBURG. Thank you, Mr. Chairman.

Senator CRANSTON. We now come to our final witness, J. Michael Kavanagh, manager, U.S. Longshoremen's and Harbor Workers' Insurance, State of California Compensation Fund.

Thank you very much for being here. We thank you for coming and joining us.

If you can abbreviate your testimony as much as possible, we would appreciate it. The full text will appear as if read.

I have a problem of a 12:30 unbreakable appointment today elsewhere.

STATEMENT OF J. MICHAEL KAVANAGH, MANAGER, U.S. LONGSHOREMEN'S AND HARBOR WORKERS' INSURANCE, STATE OF CALIFORNIA COMPENSATION FUND

Mr. KAVANAGH. All right. This will be as brief as possible.

Mr. Chairman. I am J. Michael Kavanagh of the State Compensation Fund of California. I am currently manager of the Longshoremen's and Harbor Workers' insurance program for the State fund.

Briefly, I would like to address my testimony to four areas I think germane today.

The first is the role of the State fund in the market in California. And second is the question of the market availability in California. Third is the question of affordability.

Finally, some questions directed at the bill before us, S. 2020 itself.

The State fund in California was founded in 1916 by the State legislature to provide a stable market for workers' compensation in California. Up until July 1976, the State fund, by law, was precluded from writing Longshoremen's and Harbor Workers' compensation insurance unless it was incidental to the California exposure.

In practice, what this meant was that the payroll of the longshoring exposure had to be less than 50 percent of the total payroll exposure.

Subsequent to July 1976, with the passage of Assembly bill 3070, the State fund was placed in the business of providing this insurance as fully as any other carrier for a period of 2 years. The purpose of the 2 years was to see if, during that time, the market crisis in California abated. When we entered the market in 1976, like other carriers, we really did not have a great deal of experience in the longshoring and harbor workers' area.

Part of the provisions of AB-3070 included the passage of minimum rates to be promulgated by the Insurance Commissioners bonding

upon all parties writing this compensation in California. The filings for rates in California were by the Workmen's Compensation Inspection Rating Bureau, the official rating bureau in California, and by the Insurance Commissioner.

I think the testimony earlier addressed itself to the fact that AB-1065 withdrew the minimum rate structure from the system in California. What we began with when we entered in 1976 was our rate structure was taken from the Bureau's rate filing.

The answer to where our recreational boating industry rates came from was, from that late filing with a small adjustment for increases which occurred in the rate insurance classes.

The problem that came up specifically with regard to a \$30 rate then in force compared to the \$10, which is now currently a \$10.71 rate for recreational boating itself, boatyards, raised the question in terms of the proper structure of the class in California.

This issue has had a great deal of debate. Our feeling was the structure itself was not adequate to the purpose of the recreational boating industry in the sense that there had been shifts in payroll between the shipbuilding classes and boating classes historically. And there were distortions within the rating structure. We studied this, the data that was available—often not a whole lot of data—we studied the problem as to why California rate had been so much higher than many other States.

We made a change with respect to our rates in March 1978, and lowered that rate. Now, we have restructured the class into three subclasses, which, as was indicated earlier, ranged from \$13.40 to \$20 for minimum rates. This does cover the great majority at the lower end of recreational boatyards in California.

As to the question of market availability, at an Assembly hearing in April of this year before the Subcommittee on Workers' Compensation, private industry witnesses testified that members of the private insurance industry were operating in the L and H market in California. It was apparent this was large ocean marine policies and selectively in the area of recreational boating.

At this point in time, the question of market availability is primarily resolved in terms of the State fund and one other private carrier for the recreational boating industry, Alaska Pacific.

As of the summer of 1978, with the passage of Assembly bill 3517, the State fund now is indefinitely in the market for this insurance in California and serves as the residual carrier.

Another solution to the problem of a residual carrier in California that might have provided the lead to the recreational boating industry was a proposal made to the State fund jointly with the private insurance industry to provide a pool in California, a voluntary subscription pool. We note with sadness there is no further discussion of this on the part of the private insurance industry, and we assume that if they are going to remain in the industry, we assume they will remain selectively in this industry.

At the present time, as we indicated, the rates have lowered. Our experience has been very good in this industry. At the present time, the total earned premium for the recreational boating industry, which includes boat building and repair and marina operations, constitutes \$800,000. This compares with the slightly more than \$1 million in

total earned premium for the industry of our program to date, July 1976 through July 1978.

Our experience has shown that in marina operations we have an 8 percent loss ratio, which is remarkably low. It is a little bit misleading. In this line of business, we really face the problem of catastrophic risk as compared to stateside risk. For example, we had a death case. An employee in a marina in northern California, in the Sacramento Delta. There was a death of an 18-year-old boy who fell overboard and drowned.

Under the California system, this would have incurred a cost of \$51,000. Under the federal system, the actual cost was \$5,000 in payment to the special fund and \$1,000 for burial costs. This was because the young gentleman did not happen to have any dependents. Had he been a 23-year old boy—or man, with a wife and a dependent, the cost would have been in excess of \$1.2 million.

The 8 percent loss ratio would not have stood.

For boat building and repair, we show a 14 percent loss ratio.

The program, as of March of this year, was about at the break-even point. Policyholder surplus was about zero. The history of the program from 1976 through the early part of this year was consistent with the position we were at in March.

Since that time, due to an increase in premium from finalization of audits in the first policy year plus, I think, a general maturity on the part of the program in terms of the management and process of doing business, our current loss ratio is 65 percent, that is, compared with 85 percent earlier.

At the present time, financially we are in a position to continue to review the rate structure in California. That process has been ongoing since we initiated the change in rates in the recreational boating industry.

At the current time, we are looking at several aspects of that. The first is the base rates or base percentage by which we compare the State classes to the L and H exposure. The second is the process by which we can further make distinctions in terms of real hazards of risks, whether a particular account has a greater or lesser hazard, better or worse loss histories.

The third thing we are looking at is involvement of experience rating plans. The possibility of having one went out when the Commissioner and the Bureau were withdrawing from the minimum rating structure.

We have experienced modifications in experience rating plans for stateside coverage. What this has shown is that it is very difficult to further reflect the actual experience of the particular account. We are working in the direction of trying to provide better relief and fair and consistent treatment of accounts with a method of approximating such a plan.

Again, in terms of market availability, we will continue to be in the market.

The issue was raised with regard to reinsurance. Our treaty expires in January 1979. Reinsurance is a particular problem within the long-shoremen's and harbor workers' compensation area. The reason for this is the nature of the unpredictable aspects of the Federal act—

specifically the escalation clause that cannot be precisely predicted, and some of the other benefit provisions.

As such, many carriers and reinsurers are very cautious about entering this area.

At the present time our reinsurance deductible is about \$250,000. What that means is that we pick up the first \$250,000. The reinsurer takes the rest of the risk.

You are currently faced with a situation where, most probably, either the level will go up, perhaps to \$500,000, or the insurance premium for maintaining it at \$250,000 will go up. This will have, over time, upward impact on the rating structure.

As of the present time, that may be absorbable within the surplus we currently have over the next year. Beyond that time, it would be pure conjecture on my part to indicate whether the continuing problem will or will not cause an upward movement. That will depend on what our experience in terms of total L and H portfolio over the next year is.

With regard to S. 2020, the State fund does not have a position with regard to the passage of the bill in the sense that we feel it is not our role to reflect or determine who should or who should not be under the coverage of this act. We think that is properly a matter for employers, employees, and Congress.

We would point out two troublesome areas.

The first is that as an insurer, it is extremely difficult in a number of areas since 1972 to accurately determine jurisdiction in terms of the coverage of this act. I think we have heard this morning a lot of issues raised with regard to timeliness of adjudication and questions that still remain in that process.

Second, with regard to the specific language of S. 2020, from the point of view of an insurer, the provision does not entirely ameliorate the problem. Certainly at least in California some employees within the recreational boating industry would still fall within the context of the act. The problem in the act in 1972. Congress sought to correct the problem which has been called the shifting of coverage, fortuitousness of circumstances in the coverage of the act in that an individual worker may, at one point in time, be within L and H at another point be covered by the State.

Insofar as it is difficult to determine those lines, this may continue to be a problem within the current context of that wording.

That completes my specific statement.

Senator CRANSTON. Thank you very, very much.

[The prepared statement of Mr. Kavanagh follows:]

Prepared Statement of J. Michael Kavanagh, Manager, U.S. Longshoremen's and Harbor Workers' Insurance Program, State of California Compensation Fund

Mr. Chairman and members of the committee:

I am J. Michael Kavanagh from the State Compensation Insurance Fund in California. I am currently the Manager of the U. S. Longshoremen's and Harbor Workers' Insurance Program for the State Fund.

Briefly, I would like to address my testimony to four areas that I think are germane to today's hearing. The first is the role of the State Fund in the market in California. The second is the question of L&H insurance market availability in California. Third is the matter of rate affordability. Finally, some comments are directed at the bill before us, S.2020.

The State Fund in California was founded in 1914 by the Legislature to provide a stable market for workers' compensation insurance in California. Up until July of 1976, the State Fund, by law, was precluded from writing Longshoremen's and Harbor Workers' compensation insurance unless it was incidental to the California exposure. In practice this meant that the payroll of the longshore exposure had to be less than 50% of the total payroll exposure of the employer.

With the passage of Assembly Bill 3070 in 1976, the State Fund was empowered to provide this insurance as fully as any other carrier for a period of two years. Like most private

carriers in 1976, the State Fund did not have a great amount of experience in underwriting the Longshore Act exposure. The purpose of the two year period was to see if the market crisis would abate during that time.

Subsequent to AB 3070 two USL&H rate filings were made in California. The first, and more conservative filing, was made by the Workers' Compensation Insurance Rating Bureau. This is the official rating bureau in California. The other was filed by the Insurance Commissioner. The State Fund adopted the rates in the Bureau's rate filing and adjusted them slightly to reflect an increase in reinsurance costs. This applied to all rate classes including the recreational boating industry classes.

The role of the Bureau and the Insurance Commissioner changed dramatically during 1977, with the passage of AB 1065. This bill was passed at the behest of the recreational boating industry and it removed the promulgation of mandatory USL&H minimum rates as provided for in AB 3070. Concurrently it removed the Bureau from the collection of USL&H experience data in California. The continuing lack of adequate data has hampered the current USL&H rate making processes of insurance carriers in California.

A problem of insurance affordability arose and it specifically focused on the USL&H rate of approximately \$30 for class

6824, boat building and repairing, as compared with a rate of \$10.71 for class 6834, the comparable state classification. The ensuing debate also raised serious questions concerning the appropriateness of this high rate when compared with other states. Two factors emerged from the analysis and debate. It appears that the rates for 6824 are lower in other states than they would be if the effected employees were fully aware of their coverage under the Longshore Act. Consequently the relevant loss experience is entering into the stateside compensation statistics and not the USL&H rating statistics. Additionally it appears that class 6824 in California contains distortions in its historical experience.

A serious question was raised regarding the adequacy of the structure of class 6824 with regard to recreational boat builders. We concluded that shifts in payroll had taken place historically between the boat building and repairing and ship building and repairing classes. The class wording for 6824 applied to "boats" below 150 feet in length. We determined that over 95% of all recreational boats are below 65 feet in length. Consequently we restructured class 6824 into three subclasses with minimum rates ranging from \$13.40 to \$24.63. The \$13.40 rate class applies to the great majority of recreational boatyards in California.

The general question of market availability was the subject of a California Assembly hearing in April of 1978. The

private insurance industry in California testified that members of the industry were operating in this market in California. It was apparent that this applied primarily to larger risks including large ocean marine accounts. Smaller risks are being underwritten by the private carriers on a very selective basis. At the present time, the primary markets for coverage for the recreational boating industry are the State Fund and the Alaska Pacific Assurance Company.

The State Fund was subsequently empowered by the Legislature, through the passage of AB 3517, to provide USL&H insurance coverage on an indefinite basis. We serve as the residual market in California. A companion solution to the problem of underwriting this residual market for the Longshore Act in California was a proposal to form a voluntary subscription pool. The State Fund endorsed this proposal after it was suggested by members of the private insurance industry. We note with sadness that there has been no further movement on the part of the private carriers to form such a pool since the passage of AB 3517. We assume that the private carriers will remain in the longshore market in general as well as the recreational boating industry only on a very selective basis.

The issue of rate affordability depends upon the experience of the State Fund and other carriers over time in this market. I mentioned earlier in my testimony that we made a

rating change with respect to the recreational boating industry classes. So far our experience has been very good for these classes. In total they comprise earned premiums to date of about \$800,000 with a loss ratio of 8% for marina operations and 14% loss ratio for boat building and repairing. Boat dealers have had a more normal loss experience to date. This compares with a total book of USL&H earned premium in excess of \$11 million with a loss ratio of about 65% for the period July 1976 through July 1978.

Although our marina experience has been remarkably good it must be noted that the potential for catastrophic losses is much greater under the Longshore Act than under the California Act. For example, we have a death case involving a marina in the Delta region of Northern California. The deceased was an 18 year old young man who fell into the water and drowned. Under the California system this would entail a benefit cost of \$51,000. Under the Federal Act the actual cost was \$5,000 in payment to the Special Fund and \$1,000 for burial costs. The latter costs applied because of the absence of dependents. If for example the young man had been 23 years of age with a wife of similar age and a dependent child the death benefit would have been reserved in excess of \$1.2 million. The catastrophic potential of this insurance coverage is exacerbated by the uncertainties of the escalation clauses and the magnitude of the cost of the unrelated death benefits under the Act.

The overall financial result of the USL&H Program at the State Fund has improved during the last year. The loss ratio for the period from July 1976 through July 1977 was 95%. The cumulative loss ratio as of the end of March 1978 was 84% and reflected a fiscal "breakeven" point. Since that time the result has steadily improved. As noted earlier the cumulative result was a loss ratio of about 65% as of the end of July 1978. This improved to about 63% as of the end of August 1978. This change reflects several factors including: the finalization of audited premium from the 1976 policy year, an improvement in the severity of losses, and a general maturity on the part of the staff of the USL&H Program in terms of the management and process of doing business in this market and compensation system.

We are continuing to review our USL&H rating structure in California. This process has been ongoing since we initiated the change in rates in the recreational boating industry. Currently, we are looking at several aspects of our underwriting approach. The first is a revision of the base percentage or conversion factor by which we convert California class rates to USL&H rates. The second is the development of a schedule rating plan that will consider the relative differences in the actual hazards among different risks. The third is the application of an experience rating approach.

It should be noted that both of the rate filings mentioned

earlier included the provision for the application of experience rating plans in California. With the repeal of the L&H minimum rating provision the basis for implementing these plans also ceased to exist. Currently we have a process for calculating the experience modifications on the state act coverage. There is a Bill before the Legislature to empower the WCIRB to collect USL&H experience data but not to promulgate minimum rates. The State Fund will continue to work in the direction of providing appropriate rate relief and fair and consistent treatment of our accounts.

Again, in terms of market availability, we will continue to provide a market for this coverage.

The issue has been raised regarding the availability and cost of reinsurance. Our present treaty expires in January of 1979. Reinsurance is a particular problem within the Longshoremen's and Harbor Workers' compensation market. The reason for this is the nature of the unpredictable aspects, specifically the escalation clause that cannot be predicted precisely and some of the other benefit provisions. Consequently many carriers and reinsurers are very cautious about entering this area.

At the present time, our reinsurance deductible is about \$250,000. This means that we pick up the first \$250,000 in costs on an individual claim and the reinsurer is responsible

for losses on the claim above \$250,000. We are currently faced with a situation where it is most probable that either the level of the deductible will increase to \$500,000 or the cost of maintaining the current level of \$250,000 will increase. This would have an upward impact on our rating structure over time. This might be absorbable within our current surplus over the next year. Beyond that time, it would be pure conjecture on my part to indicate whether the continuing problem will or will not cause an upward movement in rates. It will depend upon our total USL&H experience in the future.

With regard to S.2020, the State Fund has not taken a specific position concerning the passage of this Bill. We feel that it is not our role to reflect or determine who should, or should not, be under the coverage of this Act. We think that this is a matter that is more appropriate for the consideration of employers, employees and the Congress.

We would like to point out two areas of concern. It is extremely difficult to accurately determine jurisdiction in terms of the coverage of this Act in a number of areas since 1972. Many of these issues are being adjudicated and this morning's testimony has raised questions about the timeliness and nature of this process.

Secondly, and with regard to the specific language of S.2020 from the point of view of an insurer, the provisions of the

Bill do not entirely ameliorate the problem. Certainly in California, some employees, within the recreational boating and commercial fishing industries would continue to fall within the scope of the Longshore Act.

Congress intended the 1972 Amendments to the Act to resolve the problem where a worker would shift in and out of the coverage of the Act during the work day. S.2020 removes the status test for the recreational boating and commercial fishing employees but it still provides for coverage of these employees when on or over the navigable water, as situs was defined prior to the 1972 Amendments.

These employees would be subject to the shifting and fortuitousness of coverage under the State and Longshore Acts. It will continue to be necessary for the effected employers to secure USL&H insurance coverage. Insofar as it is difficult for an insurer to accurately determine the potential liability of this shifting exposure, the employers will encounter rates and market availability that reflect the inherent uncertainties.

Mr. Chairman, this concludes my prepared testimony.

Senator CRANSTON. My counsel, Hal Gross has some questions.

Mr. GROSS. Mr. Kavanagh, I take it from your last couple of sentences the answer to this question is "no."

Can the State compensation fund now say with any assurance who is and who is not covered under the Longshoremen's and Harbor Workers' Compensation Act?

Mr. KAVANAGH. I think for of the majority of what most of us would consider to be traditional maritime employees in the sense of shipbuilding, ship repair and marine cargo handling facilities, I think the status test of the act is fairly clear.

With respect to other areas, which we call gray areas since 1972, there are elements within the status test where we do not know. It may depend upon the case law, where case law seems to be going in a certain direction, and we find ourselves in a situation of having to advise an employer that he has situs, but may or may not have status. Necessarily, we must take a conservative approach to this in order to protect the employees as well as the employer, and we strongly suggest to him that he cover that possibility.

Mr. GROSS. Is the recreational boating industry one of the gray areas, or does it contain some of the gray areas?

Mr. KAVANAGH. At the present time, yes, and the gray areas particularly have been identified since the decision by Judge Schnake in the ninth district court. At this point in time, we do not know ultimately whether they will be found to be in the context of the act or not.

Mr. GROSS. Does the fish processing industry include gray areas as far as you are concerned?

Mr. KAVANAGH. Well, primarily the fish processing industry enters into the act in terms of the handling of the fish from the vessel to the cannery. The particular gray areas in this—our experience in the fisheries is very limited. We have very few accounts, by comparison to the recreational boating industry. And in the accounts we do have, each of them involves the loading or unloading of fish from the vessel to the cannery. We have not classified them as stevedores, which would be a higher rate, but have classified them in terms of their operation as a cannery using the state class and surcharging for L and H.

Mr. GROSS. In your view, would it be helpful for Congress to clarify the lines under this act by stating its intention clearly with respect to the recreational boating industry?

Mr. KAVANAGH. As an insurer, yes, I do think it would.

Mr. GROSS. If I understood your testimony correctly, from 1976 through July 1978, the recreational boating industry was paying for State compensation fund coverage. Under the Longshoremen's and Harbor Workers' Act, premiums starting with the minimum rate of \$19 and gradually escalating to the point where they climbed to over \$30 per \$100 of payroll; is that correct?

Mr. KAVANAGH. That is correct.

Mr. GROSS. And the rate now is about \$13.40 up, depending—

Mr. KAVANAGH. The rate is \$13.40 for—as I said, we have three subclassifications within the 6824 classification now which covers the great majority of boatbuilders—over 90 percent would fall within the \$13.40 minimum premium.

Mr. GROSS. During the period 1976 through 1978, was there a great

experience of losses among the recreational boating industry in California with respect to L and H coverage?

Mr. KAVANAGH. Our experience has been a very limited number of losses and these losses have been of a very minor nature.

During this time, with the exception of the death case which I described earlier, which would have considerably changed the experience of the marina class had the facts been slightly different, most of these operations are medical only or they are minor lost time injuries, where the experience has not been one of a great nature in terms of costs.

Mr. GROSS. Just so we have some kind of dollar figure in front of us, I take it, at least in northern California, the average number of employees working in a recreational boat marina is about seven. At least that number has been used in prior testimony.

Assuming a work force of seven and an average salary in the neighborhood of \$12,000 to \$15,000 a year, can you give us a figure of how much the difference between a premium of \$13.40 a hundred and, say, \$19 over—or let us go the full way, \$30 per \$100 would cost an employer over the period of 1 year.

Mr. KAVANAGH. I would have to sit and do the arithmetic.

Mr. GROSS. Can you give us an idea of the ball park?

Mr. KAVANAGH. You are talking between \$13 and \$30. You are talking approximately 40 percent of the other.

You are talking about a decrease of about 60 percent.

Mr. GROSS. Talking about a decrease of 60 percent.

In dollars over a year—

Mr. KAVANAGH. If you are talking about \$100,000, you are talking about going from \$100,000 to \$40,000.

Mr. GROSS. So the difference might be as much as \$60,000 for one employer for a year?

Mr. KAVANAGH. For example, within the marina class, our total earned premium is \$280,000 during the history of the program. We tend to write small marinas, two, three or four individuals.

Mr. GROSS. Your total premium dollar was—let us get that number a different way—\$280,000 during 1976 through 1978; is that correct?

Mr. KAVANAGH. That is correct.

Mr. GROSS. How many policies were you writing? How many marinas were you covering?

Mr. KAVANAGH. Just a moment here.

I think it was approximately 50 marinas.

Mr. GROSS. About 50.

Mr. KAVANAGH. The figure I have is our current policies in force, which is the great majority of that. That was 50 marinas. In terms of any that may have left us, it would be very small, perhaps five.

Mr. GROSS. Roughly \$50,000 per marina—

Mr. KAVANAGH. We have 50 marinas and about \$280,000. That is roughly \$5,600 in premiums.

Mr. GROSS. \$5,600.

That is at the old premium number?

Mr. KAVANAGH. No.

OK. That is at both premiums. The old premium on marinas was approximately 17. Currently it is about \$14. Marinas never paid \$30, sir.

Mr. GROSS. It is fair to say, given the current calculation as to what an appropriate premium is and given the loss experience over 1976 through 1978, that the employers who were paying \$19 or more per \$100 of payroll for their compensation insurance were actually being overcharged during that period?

Mr. KAVANAGH. The question has to be looked at in two ways.

First of all, with respect to boatbuilding and repair, which is the \$30 rate that we had derived from the Bureau's published filing—

Mr. GROSS. That is the Workmen's Compensation Rating Bureau?

Mr. KAVANAGH. Right.

When I restructured the class earlier this year, because it was a restructuring of a class rather than simply a rate change on the class itself, we endorsed all open policies, all current policies in force at that time to reflect the new rate. Thus, every boatyard at that time that we insured, and at that time it was approximately 39, if I recall the figure, all of their policies were then endorsed back to the inception of the policy to reflect the new rate. This resulted in a refunded premium to these employers, in effect.

With respect to the question as to whether or not they were overcharged, the nature of insurance is such that everybody expects at sometime to have a loss. You do not know exactly what it will be or when it will occur.

The purpose of taking out insurance is to transfer the liability for that loss by paying a premium which transfers, then, the assumption of that liability to a carrier. During any given year, a specific risk could have a very good experience. Maybe 1 or 2 years a class of business could have a good experience.

Over a period of time, however, that experience will approximate a normal distribution of experience.

I think at this point in time, it is too early to say whether the experience we have had under the recreational boating industry reflects what the long-term experience will be and whether that would constitute too high a premium for that experience.

Furthermore, I would also point to the share of the market that we have in this area. There is some confusion about what the size of that market is, as there are with all industries in the L and H market in California. Because the Bureau has not been in business, although now there is a bill before the Governor that would put them in the data collection but not rating business, we do not know and other carriers do not know the specific market sizes. We have to try to infer how much payroll is there.

For example, in the boatbuilding and repair industry, there is about \$47 million in payroll in California. According to the best figures, that amounts to about 320 risks. Of the 320 risks, the State fund insures 100 of them on the California side. Of these 100, currently 47 have longshoring exposure and are covered with a second policy for this act.

Mr. GROSS. Let me understand, 320 businesses engaged in recreational boating—

Mr. KAVANAGH. Boatbuilding and repair.

Mr. GROSS. Of which 100 are what now?

Mr. KAVANAGH. One hundred are insured by the State fund. That figure includes—

Mr. GROSS. Under California coverage?

Mr. KAVANAGH. California, as well as the longshoremen.

Mr. GROSS. How many of those which are covered by the State fund are covered exclusively under State coverage, without longshore coverage?

Mr. KAVANAGH. Fifty-three would be covered exclusively by State coverage.

Mr. GROSS. Can you give me some idea of the difference in premium a boatbuilding entity would pay—

Mr. KAVANAGH. The rate in California is \$10.71.

Mr. GROSS. Now, what you have done in addition to structuring—in addition to using your loss ratio to lower the premium, is to essentially build a smaller class, and take the recreational boatbuilders out of the larger class, which involved, I take it, some shipbuilders and other businesses, is that correct?

Mr. KAVANAGH. The class itself is defined as boats below 150 feet in length.

Mr. GROSS. Was that always the situation?

Mr. KAVANAGH. Yes. We went within that class, and broke it out in terms of materials used, how they would be used, length of the vessel, other features that would relate to boatbuilding risk.

Mr. GROSS. You have 47 businesses covered under Federal Longshoremen's and Harbor Workers' Compensation for boatbuilding and repair?

Mr. KAVANAGH. That is correct.

Mr. GROSS. Is not a group that small very, very sensitive to what you call catastrophic loss? Would not one or two, or five large losses in a single year have a tremendous effect on the premiums for all of the businesses?

Mr. KAVANAGH. It would have a serious effect upon the loss ratio in that class. As I indicated earlier, the nature of the circumstances which almost resulted in a higher loss ratio—

Mr. GROSS. Your answer is yes to my question?

Mr. KAVANAGH. Yes, on losses. Your question related to premium. That is more complicated.

For example, if that book of business were to have a much higher loss ratio, such that the fiscal position of the entire program was in jeopardy, then there would be an upward impact; probably across the board on all classes.

By the same token, if the fiscal position was stable, and there was no immediate danger on that portfolio, the fact that a specific class in a given year had a high loss ratio may not mean that rate would go up in and of itself. We would have to take a look at what kinds of losses there were, whether this is more representative of the class, or whether this is an unusual circumstance.

Senator CRANSTON. Mr. Kavanagh, I want to thank you very much.

Harold Gross has more questions to ask.

I thank you, and the others for your interest and helpfulness. We will do our best to be helpful.

Carry on.

Mr. GROSS. The questions of your loss ratio gets to the question of what kind of risks the State compensation fund is writing.

Is it your observation under the present circumstances, and with

the presence of Alaska Pacific in the market that the State compensation fund gets the best risks, or Alaska Pacific?

Mr. KAVANAGH. The State fund is essentially the residual market for Longshoremen's and Harbor Workers' compensation in California. What that means is that accounts that cannot obtain insurance elsewhere have an available market with the State fund.

So we bear the burden of the less desirable risks, whereas the private insurance industry is operating in a very selective manner, in only writing the most desirable risks.

Mr. GROSS. The likelihood of premiums within your boatbuilding class covered by L and H will go down is extremely slim, and there is a decided possibility it may go up, depending on future losses.

Mr. KAVANAGH. That depends upon the relative rates for all of the other classes of longshoring exposure. The more correct and correctly applied they are, the less danger there is of that occurring.

However, because of the catastrophic nature of this business, and if we are going to a higher reinsurance level, there is always a danger that there is or could be an upward pressure upon the rates.

Mr. GROSS. Let me see if I understand your point correctly. Do premiums which the recreational boatbuilders pay depend in part on losses suffered by other industries covered by L and H.

Mr. KAVANAGH. That is correct.

Mr. GROSS. There is testimony here today that the potential loss, risk of injury in, for example, those occupations which are traditionally covered by the Longshoremen's and Harbor Workers' Compensation Act, that is, longshoring and shipbuilding, involve four times the risk of injury of ordinary manufacturing operations. In effect what you have is a situation that as long as the recreational boating industry is covered by this act, these businesses are, in part, going to bear a heavier burden which is based on risks of loss that they do not have, but which other businesses covered by the act will have, is that correct?

Mr. KAVANAGH. Again it depends on the relative nature of the rates to the relative hazard of the risk. The rates for the more traditional maritime classes have a much clearer history with regard to their stability over time.

The rates, as I indicated, in terms of boatbuilding and repair, in California, involve a class over which there has been dispute in terms of the relative hazards. The Bureau in California still maintains that the \$10.71 rate for stateside coverage is appropriate to the hazards, and they maintain that their original rate filing adjusted for the difference in benefits between Federal and stateside acts still appropriately reflects the hazards.

I cannot personally speak to the issue if 4 to 1 is the real ratio of hazard. It also depends on the size of the entity, number of employees, techniques being used. Certainly small and large boatyards differ in relative hazards, as in their materials.

Mr. GROSS. Another way of calculating the burden on the small recreational boatbuilding businesses, and what premium dollars they are going to pay, is the total premium dollar available to cover all losses in L and H. That is what you are saving, is it not?

Mr. KAVANAGH. Would you restate that?

Mr. GROSS. The total premium dollars collected under Longshoremen's and Harbor Workers' compensation coverage for all of the businesses covered under that act is really the field from which all of the losses will be paid, and that is a determinant—

Mr. KAVANAGH. That is the large pool from which we must derive our overall basis of rate, again for the reason, for example, boatbuilding and repair, we have \$344,000 in earned premium. That is not a large share. One permanent and totally disabling injury could very easily be greater than that total premium.

Mr. GROSS. Now, to the extent that premiums are discounted for the large payrolls that are covered under the act, does not that also create upward pressure on the premiums that small recreational boat businesses will have to pay to get you up to the total premium dollars?

Mr. KAVANAGH. First of all, with regard to the differentiation between large and small payroll, the State fund does not discriminate among large and small employers with regard to its rating structure.

Mr. GROSS. What is your experience with respect to private carriers? Do you know what the practice is in the insurance industry with respect to private carriers?

Mr. KAVANAGH. I do not know the specific practices by carrier.

I do know there is a general consideration that higher premium levels are more stable in terms of the basis of insurability.

Mr. GROSS. What does that mean, in English?

Mr. KAVANAGH. In other words, I have no direct evidence in terms of specific policies and differentiations that I know relate to that source. But size of the payroll is a factor taken into account generally in insurance.

Mr. GROSS. So if there is a large payroll which produces a total number of payroll dollars which is large, that is an attractive—

Mr. KAVANAGH. I suspect the private insurers are differentiating.

Mr. GROSS. By discounting the large—

Mr. KAVANAGH. In two ways. They may not write the small risks at all, because it is relatively less profitable to them.

It may well be reflected in a lower rate, also.

Mr. GROSS. To the extent that they also calculate their total losses the same way the State does, to the extent that they discount premiums for the large industries, they will have to make up those premiums by charging more to the small businesses that are covered under the act, is that correct, if they write the coverage at all?

Mr. KAVANAGH. That, again, is a generic question, and I cannot speak precisely what they would do.

Mr. GROSS. Unless you have testimony to add, I think I have no further questions.

Mr. KAVANAGH. I think that completes my presentation.

Mr. GROSS. Thank you very much for appearing before us today. The hearing will adjourn, subject to the call of the Chair.

[Whereupon at 12:35 p.m., the committee adjourned, subject to the call of the Chair.]

